

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

CHELSEA COLLABORATIVE, MASSVOTE,
EDMA ORTIZ, and RAFAEL SANCHEZ,

*individually and on behalf of all others similarly
situated,*

Plaintiffs,

v.

WILLIAM FRANCIS GALVIN, in his Official
Capacity as Secretary of the Commonwealth of
Massachusetts, DIANE R. COLELLA, in her
Official Capacity as Election Commissioner for the
City of Revere, JEANNETTE CINTRON
WHITE, in her Official Capacity as City Clerk
of the City of Chelsea, and NICHOLAS P.
SALERNO, in his Official Capacity as the
Chairman of the Somerville Election Commission,

Defendants.

16-CV-3354-D

**PLAINTIFFS' PRE-TRIAL MEMORANDUM OF LAW
AND PROPOSED CONCLUSIONS OF LAW**

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The right to vote is fundamental under the Massachusetts Constitution, encompassing “a clear policy of facilitating voting by every eligible voter.” *Cepulonis v. Sec’y of Commonwealth*, 389 Mass. 930, 934 (1983). Yet, instead of facilitating voting by every eligible voter, a Massachusetts statute prevents thousands of constitutionally eligible citizens from voting in each and every election. This “Voter Cutoff Law” requires voters to register at least 20 days before an election, and it bars those who miss that cutoff from voting in that election. G.L. c. 51 §§ 1F, 26, 34. The 20-day registration requirement of the Voter Cutoff Law is not prescribed by the Massachusetts Constitution, and is not supported by any rationale that justifies the severe penalty of forcing eligible voters to sit out an election. The Voter Cutoff Law is therefore unconstitutional.

As early as 1887, the Supreme Judicial Court recognized that the facts necessary to assess a person’s eligibility to vote are “simple, and susceptible of rapid investigation.” *Kinneen v. Wells*, 144 Mass. 497, 499, 502 (1887). This is even more true today, where those facts have been pared back to a scant few,¹ and technology facilitates rapid processing of registrations. Yet the Voter Cutoff Law has excluded thousands of citizens from the democratic process merely because they failed to meet an unnecessary, arbitrary, and unduly burdensome 20-day registration deadline. Allowing that disenfranchisement to continue in the next election would not be consistent with the Massachusetts Constitution. Because the Voter Cutoff Law’s 20-day registration deadline is not the least restrictive means to promote the Commonwealth’s interest in confirming the eligibility of voters in an orderly manner, Plaintiffs Chelsea Collaborative, MassVOTE, Edma Ortiz, and Rafael Sanchez (“Plaintiffs”) respectfully request that the Court enter conclusions of law declaring that the current registration cutoff is unconstitutional, and enjoin the deadline’s enforcement. Such

¹ See Parties’ Proposed Findings of Fact ¶ 35.

a holding would protect the right to vote in Massachusetts while also allowing the legislature time to enact a constitutionally sound voter registration law.

FACTUAL BACKGROUND

The following sets forth material facts in support of Plaintiffs' proposed conclusions of law. Additional facts are set forth in the Parties' Proposed Findings of Fact ("PFOF"), filed contemporaneously with this memorandum.

A. The Voter Cutoff Law Disenfranchises Voters Who Are Qualified To Vote Under The Massachusetts Constitution

The Massachusetts Constitution guarantees the right to vote to all citizens 18 years or older who are Massachusetts residents. MASS. CONST. amend. art. III; *see also* MASS. DECL. OF RIGHTS art. IX; G.L. c. 51 § 1. No constitutional provision mandates a registration requirement, much less a cutoff date for registering. However, the Commonwealth has imposed a statutory requirement that voters register 20 days before an election.² G.L. c. 51 §§ 1F, 26, 34. Massachusetts citizens who are otherwise eligible to vote but who register fewer than 20 days before an election are barred from voting in that election. PFOF ¶¶ 1-8. Even when a local election official³ has received and could otherwise process the registration forms before voting begins, these citizens are disenfranchised and unable to participate in the electoral process.

² Federal law establishes the dates for congressional and presidential elections, *see* 2 U.S.C. §§ 1, 8; 3 U.S.C. § 1, and Massachusetts law establishes that elections for state officers, including presidential electors, occur on the same day. *See* G.L. ch. 54, §§ 62, 151. The Supreme Judicial Court has noted that presidential electors serve a "hybrid function" as effectively state officers carrying out a federal role. *Libertarian Ass'n of Mass. v. Sec'y of Com.*, 462 Mass. 538, 551-52 (2012).

³ The term "local election officials" is used herein to refer to the government officials tasked with overseeing voter registration and Election Day in each Massachusetts city and town. The exact title assigned to such officials varies by municipality. *See, e.g.*, 950 C.M.R. § 56.01(2) (defining "Local Official" as "includ[ing] one or more of a city or town clerk, election commission, board of registrars of voters, or any other municipal or district officer upon whom a duty is imposed by the election laws.").

