

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-609

JOHN PAUL MORAN & others<sup>1</sup>

vs.

COMMONWEALTH & others.<sup>2</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs, candidates for State and Federal offices in the November 2020 Massachusetts general election,<sup>3</sup> filed a complaint for declaratory and injunctive relief against the Commonwealth and its officials, challenging the constitutionality of G. L. c. 54, § 25B, and St. 2020, c. 115. A Superior Court judge granted the defendants' motion to dismiss, ruling that the case was moot and that the plaintiffs

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<sup>1</sup> Caroline Colarusso, Steven R. Hall, Ingrid Centurion, and Craig Valdez.

<sup>2</sup> Charles D. Baker, Jr., in his official capacity as the Governor of the Commonwealth, and William F. Galvin, in his official capacity as the Secretary of the Commonwealth.

<sup>3</sup> Moran and Colarusso ran for the United States House of Representatives. Hall ran for seats as a State senator, and Centurion and Valdez sought to be elected State representatives.

failed to state a plausible claim. See Mass. R. Civ. P. 12 (b) (1) and (6), 365 Mass. 754 (1974). We affirm.<sup>4</sup>

Background. We summarize the facts as alleged by the plaintiffs, drawing every reasonable inference in their favor. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011).

The two statutes challenged by the plaintiffs concern early and mail-in voting. In 2014, the Legislature added G. L. c. 54, § 25B (§ 25B), which required Massachusetts cities and towns to offer any qualified voter the opportunity to vote early in person or by mail, starting with the eleventh business day preceding the general election. See G. L. c. 54, § 25B (c). This provision was implemented from the 2016 general election onwards. On July 6, 2020, the Legislature approved "An Act Relative to Voting Options in Response to COVID-19" (the Act), which expanded the early voting period for the 2020 general election to fourteen days and provided for a seven-day early voting period for the 2020 primary elections. See St. 2020, c. 115, § 7 (b) (1)-(2). The Act also required the Secretary of the Commonwealth to send every registered voter in Massachusetts an application for a mail-in early voting ballot. See St. 2020, c. 115, § 6 (d) (1)-(2). Several provisions of the Act,

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<sup>4</sup> We acknowledge the amicus brief submitted by Common Cause Massachusetts in support of the defendants.

including those concerning early and mail-in voting, applied exclusively to the 2020 elections. See St. 2020, c. 115, §§ 6, 7, 10, 15, 16, 17, 18.<sup>5</sup>

The 2020 Massachusetts primary and general elections for State and Federal office took place on September 1 and November 3, respectively. See St. 2020, c. 115, § 6 (a). The plaintiffs all won their respective primary races but lost the general election. Election results were officially certified on November 25, 2020, without any contest or request for a recount.

According to the plaintiffs, only thirty-five percent of voters cast their ballots in person on the 2020 general election day, which was in stark contrast to elections held before the enactment of § 25B and the Act, when most voters voted in person. They claim that the extended early voting period impermissibly reduced "the anticipated time a challenger otherwise had to establish name recognition and to campaign." Additionally, they allege that the defendants failed to make a good faith effort to remove ineligible persons from the voter rolls, relying on the fact that many of the approximately 4.5 million ballot applications mailed by the Secretary were

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<sup>5</sup> While various provisions of the Act expired, the Legislature subsequently passed several laws extending the early mail-in voting procedure. See, e.g., St. 2020, c. 255; St. 2021, c. 5; St. 2021, c. 29. Like the Act, these laws pertained to elections that have already been held.

returned as undeliverable. They extrapolate from this fact that many of the ballot applications were likely delivered to ineligible persons, creating a risk for "fraud [and] illegal voting" in the 2020 elections.

The plaintiffs brought this complaint in the Superior Court on December 29, 2020, nearly eight weeks after election day. A few days later, elected Federal and State legislators were sworn in (on January 3, 2021, and January 4, 2021, respectively,) and commenced their official duties. See Twentieth Amendment to the United States Constitution, § 1; art. 64 of the Amendments to the Massachusetts Constitution.

