

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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No. SJC-12435

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CHELSEA COLLABORATIVE, et al.,  
*Plaintiffs-Appellees,*

v.

WILLIAM F. GALVIN, as Secretary of the Commonwealth of  
Massachusetts, et al.,  
*Defendants-Appellants.*

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ON DIRECT APPELLATE REVIEW FROM A JUDGMENT OF THE  
SUPERIOR COURT FOR SUFFOLK COUNTY

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BRIEF FOR AMICUS CURIAE PROFESSOR ALEXANDER  
STREET, Ph.D. IN SUPPORT OF APPELLEES

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**OTHER AUTHORITIES**

Choi, Hyunyoung & Hal Varian, "Predicting the Present with Google Trends", 88 <i>Economic Record</i> 2 (2012) .....	10
---	----

Rublin, Amy, "The Role of Social Science in  
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Street, Alex et al., "Estimating Voter  
Registration Deadline Effects with Web  
Search Data," 23 *Political Analysis* 2,  
225-241 (2015), available at  
[tinyurl.com/StreetArticle2015](http://tinyurl.com/StreetArticle2015) .....6

Supporting Information: Street, Murray,  
Blitzer and Patel, 2015, "Estimating Voter  
Registration Deadline Effects with Web  
Search Data," available at  
[tinyurl.com/StreetSupport2015](http://tinyurl.com/StreetSupport2015) .....13

Amicus Curiae Professor Alexander Street, Ph.D. respectfully submits this brief pursuant to his motion under Massachusetts Rule of Appellate Procedure 17 for leave to file a brief as amicus curiae, filed on January 31, 2018.

**STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>**

Professor Street is an Associate Professor of Political Science at Carroll College in Helena, Montana.<sup>2</sup> In a study published in 2015, Professor Street collaborated with a statistician and two Google employees to study how web search data can be used to estimate the impact of voter registration deadlines in different states.<sup>3</sup> Professor Street submits this brief

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<sup>1</sup> Pursuant to Aspinall v. Philip Morris Cos., 442 Mass. 381, 480 n.8 (2004), undersigned counsel state that (1) Wilmer Cutler Pickering Hale and Dorr LLP does not represent any of the parties to this case in other litigation presenting the same issues as are presented in this case; and (2) no counsel for a party authored this brief in whole or in part, nor has any party made a monetary contribution intended to fund the preparation or submission of this brief. During proceedings in the Superior Court, Plaintiffs-Appellees retained Professor Street at an hourly rate to prepare a draft expert report. The draft report focused on a publicly-available journal article authored by Professor Street and others, discussed in detail infra. The draft report was not submitted to the court and Professor Street did not appear as an expert witness.

<sup>2</sup> Additional background is set out in the Motion for Leave to File Amicus Brief, dated January 31, 2018.

<sup>3</sup> Professor Street's coauthors were Thomas A. Murray, Ph.D., then a Post-Doctoral Fellow in Biostatistics at the MD Anderson Cancer Center at the

in support of Appellees Chelsea Collaborative, MASSVote, and Rafael Sanchez.

### INTRODUCTION

The Massachusetts Constitution specifically protects the fundamental right to vote. As this Court recognized, "voting has long been recognized as a fundamental political right and indeed the 'preservative of all rights.'" Massachusetts Pub. Interest Research Grp. v. Secretary of the Com., 375 Mass. 85, 94 (1978) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). The Superior Court correctly held that Massachusetts' voter-registration statute-- which prohibits qualified voters from casting ballots unless they registered at least 20 days before a statewide election--infringes that constitutional right. In so holding, the Superior Court recognized the substantial burden that the 20-day cutoff imposes on voting rights.<sup>4</sup>

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University of Texas (now an Assistant Professor at the University of Minnesota); John Blitzer, Ph.D., a Research Scientist at Google; and Rajan S. Patel, Ph.D., a Senior Director at Google.

