

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss.

SUPERIOR COURT
DOCKET NO. 1880CV00141

CAITLIN CULLEN & another¹

vs.

SUSAN AUDETTE²

**DECISION AND ORDER ON PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

1. Introduction

The plaintiffs, Caitlin Cullen and Lily Tang, both students at the University of Massachusetts at Amherst (UMass), brought this action complaining of the schedule set by the Town of Amherst (the Town) to elect the members of its first Town Council in 2018. Under the challenged schedule, candidates took out nomination papers on or after May 1st, filed them by June 29th, and voters will narrow the field of candidates in a preliminary election on September 4th, and will elect Town Council members on November 6th. The plaintiffs have not brought this as a class action but nonetheless assert that the preliminary election schedule, in light of the academic calendar for most college students in Amherst, violates their right to participate equally in the electoral process as candidates, as guaranteed by art. 9 of the Massachusetts Declaration of Rights, and violates their right under State and Federal constitutions to participate as voters in all parts of the electoral process. Before the court is the plaintiffs' emergency motion for a preliminary injunction barring the defendant, Susan Audette, as the Acting Town Clerk for the

¹Lily Tang.

²Acting Town Clerk for the Town of Amherst, Massachusetts, in her official capacity.

Town, from conducting the preliminary Town Council election on September 4, 2018. After a hearing and consideration of the arguments and submissions by all parties, the plaintiffs' motion will be denied.

2. Background

The following facts are set forth in the parties' submissions, including affidavits. On March 27, 2018, voters in Amherst voted to change their municipal government from a Town Meeting with a Select Board to a Town Council, to be comprised of 13 members in five districts, and elections to be held months later. The Town Meeting voted to approve of a Town Charter which established a schedule for the preliminary election (to reduce the number of candidates for Town Council positions) and a final election. That election schedule was approved after extensive public hearings and debate.³ The Town Charter also included an alternative election schedule in the event that the proposed election schedule was not approved.⁴

Cullen and Tang are registered to vote in Amherst, where they are undergraduate students at UMass. Their campus is located within several Town districts. Cullen, a current member of the Town Meeting, decided not to run for the Town Council due to what she views as the following barriers posed by the election schedule: (1) May 1st was the last day of classes at UMass; (2) the first two weeks of May are the busiest for students in final exams; (3) most college students in Amherst leave for the summer when candidates campaign face to face; (4) many students may

³On April 30, 2018, the Town Meeting voted to ask the Legislature to approve an act that establishes the Town Council election schedule which is in dispute. The Legislature did approve of that act, and the governor signed it.

⁴Under the alternative schedule, candidates would have until October 22, 2018, to return nomination papers, the preliminary election would be held on December 11, 2018, and the final election would be held on January 24, 2019.

not know their fall address, and therefore their district in the Town, until sometime in August; and (5) the preliminary election set for September 4, when most students are returning to Amherst,⁵ occurs when many students are insufficiently informed to vote. Cullen asserts that the alternative schedule in the Town Charter would better accommodate college students interested in running for Town Council and those students who wish to be informed about candidates. Cullen claims that she would run for Town Council if that alternative schedule were in place.

Tang will begin her sophomore year at UMass this fall. When she filed this action, on July 26, 2018, she stated that she expected to learn her dorm assignment sometime in August. Tang is currently registered to vote in District 3 and the dorm she requested for this fall is also in District 3, but it is possible that she will be assigned to a dorm in a different district. On July 11, 2018, she asked the Town Clerk how to register to vote in the September 4th preliminary election since she did not then know in which district she would be residing on September 4th. The Town Clerk replied by email that if Tang received her new dorm assignment on or before August 15, she could change her voter registration if needed to reflect a new district within the Town, but that otherwise, she could vote using her former dormitory address and later change her registration after the election. The Town Clerk's email shows that the election schedule does not bar the plaintiffs from registering to vote or from voting in the preliminary election, regardless of where they reside or when they learn of their dormitory assignments.

Tang states in her affidavit that she is concerned about voting in the preliminary election because she will be away from Amherst all summer due to her internship out of state, and that she will not have any information about the candidates before September 4th. She notes that the

⁵Fall 2018 classes in colleges in Amherst begin on September 5 and 6th, according to the plaintiffs.

ballot does not list the candidates' political party affiliation, and that without that information or any other information about them, she probably will not vote in the preliminary election on September 4th, even if she does vote in the state-wide primary election that day. Tang does not even speculate as to how much time she would need to obtain information about candidates in order to be motivated to vote in the preliminary election.

The defendant, Audette, has filed an opposition with information contradicting the plaintiffs' key contentions. Her submissions demonstrate that returning UMass students know their fall dorm assignments by the end of July, and therefore, have two weeks to register to vote in the district in which they will reside. Many if not most Town Council candidates campaign online, through websites and Facebook accounts, and on the Town's local cable access channel. Therefore, the plaintiffs have not shown that they cannot inform themselves adequately about candidates' positions, nor has Cullen shown that she could not have run a campaign online to reach college students, who form only a part of the constituents. Furthermore, nothing prevents Cullen from campaigning face to face with constituents who reside in Amherst in the summer.

There is no basis for the plaintiffs' claim that this election schedule will harm other college students in Amherst. This is not a class action suit. Moreover, during the extensive hearing process before the election schedule was signed into law, both supporters and opponents voiced their opinions. Some college students supported the current election schedule believing reasonably (and consistently with figures submitted by the defendant) that its timing on the same days as the State primary and final elections would boost voter turnout. The alternative schedule advocated by the plaintiffs would cause other problems for college students, who will be busy finishing course work just before the preliminary election on December 11, 2018, studying for

final exams through December 21st, and away for winter break until January 22, 2019, just two days before the final election on January 24, 2019. Furthermore, Audette has shown that the additional cost of holding Town elections separate from the State primary and general elections would be \$40,000.

