



August 25, 2020

Via Email

Francis V. Kenneally
Clerk of the Supreme Judicial Court
for the Commonwealth of Massachusetts
John Adams Courthouse
1 Pemberton Square, Suite 1400
Boston, MA 02108
Francis.Kenneally@jud.state.ma.us

Re: Grossman v. Secretary of the Commonwealth, SJC-12996
Post-Argument Letter of *Amicus Curiae* the American Civil
Liberties Union of Massachusetts, Inc.

Dear Clerk Kenneally:

Subject to allowance of the enclosed Motion for Leave to File, the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") hereby submits this letter as *amicus curiae* on behalf of neither party and to make the following points.

I This case directly implicates the fundamental right to vote.

This case has important implications for the fundamental right to vote in the Commonwealth, both for the reasons articulated by the Petitioners in support of having all valid votes in the Primary counted, and because of the Secretary's arguments that material delay may result in infringement on the right to vote in the upcoming General Election. Specifically, in the 2020 Emergency Act governing these elections, the Legislature provided that mail-in ballot applications can be *requested* up to 4 business days before the Primary and the General Election. St. 2020, c. 115, §§ 3 and 6(f)(2). For the Primary, this statutory deadline falls on August 26; for the General, it falls on October 28.

Because of facts now known about mail delivery by the United States Postal Service ("USPS"), the statutory deadlines for requesting mail-in ballots will likely mean that some who request a mail-in ballot near the end of the allowed period will not receive the ballot on or before election day. Via its letter dated July 30, 2020, the USPS has told the Commonwealth to allow at least seven days for election-related mail to be delivered. Neither the parties to this case nor the United States, as *amicus curiae*, disputes that this seven-day period remains applicable. Thus, it appears that voters who request ballots at or near the August 26 deadline provided by Massachusetts law may face substantial obstacles to voting, either because they will

not receive ballots before the September 1 Primary or because their completed ballots will not reach election officials by September 1.

What is more, it has recently been reported that USPS is experiencing an overall slowdown of mail delivery, and this may further exacerbate the obstacles facing Massachusetts voters.

II. The Secretary's arguments should be placed in their proper context.

The Secretary's core concern articulated in this case is with regard to meeting the federally imposed September 19, 2020 deadline for sending out ballots to military and overseas voters, particularly given the need to address post-Primary challenges or recounts. With respect to that concern, ACLUM offers the following observations:

A. Two other New England states, New Hampshire and Rhode Island, are holding their primaries on September 8, are also relying substantially on voting through absentee or other mail-in options, and are at the same risk of needing to handle challenges or recounts, albeit through their unique state systems.¹

B. The United States as *amicus curiae* does *not* take the position that postponing the "received by" date beyond September 1 would result in the September 19 deadline not being satisfied. Indeed, its brief implies that some extension of time could be tolerated.

III. The Court's resolution of this case should seek to mitigate problems with the General Election.

At least one issue in this case is created or exacerbated by state law, will also be an issue in the General Election, and will not be remedied by extending the "received by" date past September 1—namely, the deadline by which mail-in ballots can be requested. In light of facts now known about the USPS, just as the August 26 deadline for requesting mail-in ballots may pose problems for the Primary, the October 28 deadline may pose problems for the General. Yet, as acknowledged in oral argument by counsel for the Secretary, the mail-in ballot applications inform recipients of the right to seek a ballot up to these deadlines, but fail to inform them that, if requests were delayed until that time, there could be a risk that the ballots would not be received by the voter and then received back by election officials in time actually to be counted.

The Legislature in St. 2020, c. 115, § 6(h)(3) did extend the time for receipt of ballots to three business days after the November 3 General Election. But for a voter

¹ National Conference of State Legislatures, *2020 State Primary Elections* (May 19, 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/2020-state-primary-election-dates.aspx>; https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf; <https://vote.sos.ri.gov/Voter/VotebyMail>. We do note that Massachusetts must translate its ballots into more languages than either of these other states.

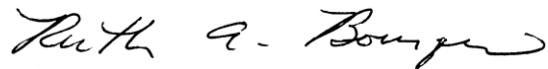
to vote purely by mail, as may be appropriate for many in light of COVID-19, the ballot must be *mailed* (not postmarked as was discussed at oral argument) on or before November 3. *Id.* § 6(h)(2). And, even with the extended time for receipt to November 6, a voter requesting a ballot on October 28, 2020, may not receive a ballot back in time to mail it back on or before November 3 or to have it received by November 6. This risk is particularly acute in light of the USPS issues that have arisen since enactment of the state statute.

In light of the foregoing, ACLUM urges the Court to encourage the Secretary to revise the language of the vote-by-mail ballot application for the General Election to not only inform prospective voters of the October 28 deadline, but also to inform them of the risks that a ballot requested at that point may not be received in time to be mailed by November 3 or received by mail by November 6. Such notice will allow all voters to be aware of the potential need to make alternative arrangements to ensure that their votes are counted.

Conclusion

We thank the Court for considering our views in this case involving one of the most important of all constitutional rights: the fundamental right to vote to select who should lead this Nation, this State and our local governments going forward.

Sincerely,

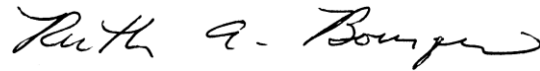


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DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)(5)

No party, party's counsel, or person or entity other than amicus curiae and its 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.

A handwritten signature in cursive script, reading "Ruth A. Bourquin", written in black ink.

Ruth A. Bourquin
BBO # 552985