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Joint Committee on Election Laws
Sen. Anne M. Gobi & Rep. John J. Mahoney, Chairs

SUPPORT FOR ELECTION DAY REGISTRATION
EDR Will Fix Unconstitutional 20-Day Registration Cutoff
& Increase Voter Participation

Dear Senator Gobi, Representative Mahoney, and members of the committee:

The ACLU of Massachusetts, on behalf of our nearly 100,000 members and supporters around the Commonwealth, encourages the committee to take action to replace Massachusetts' 20-day voter registration deadline, which is unconstitutional, with Election Day registration ("EDR"), which is both constitutionally sound and the best possible voter registration system.

In July, a Massachusetts superior court [ruled](#) that the 20-day voter registration deadline violates the Massachusetts constitution.¹ The court decisively rejected any suggestion that administrative considerations regarding the need to run orderly elections or assure that only eligible voters are permitted to vote could justify the existing statutory deadline. But the court left to the Legislature the decision about what should replace it. We trust that this body will take action.

Chelsea Collaborative v. Galvin: The 20-Day Deadline is Unconstitutional

In *Chelsea Collaborative v. Galvin*, the court concluded that the 20-day voter registration deadline is unconstitutional because it imposes an arbitrary and unnecessary toll on voters. To comply with the Massachusetts constitution, a voter registration system must permit eligible voters to continue to register "up to a time as near that of actually depositing the votes as would be consistent with the necessary preparation for conducting the election in an orderly manner and with a reasonable scrutiny of the correctness of the list."² However, in this case the court found that "the Commonwealth has shown no real reason, grounded in data, facts or expert opinion, why election officials need to close registration almost 3 weeks before the election to do their job."³

¹ Findings of Fact, Conclusions of Law, and Order of Judgment, *Chelsea Collaborative, et al. v. William Galvin*, Suffolk Superior Court, No. 16-3354-D (7/24/2017) available at <https://aclum.org/wp-content/uploads/2016/11/Decision-and-Order.pdf>. The ACLU of Massachusetts and the national ACLU brought this lawsuit on behalf of several individuals and the voting rights organizations Chelsea Collaborative and MassVOTE.

² *Id.* at 50 (quoting *Kinneen v. Wells*, 144 Mass. 497, 502 (1887)).

³ *Id.* at 65. The court was unimpressed by the only discernible basis for the deadline in the sparse legislative history, namely a memo to then Governor Weld from his Director of Legislative Research indicating that "[t]own clerks have agreed to '20 days' but object to any further shortening of the deadline." *Id.* at 55

In ruling that the cutoff is unconstitutional, the court made several key findings that were based on the evidence presented by the parties, and which should guide the Legislature's response.

For starters, Judge Wilkins found that the existing 20-day registration takes a heavy toll on the right to vote. The court found that nearly 7,000 Massachusetts residents were disenfranchised in each of the last three presidential election years—7,308 in 2008, 7,606 in 2012, and 5,567 in 2016—because they registered after the cutoff.⁴ The court also found that tens of thousands of other potential voters have been effectively disenfranchised by the 20-day deadline because they missed the deadline and then did not register. Reviewing data from 2014, for example, Judge Wilkins found that 19.9% percent of Massachusetts residents who did not vote identified the registration deadline as the reason why. This works out to approximately 118,000 people who did not vote because of the deadline. Nationally, only 9.9% of voters reported that they did not vote because of a registration deadline.⁵

The court also noted that public officials cannot reasonably disenfranchise voters merely as punishment for missing a deadline. To the contrary, the court found that otherwise eligible voters miss the deadline for a variety of understandable reasons, including other pressing life circumstances near the time of the deadline, as well as the fact that voters may recognize that particular issues or candidates matter to them only after campaigns reach their peaks and organizations begin to make endorsements—all of which can occur after the Massachusetts deadline has passed. Given these realities, Judge Wilkins concluded that it would be improper to rob people of their right to vote merely because they missed a deadline.

