

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJC-2020-_____

REBECCA GROSSMAN, BECKY GROSSMAN FOR CONGRESS,
JONATHAN LEVENFELD, SOPHIE KRIPP and SHIRLEY D. GROSSMAN, on
behalf of themselves and others similarly situated,

PETITIONERS,

v.

WILLIAM FRANCIS GALVIN, in his Official Capacity as
Secretary of the Commonwealth of Massachusetts,

RESPONDENT.

EMERGENCY PETITION FOR RELIEF
PURSUANT TO G. L. C. 214, § 1 AND G. L. C. 231A, § 1

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Dated: August 19, 2020

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INTRODUCTION

Petitioners seek emergency relief in order to prevent the disenfranchisement of innumerable registered Massachusetts voters who have sought or will seek to vote by mail in the upcoming September 1st primary election and in order to prevent the de facto elimination of either their rights to vote in that primary or to have their votes counted, or both. As applied under the circumstances, the limitation that only mail-in ballots that are actually received by the date of the September 1st primary will be counted does not merely threaten to eliminate untold numbers of voters' rights to vote and have their votes counted, but it is virtually certain to do that, effectively eviscerating the rights of voters who wish to vote by mail and who have fully complied for their part with the law permitting them to do so. Without such relief, voters all across Massachusetts who have already complied with Massachusetts law or who will do so will, by operation of that law, be prevented from either (1) voting at all; or (2) having their votes counted in those elections.

At stake, very simply, is the Constitutional right of citizens to vote, a right repeatedly recognized and zealously protected by Massachusetts courts, including this one. See Goldstein v. Secretary of Commonwealth, 484 Mass. 516, 523-24 (2020) ("Article 9 of the Massachusetts Declaration of Rights

provides, with impressive brevity and clarity, that “[a]ll elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their framers of government, have an equal right to elect officers and to be elected, for public employments’”, recognizing that the “right to vote is a fundamental constitutional right in Massachusetts”); McCavitt v. Registrar of Voters of Brockton, 385 Mass. 833, 844 (1982) (“An absentee voter should not be disenfranchised if he substantially complies with the election law”).

As set forth herein, Democratic primary elections are being held across the Commonwealth on September 1st. Because of the devastating, debilitating and dislocating impact of COVID-19 on Massachusetts residents and local governments across the Commonwealth, and because the Commonwealth deemed it unconscionable and unacceptable to force voters to choose between risking their own health and that of their families by physically going to public places to vote in person, on one hand, and exercising their Constitutional right to vote, on the other, the Massachusetts Legislature passed an emergency law on July 2, 2020, offering all Massachusetts voters the alternative of voting by mail. As a result of the combined effect of COVID-19 and this law, and as the Secretary of the Commonwealth has publicly stated, the number of Massachusetts voters seeking to

vote by mail is likely to be unprecedented and massive.

Under the emergency Act of the Legislature, voters have until August 26, 2020 to transmit their applications for mail-in ballots to the proper offices within their town or city. That means that localities must then mail the actual ballots back to the voters, and the voters have to complete their ballots and mail their ballots in, all such that they are actually received by September 1, 2020 — a mere 6 days later. Under Massachusetts law, in order for mail-in ballots to be counted, they must be actually received by no later than September 1, 2020. In other words, regardless of when in advance of September 1st voters postmark their mail-in ballots, their votes will not be counted unless actually received by September 1st. As set forth below, however, unless the Secretary is directed to ensure that ballots properly postmarked by September 1st are counted even if the United States Postal Service (the "Postal Service") cannot or does not deliver them by September 1st, innumerable Massachusetts voters, perhaps not merely thousands but tens of thousands of them or even more, will be deprived of their right to vote and/or to have their votes counted, in violation of bedrock Constitutional law, for one or more of the following reasons.

First, in a formal notification to the Secretary dated July 30, 2020, the General Counsel of the Postal Service informed the

Secretary in no uncertain terms that under the Massachusetts emergency Act, "deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," creating the "significant risk" that voters who comply with Massachusetts law will, through no fault of their own, be disenfranchised from their vote. See Addendum ("Add.") Ex. 1 (emphasis added). Whether because of the direct and indirect effects of the pandemic on the Postal Service or because of actions or operations of the Postal Service reported widely in the media in recent days, he informed the Secretary that "domestic voters should generally mail their completed ballots at least one week before the state's due date." Id.

In other words, the Postal Service itself went on record on July 30, 2020 that in order for voters to get their mail-in ballots received by Massachusetts' due date (September 1st), they will have to mail their ballots at a minimum of seven days earlier, or August 25th. However, under Massachusetts law, voters have up to August 26th to apply for a mail-in ballot, meaning that they will be legally entitled to have a ballot mailed to them if their applications are received by the local authority on August 26th – a day after the latest date Postal Service states all ballots should be mailed in if they are to be counted.

It is obvious that uncountable Massachusetts voters will be

denied the right to vote even if they comply with Massachusetts law. Massachusetts authorities have to receive the voters' applications, process them, then mail them back to the voters requesting them - a process which, according to the Postal Service, may take a week or more - and then, even if voters fill out the ballots immediately and immediately place their ballots in a post box, it may take another week or more to get to the local authority. Put another way, Massachusetts voters who fully comply with Massachusetts law and get their application for a ballot in to the local authority by August 26th, or even earlier, will as a practical matter not be able to get their ballots back by September 1st, as is required under the current operation of Massachusetts law to have them counted.

At the outset, therefore, there is an internal collision of provisions of Massachusetts law that will deprive Massachusetts voters of the Constitutional right to vote. Under the present regime, voters can comply with the Massachusetts law providing them until August 26th to get their applications for a ballot in. However, by the Postal Service's own assessment, even if the local authorities are able to place the ballot in the mail back to the voter on the very day the application is received, the voter will not even receive his or her ballot before September 1st, let alone be able to mail it back in in time to be counted by September 1st.

