

WALSH & WALSH LLP

U.S. Post Office Box 9  
Lynnfield, MA 01940

John H. Walsh Esq.  
Michael C. Walsh Esq.

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Dear Clerk Kenneally,

Please find this a amicus letter brief, from me, for the Court in the case of Grossman v. Secretary, SJC-12966. This brief is belated, but the Court has moved on an expedited schedule and I beg its consideration for the Court's ruling. I have served it through the Court's electronic filing system, and thus it should be served on all the parties and the amici.

**I. The Legislature lacks the authority to provide for absent voting, or early voting, in the means currently provided for the Coronavirus Crisis.**

The voters of the Commonwealth have spent a great deal of time and effort, in amending the Constitution of the Commonwealth several times, to arrange the measures governing voting. The most recent word on the subject, by the voters, is Article CV of Amendment.

The choices of the voters in their frame of government have not always been wise, such as their rejection of a state constitutional amendment in 1915 which would have given women the right to vote.<sup>1</sup> Nonetheless, their will must be respected and any decision the Court makes must give deference to the State Constitution.

The voters have carefully considered authorizing the Legislature to legislate absentee voting. Such an amendment was proposed as part of the 1917-1919 convention and rearrangement of the Constitution. The voters faced ballot questions on the issue in 1944 and 1976.

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<sup>1</sup> Five years later in 1920 the 19<sup>th</sup> Amendment of the Federal Constitution would unquestionably grant women the franchise.

The original absentee voting Article of Amendment XLV, a reform measure from the 1917-1918 Constitutional Convention, simply provided the Legislature with plenary power to make any such laws it felt appropriate to allow for absent voting. 25 years later, in 1944, the voters annulled the existing Article XLV by approving a new 76<sup>th</sup> amendment. Article of Amendment LXXVI sought to allow voting by physically disabled persons, in addition to those simply absent from their municipality on the day of voting. Specifically Article LXXVI provides:

Article [XLV](#) of the articles of amendment is hereby annulled and the following is adopted in place thereof:-- *Article XLV*. The general court shall have power to provide by law for voting, in the choice of any officer to be elected or upon any question submitted at an election, by qualified voters of the commonwealth who, at the time of such an election, are absent from the city or town of which they are inhabitants or are unable by reason of physical disability to cast their votes in person at the polling places.

Article of Amendment LXXVI. The 76<sup>th</sup> amendment was itself later amended in 1976 by the 105<sup>th</sup> amendment to allow for absentee voting by those unable to attend the polls due to a religious conflict on the day in question. Article of Amendment CV.

Thus, over the centuries, the voters' attention to the details of voting and the Legislature's power thereof, have not been lax. It was felt necessary to, for example, obtain a constitutional amendment to enable the Legislature to provide for the use of voting machines. Article of Amendment XXXVIII. The Legislature has also been granted the power to provide for compulsory voting. Article of Amendment LVI. Missing from this august list is any authorization for excuse-free absentee voting or early voting.

It is an important legal maxim of interpretation that the expression of one thing is the exclusion of all others. Iannelle v. Fire Commissioner of Boston, 331 Mass. 250, 253 (1954) (citing latin legal maxim "Expressio unius est exclusio alterius."); Bagley v. Illyrian Gardens, Inc.,

401 Mass. 822, 824-825 (1988) (same). It would be disrespectful to those voters who in 1918-1919 felt the need to give specific constitutional authority for legislative action in respect to absentee voting, on the day in question, for the Legislature to simply assume (as it has, prior to the crisis) the right to provide for early voting. The concern about the day of choosing was not one the voters easily surrendered since more than half a century later they passed Article CV to allow those with a religious conflict, on the day in question, to vote by absentee ballot.

The Legislature, and presumably the Executive as well, does not have the power to provide for absentee voting in the manner now expressly contemplated. Since all tinkering with the laws of voting have required constitutional authorization, i.e. action by two successive legislatures ratified by the voters, then so to does any tinkering of the kind now undertaken. The laws which the Legislature has passed over the last three years providing for excuse-free absentee voting (in form, early voting) is unconstitutional. As most recently touched by the voters in 1976 through Article CV, early voting can be tolerated only in the case of (1) physical absence from the community, (2) physical disability, and (3) religious conflict.

It presumably would not be difficult for the Legislature to conclude that the Coronavirus is a physical disability affecting voting, or passing a law declaring that all voters are presumed disabled during the pandemic. However this basic constitutional step cannot be ignored. The Constitution of the Commonwealth was framed and written while the people of Massachusetts were still engaged in armed insurrection against the world's largest and most powerful Empire, in 1780. It is a durable document meant to survive in times of crisis and apocalypse, for example providing for the Governor and Council to reconvene the Legislature in a different location in case of an "infection distemper." Constitution of the Commonwealth, Pt.2, C.2, §1, Art.5.

Rather than providing relief, and assuming an unwarranted power, even in time of emergency, the Court should direct the petitioners and the Secretary to obtain relief from the Legislature. This Court is already, in another case currently on its docket, considering whether the Governor usurped power and altered the checks and balanced of our frame of government in response to this viral crisis. This Court should not itself act and create a separation of powers issue.

Respectfully,

/S/ Michael Walsh

Michael Walsh

BBO 681001

Walsh & Walsh LLP

PO Box 9

Lynnfield, MA 01940

617-257-5496

[Walsh.lynnfield@gmail.com](mailto:Walsh.lynnfield@gmail.com)