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BY E-MAIL

Francis V. Kenneally, Esq.
Clerk for the Commonwealth
John Adams Courthouse
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Re: Rebecca Grossman, et al. v. Secretary of the Commonwealth, No. SJ-12996

Dear Clerk Kenneally,

I represent Dr. Robert Goldstein (“Dr. Goldstein”), who is a physician specializing in the treatment of infectious diseases at Massachusetts General Hospital, a registered voter in Massachusetts, and a candidate seeking the Democratic nomination to represent Massachusetts’ Eighth Congressional District (the “8th District”) in the United States Congress. Dr. Goldstein also was a petitioner in *Goldstein v. Secretary of the Commonwealth*, 484 Mass. 516 (2020), in which this Court first addressed the burden of election-related laws during the current pandemic-related health crisis. He now submits this letter as amicus curiae in the above-captioned matter to show: (a) that Petitioners seek a reasonable, limited remedy given the continuing pandemic-related public health concerns that remain urgent, well-founded, and deserving of the Court’s consideration in the above-referenced matter; and (b) that the legal and constitutional issues that Petitioners cite in their Petition also apply to the 8th District, if not the entirety of the Commonwealth.

Petitioners Seek a Reasonable Remedy in Light of the COVID-19 Public Health Crisis.

Petitioners seek a narrowly-tailored, reasonable change to the mail-in ballot deadline from the date of receipt to the postmarked date, a proposal that mirrors both the postmark deadline for Massachusetts personal income tax returns under G.L. c. 62C, §33A and the “mailbox” rule for pleadings under Mass. R. Civ. P. 5 and documents under Mass. R. App. P. 13. Such a policy also dovetails with the nature of the September 1, 2020, election date, by which those choosing to vote in-person must do so. Furthermore, according to the Secretary of the Commonwealth, over two months separate the primary election date from the November 3, 2020 election date.¹ In four of the nine Massachusetts congressional districts, only the Democratic Party has fielded a candidate – as is the case for many of the state-level offices up for election.²

¹ See *2020 Massachusetts Primary and State Election Schedule* (Updated July 8, 2020) <https://www.sec.state.ma.us/ele/elepdf/2020-Primary-and-Election-Schedule-Legal-Sized.pdf> (last visited August 22, 2020).

² See *2020 State Primary Candidates*, https://www.sec.state.ma.us/ele/ele20/state_primary_candidates20.htm (last visited August 22, 2020); *2020 State Primary Candidates: Democratic Candidates for Nomination*,

Petitioners seek this remedy for good reason. As this Court noted in *Goldstein*, Governor Baker declared “a state of emergency arising from the COVID-19 pandemic on March 10.” *See Goldstein v. Secretary of the Commonwealth*, 484 Mass. 516, 525 (2020). While nearly six months have passed since that declaration, COVID-19 continues to strain our public health system, economy, and society. School systems across the Commonwealth have struggled to determine the safest way to educate students in the new school year,³ and, citing the “continuing public health concerns related to the COVID-19 (coronavirus) pandemic,” this Court issued a Third Order Regarding Public Access to State Courthouses & Court Facilities on July 29, outlining a set of COVID-19 related restrictions and conditions for access to the courts.⁴ Researchers continue to learn how COVID-19 affects the human body – in both the short and long terms⁵ – but, as this Court noted in *Goldstein*, researchers have discovered striking facts concerning disease onset and the ability for individuals without symptoms, who therefore would not have reason to know they are infected with COVID-19, to spread COVID-19 unwittingly to others. *See Goldstein*, 484 Mass. at 526 (“Because it has been shown that one can carry and spread the COVID-19 virus without any apparent symptoms, every encounter with another person, especially a stranger, poses a risk of infection.”). For purposes of “advanc[ing] public health preparedness and planning,” the Centers for Disease Control and Prevention (the “CDC”) issued the following estimates regarding “asymptomatic carriers” and the dynamics of COVID-19 transmission in July:⁶

- 40% of COVID-19 infections are asymptomatic;
- 75% of those infected, but asymptomatic, individuals themselves are infectious (capable of spreading COVID-19 to others); and
- 50% of COVID-19 infections are transmitted to others before the carrier experiences any symptoms at all.