Second, although Petitioners submit that this Court need not go any further before appreciating that without emergency relief Massachusetts voters will be deprived of their Constitutional right to vote, they have submitted evidence from affiants who are registered voters in Massachusetts who requested their mail-ballots approximately two weeks ago and still have not received them. There is no reason to believe these voters' experiences are unique. Indeed, local town clerks are inundated with applications for mail-in ballots. By way of limited example, on August 18, 2020, the City of Newton Clerk's office sent a staff-wide email desperately seeking assistance to help process requests for mail-in ballots, stating:

The City Clerk's Office is in need of your help. Secretary of State William Galvin's office has mailed out nearly 4.5 million vote-by-mail ballot applications for this fall's elections. The City Clerk's Office is anticipating that due to the COVID-19 pandemic, the response and interest in mail-in voting will significantly increase. They have already received well over 10,000 responses and are expecting many more.

In order to ensure proper staffing for this very important need, and support the existing staff with what will be a challenging elections season, the City is seeking applications for candidates interested in providing temporary, hourly, paid, elections assistance. We are asking you to spread the word . . .

Add. Ex. 2 (emphasis added). It can be reasonably inferred that voters who have applied by mail for ballots all through the month of August will not receive their ballots in time to then

turn around and mail the completed ballots back more than a week before September 1st, such that the ballots arrive in time to be counted by that date.

Third, the dramatically higher-than-usual number of applications for mail-in ballots, combined with local governments' significantly decreased capacity to process them, coupled further with the state deadlines being "incongruous with the Postal Service's delivery standards" and the steps that have apparently been taken to undermine the processing and delivery capacity of the Postal Service, will disenfranchise voters and impact candidates for elected office. Put simply, unless voters are assured that ballots mailed before September 1st will be counted, many will be deterred from voting altogether, concluding, justifiably, that in these particular circumstances exercising their Constitutional rights is a wasted exercise.

Neither the Legislature nor the Secretary has taken any steps to amend the deadlines, provide deadlines for when local municipalities must respond to a voter's request for a mail-in ballot, or ensure that all requested mail-in ballots are received at least a week before the September 1st deadline, as advised by the General Counsel to the Postal Service.

The Petitioners respectfully submit that the unconstitutional disenfranchisement of voters in the upcoming

primary is unacceptable, antithetical to established Constitutional principles, and not justified by any State interest in refusing to count votes postmarked by September 1st but received thereafter. Under the present circumstances, the requirement for mail-in ballots to be received by the September 1st primary in order to be counted impermissibly burdens the fundamental rights of these voters and candidates and cannot be reconciled with the Massachusetts and United States Constitutions. As a result, Petitioners respectfully request that this Court order the Secretary to direct local election officials to accept and count all mail-in ballots that are postmarked by September 1st and received within ten days of that date, assuming that the ballots otherwise comply with the election laws.

This requested relief is narrowly tailored to remedy the Constitutional violations. See Goldstein, 484 Mass. at 527-532 (extending the deadlines for candidates to submit their nomination papers and allowing for the use of electronic signatures in connection with nomination papers). It is also consistent with the existing election laws which provide, for purposes of general elections, a grace period of three to ten days for mail-in ballots to be received as long as they are

postmarked by the date of the election.¹

PETITIONERS

All Petitioners are registered Massachusetts voters. Rebecca Grossman is a candidate running for the Democratic Nomination for Congress in Massachusetts' Fourth Congressional District, who is on the ballot for the September 1st Democratic primary. Rebecca Grossman is petitioning on behalf of all Massachusetts voters as well as candidates currently running for office in Massachusetts in connection with the September 1st primary who desire a free and fair election in which every voter has his or her voted counted. To that end, in bringing this Emergency Petition for Relief, Rebecca Grossman is representing the voters of the Commonwealth who have been or will be disenfranchised as a result of the application of this law in the present circumstances. See Add. Ex. 3 (R. Grossman Aff., at ¶ 5).

Petitioner Rebecca Grossman resides in Newton, Massachusetts. She is an attorney, former Assistant District Attorney for Middlesex County, and At Large member of the Newton City Council. She is running in the Democratic Primary to be the United States Representative for Massachusetts' Fourth

¹ Counting votes after September 1st is historically routine. As set forth herein, Massachusetts primaries have regularly been held and primary votes counted after September 1st with no adverse impact on preparation for general elections in November.

Congressional District, which encompasses thirty-four (34) cities and towns and over 501,000 registered voters. She and her husband requested their vote by mail ballots two (2) weeks ago in early August and still have not received their ballots by mail. See Add. Ex. 3 (R. Grossman Aff., at ¶¶ 2-4, 8, 13, 14).

Petitioner Becky Grossman for Congress is a principal campaign committee, established pursuant to 2 U.S.C. § 432(e), and designated by Rebecca Grossman, as a candidate for Congress, as her principal campaign committee for purposes of the Federal Election Campaign Act. It is registered with the Federal Election Commission. See Add. Ex. 3 (R. Grossman Aff., at ¶ 10).

Petitioner Shirley D. Grossman, who is 98 years old, resides in Auburndale, Massachusetts. She is a registered voter in Massachusetts. On or about August 1, 2020, her application to request a mail-in ballot to vote in the upcoming state elections was placed in a secure drop-box for mail-in voting. Nearly two and a half weeks have passed and Shirley Grossman still has not received her mail-in ballot for the primary election. See Add. Ex. 4 (S. Grossman Aff., at ¶¶ 1-3, 7, 8).

