

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12435

CHELSEA COLLABORATIVE, INC., MASSVOTE,
AND RAFAEL SANCHEZ,
Plaintiffs-Appellees,
v.

WILLIAM FRANCIS GALVIN, AS
SECRETARY OF THE COMMONWEALTH,
Defendant-Appellant.

ON APPEAL FROM A FINAL JUDGMENT
OF THE SUPERIOR COURT FOR SUFFOLK COUNTY

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INTRODUCTION

This case is about a law that unduly disenfranchises thousands of qualified Massachusetts voters. The Superior Court concluded that this law violates the Massachusetts Constitution, and so should this Court.

The law in question is the Commonwealth's 1993 voter-registration statute, which requires voters to register at least twenty days before a statewide election in which they seek to vote (the "Voter Cutoff Law").¹ But this case is not just about a deadline; it is about what the law does to qualified voters who miss it. For them, this law is a sledgehammer. It does not subject late registrants to some further procedure, such as enhanced vetting. Instead, subject to limited exemptions, the Voter Cutoff Law flatly prohibits qualified voters from casting ballots based on registrations submitted after the Cutoff Date.

The Voter Cutoff Law runs headlong into the Massachusetts Constitution, which expressly protects an individual's fundamental right to vote. See art. 3 of the Amendments to the Massachusetts Constitution. For over a century, this Court has rigorously scrutinized laws disenfranchising voters. See, e.g.,

¹ See G. L. c. 51, § 1F (1993); G. L. c. 51, §§ 26, 34 (1993), as amended by St. 1993, c. 475, § 6, approved January 14, 1994.

Kinneen v. Wells, 144 Mass. 497 (1887); *Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930 (1983).

That is precisely what the Voter Cutoff Law does.

Following extensive discovery and a four-day trial, the Superior Court found:

- Over the last three presidential elections, the Voter Cutoff Law has barred from voting many thousands of people who registered between the Cutoff Date and Election Day. AD11² (noting more than 20,000 people registered during this period for the 2008, 2012, and 2016 presidential elections combined).
- Tens of thousands more people are deterred from registering to vote after missing the deadline, AD32-34; A674-75, 730-32, 749, 919, or from turning out to vote, AD44.
- The Voter Cutoff Law compels election officials to use a program that removes *successfully-processed* late registrations from the lists of people who can vote on Election Day, AD1, 39, 55; A827-28, 1014, thus disenfranchising voters whose qualifications are undisputed.

Worse yet, the Voter Cutoff Law inflicts this mass disenfranchisement without justification. The Superior Court found that, due partly to advancements in technology, local election officials now quickly process voter registrations. AD37-38. In fact, they must: under the Commonwealth's new early voting law, voters in 2016 began to cast ballots just five days after the registration period closed. AD54. Thus, as

² Citations to "AD__" are to the Addendum to the Secretary's brief.

the Superior Court determined, the question whether a twenty-day registration deadline is still needed is "not a close" one. *Id.*

The Secretary of the Commonwealth argues that the Voter Cutoff Law can survive if this Court were to avert its gaze from the thousands of people who have been disenfranchised and to apply rational basis review. But this Court has never applied less-than-rigorous scrutiny to a law that disenfranchises even *one* constitutionally-qualified voter, let alone a law that does so by the *thousands*. And it should not do so now, when confronted with a trial record so thoroughly bereft of any justification for an injury of that magnitude.

Whatever rationale may once have existed for a twenty-day registration deadline, it has long since expired. The Voter Cutoff Law should be struck down.

ISSUE PRESENTED

Whether a 1993 State law imposing a voter-registration cutoff that routinely disenfranchises thousands of qualified voters, and that is neither a necessary nor appropriately-tailored measure for assuring that only qualified voters cast ballots, violates the fundamental right to vote guaranteed by the Massachusetts Constitution.

STATEMENT OF THE CASE

I. PRIOR PROCEEDINGS

On November 1, 2016, Edma Ortiz, Wilyeliz Nazario Leon, Rafael Sanchez ("Individual Plaintiffs")--all of whom were qualified voters under the Massachusetts Constitution--along with Chelsea Collaborative and MASSVote, Inc. (together with the Individual Plaintiffs, "Plaintiffs") sued the Secretary of the Commonwealth of Massachusetts ("Secretary") and the Cities of Chelsea, Revere, and Somerville (together with the Secretary, "Defendants"). Plaintiffs alleged that a State law requiring eligible voters to register twenty days before a statewide election in order to vote in that election violated the Massachusetts Constitution. A15-32.³ That same day, the Individual Plaintiffs sought an emergency preliminary injunction to enable them to exercise their constitutional right to vote on Election Day, November 8, 2016. A94-113.

On November 7, 2016, the Superior Court issued an order entitling Ortiz, Leon, and Sanchez to cast provisional ballots on Election Day, and on November 18, 2016, the Superior Court amended its November 7 Order to require that Individual Plaintiffs' provisional ballots be tabulated. A178-91. To streamline the proceedings, the Superior Court

³ Citations to "A__" are to the Record Appendix.

declined to certify a class and demoted Municipal Defendants to the status of nominal parties.⁴ A227-34; A238-43. The Superior Court ordered expedited pretrial proceedings, see Mass. R. Civ. P. 57, and held a bench trial on July 5, 6, 7, and 10, 2017. See AD3-4.⁵ At trial, the Superior Court heard testimony from nine witnesses, including local election officials and experts on election administration, and admitted over fifty exhibits in evidence. See A630-966.

On July 27, 2017, the Superior Court issued a lengthy, thorough order (the "Order") making nearly 400 separate findings of fact and striking the Voter Cutoff Law as an unconstitutional exercise of legislative disenfranchisement. AD1-72. The Superior Court framed the issue as "whether the Commonwealth may deny thousands of constitutionally-qualified voters the right to vote because of the 20-day deadline." AD49. It held that *necessity* is the central inquiry, and its legal standard focused on

⁴ The parties and the Superior Court agreed that the dispute was not rendered moot after the 2016 election because it "raises issues that are capable of repetition but will evade review." AD3, citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75 (1978).

⁵ Leon and Ortiz were dismissed from the case before trial. AD2.

"whether a statute requiring advance registration allows only for the time needed to ensure voter qualifications and orderly elections." AD51. Based on the evidence at trial, the Superior Court found that the Voter Cutoff Law disenfranchises thousands of late registrants, suppresses turnout, and deters thousands of additional voters from registering in the first place. AD11, 33-34, 44. It concluded that the Voter Cutoff Law was not needed to ensure valid, orderly elections, that the Law would not pass alternative standards of review, and that therefore the Law could not stand. See AD2, 54, 58, 63, 68. The Superior Court stayed its ruling pending appeal. A13-14.

On September 15, 2017, the Secretary filed a notice of appeal, and on October 3, 2017, the parties jointly filed an application for direct appellate review from this Court. See Mass. R. A. P. 11. This Court granted that application on November 15, 2017.

II. STATEMENT OF THE FACTS

The Secretary's brief does not meaningfully engage with the Superior Court's detailed fact-finding or the extensive record below, much of which consists of facts the Secretary could not and did not contest. The record demonstrates that, in every election, the Voter Cutoff Law disenfranchises thousands of qualified Massachusetts voters and deters many more

from registering or voting. This disenfranchisement occurs even though local election officials currently process voter-registration applications in far less time than twenty days.

a. The Voter Cutoff Law

The Massachusetts Constitution guarantees the right to vote to all citizens who meet certain basic qualifications. See art. 3 of the Amendments to the Massachusetts Constitution; see also art. 9 of the Massachusetts Declaration of Rights. It does not include, nor at any point refer to, a requirement that a qualified voter register in advance of an election. Nevertheless, since 1993 the Legislature has by statute required that qualified voters register twenty days before an election. G. L. c. 51, § 1F (1993) (requiring registration "not later than eight o'clock post meridian of the twentieth day preceding such election"); G. L. c. 51, §§ 26, 34 (1993), as amended by St. 1993, c. 475, § 6, approved January 14, 1994.⁶ In 2016, the registration deadline imposed by this law fell on October 19.

