SUPREME COURT
OF THE
STATE OF CONNECTICUT

SC 20029/SC20040

ROBERT T. KEELEY, JR.

v.

SANTA I. AYALA, REGISTRAR OF VOTERS, et al.

JOINT BRIEF OF DEFENDANTS SANTA I. AYALA, JAMES MULLEN, THOMAS ERRICHETTI, CHARLES D. CLEMONS, JR., AND JEANETTE HERRON WITH SEPARATELY BOUND APPENDIX

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TO BE ARGUED BY:
JOHN P. BOHANNON, JR. AND JAMES J. HEALY

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PRELIMINARY STATEMENT

If allowed to stand, the trial court's decision will discard the results of the second primary election conducted in Bridgeport's 133rd city council district, and force the City and the voters to go to the polls for a third time. But this Court's precedent emphasizes that courts should not disturb election results, absent extraordinary circumstances not present here. An election is "the paradigm of the democratic process designed to ascertain and implement the will of the people." *Caruso v. City of Bridgeport*, 285 Conn. 618, 637 (2008) (quoting *Bortner v. Town of Woodbridge*, 250 Conn. 241, 254 (1999)) (internal citations, quotations, and alterations omitted). Each one is "essentially – and necessarily – a snapshot," following campaigns by candidates and political parties, culminating in a result that "reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors who voted on that day[.]" *Bortner*, 250 Conn. at 255. Because this "snapshot" is something that "can never be duplicated," a court ordering a new election "is really ordering a different election[,]" *id.*, which necessarily "result[s] in the[] election day disfranchisement" of those who cast ballots. *Caruso*, 285 Conn. at 637 (quoting *Bortner*, 250 Conn. at 256) (internal citations, quotations, and alterations omitted). For those reasons, this Court "counsels strongly that a court should be very cautious before . . . vacat[ing] the results of an election and . . . order[ing] a new election." *Id.* at 637-38. *See also Bortner*, 250 Conn. at 254. Judicial review is to be similarly deferential to the will of the people, as expressed in their votes on election day. Absentee ballots carry a presumption of validity, *see, e.g., Colten v. City of Haverhill*, 564 N.E.2d 987, 990 (Mass. 1991), such that "no voter is to be disfranchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in [the voter's] favor." *In re Election of*

U.S. Representative for Second Cong. Dist., 231 Conn. 602, 653 (1994) (internal citation and quotation omitted; emphasis added).

In ordering yet another new election, the trial court (Bellis, J.) went too far and erred in four principal ways. First, the trial court read into Section 9-140b a prohibition against any candidate or party worker requesting a police designee to return an absentee ballot, and nullified 13 absentee ballots on that basis. *See* Argument, section I. Second, the trial court also erroneously nullified 12 stamped absentee ballots – the envelopes for which the plaintiff never even entered into evidence – that had been received from the post office by City mailroom personnel but allegedly did not bear postmarks or cancelation marks. Without any evidence suggesting that the lack of a postmark or cancelation mark meant the envelopes had not been delivered by the post office, the trial court nonetheless determined that the ballots had not been "mailed" within the meaning of Section 9-140b. *See* Argument, section II. Third, the trial court misconstrued applicable law in suggesting that the City was required to provide notice of the primary and deliver absentee ballot applications to the residents of a nursing home. *See* Argument, section III. Fourth, the trial court flipped the burden of proof, essentially requiring the defendants to disprove each allegation instead of holding the plaintiff to his obligation to prove violations of law so substantial that they placed the outcome of the election seriously in doubt. *See* Argument, section IV.

STATEMENT OF FACTS AND PROCEEDINGS

A. FACTUAL BACKGROUND

This case arises out of the Democratic primary elections in Bridgeport to select the two nominees from the 133rd city council district. The contest for the two spots on the general election ballot was between endorsed candidates Michael DeFilippo and Jeanette Herron

and challenging candidates Robert Keeley, Jr. and Anne Pappas Phillips. *See* Ruling, p. 2 (A48). After the primary was originally held on September 12, 2017, Mr. DeFilippo received the highest number of votes, but Ms. Herron and Mr. Keeley were tied. *Id.* A recount ended with Ms. Herron leading Mr. Keeley by a single vote. *Id.* Mr. Keeley filed suit to challenge the result. In light of, *inter alia*, the close margin for the second spot, all parties agreed to conduct a second primary with all four candidates on November 14. *Id.*, pp. 2-3 (A48-49). The trial court also appointed an Election Monitor, Attorney Maximo Medina. *Id.*, p. 3 (A49).