Petitioner Sophie Kripp resides in Franklin, Massachusetts and is a registered voter in Massachusetts. Kripp placed her application to request a mail-in ballot to vote in the upcoming

state elections in the U.S. mail during the week of August 3, 2020. Over a week and a half has passed, and Kripp still has not received her mail-in ballot for the primary election. See Add. Ex. 5 (Kripp Aff., at ¶¶ 2, 3, 7, 8).

Petitioner Jonathan Levenfeld resides in Cambridge, Massachusetts and is a registered voter in Massachusetts. Despite having been registered to vote, Levenfeld inexplicably never received his application to request a mail-in ballot. See Add. Ex. 6 (Levenfeld Aff., at ¶¶ 2-4, 7, 8). In light of the fact that Levenfeld has not even received his application to request a mail-in ballot and in light of recent news reports about how long it is expected to take ballots to arrive to the proper place once mailed, Levenfeld feels that he has no choice but to vote in person, which he wished to avoid in light of the health risks caused by the COVID-19 pandemic. *Id.*, ¶ 11.

Defendant William Francis Galvin is the Secretary of the Commonwealth of Massachusetts (the "Secretary"), and is being sued in his official capacity. The Secretary is responsible for overseeing elections in Massachusetts. M.G.L. c. 53, § 11; see also *id.* §§9, 10, 48. The Secretary has publicly recognized that, in light of the COVID-19 pandemic, Massachusetts voters will need to use voting by mail for the September 1st primary and the November 3rd general election, stating:

[The Trump administration is] well aware that voters

need to use vote by mail and that the numbers [of absentee ballots] will be much higher. They knew that. Everyone knows that. There are going to be more people voting by mail in this election probably than any other presidential election in recent times. You may have to go back to World War II [to find more].

Add. Ex. 3 (R. Grossman Aff., at ¶ 44).

**THE REQUESTED RELIEF IS APPROPRIATE IN THIS COURT PURSUANT TO
M.G.L. C. 214, § 1 AND M.G.L. C. 231A, § 1**

This Petition challenges the constitutionality, as applied under the current circumstances, of a state election law that imposes unnecessary and unjustifiable deadlines, in the midst of an unprecedented public health crisis, for requesting and casting mail-in ballots for the September 1st primary that have been acknowledged by the General Counsel of the Postal Service to be “incongruous with the Postal Service’s delivery standards.” This, the Postal Service states, creates a “significant risk” that voters who comply with Massachusetts law will, through no fault of their own, be disenfranchised from their Constitutional right to vote. This “significant risk” of Constitutional disenfranchisement is further exacerbated by local governments across Massachusetts being overburdened by the devastating effects of COVID-19, which are therefore unable in many instances to timely get mail-in ballots to voters wishing to vote by mail. It is exacerbated further by the Postal Service having apparently taken steps which adversely affect Massachusetts voters’ ability to vote

by mail. As a result, voters across the Commonwealth, including in the Fourth Congressional District, are going to be prevented from voting and having their votes count in the September 1st primary.

Petitioners seek relief from this Court in order to expeditiously secure a conclusive ruling on the merits, and provide guidance for voters, candidates and election officials at the state and local levels. Given the unprecedented acknowledgment by the federal government that application of Massachusetts election laws will lead to voters being deprived of their fundamental right to vote protected by Article 9 of the Declaration of Rights and the unprecedented burden and limitations imposed by the COVID-19 pandemic on local election officials tasked with timely transmitting, and ensuring the timely receipt of, mail-in applications and ballots, the Court's jurisdiction should be appropriately exercised.

Specifically, jurisdiction over this Petition is proper in this Court pursuant to M.G.L. c. 214, § 1, conferring on this Court "original and concurrent jurisdiction of all cases and matters of equity cognizable under the general principles of equity jurisprudence," and M.G.L. c. 231A § 1, establishing that this court "may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby." This Court has applied these authorities to

adjudicate disputes relating to the Commonwealth's election laws, particularly given the unprecedented threat to fair elections in light of the COVID-19 pandemic. See, e.g., Bertin v. Secretary of the Commonwealth, SJC No. 2020-0520; Goldstein v. Secretary of the Commonwealth, 484 Mass. 516, 525 (2020) ("We need not dwell long on how dramatically conditions have changed in Massachusetts since the Governor first announced a state of emergency arising from the COVID-19 pandemic"); Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 540-41 (2012); Wyler v. Secretary of the Commonwealth, 441 Mass. 22, 22-24 (2004).

FACTUAL BACKGROUND

I. THE EMERGENCY ACT AUTHORIZING VOTING BY MAIL IN CONNECTION WITH THE SEPTEMBER 1ST PRIMARY AND NOVEMBER 3RD GENERAL ELECTION

In early March 2020, the World Health Organization classified the COVID-19 outbreak as a "pandemic." Beginning on March 10, 2020, in response to the global pandemic and growing public health emergency caused by the outbreak of COVID-19, Governor Baker issued the first in a series of executive orders closing schools, non-essential businesses, and directing residents and workers to stay at home. In his Executive Order declaring a State of Emergency, Governor Baker recognized:

the worldwide outbreak of COVID-19 and the effects of its extreme risk of person-to-person transmission

throughout the United States and the Commonwealth significantly affect the life and health of our people, as well as the economy, and is a disaster that impacts the health, security, and safety of the public.

See Massachusetts Executive Order No. 591 (March 10, 2020) (emphasis added).

In response to this public health crisis, Governor Baker issued an Executive Order on March 23, 2020 that all businesses and other organizations that do not provide “COVID-19 Essential Services” must “close their physical workplaces and facilities ... to workers, customers, and the public” by noon on March 24 and not reopen before noon on April 7, 2020.² The Governor subsequently extended that Order.³

In response to the public health and safety restriction on the holding of elections caused by the COVID-19 pandemic, the Massachusetts Legislature on July 2, 2020 passed an emergency law entitled “An Act relative to voting options in response to COVID-19” (the “Act”). H. 4820, 191st Gen. Ct. (Mass. 2020) (enacted July 6, 2020). A key feature of the Act provides that the Secretary “shall” send every registered voter in the

² See Massachusetts COVID-19 Order No. 13 (March 23, 2020), available at www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download.

