

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL NO. 16-3354-D**

**CHELSEA COLLABORATIVE, MASSVOTE,
EDMA ORTIZ, WILYELIZ NAZARIO LEON
And RAFAEL SANCHEZ,
Plaintiffs,
vs.**

**WILLIAM F. GALVIN, as Secretary of the Commonwealth of Massachusetts,
DIANA R. COLELLA, as Election Commissioner for the City of Revere,
JEANNETTE CINTRON WHITE, as City Clerk of the City of Chelsea and
NICHOLAS P. SALERNO, as Chairman of the Somerville Election Commission,
Defendants**

**AMENDED ORDER ON MOTION FOR
PRELIMINARY INJUNCTION**

The individual plaintiffs, Edma Ortiz, Wilyeliz Nazario Leon and Rafael Sanchez (“individual plaintiffs”) are registered voters who wanted to vote in the election of November 8, 2016, but faced denial of the right to vote solely because they did not register to vote at least twenty days before the election (“twenty-day deadline”). The twenty-day deadline is established in G. L. c. 51, § 1F (“Section 1F”), which provides, in relevant part:

A person who resides in the commonwealth and in the city or town where he claims the right to vote in an election at which electors of president and vice-president are to be chosen, but whose name is not included in the current annual register of voters of the city or town where he claims the right to vote, may qualify for voting only for such electors upon application to the registrars of voters of said city or town, not later than eight o'clock post meridian of the twentieth day preceding such election.

See also G. L. c. 51, §§26, 34 (“After eight o'clock in the evening of a day on which registration is to cease, the registrars shall not register any person to vote in the next primary or election, except” for those standing in line by 8 P.M. of the deadline day).

The individual plaintiffs filed a Motion for Preliminary Injunction (“Motion”) ordering the defendants to allow them to vote in the November 8, 2016 election. The organizational plaintiffs do not seek any preliminary relief. Nothing in the Motion or in this decision would affect any voters other than the individual plaintiffs.

The individual plaintiffs’ right to vote would have been lost irreparably on November 8, unless the Court granted at least some immediate relief under the Motion. After hearing on November 7, 2016, the Court therefore ordered the defendants to accept provisional ballots from the individual plaintiffs. See below, Part III. The question now is whether to count the votes. That question cannot wait, because of the tight time deadlines for certifying final votes, as discussed below (at id.). The parties filed a Joint Motion to Modify the Court’s November 7, 2016 Preliminary Injunction on November 17, 2016.

BACKGROUND

This year, the registration deadline to vote in the November 8, 2016 election was 8 P.M. on October 19, 2016. Except for the failure to register by the 20-day deadline, the individual plaintiffs are otherwise qualified to vote. The parties’ November 17 filing stipulates to the following facts:

- Plaintiffs Edma Ortiz, Wilyeliz Nazario Leon, and Rafael Sanchez have completed and submitted voter registration applications in which they affirmed that they are United States citizens and Massachusetts residents who are eligible and qualified to vote under the Massachusetts Constitution. The Commonwealth is not contesting these affirmations at this time.
- Plaintiffs Edma Ortiz, Wilyeliz Nazario Leon, and Rafael Sanchez each were registered to vote in Massachusetts after October 19, 2016.
- Apart from being submitted after October 19, 2016, the voter registration applications for Plaintiffs Edma Ortiz, Wilyeliz Nazario Leon, and Rafael Sanchez were properly submitted and processed by Defendants.

- Consistent with this Court's order dated November 7, and with advance coordination among the state and Local Defendants, Plaintiffs Edma Ortiz, Wilyeliz Nazario Leon, and Rafael Sanchez did cast provisional ballots in their localities on November 8, 2016.

The record on the Motion provides additional details, which are found as facts only preliminarily, solely for purpose of the Motion. In particular, Ms. Ortiz registered in Chelsea on October 29, 2016. She left Boston to fly to Puerto Rico on October 5, 2016 because her mother unexpectedly died. She returned on October 19, went to Chelsea Collaborative to register on October 20, and learned that it was too late. She does not have a computer, which made it hard to register electronically. Ms. Leon has now registered in Revere, having mailed her voter registration form on October 31, 2016, after the deadline. She was not aware of the deadline. Mr. Sanchez has mailed his voter registration form to Somerville City Hall, but did not learn of the deadline until October 20. He assumed that the deadline would be short, because he did not think it should take long to verify voting eligibility.