B. The Voter Cutoff Law Has Directly Harmed Plaintiffs and Other Massachusetts Voters

Plaintiffs Chelsea Collaborative and MassVOTE are non-profit organizations whose missions include a focus on voter registration, voter education, and voter mobilization (among other things). PFOF ¶¶ 120-79. Without the Voter Cutoff Law, these organizations could devote more resources to priorities other than voter registration in the critical weeks before an election. *Id.*; see also Pltfs' Opp. to Mot. to Dismiss (Dkt. No. 29) at 7-10 (addressing harm suffered by organizational plaintiffs). Plaintiffs Edma Ortiz and Rafael Sanchez are individual voters who registered after the Voter Cutoff Law deadline and, if not for the intervention of this Court, would have been disenfranchised in the November 2016 election. PFOF ¶¶ 93-119. Indeed, each year, thousands of other Massachusetts voters who register to vote after the arbitrary date set by the Voter Cutoff Law are barred from voting until the following election. PFOF ¶ 77.

C. Massachusetts Election Officials Rapidly Process Registration Forms Despite The 20-Day Deadline

Local election officials (and the employees and volunteers they oversee) are responsible for receiving and processing voter registrations for citizens residing in their respective cities and towns. PFOF ¶¶ 12, 259. Defendants Diane R. Colella, Jeannette Cintron White, and Nicholas P. Salerno are the local election officials responsible for the administration of voting in the cities of Revere, Chelsea, and Somerville, respectively. PFOF ¶¶ 185-87, 190, 194.

To register to vote in Massachusetts, eligible citizens must submit a completed voter registration affidavit either: (i) in person or by mail to the town clerk; (ii) in person at a voter registration agency, such as state public assistance agencies; (iii) through the Registry of Motor Vehicles ("RMV"); or (iv) online via the website of the Secretary of the Commonwealth ("Secretary"). 950 C.M.R. §§ 57.04-57.07. Upon receiving a paper voter registration affidavit, a local election official reviews the form for completeness and, if it is complete, processes the

registration by entering the registrant’s information into the Voter Registration Information System (“VRIS”), a statewide electronic voter database. PFOF ¶¶ 33-34. This process of entering information into VRIS for a complete affidavit takes approximately one to two minutes per voter registration form. PFOF ¶ 36. For electronically-transmitted affidavits (*i.e.*, online applications), a local election official reviews the information to ensure it is properly formatted and then clicks a button to “certify” the voter, completing the registration process. PFOF ¶ 37.⁴

Before each Election Day, local election officials print a list including all registered voters in their respective towns and cities. PFOF ¶ 64. Printing the list takes only a few hours and does not require vendors or unusual equipment. PFOF ¶¶ 67, 69-70.

D. The Early Voting Process In Massachusetts Demonstrates That The 20-Day Registration Deadline Is Unnecessary

Beginning in the November 2016 biennial state election, all registered Massachusetts voters were able to cast early voting ballots, either in person or by mail (“Early Voting”). PFOF ¶ 45. Any voter who registered by the October 19, 2016 deadline set by the Voter Cutoff Law was entitled to vote just five days later when Early Voting began on October 24. G.L. c. 54 § 25B; PFOF ¶ 46-47. Before Early Voting began, local election officials were required to finish processing registrations submitted in advance of the deadline and prepare voting lists accounting for all eligible registered voters. PFOF ¶ 50.

After Early Voting ended, new voter lists had to be printed for Election Day. For the November 8, 2016 election, the lists had to be printed after Early Voting closed on November 4 to reflect voters who had voted already. Therefore, election officials could not print the necessary voting lists until just days before the election. PFOF ¶ 58, 66.

⁴ The step-by-step process for both electronic and paper registrations is described in detail at PFOF ¶¶ 4-43.

E. Local Election Officials In Massachusetts Already Process Voter Registrations After The 20-Day Cutoff

Three groups of voters in Massachusetts—Specially Qualified Voters (“SQVs”), individuals who become naturalized citizens after the registration deadline, and citizens who turn eighteen years old between the cutoff and Election Day—are statutorily allowed to register to vote up to 4 p.m. the day before a primary or general election. G.L. c. 51 § 50; G.L. c. 51 § 47A. Those absent from the Commonwealth, sailors, military members, family members of military members, and prisoners may qualify as SQVs. G.L. c. 50 § 1. SQVs who register before 4 p.m. the day before an election receive a certificate of supplemental registration, which they show at the polling location to cast a ballot. G.L. c. 51 §§ 50-51; PFOF ¶ 83. There is no legal limit as to how many individuals may register as an SQV for any given election. PFOF ¶ 81. Boston had 986 SQVs who participated in the November 2016 election; Somerville had 47. PFOF ¶¶ 81, 88, 91-92. The Commonwealth has successfully processed registrations from SQVs using a shorter deadline than that set by the Voter Cutoff Law, and must be prepared to do so no matter how many SQVs seek to register for any given election. PFOF ¶¶ 89-90.

ARGUMENT

Under any conceivably applicable standard, the Voter Cutoff Law is unconstitutional. Because the Voter Cutoff Law denies eligible citizens the ability to exercise their fundamental right to vote, it is subject to strict scrutiny. The Defendants cannot meet their burden of showing that the full 20-day period is required to confirm in an orderly way that only constitutionally qualified voters cast ballots. The Court should therefore declare the Voter Cutoff Law unconstitutional and enjoin its enforcement.