These CDC estimates show that the Court’s concerns regarding asymptomatic spread in *Goldstein* remain quite valid. *See* 484 Mass. at 526. In this case, many individuals could arrive at

https://www.sec.state.ma.us/ele/ele20/state_primary-democratic20.htm (last visited August 22, 2020); *2020 State Primary Candidates: Republican Candidates for Nomination*, https://www.sec.state.ma.us/ele/ele20/state_primary-republican20.htm (last visited August 22, 2020); *2020 State Primary Candidates: Green-Rainbow Candidates for Nomination*, https://www.sec.state.ma.us/ele/ele20/state_primary-greenrainbow20.htm (last visited August 22, 2020).

³ *See, e.g.*, James Vaznis, *Boston Public Schools decide to start with online learning*, BOSTON GLOBE, August 22, 2020, at A1 (available on-line at <https://www.bostonglobe.com/2020/08/21/metro/all-boston-public-schools-start-year-remotely/>) (last visited August 22, 2020).

⁴ *Court System Response to COVID-19 – Supreme Judicial Court Rules*, <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-third-order-regarding-public-access-to-state> (last visited August 22, 2020).

⁵ *See, e.g.*, Jennifer Couzin-Frankel, *From ‘brain fog’ to heart damage, COVID-19’s lingering problems alarm scientists* (July 31, 2020), <https://sciencemag.org/news/2020/07/brain-fog-heart-damage-covid-19-s-lingering-problems-alarm-scientists> (last visited August 22, 2020).

⁶ Centers for Disease Control and Prevention, *COVID-19 Pandemic Planning Scenarios* (July 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last visited August 22, 2020).

the polls as asymptomatic carriers, risking transmission of COVID-19 to poll workers, other voters, and others they encounter in the process. Others simply might not be experiencing COVID-19 symptoms yet and similarly risk transmitting the virus. The threat of COVID-19 infection will haunt each and every polling location in the Commonwealth during the primary election. Compelling voters to expose themselves to potential infection due to the inefficiencies of the U.S. Postal Service constitutes the same sort of unreasonable burden this Court remedied in *Goldstein*. See Goldstein, 484 Mass. at 524-26.

The CDC recommends that voters “[c]onsider voting alternatives available in your jurisdiction that... limit the number of people you come in contact with or the amount of time you are in contact with others” in order to “help reduce the spread of COVID-19.”⁷ “Where available in [the] jurisdiction,” the CDC further recommends that election officials “offer alternative voting methods that minimize direct contact and reduce crowd size at polling locations,” through methods including but not limited to “offering alternatives to in-person voting if allowed in the jurisdiction.”⁸ Such alternatives become meaningless, however, if legal and logistical circumstances keep those votes from actually counting in the election and thereby deprive those voters who try to participate safely of their right to vote. See Goldstein, 484 Mass. at 524-26. Voters who understandably lack confidence in their ability to vote by mail will be compelled to confront the specter of potentially deadly COVID-19 infection at their polling place, creating an unreasonable burden on their fundamental right to vote. See id.

The Potential Danger to Voters Extends to the Eighth District.

