COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12435

CHELSEA COLLABORATIVE, INC., and others,
Plaintiffs-Appellees,

v.

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

BRIEF OF AMICI CURIAE COMMON CAUSE; CONSERVATION LAW FOUNDATION; ENVIRONMENTAL LEAGUE OF MASSACHUSETTS ACTION FUND; JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION; LATINOJUSTICE PLRDEF LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE; LEAGUE OF WOMEN VOTERS OF MASSACHUSETTS; MASS ALLIANCE; NEW ENGLAND AREA CONFERENCE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NARAL PRO-CHOICE MASSACHUSETTS; NEIGHBOR TO NEIGHBOR ACTION FUND; PLANNED PARENTHOOD ADVOCACY FUND; PROGRESSIVE MASSACHUSETTS; AND SIERRA CLUB

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INTRODUCTION

Amici are 14 organizations united in the belief that the right of qualified citizens to participate in state elections is the core of our representative democracy. They submit this brief to: (i) set forth why the 20-day voter registration deadline imposed by G.L. c. 51, §§ 26 and 34 cannot be reconciled with the Massachusetts Constitution; and (ii) highlight the consequences of a deadline that disqualifies would-be voters just as public attention turns to an upcoming state election.

The Massachusetts Constitution affirmatively guarantees the right to vote, which is preservative of all others. Massachusetts Pub. Interest Research Grp. v. Secretary of the Commonwealth, 375 Mass. 85, 93 (1978). As set forth in Article 3 of the Articles of Amendment, "[e]very citizen [of]eighteen years of age and upwards . . . shall have the right to vote in [the] election of governor, lieutenant governor, senators and representatives." Mass. Const. Amend. art. 3 ("Article 3").[1] The integral role of the franchise in

[1] Article 3 has been amended on a number of occasions. See Mass. Const. Amend. arts. 20, 23, 26, 28, 30-32, 40, 68, 69, 93-95, 100. The references here are to Article 3 as amended. In addition, the text of Article 3 includes a durational residency requirement of six months, which has been unenforceable dead letter since Dunn v. Blumstein, 405 U.S. 330 (1972). See id. at 335-53 (striking down Tennessee's durational residency requirement as inconsistent with the

our frame of government is explicated in the Declaration of Rights. E.g., Mass. Const. Pt. I, art. 4 ("The people of this commonwealth have the sole and exclusive right of governing themselves"); id., art. 6 ("[T]he people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform alter or totally change the same, when their protection, safety, prosperity and happiness require it"). On this score, all parties before the Court agree.

To appreciate and effectuate the right to vote, though, is to understand that its exercise is fleeting. For the state elections protected by Article 3, the act of voting occurs once every two years for just a moment at a time. At the heart of our democracy is a paradox: it is built upon the collective exercise of the right to vote, but economists have long debated whether an individual's singular choice to vote is rational at all. Restrictions on the right to vote, therefore, are unusually pernicious. Any burden on its exercise alters the calculus of whether to vote — which in turn alters the delicate balance of democracy.

This dynamic was well understood by the original architects of voter registration deadlines. Those deadlines

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fundamental right to vote and the fundamental right to travel).

sought to limit the explosive growth of the political power of urban and immigrant populations in the late Nineteenth Century. E.g., Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 151–52 (2000); see St. 1893, c. 417, § 40, and St. 1894, c. 271, § 2 (establishing statewide registration deadlines, different and markedly more demanding in Massachusetts cities than in its towns).[2]

But imposing conditions on the right to vote (and the consequence of disenfranchisement for failure to meet the condition) is not the province of the Legislature. This Court's enforcement of Article 3 makes plain that the state constitution "facilitate[s] voting by every eligible voter." Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930, 934 (1983) (emphasis added). While the Legislature may give effect to the right by "faciltat[ing] and secur[ing]" its exercise, it has no authority at all to "defeat or impair the right of voting." See Kinneen v. Wells, 144 Mass. 497, 501 (1887); Capen v. Foster 12 Pick. 485, 497 (1832).

[2] Before 1893, the registration deadline barely preceded election day, if at all, even though a citizen had to meet many more requirements to establish his qualifications to vote. See Capen v. Foster, 12 Pick. 485, 497 (1832) (same day); see Mass. Const. Amend. art. 3 (as it stood in 1832, the right to vote also was conditioned upon the ownership of certain property and the paying of taxes).

Consequently, this Court has consistently held that Article 3 does not allow use of pre-election deadlines or waiting periods to disqualify otherwise eligible voters, absent a showing that the waiting period is needed to facilitate the franchise. New citizens must not be forced to wait 30 days before voting. Kinneen, 144 Mass. at 502 (1887). When Article 3 disqualified voters for other reasons — e.g., paucity or lack of property ownership — the Legislature had no authority to delay the right to vote once those disqualifications had been remedied. See Opinion of the Justices, 124 Mass. 596, 597-98 (1878) (a former pauper must be afforded the right to vote without delay); Bridge v. Lincoln, 14 Mass. 367, 374 (1817) ("[E]very man, who is in possession of the requisite estate, claiming it as his own . . . shall be entitled to the franchise" even if he came into its position on the morning of the election).

The statutes at issue here impermissibly impose a blanket waiting period: voters must be registered for at least 20 days before they are permitted to vote in a state election (with few exceptions not material here). The record establishes that nowhere near 20 days are needed to confirm voter eligibility; nor is that length of time needed to prepare a list of eligible voters for election day. In the words of this Court: "No [registration] system would be just

that did not extend the time of registration up to as near that of actually depositing the votes as would be consistent with the necessary preparation for conducting the election." Kinneen, 144 Mass. at 502.

This is a simple case. The record evidence is that in in three recent state elections, thousands of people who were qualified to vote — and recognized as such by their municipalities — were barred from doing so by operation of G.L. c. 51, §§ 26 and 34 solely because they had not been registered for 20 days. Article 3 does not allow such a disqualification — and for good reason.

The consequences of an unconstitutional deadline are far reaching. Nearly 600,000 Massachusetts residents are eligible to vote but not registered to do so. An untold number of the 4.3 million registered voters in this state recently have moved, and are not eligible to vote in their current district unless they re-register. Unregistered individuals and recent movers disproportionately are racial and ethnic minorities, young, formerly incarcerated or economically disadvantaged. To become involved in our system of government, each of these citizens must register and wait at least 20 days; otherwise, they will not be allowed to vote at all. The 20-day cutoff closely corresponds to the very time when public attention begins to turn to the electoral

process. So, when would-be voters are most likely to register, they are told to wait to the next election despite their constitutional right to vote in the current one.

Who votes matters not just in the election but in the actions of the elected branches that follow it. Our frame of government assumes that elected officials will be more responsive to the needs of those who vote than the needs of those who do not; and academic scholarship confirms that assumption. So, blocking eligible voters from voting also affects the laws under which they will live.

As the Massachusetts Constitution recognizes, the health of our government depends on greater citizen involvement, which the Legislature has the power to facilitate but not impair.

INTERESTS OF THE AMICI

Amici are 14 non-profit organizations that believe our Commonwealth is best served by the government that its constitution demands: one that represents and is accountable to all. They recognize that giving effect to the words of James Madison has been one of the defining struggles of American democracy: "Who are to be the electors of the . . . representatives? Not the rich, more than the poor; not the learned, more than the [under-privileged]; not the haughty heirs of distinguished names, more than the humble sons of

obscure and unpropitious fortune. The electors are to be the great body of the people of the [Commonwealth]." Federalist No. 57. In alphabetical order, Amici are:

- **Common Cause.** Common Cause is a non-partisan, nonprofit organization that advocates for clean, fair, and inclusive elections, to better ensure a government accountable to the citizens it serves.