I. THE MASSACHUSETTS VOTER CUTOFF LAW IS UNCONSTITUTIONAL

The Massachusetts Constitution protects the fundamental right to vote through two provisions: amend. art. III and art. IX of the Declaration of Rights. Amendment Article III establishes an affirmative right to vote and defines who holds that right. Its text is unequivocal: citizens who meet its criteria “*shall have a right to vote[.]*” MASS. CONST. amend. art. III (emphasis added).⁵ Statutory limitations on a citizen’s right to vote thus implicate amend. art. III, and they are permissible only if they survive strict scrutiny. *See Cepulonis*, 389 Mass. at 935. The Voter Cutoff Law is such a limitation because it prohibits thousands of citizens from voting each election, and it fails strict scrutiny because the Defendants cannot show that it is the least restrictive way to serve the Commonwealth’s interest in confirming in a fair and orderly way that only constitutionally qualified voters cast ballots.

The Voter Cutoff Law also does not pass muster under art. IX, which sets forth two additional and distinct rights: a right to participate equally in free elections, and a candidate’s right to equal ballot access. *Cf. In re Opinion of the Justices*, 240 Mass. 601, 607 (1922) (“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.”). Rather than automatically apply strict scrutiny, the SJC has used a “sliding-scale” test to assess restrictions on the ballot access right protected by art. IX. Because the Voter Cutoff Law restricts who can vote—not who can appear on the ballot—it is more properly analyzed under art. III’s strict scrutiny test.⁶ But even if it were subject to the sliding scale test established by the SJC for ballot access challenges, the Voter Cutoff Law would fail because the Defendants cannot justify the “character and magnitude of the burden” it imposes.

⁵ The federal Constitution does not contain an explicit guarantee of an affirmative right to vote analogous to amend. art. III. Instead, a “voter is entitled to vote in the [federal] election of officers of the United States by reason of the fact that he is a voter in the state in which he resides.” *Kinneen v. Wells*, 144 Mass. 497, 497 (1887).

⁶ The SJC has never applied this “sliding scale” standard to the right to vote protected by amend. art. III.

Libertarian Assoc. of Mass. v. Sec’y of Com., 462 Mass. 538, 560 (2012) (applying “sliding scale” test adapted from federal law) (hereinafter *LAM*).

A. The Voter Cutoff Law Is Unconstitutional Under Amend. Art. III

The Commonwealth can lawfully limit a citizen’s right to vote only when it “demonstrate[s] *affirmatively* that the challenged provision promotes a compelling State interest which could not be achieved in any less restrictive manner.” *Cepulonis*, 389 Mass. at 935 (citation omitted) (emphasis added). It is the government’s burden to demonstrate that it has met this standard. *Com. v. Weston W.*, 455 Mass. 24, 26 (2009). This means the Commonwealth must prove that the 20-day advance voter registration deadline challenged here is no further from the election than necessary to allow election officials to confirm in an orderly way that voters are qualified. “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.” *Kinneen*, 144 Mass. at 502 (emphasis added). The Voter Cutoff Law’s 20-day deadline clearly fails this standard.

1. Strict Scrutiny Applies to Plaintiffs’ Amend. Art. III Claim

As the Secretary concedes, “[t]he right to vote is fundamental” under the Massachusetts Constitution. PFOF ¶ 4. Indeed, because it empowers citizens both to hold their elected officials accountable and to enact laws through ballot initiatives, the right to vote is “the ‘preservative of all rights.’” *Mass. Pub. Interest Research Grp. v. Sec’y of Com.*, 375 Mass. 85, 94 (1978) (citations omitted). Imposing additional requirements on voter registration—which is “essential to the voters’ ability to exercise the franchise”—burdens this fundamental right. *Cepulonis*, 389 Mass. at 935 n.8 (collecting cases). A voter who fails to register by the cutoff date is entirely deprived of her right to participate in the selection of federal, state, and local officers on the ballot and the

determination of ballot questions posed to the community, despite meeting all the constitutionally prescribed voting requirements. *See infra* Section I.B.

“Where a statute implicates a fundamental right” the courts “employ ‘strict judicial scrutiny.’” *Goodridge v. Dep’t of Public Health*, 440 Mass. 309, 331 (2003) (citation omitted). It is therefore no surprise that the SJC has already applied strict scrutiny to a statute preventing prisoner registration because it “abridge[ed] their right to vote in contravention of the Constitution of the Commonwealth, including the Declaration of Rights.” *Cepulonis*, 389 Mass. at 935 (footnote omitted). This Court should do the same.⁷

Applying strict scrutiny to the Voter Cutoff Law is both eminently reasonable and consistent with other contexts in which the SJC applies strict scrutiny. This level of review is reserved for those foundational rights—such as the right to vote in a democracy—that “stem explicitly from or are implicitly guaranteed by the Constitution.” *LaCava v. Lucander*, 58 Mass. App. Ct. 527, 532-33 (2003) (citation omitted).⁸ For example, in *Commonwealth v. Lucas*, the SJC held that strict scrutiny applied to content-based restrictions on political speech. 472 Mass. 387, 396-97 (2015) (rejecting Commonwealth’s call for intermediate scrutiny). In so holding, the SJC cited its earlier decision in *First National Bank v. Attorney General*, where the SJC had observed

