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Caroline Colarusso
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Anthony Conte
80 Harvard Street
Winchester, MA 01890

Re: Initiative Petition Nos. 21-09, 21-21, and 21-22, Initiative Petitions for an Act
Relative to the Presentation of Identification to Vote

Dear Ms. Colarusso and Mr. Conte:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petitions, which were submitted to the Attorney General on or before the first Wednesday of August this year. I regret that we are unable to certify that the proposed laws comply with Article 48. Our decision, as with all decisions on certification of initiative petitions, is based solely on Article 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed laws.

Below, we summarize the proposed laws and then explain why Article 48 precludes their certification. Article 48, the Initiative, Part 2, Section 2 provides in pertinent part that "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition," including the freedom of elections. As explained below, the proposed laws are inconsistent with these rights because they would impinge on the freedom of elections, as construed by the Supreme Judicial Court.

All three of the petitions contain four sections. The first three sections of the three petitions are identical; the fourth section of the petitions are slightly different.

All three petitions would repeal Mass. Gen. Laws ch. 54, § 76B and replace it with a new law as follows:



Section 1. Section 1 of the petitions provides that “[a] person desiring to vote, who fails to present suitable written identification, shall not be permitted to vote.” Very simply, this section of the proposal would prevent a voter from voting if they were unable to furnish a suitable “written identification.” Section 2 details what qualifies as proper written identification under this proposed law.

Section 2. Section 2 of the petitions defines the forms of identification that can be used to avoid the bar contemplated by Section 1. Section 2 first provides that an in-person voter presents a valid “written identification” when the voter “presents to the appropriate election officer a current and valid government issued photo identification.” If, however, the identification “does not bear the same address at which the voter is registered to vote,” then the voter must also supply a “copy of a current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the voter” to be permitted to vote. For a voter who seeks to cast an absentee ballot, the voter can satisfy the “written identification” prerequisite by “submit[ting] with the ballot” a “copy of a current and valid government issued photo identification.” Again, if the supplied identification does not “bear the same address at which the voter is registered to vote,” then the voter must also submit a copy of a current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the voter.”

Section 2 also explains what happens if a voter – either an in-person voter or a voter who is casting an absentee ballot – cannot produce a satisfactory written identification. An in-person voter who “desires to vote in person” but does not “satisfy” the voter identification requirement set forth in this proposed law “may cast a provisional ballot” under Section 76C. Likewise, an absentee voter who fails to satisfy this identification requirement shall have their vote treated as a provisional ballot under Section 76C.

Section 3. Section 3 creates a carve-out to the Section 1 bar for certain voters who lack identification. A voter may cast a ballot notwithstanding Section 1’s prohibition when permitted to do so by federal law, including the Uniformed and Overseas Citizens Absentee Voting Act and the Voting Accessibility for the Elderly and Handicapped Act.

Section 4. Section 4 is where the three versions of these petitions slightly diverge. All three versions of Section 4 generally address how a prospective voter who lacks the ability to pay for a government-issued identification may acquire one without charge. Version A of the proposed law (petition 21-09) allows any person who “swears or affirms that they are unable to afford a qualifying government issued photo identification” to get a “fee waiver” to obtain an identification card from the Registry of Motor Vehicles.

Version B (petition 21-21) contemplates that any prospective voter “who does not possess a qualifying government issued photo identification” is “entitled to a fee waiver” to obtain an identification card from the Registry of Motor Vehicles. No affirmation of inability to afford an identification is required by Section 4 of Version B.

Version C of the proposed law (petition 21-22) essentially combines the requirements of Versions A and B; it permits any person who has “not already been issued a qualifying government issued photo identification” and who also “swears or affirms that they are unable to afford one” to get a “fee waiver” to obtain an identification card from the Registry of Motor Vehicles.

“[V]oting has long been recognized as a fundamental political right and indeed the ‘preservative of all rights.’” Mass. Pub. Int. Research Grp. v. Sec’y, 375 Mass. 85, 94 (1978) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). Article 9 of the Massachusetts Constitution’s Declaration of Rights provides (with emphasis added): “All 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.” As the Supreme Judicial Court has observed, the “primary, if not the exclusive, purpose of [Article 9] is to guarantee equality among all . . . [qualified] voters.” Opinion of the Justices, 368 Mass. 819, 821 (1975); see also Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 248 (1946) (explaining that Article 9 endorses the encompassed equality in voting for the freedom of elections).