- **Conservation Law Foundation (CLF).** CLF is a non-partisan, nonprofit organization whose mission is to protect the New England environment for the benefit of all people, using law, science, and the market to create solutions that preserve our natural resources, build healthy communities, and sustain a vibrant economy. CLF believes that accountable government and an inclusive elections process are necessary to ensure conservation of natural resources, protection of public health, and promotion of thriving communities for all in New England.

- **Environmental League of Massachusetts Action Fund (ELMAF).** ELMAF is a non-partisan, nonprofit organization that advocates for accountable, environmentally responsible government. ELMAF believes that each citizen affected by the state's environmental policy should be afforded a choice at the ballot box to influence it.

- **Jewish Alliance for Law and Social Action (JALSA).** JALSA is a Massachusetts nonprofit organization working for social, economic, and environmental justice, civil rights and civil liberties for all people. Jewish tradition teaches that "a ruler is not to be appointed unless the community is first consulted," and consistent with that teaching JALSA and its predecessor organizations have a long tradition of advocating that the full diversity of our citizenry must have the unabridged right to choose their leaders at the ballot box.

- **Latino Justice PLRDEF.** LatinoJustice PRLDEF's is a non-partisan, nonprofit civil rights legal defense organization whose mission is to protect the

constitutional rights of all Latinos and to promote justice for the pan-Latino community. LatinoJustice since being founded as the Puerto Rican Legal Defense & Education Fund in 1972 has worked to secure the voting rights and political participation of Latino voters, and has brought a number of seminal precedential cases creating bilingual voting systems and mandatory language assistance services.

- **Lawyers' Committee for Civil Rights and Economic Justice.** The Lawyers' Committee is a non-partisan, nonprofit legal organization whose mission is to safeguard the civil, social, and economic liberties of residents of Massachusetts. It is the local chapter of the civil rights organization founded in 1963 at the request of President John F. Kennedy in order to mobilize the private bar in vindicating the civil rights of African Americans and other racial and ethnic minorities.

- **League of Women Voters of Massachusetts (LWVMA).** For nearly a century, the non-partisan, nonprofit League has empowered and educated voters and encouraged citizen participation in government decision-making. The League advocates for an open governmental system that is representative, accountable, and responsive; that has a fair and adequate fiscal basis; and that protects individual liberties established by the constitution. Here in the Commonwealth, LWVMA presses these principles while working to register, inform, and engage voters.

- **Mass Alliance.** Mass Alliance is a coalition of advocacy organizations that work together to foster civic participation in Massachusetts. Access to the ballot is the keystone of that participation.

- **New England Area Conference, National Association for the Advancement of Colored People (NAACP).** The New England Area Conference of the NAACP is a non-partisan, nonprofit organization whose mission is to ensure the political, social, and economic rights of all persons, and to eliminate racial discrimination.

- **NARAL Pro-Choice Massachusetts.** NARAL is a non-partisan, nonprofit organization that develops and sustains a grassroots constituency in order to use the

political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices. A fair, open, and inclusive democracy is essential to its mission.

- **Neighbor to Neighbor Massachusetts Action Fund.** Neighbor to Neighbor is a nonprofit advocacy organization working to ensure that people of color, immigrants, women, and the working class are at the center of and fairly represented in the political process.

- **Planned Parenthood Action Fund (PPAF).** PPAF is a non-partisan, nonprofit organization serving as the advocacy arm of Planned Parenthood League of Massachusetts (PPLM). PPAF works to advance PPLM's mission to protect and increase access to sexual and reproductive health services for women, men, and families across Massachusetts and advocates for a future where access to health care and, in particular, reproductive healthcare, is a public policy priority. PPAF believes that voting is a critical avenue for social and political change, and has a direct impact on people's ability to access reproductive health care. The fight for reproductive health and rights will only be won with the complete participation of everyone, especially historically disenfranchised communities.

- **Progressive Massachusetts.** Progressive Massachusetts is a non-partisan, nonprofit grassroots organization that advocates for progressive public policy and elected officials who support such policies. A central mission of the organization is accountable government through fair, open, and inclusive elections.

- **Sierra Club.** Founded in 1892, the Sierra Club is the nation's largest environmental advocacy organization. Primary among its missions is the education and enlistment of humanity to protect and restore the quality of the natural and human environment. Consistent with this mission, the Sierra Club advocates for open and inclusive elections that foster accountable government.

ISSUE PRESENTED

Whether the right to vote affirmatively guaranteed by Article 3 of the Amendments to the Massachusetts Constitution may be conditioned upon a 20-day waiting period between the act of registering and the act of voting.

STATEMENT OF THE CASE

Amici adopt: (i) the statement of the case set forth by Plaintiffs-Appellees Chelsea Collaborative, Inc, MassVOTE, and Rafael Sanchez ("Plaintiffs"); and (ii) the facts found by the Superior Court, not one of which has been challenged by the Secretary of the Commonwealth. See White v. Hartigan, 464 Mass. 400, 414 (2013) ("On appeal, [this Court is] bound by a judge's findings of fact that are supported by the evidence, including all inferences that may reasonably be drawn from the evidence") (internal citation and quotation marks omitted). Amici pause to emphasize certain facts and scholarship in the context of their own as organizations seeking to inform and engage the electorate.

A. Statutory Background.

The General Laws establish that eligible voter may not vote unless she registers at least 20 days before the election, with certain limited exceptions. G.L. c. 51, § 26 (establishing the 20-day waiting period); id., § 34

(disqualifying any voter from the next election unless she meets the registration deadline).[3]

The Commonwealth provides for the casting of provisional ballots by individuals who affirm that (i) they are registered, and (ii) are not on the registered voter list at the place where they are registered to vote. G.L. c. 54, § 76C; see generally Douglas A. Randall & Douglas E. Franklin, Municipal Law and Practice § 38.54 (5th ed. May 2017 update).[4] The municipal clerk must review all provisional ballots to determine "the individual is eligible to vote in the precinct in the election." G.L. c. 54, § 76C(d). If that review indicates that the eligible voter has registered, but that she did not do so at least 20 days before the election, her vote is not counted (unless she is a specially qualified voter). Id.; Joint Appendix ("JA") 827–28, 1014; see Addendum ("ADD") 1, 37, 39, 55; G.L. c. 51, § 34.

[3] The exceptions are established by G.L. c. 50, § 1, and G.L. c. 51, §§ 47A and 50 for: those living or stationed abroad, confined in a correctional facility, recently having attained citizenship or the age of majority; or absent from the Commonwealth throughout the seven days immediately preceding the registration deadline. These "specially qualified voters" may register until 4 PM on the day preceding the election. Id., § 50.

[4] The affirmance is made under the penalty of perjury. G.L. c. 54, § 76C(g).

B. The Population of Voters Who Are Qualified But Not Registered to Vote.

As of 2014, more than twelve percent of those eligible to vote in Massachusetts were not registered to do so. Addendum ("ADD") 34. As the Superior Court found, this population totals nearly 600,000. ADD 34. It is undisputed that racial and ethnic minorities, the economically disadvantaged, and young people are disproportionately impacted. JA 710 (Tr. 207–210); JA 717–18 (Tr. 235–241). In addition, an undetermined number of the 4.3 million registered voters in Massachusetts have moved, such that they may not be able to vote at (the polling place associated with) their current address.[5] Recent movers likewise "tend to be younger, lower income, less educated, more likely to be racial and ethnic minorities." JA 710 (Tr. 208).