⁷ This higher level of scrutiny is appropriate even though federal courts apply a sliding scale approach in the voting rights context. The Massachusetts Constitution expressly guarantees that identified categories of citizens “shall have a right to vote,” amended art. III, while the federal Constitution contains no such guarantee. As the U.S. Supreme Court has explained, “[t]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.” *See, e.g., Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2257 (2013). Thus, although federal law protects many important interests relating to voting rights, the Massachusetts Constitution expressly provides additional rights. *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 individual liberties more expansive than those conferred by the Federal Constitution’” (citation omitted)); *cf. Com. v. Hodge*, 386 Mass. 165, 169 (2000) (“The Massachusetts Declaration of Rights can . . . provide greater safeguards than the Bill of Rights of the United States Constitution”).

⁸ *Cf. Gillespie v. City of Northampton*, 460 Mass. 148, 154 (2011) (listing examples of rights the SJC has “proclaimed to be paradigmatically fundamental,” including the right to travel freely, freedom from physical restraint, and parental rights concerning the care of children).

that the “Legislature has the power to regulate elections in order to prevent bribery, fraud and corruption to the end that the people’s right to vote may be protected. . . . But such regulation must be narrowly drawn to meet the precise evil sought to be curbed.” 362 Mass. 570, 587 (1972). Restrictions on speech concerning elections are subject to strict scrutiny; of course it only makes sense that the SJC subjects restrictions on the right to *participate* in those elections to the same demanding constitutional standard.

LAM, which adopted a “sliding scale” analysis to review a statutory limit on minority party ballot access, does not hold otherwise. *See* 462 Mass. at 560. *LAM* addressed a different right and an entirely different constitutional provision.⁹ A candidate’s or party’s right to *ballot access* under art. IX, which was at issue in *LAM*, is distinct from an individual’s *fundamental right to vote* under amend. art. III. *Compare* amend. art. III (expressly granting a right to vote to citizens meeting defined qualifications), *with* art. IX (defining “equal right to elect officers, and to be elected”). Expressly limiting its analysis to the particular context of ballot access, *LAM* naturally never mentioned *Cepulonis*, and certainly did not overrule it. *LAM*, 462 Mass at 560; *see Com v. Lucas*, 472 Mass. 387 (2015) (citing *Cepulonis* post-*LAM*). Indeed, the SJC has never applied *LAM*’s sliding scale test to the right to vote protected under amend. art. III. Restrictions on this fundamental right, such as the Voter Cutoff Law, therefore are and remain subject to *Cepulonis*’s strict scrutiny test.

⁹ For similar reasons, 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. 7521 (1973), “did not absolutely disenfranchise voters.” 389 Mass. at 937. *Rosario* was a federal case concerning the federal constitution, not a state case pursuant to amend. art. III. Furthermore, *Cepulonis* clearly stated that *Rosario* “is not on point,” and never indicated that it would adopt or incorporate *Rosario*’s reasoning. *Id.*

2. *The Voter Cutoff Law Fails Strict Scrutiny*

To survive strict scrutiny, the challenged statute must “promote[] a compelling state interest which could not be achieved in any less restrictive manner.” *Cepulonis*, 389 Mass. at 935 (citation omitted). The “least restrictive” standard requires a tight fit between the selected means and the desired end. *See Brackett v. Civil Serv. Com’n*, 447 Mass. 233, 251 (2006). “[C]onjecture [is] insufficient to meet the Commonwealth’s burden.” *Com. v. Weston W.*, 455 Mass. 24, 41 (2009). Here, and the existence of alternative and less restrictive solutions—including those deployed in other states—indicate that the Commonwealth’s chosen approach is not the least restrictive option. *See Cepulonis*, 389 Mass. at 936 (holding statute prohibiting prisoner registration was not the least restrictive where “[a] number of States have enacted statutes permitting absentee registration of prisoners”) (citations omitted); *cf. Lucas*, 472 Mass at 398-99 (holding statute criminalizing false political speech was not the least restrictive because “a remedy already exists” within Massachusetts) (citation omitted). Here, assuming that the Commonwealth’s interest in confirming the qualifications of voters in an orderly manner for an election is compelling, the 20-day Voter Cutoff Law is not the least restrictive way to serve that interest. The numerous states that provide election day registration (“EDR”), as well as the Commonwealth’s experiences with general voter registration, early voting, and specially qualified voters, perfectly illustrate the point, and the Defendants cannot meet their burden of showing otherwise.

(a) *Election day registration is feasible*

The experience of other states demonstrates that the 20-day registration requirement at issue here is not the least restrictive means of pursuing the Commonwealth’s interest in ensuring in an orderly manner that only qualified voters cast ballots in an election.

For example, Wisconsin has used EDR since 1975. PFOF ¶ 231. As in Massachusetts, Wisconsin elections are administered at the municipal level; eligible Wisconsin citizens may

register to vote in several ways, including by mail, online, and in-person; and Wisconsin voter registration applications are entered and tracked using a statewide electronic voter database called WisVote, which can be accessed via computer workstations. PFOF ¶¶ 229-30, 231. Unlike Massachusetts, however, Wisconsin has offered EDR for more than 40 years, and has done so successfully. Wisconsin law requires officials to enter all election day registrations into WisVote no later than 45 days after a general election. PFOF ¶ 234. This deadline has not proved unduly burdensome. Indeed, on average, it takes only two to four minutes to enter information from an election day registration form into WisVote. PFOF ¶ 237.