The record reflects no contemporaneous legislative history accompanying the decision to

⁶ The Legislature imposed a twenty-day registration deadline for cities in 1894, which was extended to towns in 1928. The deadline has varied between twenty and thirty-two days since then. AD47.

impose the twenty-day deadline apart from a passing reference in a January 13, 1994 memorandum from then-Governor William Weld's Director of Legislative Research noting that local election officials "object[ed] to any further shortening of the deadline." AD47, 55.

b. The Voter Registration Process

Citizens who meet the constitutional requirements may register to vote by completing a voter-registration application. AD4-5. The application is a short one-page form containing fourteen fields--only six of which must be completed for an applicant to be added to the Commonwealth's electronic database of registered voters, known as the Voter Registration Information System ("VRIS"). AD5-8. Local election officials use VRIS to print Election-Day voting lists. AD5.

A voter-registration application can be submitted in-person, by mail, or online. AD19, 5-7. Online applications are accepted until midnight on the Cutoff Date. A1260. At 12:01 a.m., the Secretary closes online registration until after the election, thus preventing voters from continuing to register online. AD36.

Local election officials process the applications. AD5. After checking paper applications for completeness, AD7, the officials enter the information

into VRIS, which takes one to two minutes, AD27. Online registrations do not need to be manually typed into VRIS; after confirming that information is correctly formatted, a local election official certifies the registration by pressing a button. AD8.

c. Registration and Processing Activity After the Cutoff Date

Voters and local officials continue to complete and enter voter registrations into VRIS after the Cutoff Date but before Election Day. In 2016, more than 5,500 Massachusetts voters registered between the Cutoff Date and Election Day. AD11. The Secretary has instructed local election officials "to continue processing voter-registration applications upon receipt even after the statutory registration cutoff." AD37; see A827, 1020, 1219. Local officials follow this instruction. A827. Nevertheless, the Voter Cutoff Law prohibits late registrants throughout the Commonwealth from voting on Election Day. Reflecting this mandate, at the request of local election officials seeking to comply with this Law, VRIS is programmed to remove registrants whose applications were submitted after the Cutoff Date from the voting lists used on Election Day. A827-28, 1014. Thus thousands of eligible voters who register after the Cutoff Date--including those whose registration applications have been successfully processed before

Election Day--are disenfranchised as a result of the Voter Cutoff Law. AD1, 37, 39, 55.

Certain categories of voters who meet limited statutory criteria are permitted to vote on Election Day even if they register after the Cutoff Date. Specially Qualified Voters ("SQVs"), individuals who are naturalized as U.S. citizens after the Cutoff Date, and citizens who come of age between the Cutoff Date and Election Day are permitted to register after the Cutoff Date and vote on Election Day. See AD40; G. L. c. 51, § 50; G. L. c. 51, § 47A. SQVs include those absent from the Commonwealth throughout the seven days before the Cutoff Date, military members and their families, sailors, and prisoners. G. L. c. 50, § 1. SQVs may register to vote by appearing in person before a local election official in their municipality up until 4 p.m. on the day before the election. G. L. c. 51, § 50. The official then provides a certificate entitling the SQV to vote at her polling place even if she does not appear on the voting list. *Id.*; G. L. c. 51, § 51; AD41.

Local election officials accommodate these late registrants smoothly and successfully. AD41. In 2016, the City of Boston had 986 SQVs vote on Election Day; Somerville had forty-seven. AD12.

d. Early Voting

Early voting in Massachusetts successfully increased voter convenience without any reported security problems or voting by unqualified voters. AD38. The 2016 election presented Massachusetts voters with their first opportunity to vote early in person, beginning *only five days after* the Cutoff Date. As a result, any voter who registered by the Cutoff Date was able to vote at a polling place in their community just five days later.

The experience of early voting shows that local election officials can and do complete all the tasks necessary to prepare rolls of eligible voters in far less than twenty days' time.⁷ For example, local election officials must print or prepare the necessary early voting lists before the first day of early voting, just five days after the close of registration. AD9. Local election officials track early voters on these voting lists, and then prepare *another* voter list for Election Day. AD9-10, 38. This second list cannot be printed until after early voting concludes,

⁷ The 2014 statute implementing early voting also called for a study of election-related issues in the State, including the potential impact of early voting. St. 2014, c. 111 § 12. The study was to be conducted by an Elections Task Force, with a report to be submitted by August 1, 2017. *Id.* That Task Force has never met, and its report was never submitted. AD48.

because the Election Day list must account for voters who already voted early.⁸ AD38. Local election officials have just one business day to print the Election Day voting lists. See *id.*; AD8-9; 950 Code Mass. Regs. § 47.03 (2016).

The evidence at trial showed that local election officials were able to complete all these tasks successfully. By asking employees to work extra hours and recruiting additional volunteer poll workers, the officials were able to process registration forms and early voting ballots during the period between the Cutoff Date and Election Day. AD30, 38-40, 54.⁹ Local election officials were ready for any voter to vote just five days after the close of registration. AD38, 54.

⁸ Voter lists can take up to several hours to print, although they sometimes can be printed more quickly. AD39. Local election officials in Boston, the most populous city in the Commonwealth, completed printing its voter list for the November 2016 election in less than one day. *Id.*

⁹ Every municipality except Boston processed all of its voter registrations in time for early voting, and “[e]ven in Boston, early voting proceeded on schedule, with the City accepting approximately 400 provisional ballots from those whose applications had not yet been entered into the system.” AD54. Boston also “had a pattern of late processing” prior to early voting, in 2008 and 2012. *Id.*

e. Mass Disenfranchisement

Each election year, the Voter Cutoff Law disenfranchises thousands of qualified Massachusetts citizens.

Based on the evidence presented at trial and stipulated to by the parties, the Superior Court found that thousands of Massachusetts citizens who registered to vote after the Cutoff Date were prevented from voting in recent elections. AD11. Over 7,000 voters statewide applied for registration after the Cutoff Date in each of the 2008 and 2012 presidential elections, and more than 5,000 did so in the 2016 presidential election. *Id.*; AD68. Voters who register after the Cutoff Date are disenfranchised even when local election officials are fully able to process their registrations before Election Day. AD1, 37, 39, 55.

The Superior Court further found that the Voter Cutoff Law operated to deter many more voters from participating in the election. In reaching this conclusion, the Superior Court credited expert reports and analysis provided by both sides, including the testimony of the Secretary's expert that more voters would vote without the current deadline. A919, A923. "[B]y a preponderance of the credible evidence," AD32, the Superior Court determined that "118,440 people . . . were deterred from registering for the

2014 federal election on account of the voter cutoff law," AD34; see also A674-75, 729-30, 919.¹⁰

One reason the mass disenfranchisement occurs on this scale is that voters' interest in an election peaks *after* the Cutoff Date. AD32-33. As determined below, "[p]ublic interest in and media coverage of an election increase up to and after the 20-day deadline, as Election Day approaches," with political "debates, endorsements, editorials and increased campaign advertising" all occurring after the Cutoff Date. AD33. The Superior Court found that both "[q]uantitative research" and "[a]necdotal evidence" suggest that voter interest in the election accelerates after the Cutoff Date. *Id.* As voter interest in the election builds, "the desire of unregistered voters to register for the purpose of voting in the upcoming election" strengthens as well, meaning that "[t]housands (and probably tens of thousands) of Massachusetts voters" who were eligible and wished to cast a vote, but did not register before

¹⁰ The Superior Court calculated 118,440 by taking the percentage of Massachusetts voters who indicated in a survey that they did not vote in the 2014 federal election because they missed the registration deadline (19.9%), and multiplying that number by the number of eligible voters who were not registered in 2014 (595,178). AD34.

the Cutoff Date, are disenfranchised every election.
Id.

f. Less Burdensome Alternatives

To demonstrate that Massachusetts's election administration scheme is not justified by the Commonwealth's interest in ensuring orderly elections, Plaintiffs presented evidence at trial regarding the availability of a viable, less burdensome alternative: Election Day Registration ("EDR"). EDR allows qualified citizens to register or re-register to vote on Election Day and subsequently cast a ballot based on the registration submitted that same day. AD12. Some form of EDR has been implemented by sixteen States and the District of Columbia. *Id.* Plaintiffs showed that a well-designed EDR system can be an effective mechanism for providing fair, accurate, and accessible elections. AD16. The evidence at trial demonstrated that EDR increases access to voting and voter participation while reducing the use of provisional ballots, which cause additional burdens and inefficiencies for voters and poll workers alike.
Id.