To participate in a state election, unregistered citizens and recent movers must register at least 20 days before election day. G.L. c. 51, §§ 26, 34. This 20-day waiting period is during the very time that public interest

[5] If the citizen has moved within the past six months, state law allows her to return to her prior place of residence and vote there. G.L. 51, § 1. Of course, in that circumstance, the voter is casting a ballot for a state representative, state senator, and executive councilor who may not actually represent the district in which she lives; and, before voting, the individual must undertake the burden to travel to his or her former neighborhood.

in state elections is at its zenith. ADD 33-34. After the 20-day cutoff "[p]ublic interest continues to rise right up to Election Day." JA 706 (Tr. 194); see ADD 33-34; Francia & Herrnson, "The Synergistic Effect of Campaign Effort and Election Reform on Voter Turnout in State Legislative Elections," 4 State Politics & Policy Quarterly 73, 84 (2004) ("[P]ublic interest in politics often does not peak until the final days before an election when campaigns and parties make their most aggressive efforts to mobilize voters").[6]

Amici that seek to engage the public on crucial state policy issues know this phenomenon firsthand. Public attention waxes and wanes as most voters do not work in or around government or direct unrelenting attention to it. That attention spikes in the days and weeks leading up to a state election is no more surprising than that interest in football peaks in the days before the Super Bowl; the stakes of elections are just infinitely higher.

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[6] This fact is well understood in other contexts. During the period immediately preceding election day, other constitutional protections associated with our electoral process are given their "fullest and most urgent application." Cf. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) ("Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a political campaign") (internal citation omitted).

The record confirms this experience and establishes that at the very time an unregistered citizen or recent mover is most likely to become interested in voting, it is too late for her to register to do so. JA 706 (Tr. 194). Academic scholarship is in accord:

> [I]ndividuals are rational actors who weigh the costs of voting against its perceived benefits. Political campaigns are important to this calculus to the extent that they provide an incentive for citizens to vote by convincing them that their vote is important . . . . While campaign activities may create incentives to vote, the legal environment may serve as a barrier. Burdensome registration laws . . . drive up the cost of voting and reduce the likelihood of casting a ballot. In particular, registration deadlines far in advance of Election Day decrease voter turnout.

Francia & Herrnson, supra, at 74–75. Modern metrics such as Google web search data further support the understanding that citizen interest in voting peaks as the election approaches. Alex Street, et al., "Estimating Voter Registration Deadline Effects with Web Search Data," 23 Political Analysis 225, 238 (2015) ("[M]uch of the late interest in registering is concentrated at the very end of the campaign period").

C. The Population of Voters Who Are Qualified And Registered to Vote, But Are Barred From Doing So Only By G.L. c. 51, §§ 26, 34.

Despite the deadline, thousands of voters register to vote during the 20 days before the election. ADD 11, ¶ 77.

Per guidance promulgated by the Secretary, their registration applications are accepted, processed, and entered into the state's system. ADD 37; JA 827–28 (Tr. 550–52), 842–43 (Tr. 610–12), 1020, 1219. A review of the Commonwealth's voter database known as the Voter Registration Information System ("VRIS") would indicate that they are qualified to vote. But, to effectuate the cutoff imposed by G.L. c. 51, §§ 26 and 34, the Secretary has programmed VRIS to exclude these voters from the election day voter list. JA 827–28, 1014; see ADD 1, 37, 39, 55; G.L. c. 51, § 34. For these voters, the Commonwealth and its municipalities are aware that they are qualified; the state's database so reflects; but they nonetheless are proactively barred from voting.

D. The State's Interest in Election Administration.

Amici have great respect for the Commonwealth's compelling interest in sound election administration, and for the public servants who are responsible for enforcing our election laws. Nor do amici dispute that election day and the days surrounding it are busy periods for municipal election officials. Yet, the record evidence suggests that completed registration forms take just "one or two minutes" to process. ADD 37. The Secretary suggests that this work cannot occur near election day because election officials are training poll-workers; testing voting machines; and preparing

voter lists. D. Br. at 7–8. Setting aside the preparation of voter lists (which takes as little as a couple of hours, see ADD 11, ¶ 78, JA 841 (Tr. 605)), there is no record evidence why poll workers cannot be trained and ballot machines cannot be tested weeks before election day, allowing ample time for later processing of registration forms. See JA 846 (Tr. 627) (testimony reflecting only that these responsibilities must be executed "prior to election day"). In fact, the Secretary's regulations emphasize that municipal election officials should test voting machines with ample time before the election — so as to allow any problems to be addressed. See 950 Code Mass. Regs. § 54.02; Randal & Franklin, Municipal Law and Practice § 38.47 (5th ed. 2017 Update).

E. Campaigns Focus on Registered Voters and Benefit from the 20-Day Registration Deadline.

In many ways, voter registration data is the keystone of modern campaigning — and particularly of campaigns by experienced, incumbent politicians. As Eitan Hersh explains in his recent book Hacking the Electorate: How Campaigns Perceive Voters (2015), registration data are public records, used by campaigns for voter targeting and messaging. See id. at 57–64.[7] As Hersh describes:

[7] Excerpts of the book are reprinted in the addendum.

> [P]ublic records, especially those collected in the voter registration system, serve as information shortcuts that assist campaigns in perceiving the dispositions of voters. Since the time when the voter registration system was implemented, these data became a fixture of campaign strategy. Over time, lawmakers have tweaked registration data [collection] to better serve their electoral interests.

Id. at 64. The value of these records has increased as they have become digitized. Now, "any candidate running for office c[an] easily and cheaply access a complete list of registered voters [that is] also easy to merge with other sources of politically relevant . . . information." Id.

Where, as in Massachusetts, an eligible voter's ability to register ceases 20 before from an election, candidates for office use public records law to know with almost exact precision the composition of their potential electorate. See G.L. c. 51, § 40 (registration records are "open to public inspection"); id. § 55 (voting lists "shall be printed and available for public distribution"). Surprises are mitigated. Candidates know how many people are eligible to vote and who they are — with enough time to engage in very specific voter targeting. As the Superior Court found, G.L. c. 51, §§ 26 and 34 does not benefit the voters, thousands of whom are disqualified from the franchise. E.g., ADD 67–68. The law does, however, benefit those running for office. See

Hersh, supra, at 45 ("Parties and vendors [working with campaigns] receive real time updates from election authorities about which voters have newly registered," with enough time to act). This dynamic should give the Court pause. Id. at 13 ("Because politicians typically have both administrative and political incentives in their oversight of public records, there is reason to be concerned about conflicts of interest . . . in this domain").

In fact, the persistence of the 20-day voter registration deadline in a technological era when the processing of a registration takes "one or two minutes" (ADD 37, JA 839 (Tr. 599)) exemplifies a trend note by Hersh:

> The political uses of public records are not always obvious or presented transparently. L[aws] about voter registration or about open records regulations can appear to be policies simply aimed at making elections run more smoothly . . . .
>
> It may not register with the public that these data policies could primarily serve political interests rather than administrative ones. Relatedly, state-level data policies are typically not at the top of the agenda for media outlets . . . , which means that these laws are debated and passed [or, in this case, kept] with very little public awareness. Thus, what is problematic with the laws in this domain is not that politicians have political interests, but that politicians can often change [or keep outdated] laws and further those interests without much public scrutiny.

Hersh, supra, at 198.

