



April 22, 2020

His Excellency the Governor
Charles D. Baker
Commonwealth of Massachusetts
The State House
Boston, MA 02133

The Honorable Karen Spilka
Senate President
The State House
Boston, MA 02133

The Honorable Robert DeLeo
Speaker of the House
The State House
Boston, MA 02133

The Honorable William Francis Galvin
Secretary of the Commonwealth
One Ashburton Place, Room 1700
Boston, MA 02108

Re: Voting in 2020 Fall Elections and the Coronavirus Pandemic

Dear Governor Baker, Senate President Spilka, Speaker DeLeo, and Secretary Galvin:

Thank you for your work to keep residents of the Commonwealth safe in these difficult times. We applaud your leadership and offer ourselves as a resource on issues of civil rights and civil liberties as they continue to arise.

We write now with regard to preparations for the fall elections, which are mere months away. We ask that you promptly take proactive steps to eliminate COVID-19-related barriers to voting in September and November of this year, including providing timely support for robust utilization of absentee and early voting processes. Time is of the essence. Proactive steps need to be taken soon to enable wide-spread participation in these elections, notwithstanding the predictable, ongoing effects of the pandemic.

As the Commonwealth prepares for state and federal elections in the face of this pandemic, we must ensure that all eligible voters can cast their ballots safely. No one should be forced to choose between their own health -- or the health of others -- and exercising the right to vote. Indeed, we believe that our State Constitution forbids voters being put to such a choice.

Legal Background

Article 9 of the Declaration of Rights provides that “all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.”

Article 3 of the Amendments to the Massachusetts Constitution further provides that “[e]very citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and, excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators, or representatives, *shall have a right to vote* in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.” (emphasis added).

G.L. c. 54, § 86 provides in pertinent part that “Any voter who during the hours that polling places are open on the day of a special state election or the biennial state election or of any special or regular state primary or of a presidential primary [1] is absent from the city or town where he is a voter . . . for any [] reason or [2] **who will be unable to by reason of physical disability to cast his vote in person at the polling place** or [3] who for reasons of religious belief will be unable to cast his vote in person on the day of an election and whose application for an official absent voting ballot has been filed with the city or town clerk as provided in section eighty-nine, and certified under section ninety-one, **may vote** in accordance with sections eighty-seven to one hundred and three, inclusive.” (emphasis and numbers added). The statute implements the provisions of Article 45 of the Articles of Amendment, as amended by Amendment Article 105.

As the Supreme Judicial Court reiterated in *Chelsea Collaborative v. Secretary of the Commonwealth*, 480 Mass. 27, 32 (2018) (and cases quoted), “[v]oting has long been recognized as a fundamental political right and indeed the ‘preservative of all rights.’” In addition, the Court made clear “that, with the passage of time, voting regulations once considered constitutionally permissible may come to significantly interfere with the fundamental right to vote in light of conditions existing in contemporary society.” *Id.* at 37.

Indeed, the Court essentially applied these principles in ruling that the constitution requires that, in this time of the COVID-19 pandemic, generally applicable election requirements must be adjusted. *Goldstein v. Secretary of the Commonwealth*, SJC No. 12931 (April 17, 2020).

Factual Background

In 2020, it is a patriotic and public health imperative for as many voters as possible to stay at home and avoid being in close contact with other individuals. Yet, this should not and lawfully cannot come at the cost of losing the franchise.

COVID-19 will continue to threaten public health in the Commonwealth this fall. Even if we flatten the transmission curve sufficiently to reopen the economy sooner, experts warn about a potential resurgence, including the potential for devastating impacts if a new surge coincides with other respiratory illness during ordinary flu season.¹ Because of this risk of resurgence, even if the current public health declaration is lifted prior to fall, extensive physical distancing and self-quarantine will still be recommended for a substantial time to prevent resurgences of the virus.²

Against this background, the Secretary of the Commonwealth has wisely concluded:

It is the opinion of this office that you qualify for an absentee ballot due to physical disability if:

- You are ill;
- You are confined to your home because you may transmit infection; or
- You cannot leave your home because you are a member of a population vulnerable to illness;
- You are staying in your home or avoiding your polling place as a precautionary measure in response to COVID-19.³

And in enacting emergency legislation for the spring elections, the Legislature and the Governor recognized that the constitution allows for absentee voting by reason of physical disability due to the pandemic. St. 2020, c. 45, § 4.