The results of the second primary held on November 14 were as follows:

Michael DeFilippo	240
Jeanette Herron	230
Robert Keeley, Jr.	212
Anne Pappas Phillips	168

Second Rev. Compl., Dkt. # 135.00, ¶ 19. In other words, Mr. DeFilippo once again garnered the highest vote total, followed by Ms. Herron and Mr. Keeley. This time around, however, Ms. Herron held a margin of 18 votes over Mr. Keeley for the second and final spot.

B. HISTORY OF LEGAL PROCEEDINGS

After the conclusion of the November 14 primary, the defendants filed a proposed order to allow the general election for the 133rd district to go forward on December 12. *See* Dkt. # 125.00. Though the plaintiff had not yet filed a complaint or raised any issues in regard to the November 14 primary, the trial court indicated that it intended to explore reported requests alleged to have been made by Democratic Town Committee chairman, Mario Testa, or Mr. DeFilippo that a potential police officer designee retrieve and deliver absentee ballots on behalf of certain absentee voters to the Town Clerk. Although neither individual was a party to the case, the trial court went so far as to *sua sponte* order the defendant "to produce [Officer Nikola, the police officer designee who had delivered the ballots], Mario Testa, and

Michael DeFilippo at [a] hearing" on November 24. Dkt. # 128.10. The defendants' counsel issued subpoenas to comply with the order, and counsel for Mr. Testa and Mr. DeFilippo moved to quash, arguing, *inter alia*, that because the plaintiff had not sought their testimony, "there [was] no authority in either common law or statutory law for the Court's action in compelling a party to issue a Subpoena." Dkt. # 137.00. The trial court did not act on the motion.

Thereafter, a hearing was held. Testifying witnesses included Officer Nikola, Emily Zahorsky, who worked in the City's mailroom, and Attorney Medina. During closing arguments, the trial court *sua sponte* raised the issue of whether notice of the primary had been provided to residents of a nursing home, Northbridge Health Care Center ("Northbridge"), located within the 133rd district. *See* Dkt. # 138.00. The defendants' counsel moved to reopen evidence to call Jennifer Rodriguez, the Director of Therapeutic Recreation at Northbridge, who testified to the significant actions taken to inform residents about the primary, both on and prior to the November 8 supervised absentee balloting at the facility.

The trial court rendered its decision on the record on November 30. *See* Ruling, Dkt. # 139.00 (A47-67). Thereafter, upon the defendants' joint motion, and with the plaintiff's consent, this Court accepted the reserved questions presented herein.[1]

STANDARD OF REVIEW & RELEVANT LEGAL PRINCIPLES

This Court's review in this election appeal is plenary. *See Bortner*, 250 Conn. at 258. The plaintiff was required to demonstrate a ruling by an election official that involved "substantial violations of the [elections] statute[s] that render[ed] the reliability of the result of

[1] Out of an abundance of caution, to ensure that this Court has jurisdiction to decide all matters, including review of any factual findings below, the defendants also filed a formal appeal in this case. *See Wrinn v. Dunleavy*, 186 Conn. 125, 134-35 (1982).

the election seriously in doubt." *Id.* (internal citation omitted). While "the underlying facts are to be established by a preponderance of the evidence and are subject on appeal to the clearly erroneous standard, the ultimate determination of whether, based on those underlying facts, a new election is called for . . . is a mixed question of fact and law that is subject to plenary review on appeal." *Id.* *See also Spiotti v. Town of Wolcott*, 326 Conn. 190, 195 (2017) (plenary review for matters of statutory interpretation).

ARGUMENT

I. SECTION 9-140b DOES NOT PROHIBIT A PERSON OTHER THAN THE ELECTOR FROM REQUESTING A POTENTIAL DESIGNEE TO CONTACT AN ELECTOR IN ORDER TO RETURN THE ELECTOR'S ABSENTEE BALLOT TO THE TOWN CLERK.

Though the trial court nullified the 13 absentee ballots delivered by Officer Nikola based on its conclusion that Section 9-140b allows only the "absentee voter to contact the Registrar of Voters' office of the Police Department for police officer pickup due to the voter's illness or disability," Ruling, p. 15 (A61) (emphasis added), this erroneous construction runs contrary to both the plain meaning of the statute, as well as the legislative history and administrative interpretations of that statute.

A. The Plain Language of Section 9-140b Does Not Restrict Who May Contact a Police Officer or Registrar of Voters To Request a Designee for an Elector's Absentee Ballot.