The flip side of campaigns using registration information to target registered voters is that unregistered voters are virtually ignored. Hersh, supra, at 205–13. Campaigns are incentivized to advocate policies to which registered voters are amenable. Id. at 198–99 And our democracy is based, at least in part, on the idea that when a particular candidate wins an election, she will then seek to enact those policies on which she campaigned — which were crafted without unregistered (but eligible) voters front of mind.

F. The Elected Branches Are More Responsive to the Concerns of Voters Than They Are to the Concerns of Nonvoters.

Candidates for elected office continue their focus on registered voters once the campaign is over. Our political system incents particular responsiveness to the concerns of voters over the concerns of nonvoters. Political science literature illustrates this concept.[8] It is straightforward:

[8] See, e.g., Avery, "Does Who Votes Matter? Income Bias in Voter Turnout and Economic Inequality in the American States from 1980 to 2010," 37 Political Behavior 955–976 (Dec. 2015), available at https://link.springer.com/article/10.1007%2Fs11109-015-9302-z#page-2; McElwee, "Why Voting Matters: Large Disparities in Turnout Benefit the Donor Class," Demos (Sept. 16, 2015), available at: http://www.demos.org/publication/why-voting-matters-large-disparities-turnout-benefit-donor-class.

elected officials pay disproportionate attention to those who hold, and are able to exercise, the power to hire and fire them at the ballot.

When aggregated, the effect is significant. The ability of particular neighborhoods and advocacy groups to affect policy depends, in part, on the number of active voters in their ranks.[9] Accordingly, historically marginalized communities and those who advocate for the benefit of such communities like the many of the amici), face challenges impacting public policy (because the people on whose behalf they advocate vote and register to vote in lesser percentages).[10]

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[9] See generally Jan Leighley and Jonathan Nagler, Who Votes Now?: Demographics, Issues, Inequality, and Turnout in the United States (2013).

[10] As the Pew Research Center has demonstrated:

> Nearly half of nonvoters (46%) have family incomes of less than $30,000, compared with 19% of likely voters. Most nonvoters (54%) have not attended college; 72% of likely voters have completed at least some college. These demographic differences are not new . . . . Fully 45% of nonvoters say they have had trouble paying bills in the past year, compared with 30% of likely voters. Nonvoters are also much more likely than voters to borrow money from family or friends (41% vs. 21%) and to receive a means-tested benefit (33% vs. 18%). And many nonvoters lack the financial tools commonplace in today's economy: Just 52% say they have a credit card, while about as

For some advocacy groups, the struggle for salience requires that they spend less time on educating the public, and more time and valuable human and capital resources on voter registration drives. At trial, the Executive Director of Chelsea Collaborative testified that before the 20-day registration deadline, her organization's focus primarily is on voter registration rather than on the policies for which it advocates. See JA 648–52 (Tr. 70–86). Amici either directly share Chelsea Collaborative's experience with registration drives or join its view that resources spent to convince new voters and recent movers to register three weeks

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> many (55%) have a savings account. And just 37% of nonvoters say they have a 401(k) or another retirement account; among the older and more financially secure likely voters, 72% have a retirement account.

Pew Research Center, "The Party of Non Voters" (Oct. 31, 2014), available at http://www.people-press.org/2014/10/31/the-party-of-nonvoters-2/.

At minimum, these disparities are correlated with tangible and troubling policy outcomes. For example, public transportation investments in historically marginalized areas have been lacking for decades, which inhibits economic mobility. See generally Bullard, "Addressing Urban Transportation Equity in the United States," 31 Fordham Urban L.J. 1183 (2003); White, "Stranded: How America's Failing Public Transportation Increases Inequality," The Atlantic (May 16, 2016), available at https://www.theatlantic.com/business/archive/2015/05/stranded-how-americas-failing-public-transportation-increases-inequality/393419/.

before an election are better directed at informing the public about the policy choices facing our elected branches.

More fundamentally, amici's beliefs correspond to what the Massachusetts Constitution demands: officeholders may not arbitrarily choose their voters, as they do by keeping in place a 20-day registration deadline (that allows them to know, with weeks to spare, who may vote on election day); instead, eligible voters should choose their elected officials.

SUMMARY OF THE ARGUMENT

The parties agree that Article 3 of the Amendments to the Massachusetts Constitution affirmatively grants the fundamental right to vote to citizens over the age of 18. Mass. Const. Amend. art. 3. Accordingly, this case is about what level of protection must be afforded that right under the state constitution. The answer already has been provided by this Court: where an impingement upon the right to vote has been challenged, "'the State must demonstrate affirmatively that the challenged provision promotes a compelling State interest which could not be achieved in any less restrictive matter.'" Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930, 935 (1983) (quoting Massachusetts PIRG, 375 Mass. at 93).

Application of that standard is straightforward here. The Commonwealth has identified two compelling interests, i.e., the orderly administration of elections and ascertaining voter qualifications. Defendant's Brief ("D. Br.") at 14, 16, 46.[11] The law at issue has two pertinent parts: (i) a 20-day registration deadline, G.L. c. 51, § 26; and (ii) absolute disqualification from voting in the election upon failure to meet that requirement (even where the voter's registration has been processed), id., § 34. Neither component is narrowly tailored to the state's interests. Both must be if it is to withstand this challenge. As to the first component, the 2016 election conclusively demonstrated that the Commonwealth can soundly administer an election with a 5-day registration deadline. See G.L. c. 54, § 25B(c), codified by St. 2014, c. 111, § 12 (establishing an early voting period for biennial state elections, beginning 5 days after the registration deadline). As to the second component, the Commonwealth has offered no explanation at all as to why the consequence for missing the

[11] The plainest understanding of an "orderly election" is that it includes only qualified voters; accordingly, it is not clear whether these interests are distinct or instead whether the latter is subsumed in the former. Regardless, amici accept for the purposes of this brief that both interests are compelling. For ease of reading, amici will refer to the interests collectively as the state's interest in sound election administration.

deadline should be total disqualification, rather than the casting of a provisional ballot. Its bank-shot argument is unstated: but for the threat of total disqualification after 20-days out, too many citizens would register nearer to election day which in turn would burden election officials. The argument is camouflaged between the lines for a reason: it illustrates that, but for legislative intervention, the most logical, rational, and common time to register would be just before the election.

Because G.L. c. 51, §§ 26 and 34 cannot survive any form of exacting scrutiny — regardless whether it is labeled "strict," "close" or "heightened" — the Commonwealth seeks refuge in deferential review. In its view, restrictions the right to vote should be reviewed only to determine whether they are "within the realm of reasonableness." D. Br. at 15-16. Cepulonis plainly holds otherwise. See 389 Mass. at 935.[12] Moreover, the Commonwealth's argument for rational basis review rests on two types of inapposite law. First, the Commonwealth relies on federal voting cases decided under

[12] The Secretary repeatedly uses the term "sliding scale" review to describe how this Court should analyze G.L. c. 51, §§ 26 and 34. But as discussed infra § II, the Secretary wrongly believes the "sliding scale" should result in rational basis review; accordingly, as the Secretary incorrectly uses the terms, there is no material difference between "sliding scale" review and rational basis review. See D. Br. at 18-20.

the United States Constitution. But those cases are irrelevant here. The right to vote "aris[es] under the constitution of each state, and not under the constitution of the United States." Kinneen, 144 Mass. at 497; see Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982) ("the [federal] Constitution does not confer the right of suffrage upon anyone"). Second, the Commonwealth relies on this Court's ballot access jurisprudence addressing how candidates may qualify to be placed on the ballot under Article 9 of the Declaration of Rights. But the constitutional provisions regarding voting rights, on one hand, and the access of candidates to the ballot, on the other hand, are plainly and materially distinct. The Commonwealth has closely scrutinized limits on the right to vote for more than a century, see Kinneen, 144 Mass. at 497; cases decided under Article 9 provide no reason to depart from that settled law.[13]

Even if this Court were to embrace the inapposite "sliding scale" test on which the Commonwealth relies, a proper application of that test would result in the application of close scrutiny, which G.L. c. 51, §§ 26 and 34 cannot withstand. Given the fleeting nature of the right to

[13] The Commonwealth also stresses that other states have voter registration deadlines — without noting that many of them are established or expressly contemplated by those states' constitutions. See infra § I-C and note 21.

vote, a mandatory 20-day waiting period between registration and voting is a significant burden. History and economics instruct that the calculus of whether to vote is too easily altered; the burden cannot be evaluated without that context.