³ See Massachusetts COVID-19 Order No. 21 (March 31, 2020), available at www.mass.gov/doc/march-31-2020-essential-services-extension-order/download.

Commonwealth an application to request a mail-in ballot (an "Application") to vote in the upcoming elections, which is pre-addressed to the local election official with postage guaranteed. Id. § 6(d)(1)-(2), (4). The Act requires the Secretary to send the Applications to voters by July 15. Id. However, the Secretary did not send those Applications until July 22, 2020. See Add. Ex. 3 (R. Grossman Aff., at ¶ 20).

Under the Act, any voter wishing to vote early by mail in the September 1st primary election must complete the application to vote early by mail and shall return said application to the appropriate city or town clerk. Under the Act, any application to vote by mail in the primary election must be received in the office of the local election official before 5 P.M. on Wednesday, August 26, 2020. Id. § 6(e)(1-2).

Once the voter has received his/her mail-in ballot from the local town clerk, he/she may complete and return the ballot by: (i) delivering it in person to the office of the appropriate city or town clerk; (ii) dropping it in a secured municipal drop box; or (iii) mailing it to the appropriate city or town clerk.⁴ All early voting ballots submitted by mail, delivered in person

⁴ Of course, requiring a voter to travel to a public building in the middle of a pandemic undermines the voter's reason for voting by mail in the first place, namely, the need to remain socially distant from others so as to protect their health and the health of their loved ones.

to the office of the city or town clerk or returned to a secured municipal drop box as provided by this section shall be received by the city or town clerk before the hour fixed for closing the polls on the day of the primary election. Id. § 6(h)(1-2).

The Secretary of State's office has publicly stated that all primary mail-in ballots must arrive at the voter's local election office by 8 p.m. on September 1, 2020 in order to be counted. See Add. Ex. 3 (R. Grossman Aff., Ex. B thereto) ("It doesn't matter when it's postmarked," said Debra O'Malley, a spokesperson for Secretary of State William Galvin").

Given that the Act allows voters until August 26, 2020 to request their application to vote by mail to their local town clerk, that only provides four (4) business days for the local clerk to mail the ballot and for the voter to then complete the ballot and mail it back to the local clerk such that it is received on or before September 1, 2020. While mail-in ballots must be received for the primary election on or before September 1, 2020 regardless of when they are postmarked, the Act provides that voting ballots mailed for the general election will be counted as long they are received not later than 5 P.M. on November 6, 2020 and mailed on or before November 3, 2020 (Election Day). See Act at § 6(h)(3) and M.G.L. c. 54,

§§95 and 99 (ballots from overseas may be counted if received within ten days of the election). There is no logical basis for this difference.

II. THE JULY 30, 2020 LETTER FROM THE GENERAL COUNSEL OF THE U.S. POSTAL SERVICE TO THE SECRETARY OF THE COMMONWEALTH

On or about July 30, 2020, just weeks after the Act was passed, the General Counsel of the Postal Service sent a letter to the Secretary raising concerns about the “significant risk” that Massachusetts voters who fully comply with state law will nonetheless be disenfranchised from their Constitutional right to vote. In that letter, the General Counsel of the Postal Service did not mince his words:

The purpose of this letter is to focus specifically on the deadlines for requesting and casting ballots by mail. In particular, we wanted to note that, under our reading of Massachusetts’ election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service’s delivery standards. This mismatch creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them.

Add. Ex. 1 (emphasis added).

In order to address this “incongruity” between the Massachusetts election laws and the delivery standards of the Postal Service, the General Counsel recommended to the Secretary to “adher[e] to the following timeframe when using the mail to transmit ballots to domestic voters”:

- **Ballot requests:** Where voters will both receive

and send a ballot by mail, voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum, and preferably long before that time.

- **Mailing blank ballots to voters:** In responding to a ballot request, election officials should consider that the ballot needs to be in the hands of the voter so that he or she has adequate time to complete it and put it back in the mail stream so that it can be processed and delivered by the applicable deadline. Accordingly, the Postal Service recommends that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters.
- **Mailing completed ballots to election officials:** To allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials. . . .

Addendum Ex. 1 (emphasis added).

The Postal Service further cautioned that if these time standards were not adhered to, there would be a "significant risk" that voters who complied with Massachusetts law would, through no fault of their own, would be disenfranchised from their vote:

Under our reading of your state's election laws, as in effect on July 27, 2020, certain state-law requirements and deadlines appear to be incompatible with the Postal Service's delivery standards and the

recommended timeframe noted above. As a result, to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted. . . .

If a voter submits a request at or near the ballot-request deadline, and if the requested ballot is transmitted to the voter by mail, there is a significant risk that the ballot will not reach the voter before Election Day, and accordingly that the voter will not be able to use the ballot to cast his or her vote. That risk is exacerbated by the fact that the law does not appear to impose a time period by which election officials must transmit a ballot to the voter in response to a request.

Id. (emphasis added).

It further advised the Secretary of State that:

[T]he Postal Service cannot adjust its delivery standards to accommodate the requirements of state election law. For this reason, the Postal Service asks that election officials keep the Postal Service's delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail. It is particularly important that voters be made aware of the transit times for mail (including mail-in ballots) so that they can make informed decisions about whether and when to (1) request a mail-in ballot, and (2) mail a completed ballot back to election officials.

Id. (emphasis added).