<sup>4</sup> As Appellees explain, the court found that the cutoff prevents tens of thousands of qualified Massachusetts citizens from voting. This burden on the right to vote is central to evaluation of the cutoff's constitutionality. See Appellees Br. 20-21 (because the 20-day cutoff unnecessarily disenfranchises thousands of registered, qualified voters and prevents tens of thousands more from registering, it fails the "necessary" standard established by Kineen as well as any other meaningful

Peer-reviewed empirical research amply confirms that conclusion. In 2015, Professor Street and his colleagues published "Estimating Voter Registration Deadline Effects with Web Search Data" in *Political Analysis*, a leading political science journal.<sup>5</sup> Their research employed sophisticated analysis of Google search data, correlated with data on voter registration timing from sixteen states' voter files, to model the relationship between Google searches for voter registration information and actual registration activity. The authors then used this model to estimate how many people are prevented from voting by pre-Election Day registration deadlines.

Professor Street's model estimated that tens of thousands of Massachusetts citizens could not (in the Superior Court's words) "turn their interest into a vote" due to the 20-day deadline. Chelsea Collaborative v. Galvin, 2017 WL 4125039, at \*17 (Mass. Super. July 25, 2017). Specifically, according

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scrutiny); id. at 34-37 (in light of the 20-day cutoff's substantial burden on voting rights, heightened scrutiny should apply even if the "sliding scale" test were appropriate).

<sup>5</sup> Street et al., "Estimating Voter Registration Deadline Effects with Web Search Data," 23 *Political Analysis* 2, 225-241 (2015), available at [tinyurl.com/StreetArticle2015](http://tinyurl.com/StreetArticle2015). For brevity, we will on occasion refer to the peer-reviewed research conducted and published by Professor Street and his colleagues as "Professor Street's" research.

to Professor Street's analysis, between 48,000 and 141,000 more people would have registered to vote in Massachusetts in 2012, had they been able to do so up through Election Day.<sup>6</sup>

Professor Street's research is reliable, it was accepted by the experts both for Appellants ("the Secretary") and for Appellees, and it addresses a crucial issue in this case: the extent to which the 20-day cutoff burdens voting rights in Massachusetts.

The Secretary's expert, Dr. Charles Stewart, acknowledged that he had relied on Professor Street's research as one of the bases for his opinion in another case. Tr. 782:22-783:4. He testified that Professor Street and his colleagues "did a good job of predictive accuracy" in estimating the increase in voter registration and turnout that would occur if registration were permitted through Election Day. Tr. 785:9-18. He also acknowledged that Professor Street's research showed that: (a) there is a strong

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<sup>6</sup> This is the 90% "prediction interval" for the range of plausible estimates. In other words, 90% of plausible estimates of post-deadline registrations fall within this range. A prediction interval has the merit of accounting not only for the range of plausible estimates of the relationship between known and unknown variables in a statistical model, but also for the fact that random factors may affect any particular case. Thus, this range accounts for both the relationship between web search activity and registration and for the reality that factors such as weather may affect registrations on any given day.



correlation between web searches and registration, illustrated by the fact that “[o]n days in which there were more searches, there tended to be more registrations in the states that allow registration” (Tr. 784:16-24); (b) interest in registering to vote persists after registration deadlines, “and, in fact, it starts to creep up as we get closer to the election” (Tr. 783:5-15; see also Tr. 784:25-785:4); and (c) in Massachusetts, Professor Street’s model predicted that between 48,000 and 141,000 additional people would register to vote if they could do so through Election Day, with a middle estimate of 87,000 (Tr. 785:19-786:13.). Indeed, Dr. Stewart testified that, even without Professor Street’s analysis, “we ... know that if we eliminate the registration period [i.e., allow registration up through Election Day], then people will register during that period and it’s likely to be more than register now.” Tr. 786:24-787:5 (emphasis added). Professor Street’s analysis adds to that knowledge by “giv[ing] us an estimate” of how many more people will register. Tr. 787:4-5.

Appellees’ expert, Dr. Barry Burden, also endorsed Professor Street’s research. He relied in part on that research in forming his opinion as to the effect of the 20-day cutoff. Tr. 198:4-6. He verified that Professor Street’s study “use[d] generally accepted principles in political science”

Tr. 197:24-198:3. And he explained that the measures the study used--Google search activity and official voter registration activity--"are indicators that political scientists would find valuable for measuring either real transactions with election officials or voter interests." Tr. 198:14-19.

Section I of this brief will explain Professor Street's methodology and conclusions. Section II will explain how those conclusions confirm that the 20-day cutoff severely burdens the right to vote.