The Secretary has now publicly conceded as much. On January 25, 2018, the Secretary filed an EDR bill that would allow voters to register and vote on Election Day. See Rocheleau, State's Top Election Official Offers Legislature a Plan for Same-Day

Registration, Boston Globe (Jan. 25, 2018), at B1. In a statement announcing the bill, the Secretary reportedly said: "Election Day registration has been shown to be one of the simplest and more effective ways of increasing voter participation, with administrative costs much lower than many other proposals to do the same thing, because it combines the act of registration and voting." Lannan, Galvin Backs Bill Letting People Register On Election Day, State House News Serv. (Jan. 25, 2018).

SUMMARY OF THE ARGUMENT

I. The Massachusetts Constitution, unlike the U.S. Constitution, explicitly guarantees that all citizens eighteen years of age or older who are Massachusetts residents "shall have a right to vote." art. 3 of the Amendments to the Massachusetts Constitution. Government actions implicating this fundamental right must face exacting scrutiny. This Court's opinion in *Kinneen*, which contains its most direct statement on voter-registration periods, indicates that the Voter Cutoff Law is subject to a necessity test, under which the law is unconstitutional unless it is no longer than necessary to ensure voter qualifications and to provide an orderly election. Alternatively, well-established fundamental rights doctrine--which *Cepulonis* already held applies to laws that disenfranchise qualified

voters--indicates that the Voter Cutoff Law can survive only if it is the least restrictive way to promote a compelling State interest.

The Secretary's contrary argument, which seeks to import the federal "sliding scale" test, is flawed. The only Massachusetts case to apply this test addressed a different right under a different constitutional provision. But even if the "sliding scale" test did apply here, it would call for heightened scrutiny due to the "character and magnitude" of the burden imposed by the Voter Cutoff Law. Pages 19-39.

II. The Voter Cutoff Law does not survive any of these tests. Each of them turns on whether a law is truly justified, which the Voter Cutoff Law is not. Although the Commonwealth may have a compelling interest in ascertaining voter qualifications and running orderly elections, the Voter Cutoff law does not promote these interests. And even if it did, the record does not demonstrate that the twenty-day deadline was necessary to, the least restrictive means of, or otherwise justified by promoting these interests. The advent of early voting, advances in technological capability, the experiences of specially qualified voters, and the experiences of other States all indicate that the Voter Cutoff Law is not justified. There is simply no way to square the

Massachusetts Constitution's heightened protection of the fundamental right to vote with a statute that needlessly disenfranchises thousands of voters every election; as the Superior Court put it, "this is not a close case." AD54. Pages 39-49.

III. Even if this Court were to apply rational basis review, the Voter Cutoff Law would still fail. Rationality review is not toothless in Massachusetts. Placed alongside barely articulated concerns that are unsupported by the record, the massive scale of the disenfranchisement, and the affirmative removal from voting lists of late registrants whose registrations have been approved before Election Day, render the Voter Cutoff Law arbitrary and capricious. Pages 49-50.

ARGUMENT

The Superior Court correctly concluded that the Voter Cutoff Law violates the Massachusetts Constitution. In a jury-waived trial, the trial court's findings of fact "are accepted unless they are clearly erroneous," *Wesson v. Leone Enters., Inc.*, 437 Mass. 708, 712 (2002) (citation omitted), and its legal conclusions are reviewed de novo, *Commonwealth v. McGhee*, 472 Mass. 405, 412 (2015) (citations omitted). Here, the Superior Court made abundant factual findings--which the Secretary does not meaningfully

contest ¹¹ --establishing that the Voter Cutoff Law's twenty-day registration requirement disenfranchises thousands of voters without sufficient justification. Relying on those findings, the Superior Court concluded that this needless law is incompatible with the fundamental right to vote guaranteed to each and every voter by the Massachusetts Constitution. This Court should reach the same conclusion.

I. THIS COURT'S PRECEDENT AND FUNDAMENTAL LEGAL PRINCIPLES REQUIRE THAT THE VOTER CUTOFF LAW BE SUBJECTED TO EXACTING JUDICIAL SCRUTINY.

The Superior Court rightly held that the Voter Cutoff Law must be scrutinized under this Court's most stringent test for constitutionality. AD51, 58-59. In Massachusetts, the right to vote is fundamental and enshrined in the Constitution: citizens who meet certain basic qualifications "shall have a right to vote." art. 3 of the Amendments to the Massachusetts

¹¹ In an undeveloped footnote, the Secretary claims that if he is right that the Superior Court committed legal error, then the Superior Court's factual findings should receive no deference. Sec. Br. at 43 n.34. If not waived, this novel argument should be rejected; the Secretary has failed to identify any factual error made by the Superior Court that is material and clear. Such an argument should especially be rejected in a case in which the vast majority of factual findings were stipulated to by the parties. See *Goddard v. Goucher*, 89 Mass. App. Ct. 41, 45 (2016) (factual stipulations are generally "binding on the parties and respected by the courts") (citations omitted).

Constitution. Likewise, the Commonwealth's citizens "have an equal right to elect officers, and to be elected, for public employments." art. 9 of the Massachusetts Declaration of Rights. These rights cannot be legislatively diminished.¹² See *infra*, I.A.; Part II, c. 1, § 1, art. 4, of Constitution of the Commonwealth (legislation cannot be "repugnant or contrary" to the Constitution). By contrast, the U.S. Constitution contains no analogous guarantee of a textual, affirmative right to vote.

To understand which constitutional test applies here, it is crucial to acknowledge the magnitude of the injury the Voter Cutoff Law inflicts. This law extinguishes the voting rights of qualified voters who miss an arbitrary registration deadline. Every election--and solely due to the Voter Cutoff Law--the Commonwealth scrubs its voting rolls of qualified voters whose qualification to vote has been confirmed by local election officials *before* Election Day. AD1, 37, 39, 55; A827, 1014. Over the last three

¹² The right to vote was included in the first draft of the Massachusetts Constitution authored by John Adams, see *The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts* c. 1, art. IX; c. 2, § 3, art. IV (Oct. 28-31, 1779), and the scope of voter qualifications was debated at length during the Constitutional Convention that met in 1779 and 1780, see Robert J. Taylor, *Construction of the Massachusetts Constitution*, PROCEEDINGS OF AM. ANTIQUARIAN SOC. 334-35 (1980).

Presidential elections, the law has directly disenfranchised many thousands of registered, qualified voters, AD11, and it has dissuaded tens of thousands more from registering to vote or from turning out to vote, AD34, 44; A674-75, 729-31, 919.

Applying this Court's precedent, the Superior Court correctly concluded that such a law warrants this Court's most rigorous review, in the form of the "necessity" standard established by *Kinneen*, 144 Mass. at 499, or, alternatively, the strict scrutiny test that this Court routinely applies to laws implicating fundamental rights including the right to vote, see *Cepulonis*, 389 Mass. at 935. The Secretary incorrectly argues that a "sliding scale" test applies here, but even that test would call for some form of heightened scrutiny in this case.