Milwaukee—which, like Boston, is a large, diverse urban municipality—offers another illustrative example. During the 2014 midterm elections, approximately 45,000 Milwaukee voters participated in EDR. PFOF ¶ 238. In the November 2016 election, approximately 20% of the over 247,000 Milwaukee voters took advantage of EDR. PFOF ¶ 239. Notwithstanding these high levels of participation, for the past 11 years Milwaukee has consistently met the 45-day deadline to enter EDR registrations. PFOF ¶ 235. It has also accommodated the other aspects of election administration. Milwaukee has about 330,000 registered voters, and typical turnout for a presidential election is 85%. PFOF ¶ 241. Wisconsin does not use electronic poll books, and 654 poll books are printed in Milwaukee alone.¹⁰ PFOF ¶ 247. Yet the Election Commission administers voter registration (including EDR), campaign finance reporting, filing requirements for political candidates, and absentee and mail-in ballots, with eight employees. PFOF ¶ 246.

Not only has EDR not unduly burdened Wisconsin, it has demonstrably expanded voter participation by increasing registration access and reducing registration confusion. PFOF ¶ 240. This effect is particularly profound in areas where many people live in poverty. PFOF ¶¶ 209, 212,

¹⁰ These are generally printed within days after workers finish entering mail-in registrations in WisVote. PFOF ¶ 247.

243. More generally, EDR also ensures that those who were inspired to vote by the increased public awareness as Election Day approached could vote. PFOF ¶¶204-07. Finally, EDR reduced the use of provisional ballots, which introduce inefficiency and further burdens voters and poll workers. PFOF ¶¶ 245, 223. Nothing in the legislative history of the Massachusetts Voter Cutoff Law, or in the record before this Court, demonstrates that Massachusetts cannot implement an election day registration system that incorporates some or all of what Wisconsin has successfully used for years. In fact, the District of Columbia and 16 states, including 4 in New England, have also adopted some form of EDR. PFOF ¶ 197. At a minimum, successful EDR systems in other states demonstrate that there are less restrictive means than the Voter Cutoff Law’s 20-day deadline to confirm in a fair and orderly manner that only qualified voters participate in elections.

(b) *Massachusetts already can, and does, rapidly process voter registrations after the 20-day deadline*

The Commonwealth’s own experience also indicates that the 20-day deadline is not the least restrictive option because, contrary to the Supreme Judicial Court’s pronouncement in *Kinneen*, the deadline is not “as near” the election as possible. 144 Mass. at 502. As early as 1887, *Kinneen* recognized that the facts necessary to determine a person’s eligibility to vote are typically “simple, and susceptible of rapid investigation.” *Id.* at 499. When the Voter Cutoff Law was enacted, the need for a 20-day advanced registration deadline was not demonstrated—no attempt to do so was ever made. *See* 1996 Mass. Legis. Serv. Ch. 454 (S.B. 1869) (WEST). There was no investigation, analysis, or underlying committee report. Instead, town clerks simply “object[ed] to any further shortening of the deadline.” PFOF ¶ 76.

Insufficient at its inception, this reasoning has not improved with the passage of time. Computer technology, the widespread adoption of the Internet, cloud computing, and advanced printing capabilities have all advanced significantly since 1993. Indeed, the Director and Legal

Counsel of the Secretary's Elections Division, acknowledges that improvements to the Commonwealth's voter registration technology—including online voter registration and an enhanced VRIS system—have occurred over the past 20 years, PFOF ¶¶ 71-72, whereas the Voter Cutoff Law—and its deadline—have remained unchanged.

Today, local election officials print voter lists from the VRIS database using in-office printers in as little as two hours. PFOF ¶¶ 69-70. Revealingly, in November 2016, the Secretary's office emailed local election officials at approximately 8 p.m. the night before Election Day reminding them not to wait until the following morning to print their lists, PFOF ¶ 68—an implicit concession that waiting until the last moment to finalize lists of eligible voters is not only feasible but tempting.¹¹ Simply put, processing both paper and electronic voter registrations is a quick and simple process,¹² and there is no technological barrier to local election officials processing registrations received fewer than 20 days before an election.

In fact, when citizens submit registrations after the 20-day cutoff, local election officials routinely process those registrations *before* the election is held. The Secretary instructs local election officials to process these registrations daily, upon receipt, even after the 20-day registration cutoff. PFOF ¶ 42. The City of Boston, for example, registered 1,562 voters between the October 19, 2016 voter cutoff deadline and the November 2016 election, while Revere and Somerville registered 138 and 146 voters during this same time.¹³ PFOF ¶ 77. To be clear: these voters submitted their registrations before the election, and their registrations were processed before the election. The Voter Cutoff Law disenfranchises such voters, not because of any

¹¹ By the fall 2018 election cycle, electronic poll books are expected to be certified for use statewide, PFOF ¶ 73, which would make the process even easier.