The organizational plaintiffs are organizations that educate voters, conduct get-out-the-vote activities and assist people in registering to vote. Some of their resources are consumed in addressing the consequences of the 20-day registration deadline.

As commonly occurs for nearly every election, many events, debates and election-related activities have occurred since October 19, 2016 this year. The deadline precludes voting by those who, for whatever reason, do not learn before that date about the deadline or who learn after the deadline that the election will address issues or candidates that interest them sufficiently to vote.

Section 1F was last amended on January 2, 1997 by St. 1996, c. 454, § 7. The Legislature has not weighed the burden of the twenty-day deadline in nearly 20 years, despite the obvious advances in information technology, other changes in resources and practices, and even

statutory authorizations that have affected whatever arguments may have favored that deadline in 1997. For instance, G.L. c. 54, § 25B, added by St. 2015, §§ 12, 26 authorized early voting for the present 2016 biennial state election. “The voting period for early voting shall run from the eleventh business day preceding the general election until the close of business on the business day preceding the business day before the election . . .” G. L. c. 54, § 25B(c) (emphasis added). That left only 5 days between the 20-day deadline and commencement of early voting on October 24. To implement this statute requires allowing votes by persons who registered only 5 days earlier.

DISCUSSION

To obtain preliminary relief, the individual plaintiffs must prove a likelihood of success on the merits of the case and a balance of harm in their favor when considered in light of their likelihood of success. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). “One ... is not entitled to seek [injunctive] relief unless the apprehended danger is so near as at least to be reasonably imminent.” Shaw v. Harding, 306 Mass. 441, 449-50 (1940). A party seeking to enjoin governmental action must also ordinarily show that “the relief sought will [not] adversely affect the public.” Tri-Nel Mgt. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001), citing Commonwealth v. Mass CRINC, 392 Mass. 79, 89 (1984).

The right to vote is fundamental, as guaranteed by the Massachusetts Constitution, Amend. Art. III (“Art. III”) and Decl. Rts. Art IX. In particular, Amend Art. III (as amended through 2000) provides:

ART. III. Every citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to

vote in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

In mandatory terms (“shall have a right to vote”), this provision grants the right to vote in plain language, without restriction as to time of qualification, apart from the six month residency requirement. Indeed, Amend. Art. III does not even mention registration as an advance qualification to exercise the “right to vote.” The parties sensibly acknowledge, and the Court agrees at this stage of proceedings, that the Legislature has an unstated (and perhaps even implied) power to require registration, as a reasonable regulation designed to ensure that a voter actually meets constitutional qualifications. The individual plaintiffs all qualified as voters under Amend. Art. III well before the November 8 election, as confirmed by their registration under statutory provisions. The question is whether the Commonwealth may nevertheless deny these constitutionally qualified voters the right to vote because of a statute that sets a deadline for their registration.

A strict construction of Amend. Art III would prohibit any regulation to impose an advance registration deadline, because such a requirement would disenfranchise voters who, without question, have an Art. III right to vote. The Court and parties acknowledge, at this stage, however, that the Legislature has some additional power to set a reasonable time for registration, despite the absence of any pertinent constitutional language making timely advance registration an additional voter qualification. The parties diverge significantly upon the breadth of the Legislature’s power and the scope of the Commonwealth’s burden to justify regulation of indisputably qualified voters.

“[W]hen it defends the constitutionality of a statute impinging on fundamental rights, the State must demonstrate affirmatively that the challenged provision promotes a compelling State interest which could not be achieved in any less restrictive manner . . .” Cepulonis v. Secretary

of the Commonwealth, 389 Mass. 930, 935 (1983) (holding unconstitutional certain statutory restrictions upon voter registration of prison inmates), quoting Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth, 375 Mass. 85, 93 (1978). The plaintiffs argue that this test applies here.