III. SINCE THE POSTAL SERVICE'S ADVISORY, NEITHER THE SECRETARY NOR THE LEGISLATURE HAS ACTED TO PROTECT THE CONSTITUTIONAL RIGHTS OF VOTERS WITH RESPECT TO THE SEPTEMBER 1ST PRIMARY

Since the Postal Service issued its letter, neither the

Massachusetts Legislature, nor the Secretary has taken any steps to amend the deadlines under the Act, or otherwise ensure that all requested mail-in ballots are sent to voters at least a week before the September 1st deadline. Similarly, neither the Legislature nor the Secretary has addressed the fact that the Act does not impose a time period by which election officials must transmit a ballot to the voter in response to a request – a compounding risk specifically identified by the Postal Service.

For their part, local clerks have been overwhelmed with processing the ongoing requests for mail-in ballots, doing so under the existing pressures and limitations created by the COVID-19 pandemic. Indeed, the email sent at 4:30 pm on August 18 by a City of Newton official to the staff in the clerk's office is illustrative of the burden placed on all municipal clerks in getting voters their mail-in ballots. See Add. Ex. 2.

IV. PETITIONERS AND VOTERS WHO HAVE PROMPTLY REQUESTED THEIR PRIMARY BALLOTS WEEKS AGO STILL HAVE NOT RECEIVED THEM FROM LOCAL OFFICIALS

Separate and apart from any voters who will be requesting their vote by mail ballots in advance of the August 26th deadline, voters who have already applied for their mail-in ballots weeks ago are still waiting to receive them from local officials. For example, Rebecca Grossman and her

husband requested their mail-in ballots in early August, but they are still waiting to receive them. See Add. Ex. 3 (R. Grossman Aff., at ¶ 8). Similarly, the other affiants requested their mail-in ballots as far back as two and a half weeks ago and still have not received their ballots. See, e.g., Add. Ex. 4 (S. Grossman Aff., at ¶¶7-11) (requested two and a half weeks ago); Add. Ex. 8 (M. Sherman Aff., at ¶¶ 8-9) (requested over two weeks ago); Add. Ex. 7 (J. Sherman Aff., at ¶¶ 8-9) (requested over two weeks ago); Add. Ex. 5 (S. Kripp Aff., at ¶¶ 7-8) (requested a week and a half ago).

There is no reason to believe these voters' experiences are unique, and unless they are, it can be reasonably inferred that Massachusetts voters who have applied by mail for ballots during the month of August 2020 will not receive their ballots in time to then turn around and mail the ballots back more than a week before September 1st, such that the ballots arrive in time to be counted by that date. This, of course, is highly likely to cause voters to conclude that they will be unable to vote due to a lack of a mail-in ballot, that they will be forced to vote in person, or that their timely and properly postmarked ballots will not be counted because they will not be received before September 1st. See, e.g., Add. Ex. 4 (S. Grossman Aff., at ¶¶ 10-11); Add. Ex. 5 (S. Kripp Aff., at ¶¶ 10-11); Add. Ex. 6 (Levenfeld Aff., at ¶¶ 11-12); Add. Ex. 7 (J.

Sherman Aff. at ¶¶11-12); Add. Ex. 8 (M. Sherman Aff. at ¶¶ 11-12); Add. Ex. 9 (K. Morfill Aff., at ¶¶ 11-12); Add. Ex. 10 (J. Levine Aff., at ¶¶ 10-11); Add. Ex. 11 (C. Hess Aff., at ¶¶ 9-13); Add. Ex. 12 (S. Hess Aff., at ¶¶ 9-13); Add. Ex. 13 (J. Aliber Aff., at ¶¶ 9-13); Add. Ex. 13 (C. Spence Aff., at ¶¶ 7-13).

V. THE DISENFRANCHISEMENT OF VOTERS IS FURTHER EXACERBATED BY STEPS RECENTLY TAKEN BY THE POSTAL SERVICES THAT ARE LIKELY TO UNDERMINE VOTING BY MAIL

If the burdens on voters' Constitutional right to vote under Massachusetts election laws were not great enough, Postmaster General Luis DeJoy recently implemented policy changes impacting the Postal Service, including cost-cutting measures. It appears that the Commonwealth of Massachusetts has begun experiencing some of the Postal Services' cost-cutting measures, including slashed overtime, staff cuts and decreased shifts. See Add. Ex. 3 (R. Grossman Aff., at ¶ 36).

This, of course, further undermines voters' faith in the electoral process and creates the likelihood that some voters, and probably many, are going to conclude that their votes will not count because they will not be received in time, and therefore, will not even bother to mail their votes in. This is another wholesale category of voters who will,

in effect, be disenfranchised.⁵

CONSTITUTIONAL BASES FOR RELIEF

I. AS APPLIED UNDER THE CURRENT CIRCUMSTANCES, THE VOTE BY MAIL ELECTION LAW UNCONSTITUTIONALLY INFRINGES ON BOTH CANDIDATES' AND VOTERS' FUNDAMENTAL RIGHTS UNDER THE MASSACHUSETTS AND U.S. CONSTITUTIONS

This petition is governed by several well-established Constitutional protections afforded to both voters and candidates for elected office under both the Massachusetts Constitution and the U.S. Constitution. Article 9 of the Massachusetts Declaration of Rights provides that “[a]ll elections ought to be free; and 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.” Goldstein, 484 Mass. at 523-524.

As a result, “voting has long been recognized as a fundamental political right and indeed the ‘preservative of all rights’” secured under the Massachusetts Constitution.⁶ See

⁵ Indeed, the Secretary has acknowledged this and urged citizens to file lawsuits against the Trump Administration. However, lawsuits concerning the de-funding of the Postal Service immediately before the primary and general election does nothing to ensure that voters have their votes, which are properly mailed, counted in connection with the September 1st primary.