¹² See PFOF ¶¶ 33-43.

¹³ During this period, Revere was able to keep up with all of its voter registrations daily. PFOF ¶ 43.

technological or practical impediment, but merely because of the antiquated Voter Cutoff Law. Such a system cannot pass strict scrutiny—indeed, it defies common sense.

(c) *Early voters in Massachusetts can already vote just 5 days after they register*

The Commonwealth’s implementation of early voting further demonstrates that Massachusetts can, and must, adopt a registration deadline that is closer to the election. Early voting began for the first time on October 24, 2016, five days after the voter registration deadline. PFOF ¶¶ 44, 46. Based on the limited record then available for its preliminary injunction order, this Court already concluded that the “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.” Dkt. No. 15 at 7. For three reasons, this conclusion is now even stronger given the factual record before the Court.

First, local election officials needed to prepare for all registered voters to participate in the first day of Early Voting, including those who registered on the October 19, 2016 deadline. PFOF ¶¶ 45, 50. Municipalities therefore had just five days between the registration deadline and the beginning of Early Voting on October 24, 2016 to process any new voter registrations and prepare up-to-date voter lists. As the record demonstrates, they were able to do so. Somerville and Revere printed their Early Voting registration lists without issue before the start of Early Voting on October 24, 2016. PFOF ¶ 53. Chelsea used the VRIS computers to process early voters and input all the newly registered voters before Early Voting began. PFOF ¶ 57; *see* PFOF ¶ 54. Only one municipality—Boston—did not enter all of its newly registered voters into the VRIS system prior to printing its Early Voting list. PFOF ¶ 54. In response, Boston deployed the legally acceptable solution of providing provisional ballots to any early voters who had registered before the deadline but were not yet in the system. PFOF ¶ 54. Of the approximately 50,000 citizens who voted early in Boston in 2016, only 400 voted provisionally. *See* PFOF ¶¶ 55, 62.

Second, by necessity, local election officials could not prepare and print final Election Day voter lists, which needed to denote voters who participated in Early Voting, until *after* the Early Voting period ended. In November 2016, this was just two business days before the general election. PFOF ¶ 47. The record demonstrates that municipalities completed this task successfully. PFOF ¶ 58.

Third, the very process that municipalities used to track early voters to generate the Election Day voter lists, PFOF ¶¶ 56, 66, could also be used to register new voters. Some towns tracked early voters in real time directly on VRIS computers, while other towns used a paper voting list to check in early voters and updated the VRIS system at the end of each day. PFOF ¶¶ 56-57. Either way, these VRIS terminals were the *exact same* VRIS terminals used to enter voter registration information. Local election officials could, if the law allowed it, use those very same VRIS terminals to register new voters on the same day that they register, as the Secretary already instructs them to do. PFOF ¶ 42.

Early Voting both demonstrates that the 20-day voter cutoff is unjustifiable and provides a ready-made framework for continued voter registration through Election Day. The physical locations, staffing, and computers that are already deployed for Early Voting could also be used to permit voter registration in the days immediately before an election. 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.

(d) *Specially Qualified Voters in Massachusetts can already vote just fifteen hours after they register*

Finally, much like Early Voting, the Specially Qualified Voter (“SQV”) provisions demonstrate that the Commonwealth is already well able to process voter registrations after the 20-day cutoff. G.L. c. 50 § 1; *id.* c. 51 § 50. New citizens, sailors, military members, family

members of military members, and prisoners may qualify for the “Specially Qualified Voter” exception to the 20-day cutoff. G.L. c. 50 § 1; *id.* c. 51 § 50. So, too, do voters “absent from the Commonwealth” for one week before the voter registration deadline, regardless of how geographically close those voters were to the Commonwealth or how easily they could have traveled to their local town or city hall to register. G.L. c. 50 § 1. SQVs are not always listed on the printed voter list. Instead, SQVs who register before 4 p.m. on the day before Election Day receive a certificate of supplemental registration, which they present to election officials at their polling location on Election Day to confirm their registration. *Id.* c. 51 §§ 50-51.

Even though it allows for voter registration all the way up to 15 hours before polls open at 7 a.m. on Election Day, the SQV registration process nevertheless runs smoothly. PFOF ¶ 89. As Nicholas Salerno, Chairman of the Board of the Election Commissions for Somerville, testified during his deposition, Somerville could and would accommodate as many SQVs as showed up to vote, and could do so without changing Somerville’s current operations. PFOF ¶ 90. This is further evidence that a 20-day registration cutoff for other voters is not the least restrictive means to pursue the Commonwealth’s interests here.

B. The Voter Cutoff Law Is Unconstitutional Under Art. IX

The fundamental right to vote is further protected by art. IX’s guarantee of voters’ rights to equal participation in free elections. The SJC has never applied a “sliding scale” test to this right, though it has applied such a framework to the other half of art. IX—namely, the guarantee of candidates’ ballot access rights. Even if this Court applied that framework for the first time to voters’ right to equal participation under art. IX, the Voter Cutoff Law would still fail.