The Commonwealth argues for a different test. It urges (Comm. Mem. at 7) that the Cepulonis test applies only when, like the prohibition on inmate registration, a law so affects a fundamental right “that it cannot be exercised or is significantly burdened. See Cepulonis, 389 Mass. at 937, distinguishing Rosario v. Rockefeller, 410 U.S. 752 (1973) on the ground that “[t]here the plaintiffs failed to register before a statutory deadline and could not vote in the next primary. The time limit in that case did not absolutely disenfranchise voters or deprive them of the right to vote for a lengthy period. Id. at 757. Cf. Kusper v. Pontikes, 414 U.S. 51 (1973) (twenty-three month period before a person could change party affiliation held too restrictive and hence unconstitutional.)” The Commonwealth urges a “test to determine the constitutionality of voting regulations whereby both the burden on the voter and the state interest in voting regulations are taken into account.” Comm. Mem. at 7, citing Burdick v. Takushi, 504 U.S. 428, 443-444 (1992). According to the Commonwealth (at 7), the following test applies:

Under that test, “when the burden imposed by a ballot access regulation is heavy, the provision must be narrowly tailored to promote a compelling state interest.” Barr v. Galvin, 626 F.3d 99, 109 (1st Cir. 2010). “Reasonable, nondiscriminatory restrictions, however, need be justified only by legitimate regulatory interests.” Id.; accord Clingman v. Beaver, 544 U.S. 581, 586-87 (2005).

The cited cases arise in the ballot access context, not in a dispute over the right of voters to vote.

The parties cite no case that addresses whether the Massachusetts Constitution – particularly Art. III - may afford greater rights to voters than the United States Constitution. Moreover, the cases cited by the Commonwealth turn on the federal constitution, which has no

analogue to Art. III.¹ It is therefore not dispositive that the Supreme Judicial Court has declined to extend greater protections than exist federally under a different provision of the Massachusetts Constitution. Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538 (2012) (“Art. [IX] does not extend any protections beyond the Federal constitutional requirements”). The plaintiffs have grounded their arguments primarily in Article III, which may or may not receive treatment different from that articulated in Libertarian Ass'n. At this point, the fundamental right conferred by Art. III would seem to require the stricter scrutiny advocated by the plaintiffs.

Nor do the parties cite cases that address the situation here: where one deadline applies to early voting and another applies to Election Day voting. While a final determination of the extent of the Legislature’s power must await appellate determination – and has not even been finally decided by this trial court – the Court concludes, for reasons stated below, that on the present, necessarily abbreviated, state of the record imposition of a 20-day deadline does not meet any test that is likely to apply, given that a 5-day deadline is sufficient for early voting. The Court recognizes that the parties are developing a much more complete record upon which

1. Thus, it was in the Equal Protection context of a ballot access case that the First Circuit Court of Appeals said in Barr, 626 F.3d at 108-109:

We freely acknowledge that the right to vote is central to the operation of a democratic society. Consequently, "any restrictions on that right strike at the heart of representative government." Werme v. Merrill, 84 F.3d 479, 483 (1st Cir.1996)(quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)). Some substantial regulation of elections is necessary, however, to ensure that they are fair, honest, and orderly. *See*, e.g., *id.* (citing Storer, 415 U.S. at 730).

Other federal cases have turned on voters’ associational rights under the First Amendment. *See* Clingman v. Beaver, 544 U.S. 581, 591-593 (2005) (holding that a semi-closed primary system does not violate the right to freedom of association).

to base a final ruling. For purposes of preliminary relief, the plaintiffs have sufficient grounding in the Constitution and case law to support their approach.

It is true that the plaintiffs had the opportunity to register well in advance of the election, which, for many (although not all) people is not difficult. It is also clear that people may not register by the deadline for reasons having nothing to do with neglect, such as the need to attend to other more pressing or immediate matters, their late-breaking awareness that the election does matter to them, or the like. In practice, the twenty-day deadline effectively prevents these people from voting. The plaintiffs appear to be among that group and have shown a sufficient infringement on their right to vote to support preliminary relief. In particular, their recent understanding of their interest in voting and the issues on which they wish to vote will not find expression in a vote unless the court grants relief. That is, they have shown a sufficient likelihood that they, in fact, are entitled to vote notwithstanding the twenty-day deadline. Perhaps even more significant is the fact that this right, if it exists, will be lost irreparably in a matter of days, unless the Court grants some form of relief.

The plaintiffs also point out that about 14 states have election-day registration. Even a case cited by the defendants involved upholding a seven day deadline in Connecticut against a federal equal protection challenge. ACORN v. Bysiewicz, 413 F. Supp. 2d 119, 141-49 (D. Conn. 2005). To be sure, other states have longer deadlines, some of which the federal courts have approved over the decades. The defendants have also pointed out the extensive voter registration information and opportunities made available to the public well before October 19. The Commonwealth's conscientious efforts to inform and register voters by the deadline may well have legal significance, if the twenty-day deadline need only pass a low level of scrutiny. However, those efforts do not respond to the realities presented by late-breaking (post-October

19) events or personal losses and needs or other individual impediments to focusing on the registration deadline and the citizen's desire to vote. If those realities matter, then the Commonwealth has offered only a theoretical justification for some deadline -- but no actual evidence showing why a twenty-day deadline continues to be rational in the 2010s, let alone why there are no less restrictive alternatives.