⁶ This Court has recognized that “the Massachusetts Declaration of Rights may be more protective of voting rights than the Federal Constitution.” Goldstein, 484 Mass. at 524. The Federal Constitution protects the right to vote as fundamental as a matter of equal protection as long as the State grants that

Chelsea Collaborative, Inc. v. Secretary of Commonwealth, 480 Mass. 27, 32 (2018); Dane v. Registrars of Voters of Concord, 374 Mass. 152, 160 (1978) (right to vote is protected as “natural, essential, and unalienable right[]” under Article 1 of the Declaration of Rights); Swift v. Registrars of Voters of Quincy, 281 Mass. 271, 276 (1932) (“The right to vote is a precious personal prerogative to be sedulously guarded” under “[a]rts. 4, 7, 8, [and] 9 of the Declaration of Rights”). Moreover, these fundamental Constitutional protections extend to absentee voting. See McCavitt v. Registrars of Voters of Brockton, 385 Mass. 833, 844 (1982) (“The same principles govern absentee voting. The right to absentee vote is ‘as sacred, as much to be protected and favored ... as the right of voting by personal presence’”).

Similarly, as this Court recently recognized in modifying election law requirements that were rendered impracticable in light of the COVID-19 pandemic:

The right to seek elected office, like the related right to vote, is a fundamental constitutional right in Massachusetts. . . .Over the ensuing 240 years since the adoption of our Declaration of Rights in 1780, art. 9 has served to protect the “fundamental” and “intertwine[d]” rights of candidates to gain access to the ballot and of voters to cast their

right to its citizens because “[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” Chelsea, 480 Mass. at 32, n.19. (citations omitted).

ballots as they see fit.

Goldstein, 484 Mass. at 523-524.

Against the backdrop of the "sacred" right to vote, protected by the state and federal constitutions, this Court has long-recognized that the object of elections is to ascertain the popular will, and not to thwart it and the object of election laws is to secure the rights of duly qualified voters, and not to defeat them. Brady v. State Ballot Law Commission, 485 Mass. 345 (2020) (holding that candidate complied in substance with electronic voter signature procedure); Swift v. Registrars of Voters of Quincy, 281 Mass. 271, 277 (1932) (ruling that ballots should be counted regardless of irregularities not caused by the voters). Consequently, this Court "resolve[s] voting disputes, where at all possible, in favor of the voter," repeatedly recognizing that an "absentee voter should not be disenfranchised if he substantially complies with the election law." McCavitt, 385 Mass. at 837, 844 (emphasis added). See also Fyntrilakis v. City of Springfield, 47 Mass. App. Ct. 464, 469 (1999) ("It is a fundamental principle that a voter who has cast his ballot in good faith should not be disenfranchised because of the failure of a ministerial officer to perform some duty imposed upon him by law").

Indeed, the Legislature itself has not required strict

compliance with election laws and has directed courts not to reject a ballot for an "immaterial addition, omission, or irregularity." M.G.L. c. 54, § 97. As this Court has recognized, "[i]n keeping with this statement of legislative intent, we have reasoned that 'an absentee voter should not be disenfranchised if he substantially complies with the election law.'" Connolly v. Secretary of Commonwealth 404 Mass. 556, 562 (1989). See also Brady, 485 Mass. at 352 ("As we have previously explained, access to the ballot is a fundamental right, essential to the success of democracy").

In light of the well-established law, Massachusetts voters and the candidates on the ballot for the September 1st primary are faced with an election law that, as applied under the current circumstances, unconstitutionally frustrates the fundamental right to vote and disenfranchises voters in light of (1) the acknowledged limitations of the Postal Service that will prevent voters from either receiving their ballot or having it received by September 1st in order to be counted; (2) the overwhelming ongoing burden on local cities and towns to comply with the vote by mail election law; and (3) the apparent active efforts of the federal government to impose additional limitations and burdens on the postal service in Massachusetts.

A. The September 1st Deadline For Receiving And Counting Ballots Under The Act Does Not Withstand Strict Scrutiny In Light Of Circumstances Beyond The Control Of Voters

The Commonwealth has an obligation to ensure that “our democratic processes remain fair, honest, and orderly.” Libertarian Ass’n of Mass., 462 Mass. at 560 (2012). However, as recognized by this Court, laws that regulate elections may become unconstitutional in light of changed circumstances that impair the Constitutional right to vote, including the burdens imposed by the COVID-19 pandemic.

[A]s we have recognized, statutory requirements that were once considered constitutionally permissible may later be found to interfere significantly with a fundamental right as societal conditions and technology change. And similarly, statutory requirements that in ordinary times impose only modest burdens on prospective candidates for public office may significantly interfere with the fundamental right to run for political office in a time of a pandemic.

Goldstein, 484 Mass. at 525 (internal citations omitted). These are not ordinary times.

When considering a challenge to a state election law, this Court has used a “sliding scale” approach, balancing the “‘character and magnitude’ of the burden the State’s rule imposes on [the plaintiffs’] rights against the interests the State contends justify that burden, and consider[ing] the extent to which the State’s concerns make the burden necessary.” Goldstein, 484 Mass. at 524; Libertarian Ass’n of Mass., 462

Mass. at 560. However, this Court applies strict scrutiny to a voting requirement that, under the circumstances, “significantly interferes” with the fundamental right to vote. Goldstein, 484 Mass. at 524-525 (applying strict scrutiny to the minimum signature requirements for candidates to get on the ballot given the circumstances created by the COVID-19 pandemic). Here, there is no genuine dispute that the deadlines imposed by the Act for the September 1st primary, requiring that ballots be received by September 1 in order to be counted, significantly interferes with the fundamental right to vote.