1. *Under the LAM Test, Strict Scrutiny Would Apply to Plaintiffs’ Art. IX Claim*

The SJC adopted a “sliding scale” standard “to evaluate the constitutionality of State ballot

access regimes” in *LAM*. *LAM* also recognized that, even in the ballot access context, “[r]egulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest”—a standard equivalent to strict scrutiny. 462 Mass. at 560. Here, the Voter Cutoff Law’s severe effect on the fundamental right to participate in an election would slide the *LAM* scale all the way to strict scrutiny.

The 20-day registration deadline annually disenfranchises thousands of voters. PFOF ¶ 77. Missing just a single election robs a voter of the opportunity to choose local, state and federal officials, to express an opinion on ballot proposals, and to have a voice in the community. Therefore, even under *LAM*, this severe burden triggers strict scrutiny. *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (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); *Kinneen*, 144 Mass. at 499 (postponing individuals’ right to vote diminishes the right and triggers constitutional concerns); *Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I. 1994), *aff’d* 37 F.3d 726 (1st Cir. 1994) (“[T]he relevant question is whether plaintiffs’ right to vote in *any* election has been burdened.” (emphasis in original)). Accordingly, the Voter Cutoff Law is unconstitutional under art. IX for the very same reasons that it is unconstitutional under amend. art. III.¹⁴

2. *The Voter Cutoff Law Violates Art. IX Even Under a Less Protective Standard*

Even if the scale did not slide all the way to strict scrutiny under *LAM*’s reasoning, the Voter Cutoff Law would still be unconstitutional. While only a severe burden triggers strict

¹⁴ The same would be true if the “sliding scale” analysis were applied to the amend. art. III right, but application of a sliding scale to amend. art. III would be contrary to *Cepulonis*, wholly unprecedented, and inconsistent with other contexts in which the SJC has rejected a less protective “sliding scale” framework.

scrutiny under this analysis, less-than-severe burdens still ““must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.”” *Scott*, 215 F. Supp. 3d at 1256-57 (quoting *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009)); *see also Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). To determine whether the asserted justifications are sufficiently weighty, a court must balance “the character and magnitude of the burden” on the plaintiffs’ rights “against the interests the State contends justify that burden,” while also considering “the extent to which the State’s concerns make the burden necessary.” *LAM*, 462 Mass. at 560 (internal quotation marks, citations, and alteration marks omitted). The Voter Cutoff Law cannot survive even this level of scrutiny because the character and magnitude of its burden vastly outweighs the Defendants’ asserted justifications.

(a) *The Voter Cutoff Law significantly burdens voters*

On the one hand, the Voter Cutoff Law imposes a significant burden on voters. Individuals who miss the deadline are barred from voting until the next election, even though there is no doubt they are otherwise qualified to vote immediately. Missing just one election prevents individuals from helping to determine who will hold the highest federal or state offices, who will have the power to appoint Supreme Judicial Court Justices, 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. Consequently, disenfranchisement—even of one person, even for one election—cannot be taken lightly. *Cf. Kinneen*, 144 Mass. at 499; *see also Ayers-Schaffner*, 860 F. Supp. at 921 & n.2 (holding that where voter’s right to vote in one election is burdened, it is “irrelevant” that voter would have opportunity to vote in the next election). Yet the Voter Cutoff Law routinely prevents thousands of otherwise eligible Massachusetts voters from voting. PFOF ¶ 77. *Cf. Obama for America*, 697 F.3d at 431-34 (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).

Scholarly analysis of EDR’s significant benefits further demonstrate the significant burden imposed by the Voter Cutoff Law. Dr. Barry Burden, a Professor of Political Science and Director of the Elections Research Center at the University of Wisconsin-Madison, concludes that EDR increases voter turnout by between three and six percentage points, PFOF ¶¶ 198-202, and specifically that EDR would have increased turnout in the 2012 election in Massachusetts by 8.2%, PFOF ¶ 217.¹⁵ There are several reasons EDR increases turnout. First, EDR allows the participation of voters who only become engaged in the political process in the final weeks of the election—a group that tends to include lower income and minority voters. PFOF ¶¶ 206-07. Second, EDR permits updating recently-changed names and addresses among previously-registered voters on Election Day, which benefits frequent movers—who on average are younger, lower income, and more likely to be racial and ethnic minorities. PFOF ¶¶ 208-09. Given these benefits, it is unsurprising that even the Secretary’s proffered rebuttal expert agrees that EDR is good public policy. PFOF ¶ 218. With the current 20-day registration requirement, none of these significant benefits are available to Massachusetts voters.

(b) *The Commonwealth cannot identify a “sufficiently weighty” justification*

On the other hand, the Defendants have not met their burden of demonstrating a justification that is “sufficiently weighty” to overcome this significant burden. The Commonwealth has an interest in confirming in an orderly manner that only constitutionally qualified voters cast ballots. But this interest, even if assumed to be compelling, clearly does not make the Voter Cutoff Law’s 20-day registration requirement “necessary.” *Cf. LAM*, 462 Mass. at

¹⁵ The Secretary’s proffered rebuttal expert agrees that EDR would increase turnout in Massachusetts, but reaches a different conclusion as to the magnitude of the increase. PFOF ¶ 203.