Still, the state is afforded latitude within these bounds to regulate elections in the Commonwealth. See First Nat. Bank of Boston v. Attorney General, 362 Mass. 570, 587 (1972) (explaining Legislature’s power “to regulate elections in order to prevent bribery, fraud and corruption to the end that the people’s right to vote may be protected.”). This is because “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” Storer v. Brown, 415 U.S. 724, 730 (1974); Goldstein v. Sec’y of Commonwealth, 484 Mass. 516, 524 (2020) (noting that as “with many fundamental rights, the court has sustained statutes which reasonably regulate elections and access to a place on the ballot”) (citation and internal quotation omitted). And courts have recognized that regulations to achieve the “necessary objectives” of fairness, honesty, and order will “inevitably affect[] - at least to some degree - the individual’s right to vote.” Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

To assess whether a law is permissible under Article 9, a court will consider whether it “impairs the freedom of a voter to express his choice as to men or measures.” Bowe, 320 Mass. at 249. In conducting this analysis, Massachusetts courts apply a “sliding scale approach,” under which it will “weigh 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 the extent to which the State’s concerns make the burden necessary.” Libertarian Ass’n of Mass. v. Sec’y of the Commonwealth, 462 Mass. 538, 560 (2012) (“LAM”) (quotations, citations, and alterations omitted); Chelsea Collaborative v. Sec’y of the Commonwealth, 480 Mass. 27, 35 (2018) (“In general, this ‘sliding scale’ analytical framework [discussed in LAM] is appropriate for cases that involve voting rights under the Massachusetts Constitution”).

In calibrating this sliding scale, courts first look to how burdensome a law is on the

exercise of the right to vote. “Recognizing that [Article 9 of] the Massachusetts Declaration of Rights may be more protective of voting rights than the Federal Constitution,” this Supreme Judicial Court will apply strict scrutiny to any voting requirement that “significantly interfere[s]” with the fundamental right to vote. See Goldstein, 484 Mass. at 524. At the other end of the spectrum on this scale, where a law does not “significantly interfere with the right to vote but merely regulate[s] and affect[s] the exercise of that right to a lesser degree,” courts will examine the law under “rational basis review to assure [its] reasonableness.” Chelsea Collaborative, 480 Mass. at 34. Some regulations on the right to vote, however, will fall somewhere “between these two extremes.” Chelsea Collaborative, 480 Mass. at 48-49 (Gants, C.J., concurring opinion) (citing Obama for Am. v. Husted, 697 F.3d 423, 429 (6th Cir. 2012)). In these circumstances, courts apply “a more flexible standard,” under which “the rigorousness of our inquiry... depends upon the extent to which a challenged regulation burdens” voters’ rights. Id. (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

In analyzing the instant petitions – both to calibrate the sliding scale and to assess whether under the appropriate level of scrutiny the petitions are consistent with Article 9’s protections – the Attorney General’s Office is limited to considering “the facts implicit in the petition[s]’ language, and facts susceptible to official notice,” Yankee Atomic Elec. v. Secretary of the Commonwealth, 402 Mass. 750, 759 (1988). See id. at 759 n.7 (Attorney General’s Office may consider as part of Article 48 certification process: “Factual matters which are ‘indisputably true’ are subject to judicial notice; these include ‘[m]atters of common knowledge or observation within the community’” and “additional items of which an agency official may take notice due to the agency’s established familiarity with and expertise regarding a particular subject area”). In determining whether to certify these petitions as compliant with Article 48, the Attorney General’s Office takes official notice of the following facts:

