



Memo of Dēmos in Opposition to Certification of Initiative Petition 11-21: “An Act Relative to the Presentation of Identification to Vote”

August 17, 2011

Introduction – Petition 11-21 and the Initiative Process:

Mansfield selectman Olivier Kozlowski has filed a petition initiative, Petition 11-21, which would require all Massachusetts voters to present government-issued photo identification before they get a ballot in state or local elections. The proposed law is tantamount to a poll tax because it can be costly to obtain the required government-issued photo identification, and the proposed law does not contain a provision requiring state or municipal election authorities to provide eligible voters with photo identification cards free of charge.

In Massachusetts, the process for placing initiative petitions on the ballot for approval by the voters is prescribed by Article 48 of the Massachusetts Constitution. Selectman Kozlowski completed the first step by submitting his proposed measure, signed by at least ten voters, to the Attorney General. The Attorney General then must determine whether or not the petition complies with art. 48 and may be certified and filed with the Secretary of State.

Discussion:

Petition 11-21 Should Not Be Certified:

The Attorney General should not certify Petition 11-21 because it fails to conform to art. 48’s requirement that any initiative must be consistent with the “freedom of elections.”¹ Article 48 specifically excludes certain subjects from the initiative process. This includes any propositions inconsistent with the individual rights guaranteed by the Declaration of Rights contained in Part One of the Massachusetts Constitution—including the freedom of elections. Petition 11-21’s government-issued photo identification requirement at the polls is wholly inconsistent with the freedom of elections.

The Freedom of Elections:

In *Bowe v. Secretary of the Commonwealth*, 320 Mass. 230 (Mass. 1946), the only case that has directly considered whether a proposed initiative violates the Massachusetts constitutional requirement of freedom of elections, the Court considered whether the initiatives in question would undermine equality in the right to vote or result in voter intimidation. “[I]f, in

¹ Art. 48, pt 2, §2.

point of fact the voter [...] is deterred from the exercise of his free will by means of any influence whatsoever [...] it is not a free and equal election within the spirit of the constitution.”²

Because Article 48’s exclusionary clause draws directly from the constitutional protection of the freedom of elections contained in art. 9 of the Massachusetts Declaration of Rights, the Supreme Judicial Court’s interpretation of art. 9 is also relevant to this analysis. Article 9 states:

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.

The Supreme Judicial Court has stated that “the primary, if not the exclusive, purpose of this provision is to guarantee equality among all such voters.”³ The Court cited this point of law in *Bowe* to support the idea that “equality is expressly coupled with that of freedom.”⁴

Equality in the Right to Vote:

Requiring voters to produce government-issued photo identification before they may cast a ballot would divest equality from elections in Massachusetts and consequently jeopardize the freedom of elections. Research shows that voter ID laws disenfranchise thousands, possibly millions, of Americans, and disproportionately burden certain segments of the population.⁵ Nationwide, as many as 11 percent of United States citizens – more than 21 million individuals – do not have current, unexpired government-issued photo identification.⁶ Students, young people, persons with disabilities, the elderly, African Americans, Latinos and new American citizens are all far less likely to have the type of identification required by Petition 11-21.

For students, it is not clear whether university ID cards will be accepted at the polls. Confusion over whether a university ID would be sufficient may work to disenfranchise students who show up at the polls without another form of government-issued photo ID on hand or may deter students from showing up at the polls altogether. This would be a particular concern in Massachusetts, which has more than 100 colleges and universities.

² *Id.* at 248, quoting *Neelley v. Farr*, 61 Colo. 485 (Colo. 1916).

³ *Moore v. Election Com’rs of Cambridge*, 309 Mass. 303 (Mass. 1941).

⁴ 320 Mass. at 248.

⁵ Tova Wang, Dēmos, *Voter Identification Talking Points and Fact Sheet* (2010), available at <http://www.demos.org/pubs/voterIDtalkingpoints.pdf>.

⁶ Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans’ Possession of Proof of Citizenship and Photo Identification* (Nov. 2006).

Voters are also unlikely to have a driver's license that reflects their current address if they are students, young people, renters or persons of color. While the nationwide mover rate increased in 2009 to 12.5 percent overall, renters specifically were five times more likely to move than homeowners.⁷ The unemployed, those below the poverty line, and racial minorities are all significantly more likely to move from one year to the next and to therefore not have current photo identification on Election Day.⁸

Here in Massachusetts, U.S. Census data shows that 33 percent of households in Boston own no vehicle.⁹ The rates are even higher among minority households in Boston than among white households: 38 percent of African-American households, 41 percent of Latino households, and 45 percent of Asian households lack any vehicle, compared to 29 percent of white households.¹⁰ These statistics reflect both that minorities in Massachusetts are less likely to have driver's licenses and that they face more logistical challenges in getting to the proper government agencies in order to acquire the requisite photo identification to vote.