Because voters cannot be disenfranchised as punishment for missing a deadline, the court looked to whether a 20-day deadline is necessary to ensure orderly elections and accurate voter lists. It is not. Judge Wilkins found that thousands of registrations submitted after the deadline are in fact processed *before* Election Day. These voters could be allowed to vote, but instead they are *affirmatively removed* from the final voter lists. Additionally, the court found that there are exceptions made for Specially Qualified Voters to register up to the day before the election and that every person who registered before the registration cutoff was able to vote five days later when Early Voting began. Consequently, Judge Wilkins found that the evidence “prove[d] convincingly that 20 days is not necessary to process voter registrations, ensure the accuracy of voting lists and conduct orderly balloting.”⁶

Election Day Registration is the Best Remedy

In light of Judge Wilkins's well-supported conclusion that the 20-day deadline is not justifiable, the question for the legislature is what should replace it. Election Day Registration is the obvious and best solution. EDR will fix the constitutional

⁴ *Id.* at 11

⁵ *Id.* at 34

⁶ *Id.* at 54.

problems with the existing voter cutoff law, increase voter participation, and improve election administration. At present, 16 states and the District of Columbia have some form of Election Day Registration, and they have historically had the fewest problems with voter registration. Massachusetts should join them in adopting EDR.

States that have adopted EDR have seen substantial increases in voter participation, and Massachusetts will too. Judge Wilkins estimates that Massachusetts would see a 2-3% increase in voter turnout,⁷ while an analysis by the independent public policy organization Demos anticipates a 4.9% increase.⁸ In the 2014 midterm election, a two percent increase—the court’s conservative estimate—would have translated to 97,926 additional voters. The increases would be particularly significant among subpopulations. For instance, according to Demos, Massachusetts could expect a 9.7% increase from those ages 18-25; an 8% increase from those who moved in the last six months; and a 5.6% increase among African Americans as well as those living in poverty.⁹

In the Trump/Kobach era, the National Voting Rights Act is under threat and voter suppression is ascendant. Against that backdrop, when we see an opportunity to increase voter participation among historically disenfranchised groups, we should take it.

In addition, EDR improves election administration. It allows people to update their names and addresses on Election Day, makes it easier to maintain up-to-date voter registration rolls, and reduces the administrative work of local election officials who currently spend a significant amount of their time verifying addresses. States with EDR have experienced a sharp decline in cumbersome provisional ballots, have seen no increase in wait time, and have had the fewest problems with voter registration.¹⁰ Moreover, the court specifically found that EDR “has been adopted in ways that do not create significant problems with security, fraud¹¹, accuracy of assessing voter qualifications, or orderly administration of elections.”¹²

⁷ *Id.* at 44

⁸ R. Michael Alvarez & Jonathan Nagler, Election Day Voter Registration in Massachusetts (2008) available at <http://www.demos.org/sites/default/files/publications/mass.pdf>

⁹ *Id.*

¹⁰ *Election Day Registration: A Ground-Level View*, Demos 2007, available at <http://www.demos.org/sites/default/files/publications/EDR%20-%20A%20Ground%20Level%20View.pdf>

¹¹ “In 2007, 2009, and 2011, New Hampshire’s Attorney General published the results of post-election investigations into 352 voters that completed a sworn affidavit to prove their eligibility when registering to vote on Election Day. The investigations found that all of those voters were eligible.” Famighetti, Christopher, Douglas Keith and Myrna Pérez *Non Citizen Voting: The Missing Million*, Brennan Center for Justice 2017, https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf

¹² *Chelsea Collaborative* at 45

Automatic Voter Registration Would Not Fix the Constitutional Violation Identified in *Chelsea Collaborative v. Galvin*

It is worth noting that another proposed reform to our voter registration system, Automatic Voter Registration (“AVR”), does not remedy the constitutional violation inherent in the 20-day voter registration cutoff. AVR aims to efficiently register eligible voters who engage in other transactions with the state; it does not reduce the time gap between the registration cutoff and the election. Indeed, the court specifically noted that AVR “would not fully address the problem of voters who, for whatever reason, do not decide to register until after the registration and do not have a transaction that would automatically register them.”¹³

Arguably, enacting Election Day Registration is the only way to ensure that no further litigation will be necessary to adjudicate the constitutionality of any Massachusetts registration deadlines.

It is time to pass Election Day Registration in Massachusetts. The Commonwealth has a proud history of expanding ballot access. Yet today we face both political and constitutional imperatives to do even more to ensure that all eligible voters who wish to cast a ballot are able to do so. Election Day Registration will fulfill the promise of our state constitution and establish Massachusetts as a bulwark for freedom and democratic values.

We respectfully ask you to give S.371/H.354 a favorable report, and we would welcome the opportunity to discuss the *Chelsea Collaborative* case and its implications for election law reform in the Commonwealth. Thank you.

Sincerely,

Carol Rose
Executive Director

Gavi Wolfe
Legislative Director

Rahsaan Hall
Racial Justice Program Director

¹³ *Id.* at 45