There is no need to cloud the picture with inapposite strands of other constitutional law. Amici seek nothing more than a straightforward application of Article 3's exhortation that qualified citizens "shall have [the] right to vote" consistent with this Court's long tradition of giving effect to that phase. See Swift v. Registrars of Voters of Quincy, 281 Mass. 271, 277 (1932) ("The right to vote is a sacred privilege guaranteed by the Constitution to those lawfully qualified. Every rational intendment is to be made in favor of the rightful exercise of the franchise. That principle pervades and dominates all our decisions and harmonizes them all").

I. LEGISLATIVE AUTHORITY TO PLACE CONDITIONS UPON THE FUNDAMENTAL RIGHT TO VOTE IS SHARPLY CURTAILED.

At minimum, G.L. c. 51, §§ 26 and 34 impose a 20-day waiting period between when a qualified voter must register and when he may vote on election day. This Court must closely scrutinize the justification for imposing that burden.

A. Because the Right to Vote is a Fundamental Right, Any Incursion Triggers Strict Scrutiny.

Article 3 is unique because it is an affirmative grant of an individual right. See Mass. Const. Ament. Art. 3. Most rights this Court has recognized as fundamental are negative rights — and most of them are implied negative rights. See Gillespie v. City of Northampton, 460 Mass. 148, 154 (2011) (cataloguing the rights this Court has "proclaimed to be paradigmatically fundamental"); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (1983) ("the [federal] Constitution is a charter of negative rather than positive liberties"); cf. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (1989) (the Due Process Clause is "a limitation on the State's power to act, not . . . a guarantee of certain" rights).

That Article 3 grants an affirmative right — and to whom it grants that right — is no accident. See Lawrence Friedman & Lynnea Thody, The Massachusetts State Constitution 161 (2001) (the history of Article 3 "is largely the history of the extension of suffrage in the Commonwealth").[14] The

[14] Over the years, Article 3 has been amended to drop property ownership and taxpaying requirements; it also has been amended to eliminate disqualifications on the basis of gender, wealth (e.g., not being a "pauper" or receiving "aid and assistance from the public"), and temporal residency. Friedman & Thody, supra, at 160-161.

affirmative grant represents the centrality of the right to vote in the constellation of constitutional rights. See Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make our laws under which, as good citizens, we must live. Other rights, even the most basic, our illusory if the right to vote is undermined").

At minimum, restrictions on the fundamental affirmative right to vote should be subject to the same strict scrutiny used to review restrictions on other fundamental rights. See Blixt v. Blixt, 437 Mass. 649, 656 (2002); Aime v. Commonwealth, 414 Mass. 667, 673 (1993) (same).[15]

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[15] In the context of this case, amici do not believe there is a material distinction between the Superior Court's necessity test and strict scrutiny. Notably, Kinneen, from which the test was drawn, predated the articulation of varying levels of scrutiny. This Court first began using the phrase "strict scrutiny" in the context of constitutional review in the 1970s. E.g., Commonwealth v. A Juvenile, 368 Mass. 580, 584 (1975); Doe v. Doe, 365 Mass. 556, 571 (1974).

A straightforward analysis of the Kinneen opinion reveals that this Court applied what is now known as strict scrutiny, and Cepulonis confirmed as much. See Cepulonis, 389 Mass. at 935 (law impinging on right to vote subject to strict scrutiny). As set forth in Blixt, strict scrutiny is:

> When a fundamental right is at stake, the so-called strict scrutiny formula for examining the constitutionality of State infringement on that right comes into play. This formula traditionally is stated in terms of requiring (1) a legitimate and compelling state interest to justify State action, and (2) careful examination to ascertain

A simple analogy illustrates the point. Imagine if G.L. c. 51, §§ 26 and 34 involved not the fundamental right to vote, but the fundamental right to distribute pamphlets on a public sidewalk, such that the pamphleteer had no right to speak at all lest he registered 20 days beforehand. This Court would subject that regulation to the most exacting scrutiny. Cf. Benefit v. City of Cambridge, 424 Mass. 918, 925–26 (1997) (applying strict scrutiny to an ordinance requiring sidewalk beggars to register); cf. also McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348 (1995) ("handing out leaflets in the advocacy of a politically controversial viewpoint[] is the essence of First Amendment expression. That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to [the] expression"). The same approach governs here.[16]

> whether the action was narrowly tailored to further that interest.

437 Mass. at 656 (emphasis added) (internal citations and quotations omitted).

[16] By contrast, rational basis review is reserved for only those statutes affecting interests without particular constitutional import. See Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 669 (2011). For example, a condition placed on the right to appeal a parking ticket receives deferential rational basis review; so, too, does a town's decision to ban arcades. E.g., Gillespie, 460 Mass. at 153; Police Dep't of Salem v. Sullivan, 460 Mass. 637, 641 (2011); Marshfield Family Skateland, Inc. v. Town of Marshfield, 389 Mass. 436, 445 (1983). Surely restrictions

B. The 20-Day Registration Deadline Is Neither Narrowly Tailored to Sound Election Administration Nor the Least Restrictive Path to That End.

Amici adopt Plaintiffs' argument that G.L. c. 51, §§ 26 and 34 are not narrowly tailored to the Commonwealth's interest in sound election administration and are not the least restrictive means to achieve that end. See P.Br. at 39–48. They write to emphasize four additional points.

First, on several occasions this Court has considered whether the Legislature can impose a waiting period before a qualified voter casts a ballot. Each time it has answered no. Kinneen, 144 Mass. at 499 ("Any legislation by which the exercise of his right[] is postponed diminishes them, and must be unconstitutional, unless it can be defended on the grounds that it is reasonable and necessary"); see id. (holding unconstitutional a 30-day waiting period after naturalization); Opinion of the Justices, 124 Mass. at 598 (rejecting waiting period for a citizen no longer designated a pauper); Bridge, 14 Mass. at 372–74 (when voter met then-existing property requirement on the "morning of the day of

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on the right to vote, i.e., the bedrock on which our government is built, trigger more exacting review than the foregoing inconsequential matters. And this Court expressly has so held. Cepulonis, 389 Mass. at 935–36 ("the State must demonstrate affirmatively that the challenged provision promotes a compelling state interest which could not be achieved in any less restrictive manner").

election" he was immediately eligible to vote). This case accords neatly with that clear precedent. See Kinneen, 144 Mass. at 503 (the law "denies them for the period of 30 days the exercise of a right which the constitution has conferred upon them[,] [t]here is no warrant for this within the just and constitutional limits of legislative power").

