



THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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September 3, 2025

Jeffrey Cohen
18 Cobalt Street
Wilmington, MA 01887

Re: Initiative Petition No. 25-06, Initiative Petition for a Law to Require Compliance with the Current Absentee Ballot Procedure for Early Mail-in Voting in Massachusetts

Dear Mr. Cohen:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was 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 law complies 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 law.

Below, we describe the proposed law and then explain why we cannot certify it due to the operation of Article 48, The Init., Pt. 2, § 2, ¶ 3, which excludes initiative petitions that are "inconsistent with ... freedom of elections."

Description of Petition

The petition consists of two sections. The first section amends Section 25B of Chapter 54 of the General Laws by striking subsection (a) in its entirety and replacing it with a new subsection (a) stating: "Any registered voter wanting to vote early by mail may do so pursuant to Chapter 54 of the General Laws, provided that the registered voter is eligible to vote under at least one of Sections 86 through 103 of Chapter 54 of the General Laws." The second section provides that "the initiative shall take effect upon passage."

The Petition is Inconsistent with the Freedom of Elections

This measure would eliminate "no excuse" voting by mail while maintaining the existing



law on absentee voting. By necessary implication, it would require registered voters to vote in person unless they will be absent from their city or town on the day of the election or are unable to vote in person due to physical disability or religious belief. For this reason, the proposed law is inconsistent with the freedom of elections and is therefore excluded from the initiative petition process. See Article 48, The Init., Pt. 2, § 2, ¶ 3.

Article 9 of the Massachusetts Constitution's 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.” “[T]he primary, if not the exclusive, purpose of this provision is to guarantee equality among all such voters.” Moore v. Election Comm’rs of Cambridge, 309 Mass. 303, 325 (1941).

Application of the Article 9 standard requires examination of whether a law “impairs the freedom of a voter to express his choice as to men or measures.” Bowe v. Sec’y of the Commonwealth, 320 Mass. 230, 249 (1946); see Opinion of the Justices, 375 Mass. 795, 810 (1978). This freedom is tempered by the Legislature’s authority “to regulate elections in order to prevent bribery, fraud and corruption to the end that the people’s right to vote may be protected.” First Nat. Bank of Boston v. Attorney General, 362 Mass. 570, 587 (1972). “[A]s 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”) (internal quotation and citation 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 evaluate whether a law “impairs the freedom of a voter to express his choice as to men or measures,” Bowe, 320 Mass. at 248, Massachusetts courts apply a “sliding scale approach” that “weigh[s] 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”) (internal quotations and citations 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 IX of] the Massachusetts Declaration of Rights may be more protective of voting rights than the Federal Constitution,” courts will apply strict scrutiny to any voting requirement that “significantly interfere[s]” with the fundamental right to vote. Goldstein, 484 Mass. at 524. At the other end of the sliding 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)).

Here, the proposed law would “impair[] the freedom of a voter to express his choice as to men or measures” by requiring in-person voting unless the narrow statutory criteria for absentee voting are met. The “character and magnitude of the [resulting] burden” would be substantial for voters who face barriers to voting in person, whether from work schedules, caregiving responsibilities, transportation issues, unforeseen emergencies, illness, advanced age, or another reason. Given the significance of the burden imposed on such voters, a court would likely employ strict scrutiny in evaluating the constitutional validity of the proposed law. See Goldstein, 484 Mass. at 524 (court will apply strict scrutiny to any voting requirement that “significantly interfere[s]” with the fundamental right to vote). The court would consider the governmental interests served by the imposition of the burden and the extent to which those interests necessitate the burden. See LAM, 462 Mass. at 560.

No officially noticeable facts have been brought to the attention of the Attorney General suggesting that “no excuse” voting by mail increases the risk of bribery, fraud, or corruption in voting or undermines the Commonwealth’s valid interest in promoting honesty, fairness, and order in the administration of its elections. See Anderson, 460 U.S. at 788; Storer, 415 U.S. at 730; Goldstein, 484 Mass. at 524; First Nat. Bank of Boston, 362 Mass. at 587. Even if officially noticeable facts demonstrated such a risk, it has not been established that methods less restrictive than elimination of “no excuse” voting by mail could not be employed to remediate that risk. Because we cannot determine that the proposed law’s elimination of “no excuse” voting by mail is necessitated by a compelling governmental interest, we must conclude that the petition is inconsistent with the freedom of elections.

For the reasons discussed above, the Attorney General’s Office is unable to certify that Petition No. 25-06 meets the constitutional requirements for certification set by Amendment Article 48.

Very truly yours,



Anne Sterman
Chief, Government Bureau
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cc: William Francis Galvin, Secretary of the Commonwealth