Discussion. "We review the allowance of a motion to dismiss de novo." Curtis, 458 Mass. at 676. Declaratory judgment is reserved for cases "in which an actual controversy has arisen and is specifically set forth in the pleadings." G. L. c. 231A, § 1. "The 'actual controversy' requirement . . . is considered a 'predicate of jurisdiction'" (citation omitted), Wells Fargo Fin. Mass., Inc. v. Mulvey, 93 Mass. App. Ct. 768, 770 (2018), because we generally decline to adjudicate "abstract, hypothetical, or otherwise moot questions." Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 547 (2012). While we may consider a moot question under narrow exceptions -- where "[it] is of public importance, worthy of decision by an appellate court, and is capable of

repetition yet evading review," Harmon v. Commissioner of Correction, 487 Mass. 470, 472 (2021) -- "we are particularly reluctant to answer constitutional questions which have become moot." Matter of Sturtz, 410 Mass. 58, 60 (1991).

Postelection challenges to election rules are "technically moot." Libertarian Ass'n of Mass., 462 Mass. at 548. Where an election has "arisen and concluded in the past," id., parties disputing the rules of that election "can no longer be granted the relief they [seek]." Metros v. Secretary of the Commonwealth, 396 Mass. 156, 159 (1985). See Branch v. Commonwealth Employment Relations Bd., 481 Mass. 810, 817 (2019) ("A moot case is one where a court can order 'no further effective relief'" [citation omitted]). Accordingly, the plaintiffs' entire lawsuit is moot, since they challenge election rules applied to a past election, whose results were certified weeks before they filed their lawsuit.<sup>6</sup>

In reaching this conclusion, we draw a distinction between postelection lawsuits in which plaintiffs allege that the election laws were not followed, e.g., Fyntrilakis v. Springfield, 47 Mass. App. Ct. 464 (1999), and this case, in

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<sup>6</sup> As the motion judge found, several provisions of the Act challenged by the plaintiffs are no longer in effect, which is another reason that any challenge to those provisions is moot. See Nayor v. Rent Bd. of Brookline, 334 Mass. 132 (1956) (case moot as statute under which the plaintiff brought suit had terminated by its own terms).

which the plaintiffs challenge the election laws themselves. In cases alleging that violations of election laws affected the result, courts may exercise jurisdiction even after the election, provided that the plaintiffs file their complaints in a timely manner. See McCavitt v. Registrars of Voters of Brockton, 385 Mass. 833, 840 n.7 (1982). In contrast, postelection lawsuits challenging election rules themselves become moot once the election is held. The live controversy in such cases is whether the laws in question may properly be applied to the upcoming election, and this question is rendered moot once the election ends. See Tsongas v. Secretary of the Commonwealth, 362 Mass. 708, 720 (1972) (live controversy over ballot name position before primary moot once primary held). The appropriate time to challenge election rules is before the elections, not after.<sup>7</sup> See, e.g., Grossman v. Secretary of the Commonwealth, 485 Mass. 541, 543 (2020) (preelection challenge to the Act); Goldstein v. Secretary of the Commonwealth, 484 Mass. 516, 524 (2020) (preelection challenge to minimum signature requirements in light of COVID-19).

The plaintiffs are left to contend that even if their case is moot, we should nonetheless exercise our discretion to decide

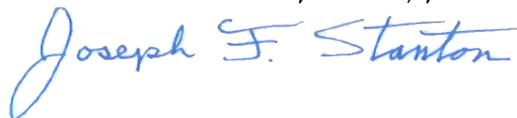
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<sup>7</sup> If the plaintiffs wished to contest the results of the 2020 election based on allegations of actual irregularities that occurred, which they do not raise in this case, they could have done so. See G. L. c. 54, § 134.

the case, because the constitutionality of the challenged election statutes is a question of public importance that is likely to arise again in future elections. Even if the plaintiffs' claims are "capable of repetition" -- a proposition undermined by the expiration of many of the provisions of the Act -- the plaintiffs, critically, fail to explain why such claims would "evade review." Harmon, 487 Mass. at 475. Indeed, we do not see why a similar challenge, brought in advance of a future election, could not be resolved before election day, as occurred in cases leading up to the 2020 elections. See Grossman, supra; Goldstein, supra. As "the controversy . . . need not evade review if parties show even minimal resoluteness in carrying on litigation," Blake v. Massachusetts Parole Bd., 369 Mass. 701, 708 (1976), we discern no error in the judge's dismissal of this case on the ground of mootness.<sup>8</sup>

Judgment affirmed.

By the Court (Massing,  
Kinder & Shin, JJ.<sup>9</sup>),



Clerk

Entered: April 13, 2022.

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<sup>8</sup> Because dismissal of the case is affirmed on the basis of mootness alone, we need not address the parties' arguments concerning whether the complaint failed to state a plausible claim.

<sup>9</sup> The panelists are listed in order of seniority.