Second, the penalty for missing the 20-day deadline is as problematic under the Massachusetts Constitution as the existence of the deadline itself. An absolute bar to voting is the opposite of narrow tailoring. The Commonwealth's formulaic practice of blocking eligible, registered voters from the election day voter list for failing to meet the deadline demonstrates the point. See infra Background § C. These citizens easily could be afforded the same provisional ballots given to other voters whose eligibility is in dispute. See G.L. c. 54, § 76C. Boston did just that in 2016, when it was unable to process certain registration forms before the early voting period — thus demonstrating the efficacy of this potential solution. ADD 30, ¶ 387; D. Br. at 9–10. That eligible voters who have registered after the deadline (but before election day) are denied provisional ballots is sufficient alone to conclude that G.L. c. 51, §§ 26 and 34 do not comport with Article 3.

Third, if the Commonwealth's goal is a soundly administered election, there are numerous means to that end that constitute a lesser incursion on the right to vote. A later deadline, closer to election day is possible, as 2016's early voting demonstrated. G.L. c. 54, § 25B; P. Br. at 11–13, 43–44. No deadline at all (i.e., election day registration) also is an option. See ADD 54–58, 63. Indeed, it is the option for which the Secretary recently has chosen to advocate. See Rocheleau, "State's Top Election Official Offers Legislature a Plan for Same-Day Voter Registration," Boston Globe B1 (Jan. 25, 2018). In addition, automatically registering voters who already share key information with the state (e.g., in connection with licensure, taxation, or the receipt of state or municipal services) would disqualify fewer voters and spread any administrative burden away from election day.[17]

Fourth, given that the 20-day voter registration deadline is not necessary for sound election administration,

[17] In addition, the Commonwealth emphasizes that the administrative burden of processing registration comes not from the two minutes it takes to process a complete registration form, but the lengthier steps that must be taken to address an incomplete form. ADD 37; JA 839–840 (Tr. 599, 602); D. Br. at 7. Yet another less restrictive alternative is to disqualify only those votes who, in the days leading up to the election, submit an incomplete form, and ensure that any incomplete forms are addressed before the next election.

the Court should look closely at who benefits from it. Lists of registered voters are public records, routinely sought and used by campaigns — and particularly by experienced, incumbent campaigners. G.L. c. 51, §§ 40, 55; see infra Background § E. The 20-day deadline ensures that campaigns will know exactly who is eligible to vote in the upcoming election (with very few exceptions) — and that they will know this information with enough time to act on it. See generally Hersh, supra. There is no conceivable reading of Article 3 that allows the General Court to enact a law that benefits those running in an election by banning the late registration of those otherwise able to vote in it. But that is precisely what G.L. c. 51, §§ 26 and 34 do.

C. Neither Rhetoric Nor Federal Law Nor Article 9 Support the Deference Sought by the Secretary.

The Secretary's position that G.L. c. 51, §§ 26 and 34 should receive deferential review is based on a mix of rhetoric and reference to inapposite law. Three quick points dispel any suggestion that a minimum 20-day waiting period between the act of registration and the act of voting should be afforded any deference at all.

First, the Secretary suggests the deadline is part of the process to determine a voter's qualification, rather than a qualification itself. D. Br. at 16–17. He attempts to

anchor this rhetoric in Capen, but the decision offers him no support. Capen held only that a registration requirement alone is not an additional qualification. 12 Pick. at 498. The requirement at issue there, though, involved no waiting period: the registrar was required by law to "be in session immediately before or on the day of the election, so as to give every voter a means of knowing whether his name was borne on the [registration] list, and opportunity to place it there if omitted." Id. at 500.

By contrast, the law here requires registration and a 20-day waiting period. G.L. c. 51, §§ 26 and 34. The suggestion that the waiting period is not an additional qualification holds together only if the 20 days are needed (or, at least, closely tailored to the need) to verify voter eligibility. See Kinneen, 144 Mass. at 502. The record is clear that nowhere near such lengthy period is needed. See P. Br. at 39–49. What, then, is the 20-day deadline other than a requirement that an eligible voter must be registered to vote for nearly three weeks before he will be allowed to do so? This Court has thrice held that a waiting period for an otherwise eligible voter is impermissible. See Kinneen, 144 Mass. at 502; Opinion of the Justices, 124 Mass. at 598; Bridge, 14 Mass. at 373–75. Each of those cases involved waiting periods after qualifications actually enumerated in

the constitution were met. Id. It would be anomalous for the Court to prohibit a waiting period following compliance with express Article 3 qualifications, but to allow a waiting period following compliance with a registration requirement that is only implied by Article 3.

Second, the Secretary's reliance upon federal caselaw and this Court's ballot access jurisprudence crumbles upon inspection. The United States Constitution grants the States broad power to regulate federal elections and "recognize[s] that States retain the power to regulate their own elections." Burdick v. Takushi, 504 U.S. 428, 433 (1992). See U.S. Const. art. I, § 4, cl. 1 ("The times, places and manner of holding elections for [Congress] shall be prescribed in each State by the Legislature thereof . . . "); Clingman v. Beaver, 544 U.S. 581, 586 (2005). Federalism and respect for state authority over elections are express considerations in every federal voting rights case relied upon by the secretary. E.g., Burdick, 504 U.S. at 433 (declining to "tie the hands of States" in the administration of their elections). So, under federal law, these matters are for the States unless they run afoul of the Fourteenth and Fifteenth Amendments (or federal laws enacted to enforce

those amendments).[18] The federal cases say nothing, whatsoever, about the scope of the affirmative right afforded eligible voters by Article 3; they, like the United States Constitution, expressly leave that decision to the Commonwealth itself. U.S. Const. art. I, § 4, cl. 1; Clingman, 544 U.S. at 586; Burdick, 504 U.S. at 433; see generally Douglas, "The Right to Vote Under State Constitutions," 67 Vand. L. Rev. 89, 95–96 (2014).

The Secretary's attempt to liken the right to vote to a candidate's right to appear on the ballot likewise cannot withstand a review of the constitutional text. Though in 1780, Article 9 of the Declaration of Rights likened the rights of voting and ballot access, Article 3 of the Amendments to the Massachusetts Constitution created an affirmative right to vote if certain qualifications are met that does not exist in the context of ballot access. E.g., Opinion of the Justices, 240 Mass. 601, 607 (1922) (analyzing

[18] Even though the federal cases uniformly express deference to state authority, the Supreme Court still emphasized 46 years ago that a registration deadline of more than 30 days would face close federal constitutional scrutiny (under less exacting constitutional language than is present in the Massachusetts Constitution). See Dunn, 405 U.S. at 348 "Fixing a constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much.") (emphasis added).

the constitutional text and concluding that "[i]t is apparent that the question whether one has a right to [run for] office under the constitution is separate and distinct from the question of whether one has the right to vote").[19]

Moreover, in the context of a candidate's right to be listed on the ballot, there are two fundamental rights with which the candidate's right must be weighed: (i) a party's fundamental freedom of association, see, e.g., Langone v. Secretary, 388 Mass. 185 (1983); and (ii) the fundamental right to vote, which could be burdened by a lengthy ballot listing every individual who desired elected office regardless of his support.[20] In the context of voting rights, each of the foregoing rights are aligned on scale. Free association rights are furthered, and not hindered, by allowing eligible voters to vote.

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[19] A review of the Massachusetts Constitution reveals qualifications in the context of ballot access that are not present in the context of voting. Compare, e.g., Mass. Const. Amend. art. 101 ("Every [state] representative for one year at least immediately preceding his election, shall have been an inhabitant of the district for which he is chosen"), with Mass. Const. Amend. art. 3 (establishing a much shorter residency requirement, since stricken in practice as unconstitutional).