#### **ARGUMENT**

##### **I. GOOGLE SEARCH DATA INDICATES THAT TENS OF THOUSANDS OF MASSACHUSETTS CITIZENS WOULD REGISTER TO VOTE BUT FOR THE 20-DAY CUTOFF**

In every recent presidential election cycle, millions of Americans searched online for information about registering to vote after the registration deadline in their state had passed. Intuitively, these searches suggest that many Americans want to register to vote in an impending election even when they can no longer do so.

Professor Street's research confirms and quantifies that intuition. By measuring the correlation between web search behavior and registration behavior prior to a registration deadline, Professor Street was able to estimate how the volume of post-deadline searches would correspond

to additional voter registrations if registration were permitted up through Election Day. In Massachusetts, Professor Street estimated that an additional 48,000 to 141,000 people would have registered to vote in 2012.

This section will explain how Professor Street reached these conclusions.

**A. Google Search Data Offers New Insights into the Effects of Registration Deadlines**

Historically, measuring the effect of registration deadlines has proven difficult. Controlled experiments are impossible. Some studies have compared voter turnout between counties or states with different deadlines, but it is very difficult to determine whether the cause of divergent rates is a difference in registration deadlines or some other difference between the counties or states examined.

Professor Street and his colleagues took a new approach to this issue by examining Google search data. Such data provides reliable, objective information and yields insights into web users' interests and desires.<sup>7</sup> It supplies direct evidence of

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<sup>7</sup> Scholars in diverse fields have analyzed search data to provide new insights into intractable questions. For example, two scholars analyzed motor vehicle and parts sales, initial unemployment claims, and vacation travel by examining the relationship between government statistics and web search queries regarding those subjects. See Choi & Varian, "Predicting the Present with Google Trends", 88

what information Americans are looking for and where and when they seek it. It is also readily available: large volumes of search data are available to the public on the Google Trends website.<sup>8</sup>

The research Professor Street and his colleagues undertook differs from earlier research in that theirs is the first to provide direct evidence that many people are still interested in registering to vote after the registration deadline in their state has passed.

**B. Google Search Data Shows that Interest in Registering to Vote Persists After Registration Closes**

Professor Street and his colleagues began by identifying search terms that indicate an interest in registering to vote. They chose the terms "register to vote" and "voter registration," either alone or combined with the name of the state where the search originated. Street et al., supra n.5, at 227.<sup>9</sup> Users

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*Economic Record* 2 (2012).

<sup>8</sup> As explained in their article, Professor Street and his colleagues used information from Google web search logs. Those logs are the source of the information available to the public on the Google Trends website, but are more comprehensive. See Street et al., supra n.5, at 227. The authors published their data and code online with their article, to allow other academics to replicate their results. See id.

<sup>9</sup> Thus, for example, "Maine voter registration" would count if the search originated in Maine, but not if it originated in Massachusetts.

who searched for those terms were more likely to “click through” to official sources of information on how to register--usually on the website of the Secretary of State--than on any other link in the search results. See id.<sup>10</sup>

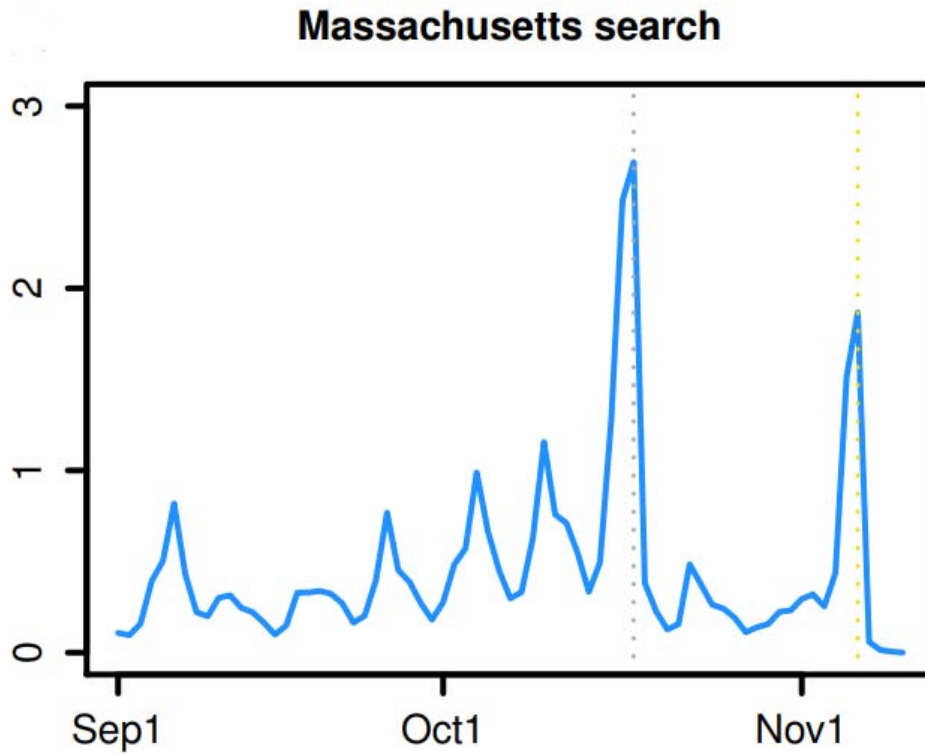
Professor Street and his colleagues then measured the number of searches for those terms in the 67-day period from September 1, 2012 through Election Day on November 6, 2012. See id. at 228. Based on the results, their first key finding was that interest in registering to vote did not disappear once the applicable deadline had passed. To the contrary, there were generally two peaks in interest: one just before the voter registration deadline and one after, as Election Day approached. See id. (“Most states show two peaks in search activity: at the time of the registration deadline, and on the Monday before the election and Election Day itself.”).