For sound public policy reasons, Connecticut allows voters to participate in elections by casting absentee ballots. Section 9-140b(a) permits an absentee ballot if, *inter alia*, "it is returned by a designee of an ill or physically disabled ballot applicant" in person to the Town Clerk by the close of the polls on election day. A "designee" may be "a person caring for the applicant," or "a member of the applicant's family," or even "a police officer, registrar of voters, deputy registrar of voters or assistant registrar of voters" in the elector's city or town. Conn.

Gen. Stat. § 9-140b(b). Our law prohibits any other person from "hav[ing] in his possession any official absentee ballot or ballot envelope . . . except the applicant to whom it was issued," as well as a host of others, including the Secretary of the State, her agents, the ballot printer, the U.S. Postal Service, any election official, and person authorized by a municipal clerk, "any other carrier, courier or messenger" approved by the Secretary of the State, or "any person authorized by any provision of the general statutes to possess a ballot or ballot envelope." Conn. Gen. Stat. § 9-140b(d). In other words, the actual absentee ballots can be possessed and delivered by the voters, their designees, couriers or messengers, and elections officials. *See id.* But nothing in the statute restricts who may contact an absentee ballot voter or in any way limits who may request a designee on a voter's behalf.

Section 9-140b is clear and unambiguous. It specifically defines who may <u>possess</u> an absentee ballot, and sets forth the list of appropriate designees to <u>deliver</u> absentee ballots. This Court will search in vain for any language or provision of this statute – or any other – that restricts candidates or parties from communicating with or on behalf of absentee voters. The "fundamental objective" of a court construing a statute is "to ascertain and give effect to the apparent intent of the legislature" based, in the first instance, on "the text of the statute itself and its relationship to other statutes." *Gonzalez v. O&G Indus., Inc.*, 322 Conn. 291, 302 (2016); Conn. Gen. Stat. § 1-2z. Where, as here, "the meaning of [the statutory] text is plain and unambiguous and does not yield absurd or unworkable results," the statute should be applied as written. *See Gonzalez*, 322 Conn. at 302. Section 9-140b unambiguously articulates who may <u>possess</u> and <u>deliver</u> absentee ballots, without any restriction on any third parties having contact with absentee voters and/or prospective designees.

The trial court's suggestion that the statute is ambiguous simply because it "does not

provide specifics as to the mechanics for the request for an officer pickup," Ruling, p. 16 (A62), is incorrect. "It is well settled . . . that silence does not necessarily equate to ambiguity." *State v. Ramos*, 306 Conn. 125, 136 (2012) (citing cases; internal quotation marks omitted). While silence can invite ambiguity where, for example, the "missing subject reasonably is necessary to effectuate the provision as written," *id.*, or the scope of an essential term is left undefined, *see, e.g., Thomas v. Dept. of Developmental Services*, 297 Conn. 391, 400 (2010), ambiguity arises in those circumstances only because such "silence [means] there is more than one plausible interpretation" of the matter at issue. *Stuart v. Stuart*, 297 Conn. 26, 37 (2010). *See State v. Orr*, 291 Conn. 642, 654 (2009) ("[A]mbiguity exists only if the [text] is susceptible to more than one plausible interpretation") (emphasis added). No ambiguity exists here. Section 9-140b does not involve multiple plausible interpretations, but simply declines to prohibit interaction between third parties and absentee electors.

The defendants' plain-meaning construction is particularly appropriate in this case because a violation of Section 9-140b carries criminal consequences. *See* Conn. Gen. Stat. § 9-359(5) (willful violation of "any provision of chapter 145" is a class D felony). Our well-established rules of construction mandate that such statutes "be construed strictly against the state and liberally in favor of the accused," *State v. Torres*, 206 Conn. 346, 355 (1988), which serves the essential purpose of providing "the public [with] fair notice of what the law forbids[.]" *State v. Skakel*, 276 Conn. 633, 675 (2006). *See also State v. Rawls*, 198 Conn. 111, 121 (1985) ("It is a fundamental tenet of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment"). Thus, even if the Section 9-140b were silent as to "the mechanics" of coordinating a police officer designee for an

absentee voter, *see* Ruling, p. 16 (A62), the fact that the statute invites criminal exposure means it cannot be construed to forbid such an action.

Because the Legislature has not seen fit to forbid third parties from having contact with absentee voters, or from requesting a qualified designee to return their ballots, Section 9-140b is unambiguous. The trial court erred in applying a contrary construction.

B. The Legislative Intent of Section 9-140b Was To Allow Persons Other than an Absentee Ballot Elector to Arrange for a Designee.