A. The Voter Cutoff Law is unconstitutional unless it is necessary.

Though the Secretary accuses the Superior Court of "devis[ing] its own" doctrine, Sec. Br. 18, the Superior Court did no more than apply this Court's most pertinent pronouncements on statutory voter-registration periods.

Those pronouncements appear in *Kinneen*. In *Kinneen*, as here, a constitutionally-qualified voter confronted a statutory time period that took away his right to vote for one election. 144 Mass. at 498-502.

The statute at issue prohibited naturalized citizens from registering to vote for thirty days after their naturalization. *Id.* at 497. Because *Kinneen's* naturalization occurred less than thirty days before Election Day, he could not register, and thus could not vote. *Id.* Recognizing that *Kinneen* was constitutionally-qualified to vote, the Court explained that "[a]ny legislation by which the exercise of [a voter's] rights is postponed, diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary, in order that the rights of the proposed voter may be ascertained and proved" *Id.* at 499.

Kinneen struck down the statute because it treated naturalized citizens differently from others. *Id.* at 503. But the Court indicated that the statute could not have survived even if it had applied to *all* citizens, stating that it was not "easy to see how [the law] could be defended," if it imposed a general cutoff for "ascertaining [voter] qualifications." *Id.* at 502. Describing the unfairness of such a law, the Court did not mince words:

No system would be just that did not extend the time of registration 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.

Id. (emphasis added).

The test articulated in *Kinneen* is consistent with this Court's earlier decision in *Capen v. Foster*, 12 Pick. 485 (1832). There, the Court held that a law requiring voters to register before casting their ballots was not per se unconstitutional.¹³ *Id.* at 499-500. But because the law at issue in *Capen* allowed for registration up to and including Election Day, the opinion simply did not speak to the constitutional test that would govern a requirement to register *before* Election Day.

Kinneen did. The Court assessed whether the law was "necessary," both in addressing the law establishing a time requirement for naturalized citizens, *Kinneen*, 144 Mass. at 499, and in describing how such a requirement would fare if it were imposed equally on all citizens, *id.* at 502. Because the Voter Cutoff Law similarly disenfranchises qualified voters via a statutory time requirement, it should be subject to *Kinneen's* necessity standard. Under this standard,

¹³ *Capen* explained that selectmen were "to be in session a sufficient length of time, shortly before the election, and for an hour at least *on the day of meeting* and before the opening of the meeting, to receive evidence of the qualifications of those whose names may have been omitted" from the list of voters. 29 Mass. at 498 (emphasis added).

the Voter Cutoff Law can stand only if it is necessary to ensure voter qualifications and an orderly election. *Id.*

The Secretary's efforts to distinguish *Kinneen* fail. The Secretary primarily argues that *Kinneen's* necessity test is mere dicta, and that the opinion's true "touchstone" is "reasonableness." Sec. Br. 29; see also *id.* at 30-35. Not so. The Secretary's attempt to ignore *Kinneen's* necessity test is unsupported by the text and illogical on its face. It would have been surpassingly odd for the Court to use two conflicting tests in the same opinion: a permissive reasonableness test for *Kinneen's* holding, and a stringent necessity test for its dicta.

Kinneen's holding is unequivocal that "[a]ny legislation" postponing the right to vote "must be unconstitutional, unless . . . it is *reasonable and necessary*, in order that the rights of the proposed voter may be ascertained and proved . . . " *Id.* at 499 (emphasis added). The Court elaborated how this standard applies to a law requiring voters to prove their qualifications well before the election, explaining that citizens are entitled to have their qualifications assessed "as near" the election as possible. *Id.* at 502.

The Secretary's alternate suggestion that *Kinneen* "is ultimately a case about voter qualifications, not

registration," Sec. Br. 30, would elevate semantics over substance. As the Superior Court held, when a registration law *disenfranchises* qualified voters who miss a deadline--as opposed to, for example, subjecting their registrations to closer inspection or making them submit provisional ballots--it "effectively create[s] a new qualification for voting." AD51; see also *Kinneen*, 144 Mass. at 501 ("The constitution does not provide that the qualifications it requires shall be possessed by the voter for any period before the election, nor has it ever been held that this was necessary."). Judicial scrutiny of laws requiring citizens to prove their qualifications in order to vote should be proportionate to the statute's *impact*, not its *label*. AD52 ("Constitutional analysis does not turn upon word choice or characterizations.") (citation omitted).

B. The Voter Cutoff Law is unconstitutional unless it is the least restrictive means to promote a compelling government interest.

Even if this Court were to ignore *Kinneen's* language about statutes that disenfranchise voters based on time requirements, which directly controls here, another line of this Court's jurisprudence calls for strict scrutiny. *Cepulonis* holds that a law is subject to strict scrutiny when it disenfranchises

constitutionally-qualified voters. 389 Mass. at 935. The Voter Cutoff Law has exactly that effect.

As the Secretary concedes, the right to vote is fundamental and the "preservative of all rights." Sec. Br. 15, quoting *Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth*, 375 Mass. 85, 94 (1978) ("*Mass. PIRG*"). "Where a statute implicates a fundamental right[,]" the courts "employ 'strict judicial scrutiny.'" *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 330 (2003), quoting *Lowell v. Kowalski*, 380 Mass. 663, 666 (1980). Generally speaking, strict scrutiny requires the Commonwealth to prove that a law promotes a compelling State interest that could not be achieved in a less restrictive manner. *Cepulonis*, 389 Mass. at 935.

This Court has already applied strict scrutiny to a statute governing voter registration. In *Cepulonis*, the Court held that an absentee-ballot statute was unconstitutional to the extent it prevented prisoners from registering to vote because "the Commonwealth [wa]s abridging their right to vote." *Id.* The Court explained that statutory limits on a citizen's right to vote implicate the constitutional guarantee and are permissible only to the extent they survive strict scrutiny. *Id.* at 935-36.

That reasoning applies equally here. Voters who do not register by the Cutoff Date--like the voters in

Cepulonis who did not register before being incarcerated--are entirely deprived of their right to participate in an election. Crucially, although the Secretary has argued that the Voter Cutoff Law relates to the Commonwealth's interest in curbing voting by people who are *not* qualified to vote, it is indisputable that the Voter Cutoff Law results in the mass disenfranchisement of *qualified* voters. Such disenfranchisement, even for one election, cf. *Kinneen*, 144 Mass. at 499, burdens the right to vote and triggers strict scrutiny, see *Cepulonis*, 389 Mass. at 935.

Applying strict scrutiny here would also be consistent with this Court's treatment of other fundamental rights. For example, in *Commonwealth v. Lucas*, this Court applied strict scrutiny to content-based restrictions on political speech. 472 Mass. 387, 396-97 (2015). If restrictions on speech concerning elections are subject to strict scrutiny--even where, as in *Lucas*, the speech is allegedly false, see *id.* at 388-89--then it only makes sense to apply the same demanding standard to restrictions on the right to vote in those elections.

The Secretary's attempts to escape this conclusion find little support in this Court's case law.

First, the Secretary interprets *Cepulonis* as though it were not a case that *required* the application of strict scrutiny to statutes implicating the right to vote. Sec. Br. 38 n.30. This interpretation is belied by *Cepulonis*'s clear mandate that "the State *must*" face strict scrutiny--that is, "demonstrate affirmatively that the challenged provision promotes a compelling State interest which could not be achieved in any less restrictive manner"--because it was "defend[ing] the constitutionality of a statute impinging on fundamental rights." 389 Mass. at 935 (emphasis added; citation omitted). As the Superior Court rightly noted, *Cepulonis* "said nothing about limiting strict scrutiny to 'severe' restrictions of voting rights." AD60.