Other states are also taking pre-emptive action now to guarantee the right to vote by absentee ballot in the fall elections. For instance, New Hampshire has proactively issued a legal interpretation of that state's "physical disability" qualification for absentee voting that expressly enables any voter to vote absentee in September and November for reasons related to COVID-19 precautions.⁴

Existing Massachusetts law compels that voting by absentee ballot this fall must be allowed and facilitated for all people who are staying home or otherwise wish to avoid a polling place as a precautionary measure in response to COVID-19. Indeed, if these voters are not

¹ <https://www.bostonglobe.com/2020/04/21/nation/cdc-director-warns-second-wave-coronavirus-this-winter-will-likely-be-worse/>

² See, e.g., <https://www.bbc.com/future/article/20200324-covid-19-how-social-distancing-can-beat-coronavirus>; <https://www.nytimes.com/2020/04/04/opinion/sunday/covid-whats-next.html>.

³ <https://www.sec.state.ma.us/ele/covid-19/covid-19.htm>

⁴ https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf

provided with ready access to absentee ballots and if our election systems are not provided the means to process such ballots efficiently, a situation will be created in which voters are forced to choose between exercising their fundamental right to vote or placing at risk their own health and the health of their community. This would constitute “a significant interference with the fundamental right to vote under the Massachusetts Constitution so as to require the application of strict scrutiny.” *Chelsea Collaborative*, 480 Mass. at 40. And given that absentee voting on a broad scale is possible if measures are taken promptly to implement it, we believe denial of the right to vote absentee would not be found to satisfy strict scrutiny.

Recommendations

To make the 2020 fall elections a success, we urge you to take prompt steps to: (1) dedicate resources in a timely manner to enable wide-scale voting by mail and the secure, expeditious and accurate counting of ballots received by mail; (2) preserve in-person voting and put in place public health protections for voters and poll workers; and (3) expand early voting for both the primary and general elections.

Dedicate sufficient resources for extensive voting by mail. Resources will be needed for printing, distribution and postage-prepaid return of absentee and early voting ballots in a large range of languages, procurement of more high speed scanning devices, procuring secure storage locations, enabling centralized tabulation systems, and other tools needed to facilitate processing of more than the usual numbers of mail-in ballots. Expanded resources are also likely needed to provide robust public education about how to request and receive a ballot in a timely way.

Preserve sufficient in-person voting, and make it safe. In addition to resources for expanded mail-in voting, resources will also be needed to retain and modify a sufficient number of in-person polling places for those who are unable to vote by mail for whatever reason. Such voters would include those who live where mail delivery is not reliable or have temporarily relocated to a place with more opportunities for physical distancing or self-quarantine and therefore may not receive mail in a timely way. Given many of these voters live in communities of color disproportionately affected by COVID-19,⁵ preservation of a sufficient number of in-person polling sites is an imperative matter of racial justice. Certainly, Massachusetts does not want to have the experience of Milwaukee, Wisconsin on April 7, where persons of color and others were left standing in line for hours due to the lack of sufficient in-person polling locations.⁶

We also urge that measures be put in place to maximize physical distancing at in-person poll locations among both voters and poll workers. This will be easier to accomplish if mail-in voting is broadly available. Provisions must also be made to provide personal protective equipment for all poll workers and masks to voters.

⁵ <https://www.aclum.org/en/publications/data-show-covid-19-hitting-essential-workers-and-people-color-hardest>

⁶ <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>

Expand early voting. The risk to in-person voters and poll workers would be further ameliorated if the law was at least temporarily amended to expand the time for early voting, pursuant to G.L. c. 54, § 25B, from a period 11 days before election day to a longer period, e.g. 20 or even 30 days. In addition, it would be wise to permit a period of early voting before the September 1 primary election. Expanding early voting options would reduce the number of people voting each of the days and allow greater physical distancing among prospective voters.

The reduction of in-person voting on election day will particularly aid poll workers, who are often older persons, and increase the likelihood that there will not be a shortage of poll workers, as happened on April 7 in Wisconsin, necessitating enlistment of the National Guard. If prospective poll workers know in advance that polling places will be safe as possible because of the types of measures discussed here, they will feel more comfortable and willing to fulfill this vital role. Of course, additional measures may need to be taken to recruit poll workers to ensure adequate staffing as well.

Conclusion

With the foregoing steps, Massachusetts can be a leader in protecting its people, including some of its most vulnerable residents, from the worst of COVID-19 and will be a role model for the entire country with regard to preservation of the right to vote.

Thank you for your continued vigilance and leadership.

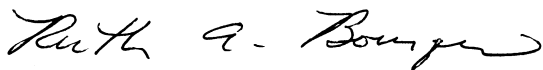
Sincerely,



Carol Rose
Executive Director



Gavi Wolfe
Legislative Director



Ruth Bourquin
Senior and Managing Attorney