Even if Section 9-140b were ambiguous, the legislative history of the statute nonetheless confirms that the Legislature specifically intended not to limit contact with an elector who has been provided with an absentee ballot. In resorting to the legislative history related to the adoption of this statute, the trial court focused almost exclusively on one part of a comment by the proponent of the bill, which suggested that the law would "restrict the partisan party worker from any involvement with the voter after he or she has received his or her ballot, thereby preventing the harassment that currently occurs in many cases today." 1974 H. Proc. at 4614-17 (remarks of Rep. Canali) (A15-18); Ruling, pp. 16-17 (A62-63). But the trial court failed to read that general remark in the context of that same legislator's specific description of how the law would operate, as well as the rest of the legislative record. Shortly after that comment, Representative Canali specified that the "harassment" that the Legislature sought to prevent was not mere contact between absentee voters and party workers, but rather "harassing the voter to allow the ballot to be picked up by party workers[.]" *Id.* (emphasis added). When Representative Yacavone asked what the law would allow with respect to an elderly elector who "[did not] have someone available to mail a ballot," Representative Canali explained that "[i]n that case, [the elector], or someone on their behalf, may contact the Assistant Registrar of Voters . . . [or] the Police Department" to request them

to act as designee. *Id.* at 4625 (A26) (emphasis added). It is difficult to conceive of any clearer expression of the legislative intent of this law, namely that an absentee voter "or someone on their behalf," *id.*, could arrange for a police officer designee to return their ballot.

The Legislature specifically emphasized that even those individuals "hold[ing] a political office, such as being Town Chairman of a particular party" could still be in contact with absentee voters, so much so that such persons could act as designees for absentee voters, if otherwise qualified and chosen to do so. *Id.* at 4632 (A33). And the legislators repeatedly endorsed police involvement in the absentee voting process as qualified designees who could help ensure that the ballots were properly delivered to the Town Clerk. *See id.* at 4621-22, 4625, 4629-30 (A22-23, A26, A30-31).

If that were not enough, an earlier version of the proposed bill contemplated that "no person shall influence or attempt to influence a voter in any way to vote absentee[.]" Committee Bill No. 5155 (Feb. Sess. 1974) (A1). Though such language would have forbidden anyone from having contact with an absentee voter, the Legislature deliberately chose not to adopt such a prohibition. The language was removed by the Elections Committee, *see* Substitute House Bill No. 5155 (May 29, 1974) (A9), and appears nowhere in the final version of the statute as adopted, or as it exists at present. Discarding that proposed limitation furthers the important policy goal of allowing and encouraging voters (absentee or otherwise) to engage in an active exchange with candidates and political parties during election campaigns. The Legislature's consideration and express rejection of the construction applied by the trial court removes any doubt about the meaning of the statute.

C. Administrative Agency Interpretations of Section 9-140b Confirm That the Statute Does Not Forbid Contact with Absentee Voters.

In addition to the plain language of the statute, *see* section I-A, and the pointed

legislative history, *see* section II-B, the trial court's proposed construction is further undermined by the fact that both the Secretary of the State and the State Elections Enforcement Commission (SEEC) have interpreted the law to allow partisan contact with absentee voters.[2] State law requires the SEEC, in consultation with the Secretary of the State, to "prepare a summary of the requirements and prohibitions of the absentee voting laws, which shall be posted on said agencies' web sites," and which "[c]andidates and political party chairpersons [must] provide . . . to campaign and party employees and volunteers." Conn. Gen. Stat. § 9-140(n). This authoritative guidance regarding absentee ballot laws, which the Secretary of the State entitled "ALL YOU NEED TO KNOW ABOUT ABSENTEE BALLOTS," informs party workers: "**You may** follow-up with the applicants, or check with the Town Clerk to see if a person has applied for or returned an absentee ballot." Secretary of the State Form (A42-43) (capitalization and bold emphasis in original). The instructions also make clear that candidates and parties "<u>may call the people</u> to whom [they] gave absentee ballot applications and remind them about deadlines or <u>encourage them to complete and submit the ballot</u>." *Id.* (emphases added). In addition, this guidance correctly alerts partisans not to help with an absentee ballot, be present when it is completed, or take possession of or deliver a ballot, *see id.*, consistent with Section 9-140b. The SEEC's instructions offer campaigns and candidates the very same advice allowing follow-up contact with absentee voters. *See* SEEC Form (A44-45). The fact that both the Secretary of the State and the SEEC have interpreted the statute in the same manner as the defendants – and contrary to the trial court – and have <u>affirmatively encouraged</u> candidates and political

[2] The defendants below prepared detailed briefing about the text, legislative history, and administrative interpretations of Section 9-140b, including the legislative and administrative records as exhibits for the trial court's review. *See* Dkt. # 131.00.