Second, the Secretary cites federal cases holding that voter-registration deadlines do not compel strict scrutiny. Sec. Br. 20-21, 36-41. These cases are not germane: the Plaintiffs do not seek relief under the U.S. Constitution, which lacks the Massachusetts Constitution's express language guaranteeing the right to vote.¹⁴ Consistent with the special status of

¹⁴ Even when Massachusetts Constitutional provisions do have federal equivalents, which art. 3 does not, they can still provide greater protection than is provided under the U.S. Constitution. See *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 87 (1983) ("[T]he Supreme Court of the United States has made it clear that a State may 'adopt in its own Constitution

voting rights in Massachusetts, this Court has made clear that the Massachusetts Constitution fiercely protects the right to vote from legislative encroachment:

The right to vote is a sacred privilege guaranteed by the Constitution to those lawfully qualified. Every rational intendment is to be made in favor of the rightful exercise of the franchise. That principle pervades and dominates all our decisions and harmonizes them all.

Swift v. Registrars of Voters of Quincy, 281 Mass 271, 277 (1932). Importing federal law would vitiate these heightened protections.

The Secretary repeatedly references a single State that has adopted the federal test. Sec. Br. at 20-21, 24-25, 39-41, citing *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 141 A.3d 335, (N.J. Super. App. Div. 2016), cert. denied, 158 A.3d 567 (N.J. 2017). But one decision by an intermediate appellate State court is not a reason for this Court to use federal case law to interpret a provision that resides exclusively in the Massachusetts Constitution. And to the extent that the decisions of other State courts are relevant here, this Court has good company in rejecting the federal

individual liberties more expansive than those conferred by the Federal Constitution") (citation omitted); *Commonwealth v. Hodge*, 386 Mass. 165, 169 (2000) ("The Massachusetts Declaration of Rights can . . . provide greater safeguards than the Bill of Rights to the United States Constitution.").

standard. Construing an affirmative right to vote under its State constitution, the Supreme Court of Missouri has declined to follow the federal standard because "the issue is constitutionality under Missouri's Constitution, not under the United States Constitution." *Weinschenk v. State*, 203 S.W.3d 201, 216 (Mo. 2006); see *id.* at 211 (explaining, in a voter ID case, that "[t]he express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart") (citations omitted). Likewise, this Court should follow binding Massachusetts precedent, rather than borrow from federal law.

C. The sliding scale test does not apply, but if it did, it would mandate heightened scrutiny.

Rather than focus on this Court's precedent, the Secretary urges this Court to import the sliding scale framework that federal courts have used to assess voting laws, and which this Court has applied only to a law governing a political party's ballot access. See Sec. Br. at 18-25, 39-41; *Libertarian Ass'n of Mass. v. Secretary of the Commonwealth*, 462 Mass. 538, 560-68 (2012) ("LAM"). No Massachusetts court has ever applied this test to a law that disenfranchises constitutionally-qualified voters, and this Court should not do so now. Moreover, even if this Court

were to import this sliding scale test, the Voter Cutoff Law's substantial burden on voting rights would slide the scale to require heightened or strict scrutiny.

1. The sliding scale test does not apply.

While this case concerns voting rights under art. 3, the only Massachusetts case to apply the sliding scale test addressed a different right (ballot access) under a different provision (art. 9). In *LAM*, the Libertarian Party of Massachusetts challenged a law governing how ballot vacancies for presidential and vice-presidential candidates could be filled by a minority political party. See 462 Mass. at 560-61. The Court applied a sliding scale test, under which the "character and magnitude" of the burden that the law imposed on the party would determine the rigor of the Court's review. *Id.*, quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The Court's decision to apply that test, which it borrowed from federal case law, turned on the Court's conclusion that "the scope of ballot access rights" protected under art. 9 was coextensive with the right under the Federal Constitution. *Id.* at 558-59.

LAM's sliding scale test does not apply here for at least three reasons.

First, although the Massachusetts Constitution's protections for ballot access align with those of the Federal Constitution, this is not so for the right to vote. For that right, the Massachusetts Constitution confers "more expansive" liberties, *Batchelder*, 388 Mass. at 87, as "[t]he right or privilege of voting is a right or privilege arising under the constitution of each state, and not under the constitution of the United States," *Kinneen*, 144 Mass. at 497. According to the U.S. Supreme Court, "[t]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 16 (2013) (citations omitted). Because the Massachusetts Constitution affirmatively grants the right vote, it protects a more robust right to vote than the Federal Constitution. *Batchelder*, 388 Mass. at 88-89 (refusing "to force parallelism with the Federal Constitution" where the text of the Massachusetts Constitution differed from the federal text).¹⁵

¹⁵ The Secretary's reliance on federal case law to assert that "the rights of voters and the rights of candidates do not lend themselves to neat separation" similarly falls flat. Sec. Br. 22, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). In Massachusetts, "the question whether one has a right to hold office under the Constitution is separate and distinct from the question whether one has a right to vote." *In re Opinion of the Justices*, 240 Mass. 601, 607 (1922). The Secretary's citation to *Langone v. Secretary of the Commonwealth* does not change this

Second, there are practical reasons to analyze laws governing candidates and parties differently from those governing individual voters. It is one thing to require political parties to make themselves aware of, and muster the resources to comply with, technical election requirements. It is quite another to disenfranchise qualified individual voters for failure to comply with such requirements. Because campaign activity and coverage peaks after the Cutoff Date, thousands of Massachusetts voters either "do not learn" about the deadline before it passes, or else "learn after the deadline that the election will address issues or candidates that interest them sufficiently to vote." AD33. It would be wrong to hold those voters to the same legal requirements as political parties and candidates; as the Superior Court put it, "[t]he voters pass judgment on elected officials, not the other way around." AD62.

Third, and contrary to the Secretary's claims (see Sec. Br. 18-19, 25-35), this Court's pre-LAM cases in no way suggest that a sliding scale or "reasonableness" test should apply to the Voter Cutoff

analysis, as that case nowhere addressed art. 3. 388 Mass. 185 (1983), appeal dismissed sub nom. *Bellotti v. Connolly*, 460 U.S. 1057 (1983). It also arose in an unusual context where a party's associational rights were pitted against a candidate's ballot-access rights and his supporters' voting rights. *Id.* at 191-96.

Law. Instead, these cases suggest that a burden must be "necessary" to be upheld.¹⁶ Noticeably absent from the Secretary's lengthy discussion of *Capen* is a description of the challenged voter-registration law, which permitted registration up to and on the day of the election. 12 Pick. at 498. *Capen* hardly stands for the proposition that, if a law disenfranchises qualified voters who miss a twenty-day registration deadline, it can nevertheless avoid rigorous judicial review.

Accepting the Secretary's invitation to import the sliding scale test would effectively demote the right to vote in Massachusetts below all other fundamental rights. This does not comport with this

¹⁶ *Kinneen*, 144 Mass. at 499; see also *Commonwealth v. Rogers*, 181 Mass. 184, 186 (1902) (noting that "[s]ome legislation [concerning elections] is permissible and necessary") (emphasis added); *Cole v. Tucker*, 164 Mass. 486, 489 (1895) (upholding the use of official ballots as they "are such as may properly be deemed necessary by the legislature, in order to secure to the voters a full and fair election, and an accurate and honest count of the ballots") (emphasis added).

The Secretary's reliance on *Moe v. Secretary of Admin. and Fin.*, 382 Mass. 629 (1981) and *Marcoux v. Attorney General*, 375 Mass. 63 (1978) is misplaced, as these cases do not address, and are not analogous to, voting rights. *Moe*, 382 Mass. at 655-56 (assessing competing interests in the unique context of abortion rights); *Marcoux*, 375 Mass. at 66 (rejecting challenge to law prohibiting possession of marijuana while distinguishing the case from ones in which fundamental rights were at stake).

Court's clear pronouncement that the right to vote is "preservative of all other rights." *Mass. PIRG*, 375 Mass. at 94 (citation omitted).