The most troubling aspect of the Commonwealth's position is implicit in the Legislature's approval a much shorter time period between registration and early voting.² The abbreviated record on the Motion suggests that the technology and systems are in place to allow voting by persons who registered much closer to the election than 20 days -- in particular, the technology to allow voting 5 days before casting a ballot appears to exist. The defendants present no evidence of difficulties arising from the short time between the 20-day deadline and the commencement of early voting. In short, the present state of the record shows no real reason, grounded in data, facts or other evidence, why the Commonwealth accomplishes anything by implementing a 20-day deadline that deprives the individual plaintiffs of their right to vote.

On the other hand, the defendants have shown significant problems with judicial imposition of a new rule, particularly at the last minute. They have also shown that same-day registration may present difficulties. In this case, however, the plaintiffs do not seek a wide-ranging preliminary remedy. There are only three individual plaintiffs currently before the Court, all of whom filed their complaint on November 1, in time to be heard before the November 8 election, with adequate notice to the affected officials. The burden on the defendants of accepting provisional ballots (and now counting them) is minimal. The Court will

² At this early stage, the evidence permits a conclusion that there is no rational reason to impose a 20 day deadline for Election Day voting, when a much shorter time period applies to registration before early voting.

not impose a broader remedy than requested by the three individual plaintiffs and will proceed promptly to adjudicate whether their ballots should be counted.

Both sides have a substantial likelihood of success on the merits. The Court in no way suggests how this case will come out in the end. Because either side may win, the most important consideration is any irreparable harm that might occur as a result of grant or denial of the Motion. That consideration weighs strongly in the plaintiffs' favor. On balance at the preliminary injunction stage, the complete and irretrievable loss of the alleged right to vote (even provisionally) in the November 8 election overcomes any harm to the defendants or the public. Indeed, provisional votes by three individuals is well within the defendants' capacity to handle on Election Day. Provisional votes caused no irreparable effect at all, because, if, after further consideration on the merits, the defendants have the better argument, the Court could order that the provisional votes be disregarded.

After the opportunity for the parties to make supplemental submissions on the Motion, the Court now concludes that the provisional votes should be counted, because the irreparable harm to the individual plaintiffs' constitutional right to vote outweighs any harm to the defendants or the public interest, in light of the plaintiffs' likelihood of success on the merits of the constitutional challenge, as applied to them with respect to the November 8, 2016 election.

III. RELIEF

The plaintiffs have requested an order allowing them to cast a regular ballot. Because of the substantial legal questions raised by this case, including substantial arguments in favor of the 20-day deadline advanced by the defendants, the Court initially declined to order a remedy that

cannot be undone.³ Instead, it ordered the defendants to allow the three individual plaintiffs to cast provisional ballots under G. L. c. 54, §76C(a)-(c), which read:

(a) Whenever a person asserting a right to vote in a primary, caucus, preliminary, or other election appears at the polling place for the precinct in which that person resides, but that person is not permitted to vote, that person shall be allowed to deposit a provisional ballot as provided in this section. A precinct election officer who cannot confirm a potential voter's eligibility to vote on election day shall notify the individual of the option of appearing before the city or town clerk to dispute eligibility or vote a provisional ballot in that precinct pursuant to the procedures set forth in this section. An election officer who believes that the individual may be eligible instead to vote in a different precinct shall direct the individual to the polling place for that precinct.

(b) To cast a provisional ballot, an individual shall execute a provisional ballot affirmation before a precinct officer at the polling place declaring that the individual is a registered voter in the city or town and resides within the geographical boundaries of the precinct.

(c) A provisional voter shall be requested to present identification when completing a provisional ballot. Failure to present identification shall not prevent the voter from completing a provisional ballot.

(d) A provisional ballot shall be counted if the city or town clerk determines that the individual is eligible to vote in the precinct in the election under the law of the commonwealth. A provisional ballot shall not be counted if the city or town clerk determines that the individual is ineligible to vote in the precinct in the election under the law of the commonwealth. A provisional ballot cast by a person whose name is not on the voting list for the city or town in which they are claiming the right to vote, but whom the city or town clerk determines to be eligible to vote in another precinct of the same city or town, shall be counted in the precinct in which the person cast the provisional ballot for all offices for which the person is eligible to vote.