This is exactly what the authors found with respect to Massachusetts. The chart below shows searches for “voter registration” and related terms from September 1, 2012 to November 10, 2012, with the registration deadline (October 17) marked with a dotted grey line and Election Day (November 6) marked

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<sup>10</sup> This finding implies that users searched for the selected terms because they were interested in registering to vote, and not for some other purpose.

with a dotted yellow line.<sup>11</sup>



Supporting Information, at 53, Fig. 1.

As the chart clearly shows, many searches occurred after the registration deadline passed, with a significant spike in interest in the final two days of the campaign cycle, on the Monday before Election

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<sup>11</sup> See Supporting Information: Street, Murray, Blitzer and Patel, 2015, "Estimating Voter Registration Deadline Effects with Web Search Data," at 53, Fig. S1, available at [tinyurl.com/StreetSupport2015](http://tinyurl.com/StreetSupport2015) (hereinafter "Supporting Information"). The vertical axis is in a standardized unit so that charts displaying the results for different states appear on the same scale, despite the large variation in population (and thus search volume) between states.

Day and Election Day itself (November 5 and 6). In fact, 34.3% of the web search activity in Massachusetts in the September 1 to November 6 period took place after the October 17 deadline. This pattern of search queries suggests that many Massachusetts citizens were interested in registering to vote in the 2012 election in the days preceding Election Day, but were unable to do so.<sup>12</sup>

**C. Based on Google Search Data, Professor Street Estimated that Tens of Thousands of Massachusetts Citizens Do Not Register to Vote Because of the 20-Day Cutoff**

Next, Professor Street and his colleagues compared the Google search data with actual voter registration information. They obtained voter files from sixteen states, reflecting the date of registration for 80 million Americans. Street et al., supra n.5, at 228.<sup>13</sup> Although the authors did not

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<sup>12</sup> At trial, the Secretary's expert, Dr. Stewart, acknowledged that "interest [in registering]," as manifested by Google searches, "can continue past the registration deadline." Tr. 783:5-15.

<sup>13</sup> As Professor Street's article explains, the sample was limited to data from 16 states by restrictions that some states place on the use of voter files and on the costs of obtaining files from others. See Street et al., supra n.5, 228. The sixteen-state sample was diverse: it included one state where in-person registration did not close, two states with in-person registration deadlines shortly before the election, and several states that allowed election-date registration. Id. at 230. In addition, the states were diverse in terms of population size, tendency to support Democrats or Republicans, and the

obtain Massachusetts' voter files,<sup>14</sup> their model enabled them to predict counterfactual post-deadline registrations across all 50 states.<sup>15</sup>

Comparing search queries before the registration deadline with actual registration numbers revealed a strong correlation between the two.<sup>16</sup> The figure below, for example, shows daily registrations (solid black line) and search volume (dashed grey line) in New Jersey. Until registration closed (indicated by the D for deadline on the horizontal axis), registrations were higher when search volume was higher.<sup>17</sup>

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competitiveness of the 2012 presidential race. See id. Nevertheless, the authors considered the possibility that the sample "may not be representative of the entire country," and conducted further cross-validation exercises to test their ability to predict beyond the sample. See id.