3. Legal Analysis

A preliminary injunction is an extraordinary remedy and "should not be granted unless the plaintiff [has] made a clear showing of entitlement thereto." *Student No. 9 v. Bd. of Educ.*, 440 Mass. 752, 762 (2004). "To succeed in an action for a preliminary injunction, a plaintiff must show (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction." *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001). The plaintiffs, as the moving parties, "must show that, without the requested relief, [they] may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits." See *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1990).

The plaintiffs argue that the Town's preliminary election schedule abridges their rights as voters, and Cullen's right to participate in the election as a possible candidate, under the Twenty-Sixth Amendment to the United States Constitution and art. 9 of the Massachusetts Declaration of Rights. The Twenty-Sixth Amendment states, "The right of citizens of the United States, who are eighteen years or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Art. 9 recognizes that "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." Art. 9 establishes a fundamental right of candidates for political office to participate equally in the electoral process. *Libertarian Assoc'n of Massachusetts v. Sec'y of the Comm.*, 462 Mass. 538, 560 (2012). The plaintiffs note that "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government," *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969), and that the right to vote extends to the manner in which it is exercised, see *Bush v. Gore*, 531 U.S. 98, 104 (2000).

The level of judicial scrutiny over voting laws depends upon the degree to which the right is impaired. See *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 480 Mass. 27, 33 (2018). A statute that significantly interferes with the right to vote is subject to strict scrutiny, and survives that test only if it is narrowly tailored and advances a compelling state interest. See *Libertarian Assoc'n of Massachusetts v. Sec'y of the Comm.*, 462 Mass. at 560. Laws which do not significantly interfere with that right "but merely regulate and affect the exercise of that right to a lesser degree are subject to rational basis review to assure their reasonableness." *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 480 Mass. at 33-34, 36 (whether to apply rational basis test or strict scrutiny to requirement that prospective voter register 20 days before election depends upon whether requirement significantly interferes with fundamental right to vote).

The plaintiffs fall short in meeting their burden to obtain preliminary injunctive relief. As explained above, the plaintiffs have not shown that the election schedule in place negatively impacts them at all, either as voters seeking information about candidates or as potential

candidates running a campaign. They have not established that the preliminary election schedule, viewed with their academic calendar, hinders their ability to inform themselves about Town Council candidates. The plaintiffs point to no case law, nor is the court aware of any, equating an "equal right to election" (among qualified candidates) with a candidate's preference for optimal campaigning opportunities when students are not too busy studying, moving in or out of dorms, or away on vacation.⁶ Even could such a right be inferred, Cullen has not demonstrated that the preliminary election schedule impaired her ability to campaign to students and non-students for a Town Council position or that the preliminary election schedule was not lawfully approved.

There is no merit to the plaintiffs' contention that the election schedule substantially interferes with their right to vote and that it is subject to strict scrutiny analysis. Even assuming *arguendo* that the election schedule could be viewed as regulating and affecting the exercise of the plaintiffs' right to vote, and thus triggering judicial review under the rational basis test, the plaintiffs fare no better. The record leaves no doubt that the election schedule is reasonable and rationally related to the interest of the Town's voters, as expressed through the Town Charter and the Special Act authorized by the Town Meeting, that forming a Town Council as expeditiously as possible is of utmost importance. See Town Charter Section 10.8 (election schedule to be submitted to Town Meeting "as soon as practicable after the passage of this Charter"); Special

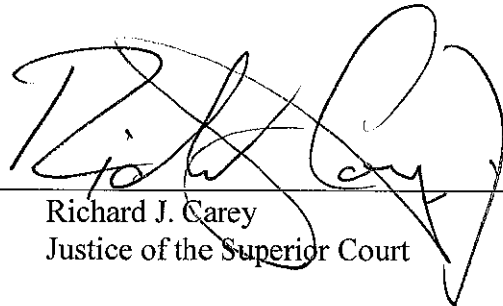
⁶The cases cited by the plaintiffs are inapposite. See, e.g., *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 91-93 (1983) (plaintiff's right to solicit ballot signatures, which can only be done in person, in contrast to expressing campaign views via the press and mail, is fundamental but may be subject to reasonable limitations by mail with respect to locations and manner in which signatures may be sought). This is not a case in which a law makes it difficult to cast a vote because the election is scheduled to fall on a day when a significant number of voters will predictably be absent. See *Walgren v. Bd. of Selectmen of the Town of Amherst*, 519 F.2d 1364, 1368 (1st Cir. 1975) (court would be disturbed if town had reasonable alternative election day but continued to schedule election during college vacations or recess "secure in the conviction that returning to town and absentee voting would be considered insignificant burdens").

Act (stating that "Amherst has changed its form of government and desires to elect its first Town Council as soon as practicable"). See *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 480 Mass. at 33-34, 36.

For all these reasons, the plaintiffs have failed to demonstrate that they are likely to succeed on the merits or that they will suffer irreparable harm if their motion for a preliminary injunction were denied. See *Tri-Nel Mgmt. v. Board of Health*, 433 Mass. at 219; *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. at 616.

ORDER

It is hereby **ORDERED** that the Plaintiffs' Emergency Motion for Preliminary Injunction is **DENIED**.



Richard J. Carey
Justice of the Superior Court

Dated: August ⁶, 2018