parties to have contact with voters who have received absentee ballots confirms that there was no violation of Section 9-140b in this case.[3]

D. Absurd Results Would Follow from the Trial Court's Erroneous Construction of Section 9-140b.

If allowed to stand, the trial court's unreasonable and overly-restrictive construction of Section 9-140b would invite absurd and unworkable results. If only the elector is permitted to request a police or registrar designee, *see* Ruling, p. 18 (A64), the statute would necessarily restrict even non-partisans from requesting a designee on behalf of an ill or disabled relative, neighbor, or friend. This would discourage the electoral participation on which our system of government depends, and also raise serious constitutional issues regarding freedom of speech. Simply put, because Section 9-140b does not prohibit a third party from contacting the Registrar of Voters or the police department to ask for a designee for an absentee ballot holder, the trial court's decision to the contrary was wrong, and should be reversed.[4]

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[3] These interpretations, which date back to 2010 and 2006 respectively, may well warrant deference from this Court. *See, e.g.*, *Velez v. Comm'r of Labor*, 306 Conn. 475, 485 (2012) (quoting *Longley v. State Employees Retirement Comm'n*, 284 Conn. 149, 163-64 (2007)) ("[A]n agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable").

[4] Although the trial court also expressed reservations about "four absentee ballots that [Officer Nikola retrieved] from one person at one house," Ruling, p. 14 (A60), the plaintiff did not adduce any evidence that these electors were not qualified absentee voters, or that the person who handed them to Officer Nikola was not a valid designee. *See* Conn. Gen. Stat. § 9-140b(c) (designees include family members and persons providing care to the voter). Thus, nothing in the record indicates that these voters were not present when the ballots were picked up, nor that the person who physically handed them to the officer was not a qualified designee in his or her own right. Absent evidence to indicate any violation at all, much less any so severe as to cast doubt on the result, this was not a basis to discard the election results. *See Bortner*, 250 Conn. at 258.

II. THE TRIAL COURT'S NULLIFICATION OF STAMPED ABSENTEE BALLOTS THAT WERE ALLEGEDLY NOT POSTMARKED WAS ERRONEOUS, BECAUSE THE BALLOTS WERE PROPERLY "MAILED" UNDER SECTION 9-140b.

Contrary to the trial court's ruling, *see* Ruling, pp. 6-7 (A52-53), the 12 absentee ballots were properly mailed in compliance with Connecticut law. An absentee ballot may be submitted by mail, if "[i]t is mailed . . . so that it is received by the clerk of the municipality in which the applicant is qualified to vote not later than the close of the polls[.]" Conn. Gen. Stat. § 9-140b(a)(1). The term "mailed" is broadly defined as being "sent by the United States Postal Service or any commercial carrier, courier or messenger service recognized and approved by the Secretary of the State." Conn. Gen. Stat. § 9-140b(c). There is no indication that the twelve ballots were not "mailed" within the meaning of Section 9-140b.

As an initial matter, the plaintiff <u>never entered these ballots or envelopes into evidence</u>. Thus, there could not possibly be any basis to conclude that they were legally invalid. But even if the plaintiff had offered them into the record below, the trial court erroneously found that, because the ballot envelopes allegedly "bore stamps but were not postmarked or canceled," they therefore "were not sent by the United States Postal Service and not mail[ed] as defined by statute[.]" Ruling, pp. 6-7 (A52-53). Nothing in the statute required that the ballot envelopes bear canceled postmarks. Instead, the ballots simply had to be "sent" by the post office, or any other valid carrier. While "sent" is not defined within the statute or elsewhere in the relevant statutes, the plain meaning of the word is the past tense of "send," meaning "deliver," *see* Merriam Webster's Dict. (3d ed. 1986), or "to cause to be conveyed by an intermediary to a destination." American Heritage Dict. (5th ed. 2011). *See also* Merriam-Webster's Coll. Dict. (11th ed. 2003) ("to cause to be carried to a destination"). The presence or absence of a cancelation mark is of no moment. First, the

statute did not define "mailed" to include "postmarked" by the postal service, only that it was "sent." When the Legislature wants to require an item to be postmarked, it can and will do so specifically. In fact, the postmark requirement appears in over 40 statutes, including four pertaining to elections, *see, e.g.,* Conn. Gen. Stat. § 9-23g; § 9-153b(d) (regarding military absentee ballots); § 9-311(b); § 9-608(d), but not in Section 9-140b. Under the statutory definition applicable here, even if a ballot had been sent mistakenly without any stamp at all, it still would have been "mailed" within the meaning of the statute if it was nonetheless delivered by the postal service. Second, this statutory definition encompasses other "commercial carrier[s]," so much so that even an approved "courier or messenger service" can validly deliver a ballot. *See* Conn. Gen. Stat. § 9-140b(c). This broad definition of "mailed" means that, as long as the ballots were delivered by the post office, regardless of whether they had been formally postmarked, they were in full compliance with the law.