Disabled persons and seniors are also disproportionately impacted by photo identification laws. In 2005, the American Association of People with Disabilities estimated that more than 3 million Americans with disabilities do not possess a driver's license or state-issued photo ID.¹¹ Many older people no longer drive or maintain up-to-date driver's licenses. In fact, 18 percent of Americans over the age of 65 do not have a photo ID and these seniors will be unfairly blocked from voting simply because they lack this most common and acceptable form of voter ID.¹²

Because Petition 11-21 does not make any provision for the state to supply voters with free photo identification cards, the proposed law would unfairly burden voters who cannot afford the fee to acquire the requisite identification. In Massachusetts, the Registry of Motor Vehicles

⁷ United States Census Bureau, *U.S. Census Bureau Reports Residents Move at Higher Rate in 2009 After Record Low in 2008* (May 2010), available at http://www.census.gov/newsroom/releases/archives/mobility_of_the_population/cb10-67.html.

⁸ *Id.* Of the civilian population 16 and older who were unemployed, 20.9 percent lived in a different residence in 2008 than in 2009, compared with 12.5 percent of those who were employed. In 2009, 23.6 percent of people with incomes below 100 percent of the poverty line moved within the previous year as compared with 17.5 percent of people with incomes between 100 and 149 percent of the poverty line. The black population had the highest mover rate in 2009 (16.9 percent), followed by Hispanics (15.8 percent) and Asians (13.8 percent), while white non-Hispanics had the lowest mover rate (10.7 percent).

⁹ *Testimony of Brenda Wright to the Joint Committee on Election Laws, General Court of the Commonwealth of Massachusetts*, June 13, 2007, available at http://www.demos.org/pubs/Mass_ID_testimony.pdf.

¹⁰ *Id.*

¹¹ American Association of People with Disabilities, et al., *Statement in Opposition to a National Voter Identification Card*, June 29, 2005.

¹² *Supra* n.5.

currently charges between \$25 and \$75 for an identification card or license. Massachusetts residents who have moved here from out of state would have to pay between \$100 and \$125 to convert their out-of-state license rather than simply registering to vote for free.

Even if the proposed law were to be amended in the future to require the state to supply free photo identification, voters must still present other documents in order to get the “free” ID. The only truly acceptable documents are an original birth certificate or a passport. Many people will not have their original birth certificate at home and only about a quarter of Americans have passports.¹³ Individuals who change their surname upon marriage, as women disproportionately do, will face additional difficulties in securing the proper documentation in order to acquire ID. Voters without their birth certificates handy or who have any discrepancies on their birth certificate from their current name will have to go out and buy one. In many states, a would-be voter must pay up to \$45 for a birth certificate, \$120 - \$165 for a passport, and over \$200 for naturalization papers.¹⁴

In Massachusetts, a birth certificate costs anywhere from \$18 to \$45, but an individual cannot get one for \$18 unless they are able to go in person to the registry. To get a birth certificate by mail costs at least \$28, and that is only if the voter can wait 30 days for the birth certificate to arrive. It costs \$37 for so-called “expedited” service, which means 7-10 business days, and it costs \$45 if ordered by phone or online. Some U.S. citizens, such as Native Americans born on reservations and elderly persons who may not have been born in hospitals, do not have birth certificates and cannot get one at any cost.

Petition 11-21 amounts to imposing a new type of poll tax on voters and would disproportionately burden people who do not have and cannot afford the necessary documents. The Supreme Court has held unequivocally that poll taxes are unconstitutional and “no equivalent or milder substitute may be imposed.”¹⁵ Although the inquiry at this stage of the process is limited to Petition 11-21’s compliance with art. 48, this aspect of the proposed law cannot be overlooked because it bears directly upon – and abrogates – equality in the right to vote. Accordingly, Petition 11-21 is inconsistent with the freedom of elections.

Voter Intimidation:

Even the mere specter of a photo identification requirement is used as a means of intimidating voters who are unsure of exactly which documents they might have to produce in

¹³ *Supra* n.5.

¹⁴ *Id.* See also U.S. Department of State, *Passport Fees*, available at http://travel.state.gov/passport/fees/fees_837.html (last visited Aug. 16, 2011).

¹⁵ *Harman v. Forssenius*, 380 U.S. 528, 542 (1965). See also *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) (“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”).

order to be given a ballot on Election Day. A study conducted by a Harvard professor showed that poll workers demand photo identification much more often from blacks and Hispanics than white voters. During the 2008 Super Tuesday primary, the study found that 53 percent of whites were asked for photo ID, compared with 58 percent of Hispanics and 73 percent of African Americans.¹⁶

In April 2011, a billboard asking voters to show ID was placed near a largely Latino district in Southbridge, Massachusetts just prior to a special election primary for a State House seat. The billboard was sponsored by the groups Empower Massachusetts and Show ID to Vote, both with connections to the Tea Party movement, and told voters to “protect the integrity of the vote” and “show ID” next to a picture of a white woman holding an identification card. Massachusetts, of course, did not then require photo identification to vote, but these groups were able to use the idea of it to attempt to intimidate minority voters. Petition 11-21 would give credence to blatant voter intimidation and undermine the freedom of elections guaranteed by art. 9.

Conclusion:

A mandatory government-issued photo identification requirement would clearly substantially burden the voting rights of the young, the elderly, renters, non-drivers, racial minorities, and the poor. It would also be used as a tool by groups hoping to intimidate voters away from the polls due to uncertainty about having the proper documentation. The disparate impact photo identification laws have upon certain segments of the voting population and the potential created for voter intimidation make Petition 11-21 a violation of the fundamental right to vote under art. 9 and consequently, it must be excluded from the initiative process by art. 48 for interfering with the freedom of elections.

¹⁶ *Supra* n.5.