2. Even the sliding scale test would mandate at least heightened scrutiny.

The Secretary rightly acknowledges that, even when the sliding scale test is applied, the level of scrutiny it requires depends on the burden imposed by the law at issue. Sec. Br. 35-36. The "'character and magnitude' of the burden the State's rule imposes" must be weighed against "the interests the State contends justify that burden." *LAM*, 462 Mass. at 560, quoting *Timmons*, 520 U.S. at 358. Severe burdens trigger strict scrutiny. *Id.* Less-than-severe burdens still "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation," *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257-58 (N.D. Fla. 2016) (citation omitted), taking into consideration "the extent to which the State's concerns make the burden necessary," *LAM*, 462 Mass. at 560 (citation omitted). Given the substantial burden imposed by the Voter Cutoff Law, if this Court imports the sliding scale test--though it should not--it should apply a heightened form of scrutiny.

Missing a single election prevents a citizen from helping to determine who will hold the highest federal

and State offices, who will have the power to appoint judges, who will hold municipal positions with a direct impact on their daily lives, and which ballot initiatives concerning important local and State issues will succeed. See AD67-68. For these reasons, the Superior Court correctly recognized that if the Voter Cutoff Law disenfranchised only one constitutionally-qualified voter, this alone would be a substantial, and even severe, burden. AD67; cf. *Kinneen*, 144 Mass. at 499. But that burden must be multiplied thousands of times, to account for all the qualified voters who are disenfranchised and deterred by the Voter Cutoff Law. AD68; see *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (adopting district court finding that "approximately 100,000 Ohio voters would choose to [early] vote").

At a minimum, these circumstances trigger heightened scrutiny under the sliding scale test. See *Husted*, 697 F.3d at 431-32 (applying heightened scrutiny); *Scott*, 215 F. Supp. 3d at 1257 (holding "statutory framework" that "completely disenfranchises thousands of voters" from a single election "amounts to a severe burden on the right to vote" that triggered strict scrutiny); *Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I. 1994), ("[T]he relevant question is whether plaintiffs' right to vote in any election has been burdened."), *aff'd*,

37 F.3d 726 (1st Cir. 1994). The substantial burden the Voter Cutoff Law imposes on the right to vote either constitutes a severe burden that triggers strict scrutiny or, at the least, a hefty counterweight that requires some degree of heightened scrutiny of the "'precise interests put forward by the State' . . . taking into consideration 'the extent to which those interests make it *necessary* to burden the plaintiffs' rights.'" *Husted*, 697 F.3d at 429, quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); see also *LAM*, 462 Mass. at 560.

The Secretary deploys two tactics designed to downplay the burden caused by the Voter Cutoff Law and thus avoid heightened scrutiny. The first is avoidance. Rather than dispute the Superior Court's finding that the Voter Cutoff Law disenfranchised around 5,500 people who registered after the Cutoff Date but before Election Day in 2016, AD11, the Secretary simply declines to mention it. Likewise, the Secretary does not dispute the Superior Court's finding that many more thousands of people were deterred from registering for or voting in the 2014 federal election on account of the Voter Cutoff Law. AD34, 44.

The second tactic is temporal. The Secretary insists that the Voter Cutoff Law's burdens must be assessed by looking only at how difficult it is to

comply with the cutoff *before* it passes, without inquiring as to the fate of those who miss it. Sec. Br. 36-42. This approach would justify nearly any deadline, however early, on the theory that people ought to simply register on time. It also fails to account for the fact that the Voter Cutoff Law would be less burdensome if the consequence of missing the deadline did not reach disenfranchisement (e.g., casting a provisional ballot instead). The Secretary's approach also faults voters for their disenfranchisement, while failing to acknowledge that the number of people who fail to comply with the Voter Cutoff Law is a useful metric for gauging the difficulty of compliance.

Unsurprisingly, the Secretary's approach is not the law. For example, *Cepulonis* did not focus on whether the prisoner could have registered before entering prison, nor did *Kinneen* focus on whether the non-citizen could have completed his naturalization sooner to meet the thirty-day requirement. In both instances, the Court focused its inquiry on what befell the potential voters *after* it had become too late for them to comply with a statute affecting their right to vote. See *Cepulonis*, 389 Mass. at 935-37; *Kinneen*, 144 Mass. at 499, 503; see also *Husted*, 697 F.3d at 423 (affirming finding that right to vote was burdened where voters were precluded from

participating in early voting, even if they had other means available to cast ballots).¹⁷ This Court should likewise reckon with the reality of disenfranchisement when it assesses burden.

II. THE VOTER CUTOFF LAW CANNOT SURVIVE THE NECESSITY TEST, STRICT SCRUTINY, OR HEIGHTENED SCRUTINY UNDER THE SLIDING SCALE TEST.

The Superior Court ruled that, whether subjected to the necessity test, strict scrutiny, or the sliding scale, the constitutional viability of the Voter Cutoff Law does not present "a close case." AD54. Though they may vary in rigor, all three standards--necessity and strict scrutiny under State law, as well as heightened scrutiny under the federal sliding scale--essentially ask whether a law impinging on the fundamental right to vote is truly justified.¹⁸ Here,

¹⁷ It is of no significance that dicta in *Cepulonis* observed that a voter-registration deadline assessed by the U.S. Supreme Court in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), "did not absolutely disenfranchise voters." 389 Mass. at 937. *Rosario* concerned the U.S. Constitution, not a State case pursuant to art. 3. Furthermore, *Cepulonis* clearly stated that *Rosario* "is not on point" and never indicated that it would adopt or incorporate *Rosario's* reasoning. *Id.*

¹⁸ Under the necessity test, a time requirement fails if it is longer than necessary to ensure voter qualifications and to provide an orderly election. See *Kinneen*, 144 Mass. at 499. Under strict scrutiny, a law is infirm if it fails to pursue a compelling government interest via the least restrictive means. See *Cepulonis*, 389 Mass. at 935-36. And under the sliding scale, a law that imposes a severe burden will

the Superior Court correctly found that the record failed to supply any substantial justification for the Voter Cutoff Law, much less one that could survive an inquiry into its necessity or tailoring. The Secretary gives scant attention to this record, while insisting that a searching inquiry into the Voter Cutoff Law would require “[f]urther proceedings.” Sec. Br. 49. But extensive proceedings have been held, including a four-day bench trial, all of which clarified the utter absence of justification for a law that effects mass disenfranchisement.

A. The Commonwealth’s election-related interests may be compelling, but the Voter Cutoff Law does not promote them.

Although the Commonwealth may well have “compelling interests in ascertaining voter qualifications and in running orderly elections,” Sec. Br. 14, 45, the Voter Cutoff Law does not promote those interests. The law does not merely scrutinize voters who miss the cutoff--it disenfranchises them entirely.

Over the last three presidential elections, the Voter Cutoff Law barred many thousands of qualified

call for strict scrutiny, while less-than-severe burdens still must be justified by a sufficiently weighty State interest, taking into consideration the extent to which that interest makes the burden necessary. See *LAM*, 462 Mass. at 560; *Scott*, F. Supp. 3d at 1257-58.

voters who submitted their registrations between the Cutoff Date and Election Day. AD11. It has also deterred countless others from registering or voting. AD34, 44.

On the other side of the ledger, although some voter-registration applications may need to be corrected, the Secretary does not assert that unqualified people are trying to register to vote in Massachusetts. Unless the Secretary is prepared to argue that it is better for thousands of qualified voters to be disenfranchised than for one hypothetical imposter to slip through--which would be a remarkable stance--the Voter Cutoff Law does not achieve a net increase of "order," "celerity," or any other asserted government interest.

The law's failure to promote the Commonwealth's interests at all, let alone efficiently, reaches its nadir in the form of what are, in effect, voter purges.

Local election officials successfully process, and input into VRIS, numerous registrations submitted after the Cutoff Date. AD1, 39, 55; A827, 1020, 1219. Yet the Voter Cutoff Law compels the system to "exclude[]" those unquestionably qualified voters "from the final voter printout." AD1; see also AD39, 55; A827, 1014. To put it mildly, deleting voters whose eligibility has already been ascertained does not promote any governmental interest in "ascertaining

voter qualifications" or "running orderly elections."
Sec. Br. 14, 45.

