



April 12, 2020

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AMERICAN CIVIL
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Via Electronic Mail to atrento@oag.state.md.us

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Re: Ensuring the Rights of All Voters During the Seventh Congressional District
Special Election

WWW.ACLU-MD.ORG

Dear Mr. Trento, Chairman Cogan, Vice Chairman Hogan, and Members of the
Board:

OFFICERS AND DIRECTORS
JOHN HENDERSON
PRESIDENT

DANA VICKERS SHELLEY
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

We appreciate the challenge that COVID-19 has presented to the Board of Elections regarding the upcoming elections: Providing elections that both protect the public's health and safety and preserve Marylanders' right to vote. We are encouraged by your leadership and decision to embrace voting by mail while preserving an accessible, in-person voting option for the 2020 Primary. We write today to urge you to do the same thing for the same reasons for the Seventh Congressional District Special Election: Provide an in-person voting option to ensure that every Marylander – no matter their race, ability, circumstance, or status – is able to exercise their constitutionally-protected right to vote.

At the outset, we remind you that Maryland's Seventh Congressional District has a storied past: In 1971, Seventh District voters elected the first Black Congressman in Maryland's history, the late Parren J. Mitchell. Since Congressman Mitchell's path-breaking election, Seventh District voters have consistently sent Black Marylanders to Congress – most recently beloved Congressman Elijah Cummings, whose tragic death necessitates this Special Election. It is not acceptable, and smacks of racism, for the voters of this historic majority-Black district to be treated differently – with fewer protections for their voting rights than



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other voters across the state – as is currently proposed. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (When government “singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.”)

The right to vote is a fundamental exercise in civic duty guaranteed by the Constitution to all Americans. This includes voters with disabilities, voters needing language assistance, anyone who cannot receive a mailed ballot such as those with unstable housing or have been displaced during this pandemic, and voters who cannot register between now and the election due to lack of internet service or identification requirements which cannot currently be remedied due to government closures. Yet all of these voters could be disenfranchised should Maryland adopt a mail-only process for the Special Election.

The law is clear that an in-person option is necessary to protect the rights of voters in elections, under the Help America Vote Act of 2002 (HAVA)¹ and Americans with Disabilities Act (ADA). HAVA’s Uniform and Nondiscriminatory Election Technology and Administration Requirements compel the voting system, “to be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”² Further, the United States Election Assistance Commission clearly outlines the right to ADA-accessible polling places with voting machines for voters, in order to seek assistance from workers at the polling place.³ Moreover, Title II of the ADA requires that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁴ Voting is an activity of a public entity covered by Title II of the ADA. The laws are clear and unambiguous in the necessity for an in-person voting option to ensure voters are afforded the

¹ Pub. L. 107-252, 42 U.S.C. § 15301 (2002).

² Help America Vote Act of 2002, 52 U.S.C. § 21801(a)(3)(A).

³ UNITED STATES ELECTION ASSISTANCE COMMISSION, VOTING ACCESSIBILITY, <https://www.eac.gov/voters/voting-accessibility> (last visited: Apr. 11, 2020).

⁴ Americans with Disabilities Act, 42 U.S.C. § 12132 (1990).



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opportunity to vote. These laws are not suspended in a crisis and the presence of a state emergency does not provide exceptions for the protections provided under HAVA and the ADA. Rather, these laws were put in place to steadfastly safeguard the rights of the most marginalized, especially when voting parameters and conditions would be changed and tested. Moreover, the racially disparate impact that would result from denial of these accommodations only to voters of the Seventh Congressional District voting in the Special Election – a majority of whom are Black – further reinforces the imperative that equal access be provided to all voters both in the Primary and in the Special Election.⁵

On April 2, 2020, the Maryland State Board of Elections made the decision to make the in-person option available for the Primary Election in recognition that voters with disabilities, voters without a stable addresses, displaced voters, and voters needing language assistance will all be disenfranchised without an in-person voting option, based in part by the legal analysis and recommendations presented by your counsel. Also, the Board's staff and counsel were clear in their recommendations that an in-person options was necessary⁶, and that there is a

⁵ In addition to the Constitutional protections against race discrimination under the Fourteenth and Fifteenth Amendments noted in *Gomillion* and its progeny, the federal Voting Rights Act is implicated by election procedures that are racially discriminatory in impact. That is, a Voting Rights Act violation occurs where election procedures have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, including where political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of protected citizens, including Black voters in the Seventh District, such that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. [42 U.S.C.A. § 1973\(b\)](#).

⁶ The meeting materials for the March 25, 2020 Board Meeting included a memo to the Board dated March 20, 2020, presumably from its staff or counsel, which included the following statements: "Proposed Solution: Expand mail-in voting and early voting capabilities to preserve limited but necessary in-person voting to ensure all Marylanders are able to safely participate in the 2020 election"; "While expanding mail-in voting capabilities is important, it will be critical to do so as a means of preserving in-person voting options for those voters unable to participate by mail, not exclusively as a replacement. Examining states that have turned to a mail-dominant format shows its successes but also why its limitations require Maryland to preserve some degree of in-person voting."; "First, and most important, all the states with vote-by-mail systems still include some options for in-person voting."; "So while it is important for Maryland to expand its vote by mail system, it would be irresponsible to do so at the exclusion of some in-person voting options."; and "Preserving some degree of in-person voting options will therefore be essential to avoid disenfranchisement."



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safe way to carry out the critical in-person voting while adhering to the guidelines issued by both the United States Center for Disease Control and the United States Election Assistance Commission. We agree with the Board and its counsel's analysis and believe that such findings apply equally to the Special Election.

We see little that would distinguish the Special Election from the Primary in any way that would support a decision to provide an in-person voting option in one election and not the other. In fact, there are reasons that would suggest providing an in-person voting option for the Special Election will be less burdensome for the Maryland State Board of Election than for providing an in-person voting option for the Primary Election, given that the election involves only three of the 24 counties (including the county equivalent, Baltimore City) and special elections typically have much lower turnouts than Presidential primaries. Finally, we ask the Board to consider the racial impact of this decision, given the historical context and significance of this particular Congressional seat to Marylanders. If the Board's approach for the Special Election departs from what it has agreed is necessary to protect the rights of all voters for the Primary Election, it will consign Seventh District voters to second-class status in a way could raise significant concerns under the Constitution and Voting Rights Act.

For all of these reasons, we urge the Maryland State Board of Elections to implement an in-person option for voters during the Seventh Congressional District Special Election in accordance with the law, which would honor all Marylanders' right to vote and provide for a more equitable and fair election.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah A. Jeon".

Deborah A. Jeon
Legal Director

A handwritten signature in black ink, appearing to read "Amy Cruice".

Amy Cruice
Election Protection Director