While a different analysis may have been theoretically possible if the plaintiff had adduced any evidence suggesting that a letter without a cancelation mark or postmark has not been "sent" or "mailed" by the postal service, the plaintiff never did so. To the contrary, as the Election Monitor noted in his report, the mailroom supervisor in Bridgeport City Hall confirmed our everyday experience – namely, that it is "quite common" to receive mail without postmarks or cancelation marks. *See* Report of the Election Monitor, Dkt. # 126.00, pp. 5-6. The lack of postmarks is entirely consistent with mail that, for example, was simply not routed through a particular delivery channel, *see id.*, on its way to City Hall. But nothing in the record contradicts the fact that the ballots were, in fact, delivered by U.S. mail.

The only substantive evidence on this point came by way of testimony from Emily Zahorsky, a City employee who worked in the mailroom. She testified that, on November 14,

she and her mailroom supervisor, Jack McDowell, had picked up the ballots within a mail bin that they received directly from the post office, which they then delivered to the Town Clerk at City Hall. *See* Tr. 11/28 at 24-30. Although Ms. Zahorsky and Mr. McDowell made a few very brief stops on their way back to City Hall, they received no more than "[t]wo [or] three pieces" of outgoing mail in that process. *See id.* at 42-44. While the mail bin may have been in an unlocked car for "[j]ust a couple minutes" during these stops, *see id.* at 35, the trial court's suggestion that there was a mere "opportunity" for an interloper to add illegally and surreptitiously to the absentee ballots in the mail bin in the car, without more, *see* Ruling, p. 7 (A53), is far removed from any basis to conclude that any violation actually occurred.

It is implausible to suggest – without any evidence – that someone may have produced a set of 12 perfectly counterfeited absentee ballots, in the unique blue-colored envelopes used for this primary, with appropriate serial numbers, signatures and, when necessary, the identification of voters who had, in fact, applied for absentee ballots but who had not yet returned their own absentee ballots to the Town Clerk, before successfully breaking into the car that was carrying the mail bin back to City Hall.[5] No witness testified that anyone was seen interfering with the mail bin, or even the car in which the bin was kept. No evidence suggested that the mail bin had been tampered with in any way. Without anything to suggest any actual interference with the absentee ballots, the court's decision to disallow them, *see id.*, pp. 6-7 (A52-53), was a legal error compounded by reliance on conjecture and speculation. *See Echavarria v. Nat'l Grange Mut. Ins. Co.*, 275 Conn. 408, 419 (2005) (where "the trial court's conclusions or findings of fact rest on speculation rather than on sufficient

[5] The trial court implicitly acknowledged that, even if any additional absentee ballots had been hypothetically added to the mail bin, it is impossible to discern whether it occurred "either by mistake or foul play." *Id.*, p. 7 (A53).

evidence, they are clearly erroneous"); *Comm'r of Transp. v. Towpath Associates*, 255 Conn. 529, 546 (2001) ("In the absence of evidence to support [the trial court's] finding . . . the trial court's determination . . . was nothing more than speculation").

Simply put, because nothing in the record indicated that the 12 absentee ballots had not, in fact, been properly "mailed" (delivered) within the meaning of Section 9-140b, there was no violation of the statute, and certainly none that would rise to the level of vacating the election result. *See Caruso*, 285 Conn. at 637 ("counsel[ing] strongly that a court should be very cautious before exercising its power . . . to vacate the results of an election and to order a new election").

III. THE SUPERVISED ABSENTEE BALLOTING AT THE NORTHBRIDGE HEALTH CARE CENTER WAS IN FULL COMPLIANCE WITH THE LAW.

During the defendants' closing argument, the trial court interjected *sua sponte* to raise an issue regarding "who is required to notify the actual voters" at Northbridge, *see* Tr. 11/28 at 81, even though the plaintiff had not advanced any allegation related to notice of the supervised absentee balloting process. While it is true that supervised absentee balloting was required at Northbridge, *see* Ruling, p. 9 (A55), the trial court was wrong to conclude that notice had to be given, *see id.*, p. 12 (A58) (faulting registrar designees for "not go[ing] room to room" to notify residents of election). In truth, the law requires no such thing. Any resident of such a facility that wishes to vote must actually apply for an absentee ballot to the Town Clerk. *See* Conn. Gen. Stat. § 9-159r(b). From there, the Registrar of Voters will deliver the absentee ballot materials to the applicants. *See id.* The facility and the Registrar of Voters will agree on a day and time to conduct the supervised absentee balloting prior to the election or primary at issue. *See id.*