The Secretary's brief scarcely mentions the mass disenfranchisement resulting from the Voter Cutoff Law, and it entirely ignores the pre-election voter exclusions. This is perhaps because ignoring the law's costs is the only conceivable way to claim that it has benefits. The law promotes the Commonwealth's interest in running successful elections in much the same way that an amputation promotes a patient's interest in avoiding hangnails: the cure is worse than the ailment.

B. The Voter Cutoff Law's twenty-day deadline is not necessary, the least restrictive means, nor justified by State interests.

Even assuming that the Voter Cutoff Law promotes the Commonwealth's interests, the Superior Court correctly concluded that the record below cannot justify a deadline that falls a full twenty days before Election Day. The Superior Court found, and the Secretary does not meaningfully dispute, that local election officials can and do process large numbers of voter-registration applications in far shorter time than twenty days. See AD54-58. Since there is no justification for the Voter Cutoff law, it would fail any level of heightened scrutiny.

1. Early Voting

The advent of early voting in Massachusetts has created a contradiction in the State's electoral regime: early voting now requires local election officials to process registrations in as few as five days, yet the Voter Cutoff Law still mandates that those officials are given twenty days. The successful implementation of the new law decisively proves that local election officials can prepare for an election in a quarter of the time the Voter Cutoff Law provides. The Voter Cutoff Law is an unconstitutional anachronism that will continue to disenfranchise duly-qualified citizens so long as it remains on the books.

In 2016, early voting allowed any registered voter to cast a ballot five days after the Cutoff Date. AD1. Local election officials "success[fully]" implemented this law. AD8-9, 38-40. In every city and town save one, Boston,¹⁹ officials processed all registrations between Cutoff Date and the start of the early voting. AD38. As a result, anyone who registered on October 19, 2016 could vote at an early voting location in their city or town on October 24, 2016. Yet, because of the Voter Cutoff Law, anyone who

¹⁹ Boston resolved the situation by using provisional ballots for approximately 400 early voters whose names had not yet been entered into VRIS. AD30, 38.

registered on October 20, 2016 would be prohibited from voting on November 8, 2016--fully nineteen days later. AD8-9.

Thus, in November 2016, the Commonwealth proved that it could process registrations within five days or devise alternative and reasonable strategies to enable voting to proceed in the single municipality where some registrations were still being processed. As the Superior Court held, early voting has conclusively shown that the Voter Cutoff Law is unnecessary to ensure orderly elections. AD54. There is simply no record evidence indicating that local election officials cannot process voter-registration applications submitted after the Cutoff Date in time for Election Day. See, e.g., A842-46 (the City of Revere processed *all* registrations it received between the Cutoff Date and Election Day in November 2016).

2. Technological Capability

The Superior Court found that local election officials process voter registrations rapidly and that voter lists are expediently printed: it takes two or three minutes for "[p]rocessing a complete application," and two hours for [p]rinting of full municipal voter lists." AD54-55. Likewise, the Superior Court found that the Commonwealth could allow more people to vote simply by eliminating its

programmed purge of qualified voters and instead "[p]rinting the *full* VRIS data base immediately before election day." AD55.

These findings render a twenty-day cutoff wholly unjustifiable, and the Secretary does not claim that any of them is clearly erroneous.

3. Specially Qualified Voters

Local election officials' quick turnaround for SQVs further underscores the absence of a justification for a twenty-day cutoff. Voters who meet the statutory SQV criteria can register to vote up until 4 p.m. on the day before the election. AD11-12. There is no cap on the number of voters who can avail themselves of this exception, *id.*, and evidence from a sampling of municipalities shows that hundreds did so, AD12, with other SQVs no doubt participating across the Commonwealth. Local election officials' ability to deal with such voters smoothly is at odds with the Secretary's claim that the officials need twenty days to prepare an election. Cf. *Lucas*, 472 Mass. 387, 398-99 (holding statute criminalizing false political speech was not the least restrictive means of achieving State interest in holding fair and free elections because "a remedy [to false speech] already exists" within Massachusetts).

4. Election Regimes in Other States

Finally, the Superior Court determined that the implementation of EDR in sixteen other States and the District of Columbia undermines any attempt to justify a twenty-day deadline in Massachusetts. A65; see *Cepulonis*, 389 Mass. at 936 (noting that “[a] number of States ha[d] enacted statutes” less restrictive than the one in Massachusetts).

Here, the Superior Court found that EDR can advance a State’s interest in running fair, accurate, and accessible elections, while simultaneously increasing voter participation and making elections more efficient. AD16. The EDR bill that the Secretary filed with the legislature after submitting his brief in this appeal suggests that he agrees. See *Lannan*, *supra*.

C. The work of local election officials and the Secretary’s office does not render the Voter Cutoff Law necessary, the least restrictive means, nor justified in achieving State interests.

The Secretary has introduced no evidence that the twenty-day cutoff period is actually warranted. Instead, the Secretary devotes substantial energy toward establishing two propositions that are peripheral to this case: that local election officials work hard to run elections, Sec. Br. 7-11, 48, and that the Secretary’s office works hard to inform

voters of the Cutoff Date, *id.* at 4-6. While these efforts are commendable, they cannot justify the Voter Cutoff Law.

First, accepting that local election officials already work hard, and even assuming they would have to work harder if the Voter Cutoff Law were struck down, there is no evidence that these officials would fail to accomplish their work should the Order be affirmed. To the contrary, the Superior Court found that “[c]hanging or eliminating the twenty-day requirement would shift [local election officials’] work from one period to another, but would not make it impossibly difficult to accomplish the necessary tasks.” AD56. In short, because local election officials can process registrations and prepare for orderly elections in far less than twenty days, the Massachusetts Constitution requires that they do so. As the Superior Court explained, the hard work of election officials deserves “admiration and respect,” but the relevant rights belong to the voters “from a constitutional point of view”. AD56.

Second, although the Secretary deserves credit for attempting to inform the public about the Cutoff Date, the need to do so is one of the Voter Cutoff Law’s costs. The Secretary must spend his office’s time and the public’s money on literature and advertisements designed to inform citizens of the

impending cutoff. As the Superior Court found, the Voter Cutoff Law requires these efforts to be undertaken during a period artificially divorced from peak interest in the election. AD33-35. These efforts may also have the unfortunate effect of reducing turnout by SQVs, whose exemption from the Voter Cutoff Law goes unmentioned in materials telling voters they are out of luck after the Cutoff Date. See A1500-99; see also AD46 (noting that exceptions such as SQVs "are not well-publicized or understood").

Because some of these efforts and expenditures could be eliminated or redirected if the Voter Cutoff Law did not exist, the record does not establish that striking the Voter Cutoff Law would result in any net increase in the administrative burdens, let alone an increase of a magnitude that would justify disenfranchising thousands of eligible voters.²⁰ But even if there were additional burdens or costs, they would provide no justification for a mass infringement of a fundamental right. See *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 249 (2012) ("[T]he fiscal consequences of any . . . judgment on the merits cannot be permitted to intrude on consideration of the case before [the Court]."

²⁰ Similarly, the Superior Court found that EDR can alleviate a state's administrative burdens by reducing the use of provisional ballots. AD16.

(quotation omitted); see also *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) (“There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by . . . state and local offices involved in elections.”).

III. EVEN IF THE COURT WERE TO APPLY RATIONAL BASIS REVIEW, THE VOTER CUTOFF LAW WOULD STILL FAIL.

Ultimately, even the Secretary’s preferred analytical framework cannot save the Voter Cutoff Law. See Sec. Br. 43-44. That is, even if this Court were to import the sliding scale test from federal law and slide down to rational basis, the Voter Cutoff Law still could not stand.