- Time and expense associated with acquiring a government-issued identification. For individuals who do not have a photographic identification and who wish to vote, the petitions contemplate that the Massachusetts Registry of Motor Vehicles will be able to furnish such identification. To obtain a Standard ID from the RMV, a voter would need to provide certain proof of identification to the RMV, such as: (1) a valid, unexpired U.S. passport or passport card (and if the U.S. passport was issued within the prior six months a U.S. birth certificate is also necessary); (2) an original or certified version of U.S. birth certificate that meets certain requirements; (3) a consular Report of Birth Abroad; (4) a Certificate of Citizenship; or (5) a Certificate of Naturalization.¹ Because a Standard ID must have a photograph, a voter would need to go to an RMV Service Center in person to obtain one after having made an appointment with the RMV.² Although the RMV can furnish a successful applicant with a temporary Standard ID, a permanent Standard ID will be mailed to the applicant within 7-10 days.³ Id. Although the petitions contemplate that a fee waiver can be obtained from the RMV to acquire such

¹ See <https://www.mass.gov/guides/massachusetts-identification-id-requirements>.

² See <https://www.mass.gov/how-to/apply-for-a-massachusetts-identification-card-mass-id>.

³ See id.

documentation, the underlying documentation required to obtain a Standard ID from the RMV are not costless. For example, a first-time applicant for a U.S. passport will pay \$65 for the cheapest type of passport; and a birth certificate ordered online from the City of Boston costs \$14 (plus processing fees).⁴

- Religious groups who refuse to have photographs taken. Members of certain religious groups have religious objections to being photographed and would, therefore, refuse to be photographed for a government-issued identification.

Based on these facts and those implied by the petitions, we conclude that these petitions significantly interfere with voters' ability to cast their ballots. As noted above, the process to obtain a Standard ID in Massachusetts – even if the RMV's fee is waived – is time-consuming and requires the payment of significant fees to obtain the necessary underlying supporting documents. Here, prospective voters who lacked proper identification would need to allot time to make an appointment with the RMV, acquire the proper underlying support documentation, fill out an application, and go to an RMV Service Center to obtain a Standard ID. Such voters would also need to accomplish these tasks at least 7-10 days before an election to ensure that the Standard ID was received in time to vote. This process substantially burdens the exercise of the franchise. The fees associated with obtaining a Standard ID also substantially burden voters who cannot afford the underlying support documents necessary to obtain the identification required by the petitions. These real financial costs, costs that are not waived or otherwise offset by the petitions, effect a real hardship on certain qualified voters who will be unable to vote because they cannot afford the necessary documentation to acquire a Standard ID. And those members of religious groups who would decline, as a matter of their religious beliefs, to obtain a government-issued photographic identification, would find it impossible to vote under the provisions of these proposed laws.

All told, each of these steps involved in obtaining a photo ID imposes significant burdens on the right to vote, especially on certain groups of voters. And these proposals make no provision to ensure that those who can jump through all these hoops and apply for IDs at the RMV will in fact be provided with the required ID in time for a pending election. Accordingly, these petitions are facially inimical to the protections afforded by Article 9. And from a purely facial analysis, these proposed laws infringe on the right to free elections, regardless of what level of scrutiny applies. Even assuming, as the Attorney General's Office does on this limited record before it, that petitioners have asserted a valid government interest in preventing voter fraud, the result would be the same: because these proposed laws burden voters and interfere with their exercise of the franchise, these measures cannot be certified.⁵ Simply put, the laws proposed by the petitions are inconsistent with the Article 9 guarantee of "freedom of elections," including its guarantee to voters of an "equal right to elect" because these petitions would

⁴ See <https://travel.state.gov/content/travel/en/passports/how-apply/fees.html>; <https://www.boston.gov/departments/registry/how-get-birth-certificate>.

⁵ Although the petitions would allow voters who could not present valid identification to cast provisional ballots, the proposed laws make no allowance for deciding whether to count any such provisional ballots. The availability of provisional ballots does not ease burdens on voters, because G.L. c. 54, § 76C would then seem to require such provisional voters to present the required photo ID after election day to have their votes counted.

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significantly interfere with the freedom of elections by preventing otherwise-qualified persons from voting, thus “impair[ing] the freedom of a voter to express his choice as to men or measures.” Bowe, 320 Mass. at 249.

For this reason, the Attorney General’s Office is unable to certify that Petition Nos. 21-09, 21-21, and 21-22 comply with Article 48.

Very truly yours,



Anne Sterman
Deputy Chief, Government Bureau
617-963-2524

cc: William Francis Galvin, Secretary of the Commonwealth