In other words, the onus was on the voter to apply for an absentee ballot, not on City

personnel to "go room to room . . . to see who wanted to vote[.]" *See* Ruling, p. 12 (A58). There is no way for the City to have "failed to take reasonable steps to deliver the [absentee ballot] applications and ballots" because there was no legal requirement for them to do so. *Id.* This reflects a misunderstanding of the statute – the applications need not be delivered to voters, but only any ballots that are actually requested. *See* Conn. Gen. Stat. § 9-159r(b). Nor was there any law requiring the City to "post reasonable notice of the supervised absentee balloting so as to inform potential voters at Northbridge[.]" *See* Ruling, p. 12 (A58). This Court will search Sections 9-159q and 9-159r in vain for any provision requiring either notice of supervised absentee balloting or the delivery of absentee ballot applications.[6] To the contrary, the law requires that, if a resident voter applies for an absentee ballot, the Town Clerk and Registrar of Voters prepare the actual "ballots and envelopes . . . for delivery to the applicant[.]" Conn. Gen. Stat. § 9-159r(b). In this case, because no voter at Northbridge applied for an absentee ballot for this election, there was nothing to be delivered. Any inquiry on this point should have ended there.

The trial court focused on an interpretation of the testimony that led the court below to believe that, prior to the previous general election of November 7, 2017, the supervised absentee ballot designees of the Registrar came to the facility prior to that election and walked around the facility "to see who wanted to vote and to distribute absentee ballot applications." Ruling, p. 11 (A57). No evidence was presented as to whether the designees of the Registrar were in fact soliciting individual voter applications or, instead, were delivering

[6] While there is a separate statute that requires the administrator of an institution for persons with intellectual disabilities to notify the guardian or conservator of any resident about such an election, *see* Conn. Gen. Stat. § 9-159s, nothing required the City to provide any notice to the residents of Northbridge.

absentee ballot sets to voters who had previously applied for them while also accepting additional applications from additional voters with whom they may have come in contact. The trial court's conclusion was based purely on speculation. The Registrar's designees for the previous November 7 general election were not even identified, much less called to testify. But even if City personnel had gone above and beyond their required duties in connection with previous elections, that does not mean they were required by law to do so again. Because the statutes impose no such obligation, *see* Conn. Gen. Stat. § 9-159q; 9-159r, the trial court erred in concluding that "the proper procedure was not followed here." Ruling, p. 12 (A58).[7]

Although there was no obligation to provide notice of the primary to Northbridge residents, ample notice was nonetheless provided. After the trial court *sua sponte* raised this issue during closing argument, the defendants moved to reopen evidence to call as a witness Northbridge's Director of Therapeutic Recreation, Jennifer Rodriguez. *See* Dkt. # 138.00. Ms. Rodriguez testified that she created two flyers, one placed in each of the two elevators used by the building's residents, in locked frames that could not be removed. *See* Tr. 11/29 at 8, 16-17, 30. The flyers alerted the residents to the upcoming voting for the special Democratic primary, including the date "in very big print." *Id.* She posted an additional flyer on a "big calendar" on the main floor, where "all the [daily] activities" for the residents were highlighted, and which is located in the area where the residents take their morning coffee. *Id.* at 8-11. Northbridge staff gave residents a verbal "gentle reminder" about the primary when they congregated for morning coffee on the morning of the supervised absentee voting,

[7] Because none of the Northbridge residents applied for absentee balloting, it is neither surprising nor suspect that the supervised absentee balloting designees who properly appeared at the facility did not receive any votes.

and Ms. Rodriguez's receptionist also made an overhead announcement reminding anyone who wished to vote to report to the appointed location. *Id.* at 8-9. Moreover, despite not having received any applications, the registrar's designees nonetheless attended the supervised absentee ballot session at Northbridge, with applications in hand, just in case any voter came forward and wished to vote. *See* Pl. Ex. 16. Contrary to the trial court's legal conclusion, there had been more than ample notice provided to Northbridge residents regarding this primary. If anything, City officials went above and beyond their statutory duties.