First, the unprecedented COVID-19 pandemic, which has resulted in a declared state of emergency in Massachusetts, has severely limited the ability and desire of citizens to safely congregate and associate in private and public settings, including polling places, for fear of contracting the virus, which can spread at an alarming rate. See Goldstein, 484 Mass. at 522-523 and 536-537 (“our electoral process seems dangerously unequipped to adapt to the new paradigm” created by the COVID-19 pandemic). As the Secretary has publicly acknowledged, this has created an unprecedented desire by citizens to use the Act to cast their ballots by mail. See Add. Ex. 3 (R. Grossman Aff., at ¶ 44) (“There are going to be more people voting by mail in this election probably than any

other presidential election in recent times. You may have to go back to World War II" to find more).

Second, the General Counsel of the Postal Service has informed the Secretary in no uncertain terms that the deadlines for requesting and casting mail-in ballots are "incongruous" with the Postal Service's delivery standards and that disconnect creates a virtual guarantee that ballots requested near the deadline under state law will not be returned by mail in time to be counted under Massachusetts law. Indeed, under the law, voters have until August 26, 2020 to submit their application to vote by mail to their local town clerk, which only provides four (4) business days for the local clerk to mail the ballot, have the voter complete the ballot, and then mail it back to the local clerk such that it is received on or before September 1, 2020. This is a logistical impossibility, as confirmed by the Postal Service.

Third, even voters who have already acted weeks ago to request their mail-in ballots have not received them from their various local election officials given the incredible burden that local municipalities are under due to the COVID pandemic. Under the guidance issued by the Postal Service, these ballots will have to be delivered to voters no later than August 25th in order for there to be any hope that they

might actually be received by September 1st.

Fourth, the significant interference with voters' ability to fully utilize voting by mail is further exacerbated by the apparent efforts within the federal government to interfere with voting by mail by taking steps to hamper the Postal Service in advance of the general election. This conduct has itself sown doubt and confusion in voters about the primary election and whether their mail-in ballots will be received in time to be counted.

The burden on Petitioners' rights (and the rights of those similarly situated) is unquestionably severe. They face the Hobson's Choice of abandoning their right to vote by mail and risking their health and that of their loved ones by travelling to a public polling place or town election office or, assuming their ballot arrives in time, mailing it knowing there is a substantial risk that it will not be counted. As a result, the State is called upon to demonstrate that the existing September 1st deadline to receive mail-in ballots is narrowly tailored to a compelling interest, which it cannot do.

B. The Vote By Mail Election Law Is Not Narrowly Drawn To A Compelling State Interest, Given the Circumstances

1. The State's Interest In Refusing To Count Timely and Properly Postmarked Ballots That Are Received After September 1st Is Not Compelling Under the Circumstances

As a general matter, the Commonwealth has a well-recognized

interest in facilitating the achievement of a reasonably prompt determination of the result of the election. See McCavitt, 385 Mass. at 844 (recognizing "the achievement of a reasonably prompt determination of the result of the election" as a proper government interest). However, these are not ordinary times. The Commonwealth's interest in expediency cannot trump the fundamental Constitutional rights of voters, particularly where voters can comply with the letter of the law in exercising their right to vote by mail and still not have their votes counted due to the inability of the Postal Service to timely deliver their ballots so that they are received by local election officials by September 1, 2020. See Fyntrilakis, 47 Mass. App. Ct. at 469 ("It is a fundamental principle that a voter who has cast his ballot in good faith should not be disenfranchised because of the failure of a ministerial officer to perform some duty imposed upon him by law"); McCavitt, 385 Mass. at 844 ("absentee voter should not be disenfranchised if he substantially complies with the election law").

Present conditions sever the link between a legitimate justification and the drastic burden on Constitutional rights which is imposed by the law. Those conditions include: (1) the acknowledged substantial increase in voting by mail anticipated by the Secretary; (2) the increased burden that voting by mail places on local town election officials responsible for

processing in-coming applications for ballots, sending those ballots to voters, and then receiving those ballots from voters - doing so with a decreased capacity given the financial, staffing and other burdens created by the COVID-19 pandemic; (3) the acknowledged inability of the federal postal service to timely deliver applications for ballots and ballots under the state election law; and (4) the recent steps taken by the Postal Service that are likely to undermine voting by mail.

2. Other, Less Stringent, Deadlines Adequately Address The Commonwealth's Interests, While Ensuring That Voters Are Not Disenfranchised

Here, the Court does not need to search far for less restrictive alternatives to ensure both that voters are not disenfranchised and that the Commonwealth can promptly determine the winners of the September 1st primary and prepare for the November 3rd general election. The Secretary can simply direct local election officials to accept and count all mail-in ballots that are postmarked by September 1st and received within ten days of September 1st, assuming that the ballots otherwise comply with the election laws. Indeed, this is entirely consistent with the existing election laws.

For example, the Legislature provided that voting ballots mailed for the general election will be counted as long they are received not later than 5 P.M. on November 6, 2020 and mailed on or before November 3, 2020 (Election Day). See Act at § 6(h)(3).

The Legislature also provides that the general election ballots mailed from outside the United States will be counted if they are received within ten (10) days of the election and postmarked on or before the day of the election. See M.G.L. c. 54, §§95 and 99. Moreover, the 10-day grace period until September 11, 2020 to allow for the operation of the mail system is also consistent with when primaries have historically been held in Massachusetts, including primaries as late as September 14, 17, and 19. See Add. Ex. 3 (R. Grossman Aff., at ¶ 16). The timing of this primary has no impact on the Commonwealth's ability to prepare for a general election in November.