[20] A voter's meaningful choice is demeaned if the act of voting becomes a game of identifying "Where's Waldo" on a 30-page ballot listing anybody wishing to run for office. Cf. Tsongas v. Secretary of the Commonwealth, 362 Mass. 708, 719 (1972) (noting possibility that top or near top position on the ballot may confer a benefit).

Lastly, the Secretary stresses that similar voter registration deadlines are in place in other states — as if to suggest that if the deadlines are permissible in those states, they must be in the Commonwealth too. D. Br. at 3. The Secretary should not rely on the law of other states without noting the material differences between the text of their constitutions and the text of the Massachusetts Constitution. Of course registration deadlines are allowed in a number of states: many are set by the constitution of those states. E.g., Del. Const. art. V, § 4 (establishing a 20-day registration deadline); N.Y. Const. art. II, § 5 (establishing a minimum 10-day registration deadline); Or. Const. art. II, § 2 (establishing a 20-day registration deadline); Ohio Const. art. V, § 1 (establishing a 30-day registration deadline); R.I. Const. art. II, § 1 (establishing a 30-day registration deadline). Other deadlines are expressly contemplated by state constitutions. See Mo. Const. art. VIII, § 2 (conditioning the right to vote on "regist[ration] within the time period prescribed by law"). Tenn. Const. art. IV, § 1 (mandating "registr[ation] . . . for a period of time prior to the day of any election as prescribed by the General Assembly"); Va. Const. art. II, § 2 (expressly empowering the legislature to establish a 30-

day deadline).[21] Tellingly, the Massachusetts Constitution has no such language.

II. ARBITRARY DISQUALIFICATION OF ELIGIBLE VOTERS SIGNIFICANTLY BURDENS THE RIGHT TO VOTE AND CANNOT BE WAIVED AWAY AS INSUBSTANTIAL.

Because the "sliding scale" analysis advocated by the Secretary has no application here, the Court need not undertake an analysis of whether the 20-day deadline significantly burdens the right to vote. If, however, the

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[21] The Secretary identifies 26 other states with voter registration deadlines of 20 days or longer. See D. Br. at 3, n. 8. As noted in the text, eight states state set — or expressly contemplate — such deadlines in their constitutions.

An additional 15 state constitutions expressly grant their respective state legislatures broad power to establish a registration process; such language is not present in the Massachusetts Constitution. Ala. Const. Art. VIII, § 177; Ariz. Const. art. VII, § 2; Ark. Const. III, §§ 1–2; Fla. Const. art. V, § 4; Ga. Const. art II, § 1, ¶ II; Ind. Const. art. II, § 14; Kan. Const. art. V, § 4; Ky. Const. § 147; Mich. Const. art. II, § 1; Miss. Const. art. XII, § 241; Nev. Const. art. 2, § 6; N.M. Const. art. VII, § 1; N.C. Const. art. VI, § 1; Wash. Const. art. VI, § 7; W. Va. Const. art. IV, § 12.

Certain of these constitutions are quite direct about the primacy of legislative authority to require compliance with a registration system as a qualification for voting. Pennsylvania, for example, provides that a citizen's right to vote is "subject . . . to such laws requiring and regulating the registration of [voters] as the General Assembly may enact." Pa. Const. art. VII, § 1. Mississippi is similar: "[R]egistration under the constitution and laws of this state . . . is hereby declared to be an essential and necessary qualification to vote at any election." Miss. Const. art. XII, § 244.

Court chooses to adopt that analysis, it should recognize the considerable impact of the deadline on the franchise. The impact is best understood in the context of the unique characteristics of the act of voting and the history of pre-election registration deadlines. In addition, this Court should consider the persistence of the 20-day deadline through an era of technological advancement that has rendered it obsolete in light of the clear benefit it affords candidates for office.

For these reasons, even under the "sliding scale" analysis, G.L. c. 51, §§ 26 and 34 must be subject to close scrutiny, which they cannot withstand. See Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 560 (2012) (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

A. The Requirement of 20-Day Advance Registration Must Be Analyzed in the Very Unique Context and History of the Right to Vote.

That a bureaucratic hurdle may inhibit the exercise of a fundamental right is not disputed in other contexts. Nor is the idea that the magnitude of the burden must be viewed in the context of how the right is exercised. So, while the government may require a permit to host a massive march on a public street, it may not require licensure for the

individual leafleting on the sidewalk.[22] In the first situation, the burden is slight relative to the exercise of the right; in the second, the burden is considerable and may preclude the exercise of the right all together.

The same considerations apply here. "[E]very rational man decides to vote just as he makes all other decisions; if the returns outweigh the cost, he votes; if not, he abstains." Anthony Downs, An Economic Theory of Democracy 260 (1957). The 20-day pre-election registration requirement imposes two costs: (i) the act of registration separate and apart from the act of voting; and (ii) the need to proactively think of and act upon the need to register before public attention concentrates on the election.

These costs and their impact on voting have been plain in this country for more than a century. The widespread enactment of pre-election day registration throughout the

[22] Compare Cox v. State of New Hampshire, 312 U.S. 569, 575–78 (1941) (upholding state's authority to establish a neutral license scheme for parades), with Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (striking down municipal attempt to ban leafleting without a permit, and describing the attempt as a "strik[e] at the very foundation of the freedom of the press") and Watchtower Bible and Tract Soc'y of N.Y. v. Village of Stratton, 536 U.S. 150, 153 (2002) (door-to-door advocacy may not be conditioned upon registration and reciting the long history of "invalidat[ing] restrictions on door-to-door canvassing and pamphleteering").

Northern states in the late Nineteenth Century was no accident:

> Registration statutes passed [in the North] were directed primarily against the population of urban areas, indicating a strong distrust of city political machines and their ethnic clients . . . . Many citizens who were only marginally involved in the voting process were 'priced out of the system' as the costs of participation had become too great.

Quinlivan, "One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration," 137 U. Penn. L. Rev. 2361, 2369 (1989).[23] Consistent with this trend, the first known[24] statewide pre-election registration requirement in Massachusetts set a more

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[23] During this time period, "legislators from rural and semirural districts tended to favor stringent registration requirements that would apply only to city dwellers." Alexander Keyssar, The Right to Vote: the Contested History of Democracy in the United States 156 (2000) (emphasis added). They argued that it would be a "hardship for their constituents to travel twice each fall, first to register and then to vote." Id.

[24] The Superior Court acknowledged the Legislature's initial creation of statewide, pre-election voter registration deadlines in 1893 and 1894. ADD 47. The 1893 act is drafted as though it is the first such statewide deadline, and it is the only one undersigned counsel were able to locate after diligent research (including consultation with those with expertise in legislative records). Amici cannot, however, exclude the possibility (however small) of a session law establishing statewide registration deadlines between the 1837 decision in Capen and the 1893 legislation. Suffice it to say (as the Superior Court did) that the Commonwealth's current pre-election registration requirements trace back to those set during the 1893-94 legislative session. ADD 47.

stringent deadline for Boston (14 days) and other cities (10 days) than it did for towns (6 days). St. 1893, c. 417, § 40. The very next year the cutoff periods were lengthened before any statewide election had occurred: 20 days for all cities; 10 for all towns. St. 1894, c. 271, § 2, amending St. 1893, c. 417, § 40. Given the historical context, even the gentlest skepticism yields the conclusion that the 1893-1894 General Court's concern about urban election administration cannot be isolated from its concern about the growing political power of recent immigrants. See Thomas H. O'Connor, The Boston Irish: A Political History 151-156 (1995) (describing increased Irish political power and waives of new and diverse immigrant populations in the 1880s and 1890s, and "'prominent' citizens [who were] sufficiently concerned about the influx of foreigners to seek ways of 'safeguarding' the established order").