With an estimated population of 764,891 as of 2018,⁹ the 8th District includes southern and western portions of the City of Boston, along with all or part of the following cities and towns, listed roughly from north to south: Milton, Quincy, Hull, Braintree, Weymouth, Hingham, Cohasset, Scituate, Holbrook, Dedham, Westwood, Norwood, Canton, Walpole, Stoughton, Avon, Abington, Brockton, Whitman, West Bridgewater, East Bridgewater, Bridgewater, and Raynham.¹⁰ According to the Massachusetts Department Public Health, for the period of August 5, 2020 – August 19, 2020, the average daily incidence of positive test results per 100,000 people increased in Boston, Braintree, Brockton, Canton, Dedham, Hingham, East Bridgewater, Milton, Norwood, Stoughton, and Walpole.¹¹ Excluding the relevant precincts of

⁷ Centers for Disease Control and Prevention, *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)* (June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last visited August 22, 2020).

⁸ *Id.*

⁹ United States Census Bureau, <https://www.census.gov/mycd/?st=25&cd=08> (last visited August 22, 2020).

¹⁰ *Massachusetts Congressional Districts: District No. 8*, <https://www.sec.state.ma.us/ele/eledist/con11idx.htm#D8> (last visited August 23, 2020); *Massachusetts Congressional Districts*, <https://www.sec.state.ma.us/cis/cispdf/MA-Congressional-Map-2019.pdf> (last visited August 22, 2020). The latter cite is a map that shows how the 8th District abuts Massachusetts’ Fourth Congressional District (the “4th District”) – where Petitioner Rebecca Grossman seeks election to the United States Congress – as the two districts proceed south from Boston.

¹¹ Massachusetts Department of Public Health COVID-19 Weekly COVID-19 Public Health Report – Wednesday, August 19, 2020, *Count and Rate of Confirmed COVID-19 Cases and Tests Performed in MA by City/Town*,

Boston and Milton (municipalities that are not completely in the 8th District), these cities and towns comprise approximately 39.5% of the 8th District's total population.¹² **In other words, at least 39.5% of the 8th District's total population has experienced a relative increase in COVID-19 cases over approximately the past two weeks.** Failure to provide these individuals with a meaningful opportunity to vote without physically visiting a polling location with such disease prevalence across the 8th District will unduly burden the right of "voters to cast their ballots as they see fit." *See Goldstein*, 484 Mass. at 524-26.

Conclusion

Based on the foregoing, this Court should grant the relief that Petitioners seek in their Petition.

Respectfully submitted,
ROBERT GOLDSTEIN

By his attorney,

/s/ William G. Cosmas, Jr.

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January 1, 2020 – August 19, 2020, <https://www.mass.gov/info-details/covid-19-response-reporting> (last visited August 22, 2020) at 3-11. This report also reflects that the City of Brockton is at "high risk" for COVID-19 infection. Peter Bailey-Wells and Jaclyn Reiss, *Here's a look at the state map of communities that are high, moderate, and low risk for COVID-19*, <https://www.bostonglobe.com/2020/08/11/nation/heres-look-new-state-map-high-moderate-low-risk-communities-covid-19-mass/> (last visited August 22, 2020) (analyzing the August 19, 2020 Massachusetts Department of Public Health COVID-19 Weekly Public Health Report – Wednesday, August 19, 2020).

¹² *See* United States Census Bureau, <https://www.census.gov/mycd/?st=25&cd=08> (last visited August 22, 2020) (showing total 8th District population); Population Estimates of Massachusetts Towns & Cities (2010-2018), UMass Donahue Institute, <https://www.donahue.umassp.edu/data/pep/dashboards/2018townpop/index.html> (last visited August 22, 2020) (compiling and showing 2018 U.S. Census Bureau estimates for every city and town in Massachusetts, including Braintree (37,242), Brockton (95,659), Canton (23,410), Dedham (25,310), East Bridgewater (14,427), Hingham (23,414), Norwood (29,245) and Stoughton (28,554)).

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)(5)

No party, party's counsel, or person or entity other than amicus curiae and his counsel, authored this letter in whole or in part, or contributed money intended to fund its preparation or submission. Neither amicus curiae nor his counsel has either represented any of the parties to this appeal in another proceeding involving similar issues, or been or represented a party in a proceeding or legal transaction at issue in the present appeal.

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