<sup>14</sup> In Massachusetts, voter files are held separately by each of the Commonwealth's 351 municipalities, and each charges a separate fee.

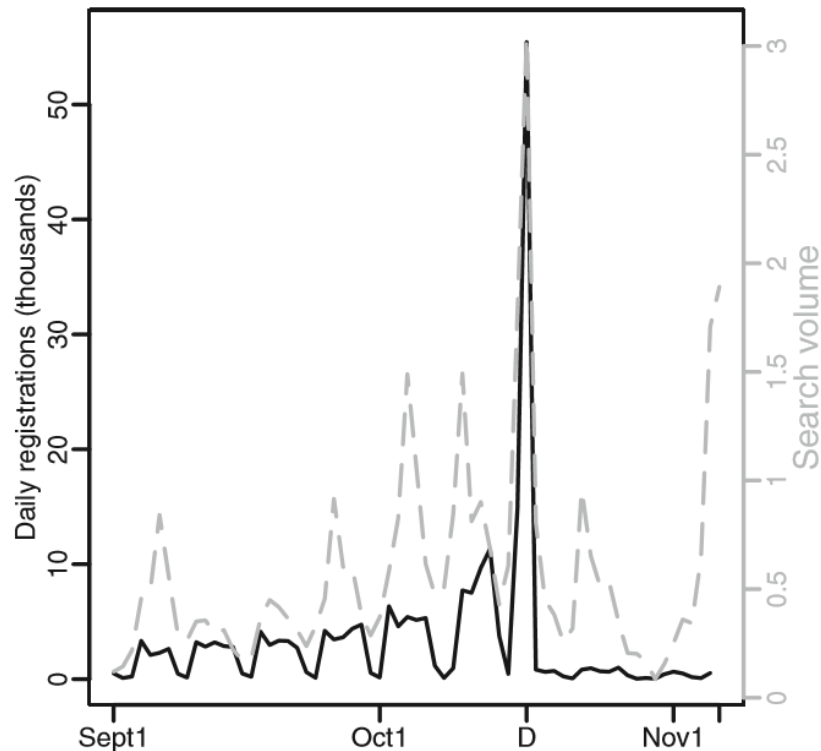
<sup>15</sup> According to the Secretary's expert, the authors "did a good job of predictive accuracy" in the results their model yielded. Tr. 785:9-18.

<sup>16</sup> The Spearman's rank correlation coefficient, a measure of the statistical similarity of two variables--here, of search volume and registration numbers--was 0.85. (A coefficient of 1 indicates perfect correlation.)

<sup>17</sup> Street et al., supra n.5, at 229, Fig. 1. As with the Massachusetts search chart above, the values on the search volume (right) axis have been standardized to allow comparisons across states.



### New Jersey voter registration and search timing



Street et al., supra n.5 at 229, Fig. 1.

This correlation enabled Professor Street and his colleagues to predict from search activity that occurred after a registration deadline how many people would have registered if registration did not close prior to Election Day.

Specifically, using search data and registration information from the 16 states where voter files were readily available, Professor Street and his colleagues modeled the relationship between pre-deadline search volumes and registration totals.<sup>18</sup> Using the resulting

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<sup>18</sup> Professor Street and his colleagues used fully Bayesian models. The technical details of those

coefficients and search data from the post-deadline period, they created counterfactual predictions of how many people would likely have registered after the deadline, if permitted to do so.

The result was that an estimated 3.5 million Americans would have registered to vote if registration deadlines had not prevented them from doing so. See Street et al., supra n.5, at 233. That would increase nationwide voter registration by two percentage points. See id.<sup>19</sup>

In Massachusetts, Professor Street and his colleagues estimated that between 48,000 and 141,000 more people would have registered, but for the 20-day cutoff. See Supporting Information, supra n.11, at 52, Table S3 (predicting 87,000 additional registrants, with a 90% prediction interval of 48,000 to 141,000). In other words, if Massachusetts had permitted registration all the way through Election Day, it is likely that 87,000 more citizens--and as many as 141,000 more--would have been allowed a chance to cast a vote.<sup>20</sup> These estimates represent sufficient

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models are set out in Street et al., supra n.5, at 231-232.