IV. BY SWITCHING THE BURDEN OF PROOF TO THE DEFENDANTS, THE TRIAL COURT DISENFRANCHISED VOTERS AND WRONGLY CONCLUDED THAT THE PLAINTIFF HAD PROVEN SUBSTANTIAL STATUTORY VIOLATIONS THAT LEFT THE RELIABILITY OF THE ELECTION SERIOUSLY IN DOUBT.

The trial court's erroneous rulings had the result of disqualifying and disenfranchising numerous voters. In addition to the 13 voters whose absentee ballots were properly delivered by a police designee, and the 12 voters whose absentee ballots were properly "mailed" (albeit perhaps without a postmark) through the post office, the trial court also went so far as to nullify the ballot of another individual voter. *See* Ruling, pp. 8-9 (A54-55). That voter had apparently mailed in an unsigned application, which was approved by the Registrar of Voters' office in August 2017. *Id.*, p. 8 (A54). The trial court found that "there [was] no evidence of eligibility" and disallowed that voter's absentee ballot. *Id.*, p. 9 (A55). Besides plainly reversing the burden of proof – the plaintiff should have been required to prove that the voter was ineligible – the trial court effectively removed from the voter rolls an elector whose registration had been approved, without any notice to the voter or any evidence that he was not eligible to cast a ballot. The voter was never called as a witness. Neither did the trial court consider the statutes by which registrars can remove invalid electors from the voter rolls. *See, e.g.*, Conn. Gen. Stat. § 9-35; 9-43. In fact, there does not appear to be any

statute providing for the removal of a voter whose application has been accepted simply because the application was not signed. Because the application was accepted, this elector was a legally valid voter on the day of the primary, and his vote was properly counted.

The trial court also shifted the burden of proof below in other respects, effectively requiring the City to justify its actions, instead of holding the plaintiff to his burden to prove a violation so substantial that it warranted throwing out the election results. *See Bortner*, 250 Conn. at 258. By way of example, the 12 stamped absentee ballot envelopes allegedly without cancelation marks were not even admitted into evidence. The trial court also went far afield in speculating that, because those ballots were picked up from the post office in a bin that was transported in an unlocked car that happened to make several brief stops on the way back to City Hall, there may have been a mere "opportunity" for mistake or tampering, thus constituting a violation so substantial that a new election was required. *See* Ruling, p. 7 (A53). And, in misconstruing Section 9-140b to prohibit any partisan from requesting a designee for an absentee voter, the trial court's decision had the unfortunate effect of stigmatizing hardworking City personnel. *Id.*, p. 19 (A65) (suggesting that "illegal partisan party interference came into play," and that the police chief was "complicit" in supposed "dishonesty and corruption when it comes to absentee ballots in the city of Bridgeport").[8]

In truth, nothing improper occurred. The record is devoid of any evidence of any violation of election law. As the Election Monitor noted in his report below, City officials "were cooperative, some generously so." *See* Dkt. # 126.00, p. 3. In fact, he made clear that "all

[8] Contrary to the trial court's suggestion, the assistance of police as absentee ballot designees was specifically contemplated and authorized by the Legislature. *See* 1974 H. Proc. at 4621-22, 4625, 4629-30 (A A22-23, A26, A30-31). Far from being "complicit" in any misconduct, *see* Ruling, p. 19 (A65), the police involvement here, as expressly permitted by the statute, helps to preserve the integrity of the election process.

of the personnel in [the office of the] Town Clerk . . . were extremely generous with their time, accommodating in every way and quite helpful" and named two specific City employees, Ms. Christina Resto and Mr. Joshua Diaz, who "were critically important in allowing [him] to obtain the access and information [he requested]," and "were extremely generous with their time and assistance." *Id.*, p. 11. Any suggestion of corruption or untoward activity by any election official or City employee was simply without basis and unwarranted.

By flipping the burden of proof and making incorrect legal conclusions, the trial court rendered an erroneous decision below. Given that "[a] proper judicial respect for the electoral process mandates" that courts "exercise caution and restraint" before vacating an election, *see Bortner*, 250 Conn. at 255, the record below fell well short of demonstrating any "substantial violations" of state law that would "render the reliability of the result of the election seriously in doubt." *Id.* at 258. *See also Caruso*, 285 Conn. at 637-38.

CONCLUSION

The decision of the Superior Court should be reversed and remanded, to allow for a general election to be set and for all other attendant relief. The defendants respectfully request that, pursuant to Section 9-325, this Court's decision be attested by the Clerk of the Supreme Court and transmitted to the Secretary of the State, to approve the results of the November 14 primary.

Respectfully submitted,

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COMPLIANCE CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on December 18, 2017:

1. the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

2. the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

3. a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

4. the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

5. the brief complies with all provisions of Section 62-7.

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