Rationality review is not toothless in Massachusetts. See *Goodridge*, 440 Mass. at 331 (under rational basis, considering and rejecting the State’s three justifications for its policy of denying marriage licenses to same-sex couples). Here, for the reasons stated above, it is arbitrary and capricious to deprive citizens of a fundamental right in return for barely articulated “efficiency” concerns that are not supported by the record.

Although the Superior Court believed that the Voter Cutoff Law could survive rational basis, AD67-68, it recognized that its findings--particularly with respect to the purposeful omission of qualified

voters--"call into question *any* rationale for denying any qualified citizen the right to vote on account of the 20-day deadline," AD1-2 (emphasis added).²¹

CONCLUSION

For the foregoing reasons, the Judgment of the Superior Court should be affirmed.

²¹ Plaintiffs preserved the argument that the law fails under rational basis review. See, e.g., A468 ("[Kinneen] provides that, wholly apart from whether the Voter Cutoff Law is the sort of burden that can survive strict scrutiny or even rational basis review, it is an unnecessary and therefore unconstitutional new voter qualification."); A345 ("The Commonwealth's experience with Early Voting therefore contradicts any argument that 20 days is a rational cutoff, let alone a necessary and least restrictive one.").

Dated: February 1, 2018

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CERTIFICATE OF SERVICE

I, Patrick Welsh, hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including but not limited to Mass. R. App. P. 16 and 20.



Patrick Welsh

CERTIFICATE OF SERVICE

I, Patrick Welsh, a member of the Bar of this court, hereby certify that on this day, February 1, 2018, the foregoing brief was served by courier on counsel for the Appellant.



Patrick Welsh

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STATE HOUSE NEWS SERVICE

<http://www.statehousenews.com>

SAME-DAY REGISTRATION GETS PUSH WITH BACKING FROM GALVIN

By Katie Lannan

STATE HOUSE NEWS SERVICE

STATE HOUSE, BOSTON, JAN. 25, 2018.....Beginning next year, Massachusetts voters would be able to register to vote on the same day they cast their ballots, under a new proposal from Secretary of State William Galvin.

Galvin announced Thursday that he is proposing legislation that would allow Massachusetts residents who are otherwise eligible to vote to go to their local polling place on Election Day, complete a registration form, and vote immediately afterward. Current law requires voters to be registered at least 20 days before an election in which they plan to vote.

"Election Day registration has been shown to be one of the simplest and more effective ways of increasing voter participation, with administrative costs much lower than many other proposals to do the same thing, because it combines the act of registration and voting," Galvin said.



Under Secretary William Galvin's bill, Massachusetts would also join the Electronic Registration Information Center. [Photo: Sam Doran/File/SHNS]

A Galvin spokeswoman said the secretary had presented his legislation to Election Laws Committee chairs Sen. Anne Gobi and Rep. John Mahoney and is "encouraging them to incorporate the language into" related bills that have already been filed.

Several other bills that would establish same-day registration are before the committee, including proposals from Sen. Joseph Boncore (S 367), Sen. Cynthia Creem (S 371), Rep. Jennifer Benson (H 353), and Rep. Liz Malia (H 2093).

Legislative committees face a Feb. 7 deadline to act on bills filed at the beginning of the session and can report them out favorably or unfavorably, pack them into dead-end study orders, or receive more time through an extension order.

Josh Zakim, a Boston city councilor challenging Galvin in the Democratic primary for secretary of state, said he has supported same-day voter registration "for quite some time" and was glad to see "Secretary Galvin showing up at the party." Zakim told the News Service he found it "a little incongruous" that Galvin would announce his proposal while the secretary's appeal is ongoing in a court case that struck down the 20-day voter registration deadline.

"It's something Secretary Galvin has had numerous opportunities to act on in the last two and a half decades that he has been secretary of state and has not done so," said Zakim, who said he has received a positive response from voters when talking about election-day registration on the campaign trail and believes it would reduce unnecessary barriers to participating in the democratic process.

Galvin's office said in a statement that he has "expressed support for Election Day registration in the past."

"Allowing voters to register on Election Day is the next step in our successful effort to expand access to the ballot," Galvin said. "Over the past few years, my office has worked to bring online voter registration, pre-registration and early voting to Massachusetts. This is yet another way to make it easier to cast a ballot for any eligible citizen who wants to vote."

Fifteen states and Washington, D.C. offer same-day voter registration, according to the National Conference of State Legislatures. Hawaii has also enacted same-day registration, set to take effect this year.

Registration deadlines in most other states fall between eight and 30 days before the election, according to NCSL. Massachusetts and Rhode Island are the only two states in New England that do not have same-day registration.

Galvin's proposal would also have Massachusetts join the Electronic Registration Information Center, which his office says is "a group of states whose mission is ensuring the accuracy of voting lists and increasing voter participation."

The Senate in 2014 approved a same-day registration measure but it did not survive talks with the House over an election bill that was signed into law.

-END-

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Metro

State's top election official offers Legislature a plan for same-day voter registration



JESSICA RINALDI/GLOBE STAFF

Secretary of the Commonwealth William F. Galvin.

By [Matt Rocheleau](#)

GLOBE STAFF JANUARY 25, 2018

Massachusetts' top election official unveiled a proposal on Thursday to allow residents to register to vote on Election Day, as he faces a mix of public, legal, and political pressure to eliminate the state's requirement for residents to register at least 20 days in advance.

Secretary of the Commonwealth William F. Galvin said he has always supported the basic notion of so-called same-day or Election Day voter registration, which [research shows](#) can bolster democracy by motivating voters to go to the polls.

But he has worried that making the switch would burden local election officials with added costs as well as technical and logistical challenges.

Now, however, Galvin says he has drafted a proposal that — unlike previous bills aimed at bringing same-day registration to the state — would address those concerns, and he's urging state lawmakers to approve his pitch.

“We've heard advocates for a long time talking about the concept, but they didn't have the details of how this would work,” Galvin said. “That's what we've done here, we've figured out the details.”

Galvin and other state leaders have been under pressure to eliminate Massachusetts' 20-day registration deadline. In the fall of 2016, several advocacy groups [sued](#) the state, and in July a judge [ruled](#) the deadline was unconstitutional. One month later, city councilors in Boston [began a process](#) to explore whether the city could adopt same-day registration on its own sooner than, and regardless of, whatever happens at the state level.

That push was led by City Councilor Josh Zakim, who in late November [announced](#) he will run against Galvin for secretary of the Commonwealth in this year's Democratic primary. Zakim, as a central point of his campaign, has [stressed](#) that he would do more to improve voter access and turnout, including by working to bring same-day registration to Massachusetts.

The state is appealing the court ruling, and Galvin said he still does not agree with the judge's decision, but he said the proposal he announced Thursday was not a result of Zakim's challenge.

Zakim was less certain.

“The timing is very interesting,” he said. “This is something I've been talking about since the beginning of this campaign and it's something that's resonated with voters.”

“I think it's good to see that the secretary after several decades has finally come around on this issue. It's long overdue,” he added.

Galvin said he has presented the proposal to the Legislature's Joint Committee on Election Laws and is hopeful lawmakers will pass it this summer.

The proposal would put same-day registration in effect starting in 2019, which Galvin said would provide time for local officials to adopt and fine-tune the change before the 2020 presidential election.

To register on Election Day, residents would have to prove their identity and residency in person, as in other states with same-day registration.

The practice has been allowed in more than a dozen states, in some cases for decades and without the need for special technology. And it is not always a costly change.

But Galvin said more funding and special technology would be needed to ensure same-day registration is rolled out smoothly, accurately, and securely.

The proposal calls for having statewide electronic poll books at each polling location. Other states use such books, which would connect to the state's database of voters and can verify in real time that the person isn't registered and hasn't already voted.

There would be a startup cost to that, and Galvin said cities and towns would need additional funding for extra staffing on Election Day.

The proposal does not specify how much funding should be provided. Galvin said switching to same-day registration can reduce costs in some areas. For example, it can slash the number of provisional ballots, used if questions about a voter's eligibility arise.

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