<sup>19</sup> Because turnout for late registrants is high and turnout for Election Day registrants is effectively 100%, this increase in registration would likely correspond to an increase in turnout of 3 percentage points. See Street et al., supra n.5, at 233; Supporting Information, supra n.11, at 46, S4.

<sup>20</sup> Professor Street and his colleagues set out and

additional voters to have altered the result of Massachusetts' 2014 gubernatorial race or its 2016 Democratic primary, which were decided by margins of 40,361 and 17,068 votes respectively.

**D. The Secretary's Expert and Appellees' Expert Have Both Relied on Professor Street's Research**

The reliance of both sides' experts on Professor Street's research confirms its reliability. Appellees' expert, Dr. Burden, relied in part on Professor Street's analysis in reaching his conclusions in this case, and the Secretary's expert,

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explained a number of key assumptions underlying their analysis. Most importantly, their approach assumes that searches performed after a deadline were equally indicative of interest in registering to vote as were searches performed before a deadline. To support the plausibility of this assumption, they examined whether searchers in the post-deadline period were less likely to click through to official registration information, and found only small differences; they then conducted a sensitivity analysis to assess how violations of their critical assumption would affect their results. See Street et al., supra n.5, at 233-234, 236-237. In addition, to test their ability to predict beyond the sample of 16 states for which they had voter files, Professor Street and his colleagues ran their model within that sample while holding out one state at a time, to see how the estimates for that state performed against the real-world data. In 14 of the 16 states, observed registrations were within the 90% prediction interval. See id. at 235. Finally, Professor Street and his colleagues measured the effectiveness of their model against historical results in Iowa, which had a 10-day registration deadline in 2004 but permitted election-day registration in 2008 and 2012. See id.

Dr. Stewart, relied on it in another case. See Tr. 198:4-6 (Burden); Tr. 783:2-4 (Stewart). Dr. Stewart also specifically acknowledged that a correlation exists between web search activity and registrations (see Tr. 784:19-24) and said that the article "did a good job of predictive accuracy" (Tr. 785:14-18). These statements--from the Secretary's own expert--specifically endorse the most important aspects of Professor Street's research: first, the link between search activity and registration, which is fundamental to the counterfactual prediction of post-deadline registrations; and second, the accuracy of the predictions themselves.

Those predictions demonstrate just how severely Massachusetts' 20-day cutoff burdens voting rights. Many tens of thousands of Massachusetts citizens would have registered to vote were it not for the cutoff. As explained in Part II, this Court should find that the cutoff intolerably burdens voting rights on the basis of this concrete, empirical evidence.

## **II. THE 20-DAY REGISTRATION DEADLINE INTOLERABLY BURDENS VOTING RIGHTS**

Professor Street's research demonstrates that the 20-day cutoff effectively disenfranchises tens of thousands of Massachusetts citizens. As Appellees have shown, this extraordinary impact justifies--in fact, compels--the most exacting standard of scrutiny: either the "necessity" test established in Kineen or

strict scrutiny. See Appellees Br. 21-30.

Moreover, Professor Street's research demonstrates the effect of the cutoff empirically, through rigorous, peer-reviewed research. By contrast, the Secretary does not provide any equivalent empirical basis for his claim that the cutoff imposes only a modest burden on voting rights. Instead, he marshals considerable evidence of the efforts that election officials put forth in the lead-up to an election. Then, the Secretary suggests that this Court can form its own impressions regarding the ease of registration. See Appellants Br. 38 ("[T]he record here resoundingly demonstrates that voter registration in Massachusetts is not difficult, is widely available, and is extensively publicized.").

But any contention that registering to vote 20 days before an election is "not difficult" must be weighed against the credible research showing that tens of thousands of Massachusetts citizens wish to register to vote but, because of the 20-day cutoff, are unable to do so. Put differently, the Secretary's contention does not substantively address the burden that the 20-day cutoff actually imposes on eligible voters. Professor Street's research shows that this burden, however characterized, is substantial, and prevents tens of thousands of citizens from participating in our democracy.

Accordingly, Professor Street's research allows this Court to assess the actual effects of the registration deadline, rather than to speculate about how Massachusetts citizens can or ought to act in light of the Secretary's organizational efforts. Those actual effects demand that the cutoff be subject to the highest standards of scrutiny.