II. THIS COURT HAS THE AUTHORITY TO ORDER THE SECRETARY OF THE COMMONWEALTH TO DIRECT LOCAL ELECTION OFFICIALS TO COUNT ALL MAIL-IN BALLOTS THAT ARE POSTMARKED BY SEPTEMBER 1st AND RECEIVED WITHIN 10 DAYS OF SEPTEMBER 1st, ASSUMING THAT THEY OTHERWISE COMPLY WITH THE VOTE BY MAIL ELECTION LAW

As recently recognized by this Court in Goldstein,

As a general matter, the principle of separation of powers set forth in Art. 30 of the Massachusetts Declaration of Rights prevents the "judiciary [from] substituting its notions of correct policy for that of a popularly elected Legislature." (citation omitted). But where fundamental constitutional rights are violated, and where the Legislature fails to remedy the constitutional deficiencies after having had the opportunity to do so, and where an aggrieved litigant files suit seeking remedial relief for the constitutional violation, the judiciary must provide such a remedy.

Here, where the filing deadline for nomination papers fast approaches, and the Legislature has yet to take decisive action, we have little choice but to provide equitable relief, pursuant to G.L. c. 214, §1, to

protect the constitutional rights of the plaintiffs and those similarly situated.

Goldstein, 484 Mass. at 527 (emphasis added), (internal citations omitted). Here, faced with the Postal Service's public warning that the deadlines under the state election laws are "incongruous with the Postal Service's delivery standards" and creates the "significant risk that . . . ballots may be requested in a manner that is consistent with [Massachusetts] election rules and returned promptly, and yet not be returned in time to be counted," neither the Legislature, nor the Secretary has acted.

Specifically, the Legislature has not moved to relax or extend the deadlines despite the Postal Service advising the Secretary that:

- "voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum, and preferably long before that time";
- "In responding to a ballot request, election officials should consider that the ballot needs to be in the hands of the voter so that he or she has adequate time to complete it and put it back in the mail stream so that it can be processed and delivered by the applicable deadline. Accordingly, the Postal Service recommends that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters"; and
- "To allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week

before the state's due date."

Add. Ex. 3 (R. Grossman Aff., ¶ 29 and Ex. A thereto) (emphasis added). Similarly, the Secretary has not issued any regulations under the Act, provided deadlines to local officials regarding when they must mail a ballot in response to a voter's application, or allowed for ballots postmarked on or before the September 1st primary to be counted. The September 1st primary is just 13 days away.

While the Court cannot control the U.S. mail system, it can ensure that those ballots mailed on or before the September 1st primary are counted as long as they are received within 10 days of the primary. As set forth above, this requested equitable relief is entirely consistent with the Legislature's recognition that there be a delay of three to ten days for elected officials to receive ballots by mail in connection with a general election. As a result, the requested relief is "no more intrusive than it ought reasonably be to ensure the accomplishment of the legally justified result." See Goldstein, 484 Mass. at 527-528 (extending the deadlines for candidates to submit their nomination papers and allowing for the use of electronic signatures in connection with nomination papers).⁷

⁷ As this Court recognized in Goldstein, the requested relief is not unprecedented as "[o]ther States, addressing the potential

CONCLUSION

Massachusetts is currently experiencing a severe public health crisis, in which people have been directed to stay at home and minimize in-person contact to contain COVID-19. This, in turn, has created an expansive desire by voters to rely on the vote by mail provisions of the state election laws. However, as acknowledged by the Postal Service, the deadlines are incompatible with the operations of the mail service such that voters, through no fault of their own, will be disenfranchised from their Constitutional right to vote.

Without immediate relief from this Court, Petitioners and all other candidates and voters similarly situated will face a deprivation of their most basic Constitutional rights.

REQUESTED RELIEF

Given the patent constitutional violations identified herein, and in light of the failure by the Legislature and the Secretary to act in a timely manner, this Court should:

for voter disenfranchisement in the face of natural disasters, have similarly provided narrowly tailored equitable relief to protect the constitutional rights of voters." Goldstein, 484 Mass. at 531, n.14. See Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 545 (2018); Georgia Coalition for the People's Agenda, Inc. v. Deal, 214 F. Supp. 3d 1344 (S.D. Ga. 2016) (ordering extension of voter registration deadline where hurricane caused elections office to close, delayed mail service, and forced citizens to take shelter); Florida Democratic Party v. Scott, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (extending voter registration deadline after hurricane foreclosed in-person and by-mail voter registration).

- A. Accept this Emergency Petition. Petitioners respectfully request a telephonic hearing and expedited treatment.
- B. Issue a declaratory judgment that, in light of the emergency circumstances brought about by the COVID-19 pandemic and that deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards, that the deadline for when mail-in ballots for the September 1st primary must be received in order to be counted impose an unconstitutionally severe burden on the fundamental rights of all Massachusetts voters and candidates, and is thus void.
- C. The Court should exercise its equitable jurisdiction to order the Secretary to direct local election officials to accept and count all mail-in ballots that are postmarked by September 1st primary and received within ten days of September 1, assuming that the ballots otherwise comply with the election laws.
- D. Relief should apply to all voters, to prevent serial litigation and achieve a global resolution of the burden imposed on fundamental rights by the Vote By Mail Election Law's operation.
- E. Issue appropriate injunctive relief to effectuate its declaratory judgment in advance of the upcoming September 1st primary, including enjoining the Secretary from requiring that primary ballots must arrive at voters' local election offices, whether by mail or hand-delivered, by 8 p.m. on September 1, 2020 in order to be counted.
- F. Order any other relief this Court deems appropriate.

Respectfully submitted,

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Dated: August 19, 2020

CERTIFICATE OF SERVICE

I, Joseph D. Lipchitz, a member of the Bar of this Court, hereby certify that on this day, August 19, 2020, the foregoing Petition and accompanying documents were electronically served on counsel to the Secretary of Commonwealth by emails sent to Assistant Attorney General Anne Sterman and Assistant Attorney General Elizabeth Kaplan.

/s/ Joseph D. Lipchitz

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