560. To the contrary, local election officials’ rapid processing of general registrations, and implementation of Early Voting and SQV registrations, demonstrates that a 20-day period is not required to process registrations and prepare voting lists because those tasks are already completed in a far shorter period. *Cf. Obama for America*, 697 F.3d at 432-34 (holding State’s interest in smooth election administration not sufficiently weighty to justify preventing non-military plaintiffs from participating in early voting where local boards previously administered early voting without a problem). That 16 states have implemented some form of election day registration supports a similar conclusion. *Cf. Scott*, 215 F. Supp. 3d at 1257 (holding state’s interest not sufficiently weighty to justify refusing to extend registration deadline after a hurricane where “many other states” had done so).

Finally, the Voter Cutoff Law cannot be defended on the grounds that it costs less to administer than alternatives, like EDR, that intrude less severely on a fundamental right. There is no record evidence in this litigation that the Commonwealth would be required to incur additional costs were it to implement a less burdensome registration process.¹⁶ In fact, the record suggests that EDR can *reduce* the burden on a state, by eliminating a bottleneck of registration applications on the cutoff date, reducing utilization of provisional ballots, and aiding in the maintenance of more accurate voting rolls. PFOF ¶¶ 208, 222-23, 244-45.

However, if implementing a less restrictive means to achieve the Commonwealth’s interests here would result in an increase in costs, the Voter Cutoff Law could not be justified on that basis. As the SJC has recognized, when a plaintiff’s constitutional rights have been violated, “the fiscal consequences of any . . . judgment on the merits cannot be permitted to intrude on

¹⁶ Indeed, despite 2014 legislation mandating the creation of an elections task force (on which the Secretary or his designee would sit) to study “more accessible voter registration, including, but not limited to, same-day registration” and to issue a report by August 1, 2017, the task force has never been convened. PFOF ¶¶ 251-52; Section 16B of Chapter 111 of the Acts of 2014 (“An Act Relative to Election Laws”) (May 22, 2014).

consideration of the case before [the Court].” *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 249 (2012). The Defendants fail to hint at any justification other than cost in defense of the outdated 20-day Voter Cutoff Law. Actual cost savings, let alone hypothetical ones, cannot excuse a constitutional violation.

Taking these factors together—the significant burden imposed on the thousands of disenfranchised voters every election; the deprivation of significant advantages flowing from less restrictive alternatives such as EDR; and the absence of any “weighty” justification in support of the deadline—it is clear that the Voter Cutoff Law cannot stand even under a “sliding scale” analysis.

II. THE COURT SHOULD ENJOIN ENFORCEMENT OF THE VOTER CUTOFF LAW

It is abundantly clear that the current 20-day Voter Cutoff Law is *not* the least restrictive means available to the Commonwealth. Less restrictive alternatives, including EDR, are clearly available.¹⁷ The current statute therefore cannot stand. Accordingly, this Court should hold that the Voter Cutoff Law is unconstitutional, and enjoin application of the deadline. *See Cepulonis*, 389 Mass. at 937–38 (ordering Superior Court to enter declaration invalidating certain absentee voter restrictions); *Goodridge*, 440 Mass. at 344 (ordering Superior Court to enter declaration construing meaning of civil marriage).¹⁸

¹⁷ The SJC in *Cepulonis*, for example, noted that the Commonwealth had several options available and might impose one, or some combination, of them in order to address the constitutional flaw in that case. 389 Mass. at 936 n.10.

¹⁸ The Court could, in its discretion, appropriately stay its ruling for a reasonable period to allow the legislature to adopt legislation consistent with the Court’s order. *See Goodridge*, 440 Mass. at 343-44. As noted, existing legislation has already called for an elections task force, and this vehicle could be used (if it were to convene) to study constitutionally sound and administratively feasible legislation. Moreover, there is already pending legislation at the State House that, if passed, would allow for EDR. *See, e.g.*, Senate Bill No. 371 (“An Act establishing election day registration”), available at <https://malegislature.gov/Bills/190/S371.html>.

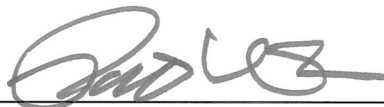
PROPOSED CONCLUSIONS OF LAW

For the foregoing reasons, Plaintiffs respectfully request that this Court make the following conclusions of law:

1. The 20-day voter registration deadline, G.L. c. 51 §§ 1F, 26, 34, impinges on the fundamental right to vote protected by MASS. CONST. amend. art. III and MASS. DECL. OF RIGHTS art. IX.
2. The applicable standard of review is strict scrutiny.
3. The 20-day voter registration deadline does not promote any compelling state interest which could not be achieved in a less restrictive manner. Accordingly, the 20-day voter registration deadline is unconstitutional.
4. Even if a “sliding scale” standard were applied, the 20-day voter registration deadline would still be unconstitutional because the Defendants fail to demonstrate a justification sufficiently weighty to overcome the significant burden on voters caused by the statute.
5. The appropriate remedy is a declaratory judgment consistent with these findings, and a permanent injunction enjoining the Defendants from enforcing the 20-day registration deadline.

Dated: June 28, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel of record for each Defendant by U.S. mail and by e-mail on June 28, 2017.

A handwritten signature in black ink, appearing to read "P. J. Welsh", written over a horizontal line.

Patrick J. Welsh