Moreover, even if this Court were to conclude that the federal "sliding scale" test were applicable--which it is not, for the reasons set out in the Appellees' brief (see Appellees Br. 31-35)--Professor Street's empirical research is equally instructive. In cases applying the sliding scale, federal courts have stressed the importance of concrete, empirical evidence of burden, and where (as here) such evidence demonstrates that the burden is significant, heightened scrutiny must apply.

For example, in Obama for America v. Husted, 697 F.3d 423, 431-432 (6th Cir. 2012), the Sixth Circuit applied heightened scrutiny to a law limiting the days on which non-military voters could cast early votes in light of "extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." Id. at 431. Specifically, the district court received "statistical studies that estimated approximately 100,000 Ohio voters would choose to vote

during the three-day period before Election Day.”  
Id.; see also Florida Democratic Party v. Scott, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (assessing Florida’s registration deadline with determination that “in excess of a hundred thousand aspiring eligible Florida voters were likely to have registered to vote in the final week of voter registration” if not for registration law).

By contrast, cases rejecting challenges to voting-related laws have emphasized the absence of empirical evidence of burden. In Clingman v. Beaver, 544 U.S. 581 (2005), for example, the Court declined to reach the question of whether Oklahoma’s ballot access and voter registration laws together burdened the franchise, in part because the record was devoid of evidence of “whether these other laws actually burden” constitutional rights. Id. at 598 (emphasis added); see also Crawford v. Marion County Elections Bd., 553 U.S. 181, 189-190, 200, 205 (2008) (evidence in the record was not sufficient to sustain a facial challenge to Indiana’s photo ID requirement for voting where that evidence did not “quantify . . . the magnitude of the burden” or even provide “the number of registered voters without photo identification”); Northern Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 631 (6th Cir. 2016) (record was “devoid of quantifiable evidence from which an arbiter could

gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of [the challenged law].”).

Accordingly, when the “actual” effect of a law can be measured, see Clingman, 544 U.S. at 598; when the “magnitude of the burden” can be quantified, see Crawford, 553 U.S. at 200-202; or the “frequency” of disenfranchisement “quantif[ied],” see Husted, 837 F.3d at 631, then empirical evidence of those burdens and effects--and not speculation or broad impressions--are the proper material for judicial consideration.

More broadly, this approach accords with a long history of drawing on empirical analysis and academic expertise to assess a law’s effects (and consequently its constitutional legitimacy). Indeed, in several cases, this Court has looked to empirical data relating to a law’s effect--including data supplied by amici curiae--in assessing its legitimacy.

For example, the majority and dissent’s well-developed disagreement as to the proper understanding of social and psychological effects of same-sex marriage in Goodridge v. Department of Pub. Health, 440 Mass. 309 (2003), only highlights the important role such studies play. See Rublin, “The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law”, 19 Duke J. of Gender Law



& Policy 179, 199-200 (2011) (detailing the central role of amici-supplied studies in Goodridge). Earlier, this Court cited studies provided by amici curiae regarding rates of bicycle ownership and bicycle-vehicle crashes to support its conclusion that pending bicycle-path legislation did not contravene the Constitution. See Opinion of the Justices to the Senate, 370 Mass. 895, 903-904 (1976). And more recently, this Court cited data compiled by the Boston Police Department and the ACLU regarding the higher-than-average frequency with which black males are targeted by police, to determine that flight by black males is of little inculpatory significance. Commonwealth v. Warren, 475 Mass. 530, 539-540 (2016).

Amicus respectfully submits that the Court should consider empirical evidence in evaluating the effect of Massachusetts' 20-day cutoff. Amicus's own research, endorsed by experts for both sides below, found that the cutoff prevents between 48,000 and 141,000 Massachusetts citizens from registering to vote. In light of that extraordinary burden on voting rights, and for the reasons set out in the Appellee's Brief, this Court should apply a searching standard of scrutiny to the 20-day cutoff and should conclude that it violates the Constitution.

CONCLUSION

This Court should affirm the decision of the Superior Court.

February 20, 2018      Respectfully submitted,



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I, Eric L. Hawkins, hereby certify, under the penalties of perjury that on February 20, 2018, I caused true and accurate copies of the foregoing to be filed in the office of the clerk of the Supreme Judicial Court and served two copies upon the following counsel by electronic and overnight mail:

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MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K)  
CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.



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