The Commonwealth argues that this provision does not apply, because the second sentence in paragraph (a) provides: “[a] precinct election officer who cannot confirm a potential voter's

³ Moreover, such an order would depart from at least the policy expressed in G. L. c. 54, § 76C(e), applicable to orders to extend the time for voting in federal elections:

(e) An individual who votes in an election for federal office as a result of a federal or state court order or any other order extending the time established for closing the polls by a state law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot. A provisional ballot cast during an extension of the time for closing the polls required by orders described in this subsection shall be separated and held apart from other provisional ballots cast by those not affected by the order.

eligibility to vote on election day shall notify the individual of the option of appearing before the city or town clerk to dispute eligibility or vote a provisional ballot in that precinct pursuant to the procedures set forth in this section.” The Commonwealth says that the officials could, in fact, confirm that the individual plaintiffs are not eligible because they did not register in time. This argument would defeat the plaintiffs’ asserted constitutional right to vote in this case. The Court should construe the statute, if possible, to avoid reaching a constitutional question, because the Legislature is presumed to have acted with the intent to comply with the Constitution. See Verrochi v. Commonwealth, 394 Mass. 633, 638 (construing statute to avoid constitutional difficulties).

A constitutionally sound construction is straightforward. The second sentence in paragraph (a) merely determines when the officials must inform a voter of a right to cast a provisional ballot. Notice to the voter is not the issue here. The controlling language appears in the first sentence of paragraph (a), which reads: “Whenever a person asserting a right to vote in a primary, caucus, preliminary, or other election appears at the polling place for the precinct in which that person resides, but that person is not permitted to vote, that person shall be allowed to deposit a provisional ballot as provided in this section.” The serious constitutional question regarding the applying the 20-day deadline to plaintiffs who have obtained a court order necessarily renders the local officials unable to “confirm a potential voter’s eligibility to vote on election day.” This provision specifically requires the defendants to accept a provisional ballot if not otherwise permitted to vote.

Most importantly, the individual plaintiffs are “registered voter[s] in the city or town.” Paragraph (b) only requires an affirmation “declaring that the individual is a registered voter in the city or town.” Nothing in the statute requires an affirmation that the voter registered before

the 20-day deadline. Accordingly, a registered voter (including the three individual plaintiffs) may sign the affirmation even if that voter did not register by the deadline. For purposes of this election, the requirement of paragraph (b) will be met in this case by an affirmation declaring that, by virtue of the constitution the voter is deemed a registered voter in the city or town and resides within the geographical boundaries of the precinct.

The time for establishing final entitlement to vote is short, under G. L. c. 54, § 76C(f), which provides:

(f) The city or town clerk shall count all eligible provisional ballots. A provisional ballot cast by an individual whose voter information is verified before 5:00 p.m. on . . . the twelfth day after a state election shall be removed from its provisional ballot envelope, grouped with other ballots in a manner that allows for the secrecy of the ballot to the greatest extent possible, and counted as any other ballot.

The Court meets this deadline by ruling based upon the facts presently before it, without in any way suggesting how this case will come out in the end. Thus, the Court stresses that it is not reaching a final determination on the constitutionality of any statute. Indeed, the plaintiffs have disclaimed any argument that the Court should establish any new deadline or take any similar action, which is certainly committed to the Legislature's determination.

ORDER

After hearing, the COURT HEREBY ORDERS AS A PRELIMINARY INJUNCTION THAT, pending further hearing:

1. The defendants shall tabulate the provisional ballots cast by Edma Ortiz, Wilyeliz Nazario Leon and Rafael Sanchez in the November 8, 2016 election pursuant to G. L. c. 54, § 76C, notwithstanding any failure to register before October 19, 2016.
2. This order does not apply in favor of, or grant rights to, anyone other than (on a preliminary basis only) to Edma Ortiz, Wilyeliz Nazario Leon and Rafael Sanchez, and is entered only with respect to the election of November 8, 2016, in response to a timely Complaint, filed November 1, 2016.

3. By November 30, 2016, the parties shall submit a proposed schedule for resolving the remaining issues in this case.

Dated: November 18, 2016

Douglas H. Wilkins, Associate Justice