In considering the burden imposed by the 20-day registration deadline, this Court should not forget what the General Court knew more than a century ago. Any burden on the right to vote that is not needed for sound election administration is a material one, because the calculus of whether to vote is so easily altered. That is particularly true for historically disenfranchised citizens. See Cunningham, supra, at 371 (the "first" lesson from historical

scholarship is that "registration restrictions can have discernable impact on the racial and socioeconomic character of the electorate") (emphasis added).[25]

Here the burden imposed by G.L. c. 51, §§ 26 and 34 lands in the weeks before the election, just as first-time state voters and recent movers are likely to be engaged by the electoral process. At that time, the papers, public airways, and podcasts feature little else. But to those newly engaged-voters who have an affirmative right to participate in the election of the leaders who govern them, G.L. c. 51, §§ 26 and 34 says: no, you will have to wait for two years.

B. The Consequence for Missing the 20-Day Deadline is Capriciously Burdensome.

The consequence for missing the 20-day deadline unquestionably is a substantial burden: it is a complete disqualification from the right to vote. The late-registering citizen is barred from voting in the state election; and the scholarship suggests that those brought to

[25] See Alvarez, et al., "How Hard Can It Be: Do Citizens Think it is Difficult to Register to Vote," 18 Stan. L. & Pol'y Rev. 382, 406 (2007) ("[T]he perception among young voters and . . . racial minorities that the registration process is difficult suggests that the legacy of disenfranchising minority voters and the procedural difficulties long encountered by both groups continue to exist").

power by that election will be less responsive to her. See infra Background § F. Because representative democracy envisions that policy outcomes will be affected by voter participation, blocking eligible voters from voting also affects the laws under which they will live. See Avery & Peffley, "Voter Registration Requirements, Voter Turnout, and Welfare Eligibility Policy: Class Bias Matters," 5 State Politics & Policy Q. 47, 61 (Spring 2005) ("Greater electoral clout for the disadvantaged [is] clearly associated with stronger policy representation for them").

Imagining the complete disqualification imposed by G.L. c. 51, §§ 26 and 34 in the context of the Commonwealth's other most commonly used registration demonstrates the burden. Motor vehicle registrations expire at the end of every other calendar year. If, citing administrative concerns at the Registry of Motor Vehicles, the Commonwealth barred all registration renewals during the last 20 days of the year, the outcry would be pronounced. The outcry would reach a fever pitch if the consequence of failing to renew before that 20-day period was a complete disqualification from driving the motor vehicle for the next two years. It is hard to imagine such a law would withstand a legal challenge, even under the most deferential standard of review. Cf. Gillespie, 460 Mass. at 154 ("it is clear that there is no

fundamental right to operate a motor vehicle").[26] But that is what G.L. c. 51, §§ 26 and 34 do in a much more important context. The right to vote is too precious for such caprice.

C. Even if This Court Accepts the Secretary's Invitation to Apply a "Sliding Scale" Analysis, the Scale Weighs in Favor of Close Scrutiny.

In sum, the 20-day waiting period after a new voter or recent mover registers is a significant burden on the franchise which bears little or no relationship to the Commonwealth's articulated justification for it. If the Court applies the sliding scale analysis articulated in LAM, it must weigh the three factors involved in that analysis: (i) the "character and magnitude" of the burden; (ii) the "interests the State contends justify that burden"; and (iii)

[26] It is even more difficult to imagine the Commonwealth adopting such an arbitrary approach to motor vehicle registration renewal, and it is worth pausing to consider why. Those with sufficient assets to own a motor vehicle are overwhelmingly likely to be registered to vote and to exercise that right regularly. See Sean McElwee, "Why Voting Matters: Large Disparities in Turnout Benefit the Donor Class," Demos (Sept. 16, 2015), available at: http://www.demos.org/publication/why-voting-matters-large-disparities-turnout-benefit-donor-class (using Census data to demonstrate correlation between voting rates and income levels). Depriving those individuals of their ability to operate the motor vehicle that they own for any period of time would be deeply unpopular; the political incentives are to make the Registry of Motor Vehicles more customer-friendly, rather than less. E.g., Joshua Miller, "Governor Touts Reduced Wait Times at RMV," Boston Globe (Dec. 28, 2015). By contrast, where a law deprives would-be voters of the franchise, those eligible (but disqualified) voters have no immediate recourse at the ballot box.

the "extent to which the State's concerns make the burden necessary." LAM, 462 Mass. at 560 (quoting Timmons, 520 U.S. at 358; Burdick, 504 U.S. at 434.

Here, G.L. c. 51, §§ 26 and 34 establish a 20-day waiting period after registration and complete disqualification for non-compliance. The character of this burden has a dubious history. Infra § II-A. Its magnitude is considerable for those who miss the deadline: though the Commonwealth could afford them the opportunity to vote provisionally, they instead are disqualified entirely. Infra § I-B.

The articulated state interest is sound election administration. Amici advocate tirelessly for the importance of that interest. But it is not served by such a lengthy deadline or complete disqualification, particularly as technology has advanced. P. Br. at 39–49. Besides, it is not at all clear how the blanket exclusion of otherwise eligible voters ever could accomplish sound election administration. Meanwhile, candidates for office benefit from the status quo — and as recent scholarship establishes, that benefit has only increased with modern technology. Infra Background § E.

Any balance here weighs in favor of the right to vote, and against atextual and needless restrictions on it. This

Court has stood on that principle for more than two centuries, and there the Court should remain. See Bridge, 14 Mass. at 374 ("the true intent and meaning of the constitution is[] that every man[] who is [qualified] . . . shall be entitled to the franchise").

III. THIS "POLICY CHOICE" IS MADE BY THE CONSTITUTION.

One theme courses through the Secretary's brief: whether and when to establish a registration deadline is "a policy choice that is exclusively within the Legislature's domain." D. Br. at 49; see id. at 15, 49–50. What the Secretary has failed to grasp is that the Massachusetts Constitution already has made that choice by guaranteeing that all eligible voters "shall have [the] right to vote." Mass. Const. Amend. art. 3. Any legislative encroachment on that right is subject to withering scrutiny. See Cepulonis, 389 Mass. at 934.

The reason is simple. The Legislature has no authority at all to make policy choices on behalf citizens it has needlessly excluded from the source of its power — the biennial state election. Mass. Const. Pt. I, art. 4 ("The people of this commonwealth have the sole and exclusive right of governing themselves"); id., art. 6 ("[T]he people alone have an incontestable, unalienable, and indefeasible right to institute government; to reform alter or totally change the

same, when their protection, safety, prosperity and happiness require it").

If this Court concludes, as it should, that G.L. c. 51, §§ 26 and 34 are unconstitutional, then the legislative policy choice will arise: is a pre-election registration deadline needed for election administration at all and, if so, how many days are required before election day? On that question, the Secretary's recently has made his stance clear. See Rocheleau, "State's Top Election Official Offers Legislature a Plan for Same-Day Voter Registration," Boston Globe B1 (Jan. 25, 2018).

CONCLUSION

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

Respectfully Submitted,

By their attorneys,

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Dated: February 20, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

I, M. Patrick Moore, Jr., hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 appendix to the briefs); Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

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M. Patrick Moore, Jr.

CERTIFICATE OF SERVICE

I, M. Patrick Moore, Jr., counsel for the amici curiae, hereby certify that I have served a copy of this Brief by causing it to be delivered by mail and email to the following:

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