
COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

No. SJC-12435

CHELSEA COLLABORATIVE, INC., MASSVOTE, AND RAFAEL SANCHEZ,
Plaintiffs-Appellees,

v.

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

ON APPEAL FROM A FINAL JUDGMENT
OF THE SUPERIOR COURT FOR SUFFOLK COUNTY

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Whether the Commonwealth's statutory requirement that most voters be registered 20 days prior to an election in which they wish to vote is consistent with the Massachusetts Constitution.

STATEMENT OF THE CASE

This case is a constitutional challenge to Massachusetts statutes, G.L. c. 51, §§ 26 and 34, requiring most voters who wish to vote in an election to register no later than the 20th day preceding that election (the "20-Day Rule").² The plaintiffs claim that the 20-Day Rule violates Article IX of the Declaration of Rights, and Amendment Article III.

Prior Proceedings

On November 1, 2016, three individuals and two organizations filed a putative class-action complaint for declaratory and injunctive relief, challenging the constitutionality of the 20-Day Rule. A7, 15-93.³ The complaint named as defendants the Secretary of the Commonwealth and local election officials in Chelsea, Revere, and Somerville. *Id.*⁴

² Section 1F of G.L. c. 51, cited incorrectly by the Superior Court as a source of the 20-Day Rule, see AD1, AD72, sets forth a procedure whereby an unregistered voter may cast a "presidential only" absentee ballot.

³ Citations to "A__" are to the Record Appendix. Citations to "AD__" are to the Addendum to this brief.

⁴ The local officials were designated nominal parties,

The three individual plaintiffs sought preliminary injunctive relief allowing them to vote in the November 8, 2016 election despite not having registered 20 days before the election. A94-97. After a hearing on November 7, the Superior Court (Wilkins, J.) granted that request, and the three individual plaintiffs were permitted to cast provisional ballots on November 8. A178-91. Their votes were later counted under a revised preliminary injunction order. A190.⁵

Following a four-day jury-waived trial, the court (Wilkins, J.) issued its Findings of Fact, Conclusions of Law and Order for Judgment on July 24, 2017, declaring the 20-Day Rule unconstitutional. AD72. The court stayed its order pending appeal. *Id.* The Secretary timely appealed, and this Court granted the parties' application for direct appellate review.⁶

Statement of Facts

1. Voter registration in the United States

Every State but one requires that voters be

A243, and are not participating in this appeal.

⁵ The Court denied the plaintiffs' motion for class certification. A8, 10. One individual plaintiff, Wilyeliz Nazario Leon, was voluntarily dismissed. A10. A second, Edma Ortiz, was dismissed for lack of an actual controversy because she was a "specially qualified voter," see G.L. c. 50, § 1, and hence not subject to the 20-Day Rule. A13; see G.L. c. 51, § 50.

⁶ The Secretary noticed an appeal on July 26. A13. The docket reflects that judgment entered the next day, *id.* In an abundance of caution, the Secretary filed a second, timely notice of appeal on September 15. A14.

registered before they may vote.⁷ Thirty-four States have pre-election day voter registration deadlines ranging from seven to 30 days. AD73-76.⁸ Fifteen States and the District of Columbia have adopted some form of election-day registration ("EDR"), which allows voters both to register and to vote on election day, usually following an earlier deadline or "blackout" period. AD76-77.⁹ In addition, five states plus the District of Columbia have adopted some form of automatic voter registration, whereby filing certain government documents (e.g., a driver's license application) automatically registers the filer to vote. AD78.

2. Voter registration in Massachusetts

Most Massachusetts voters must register to vote 20 days before an election in which they wish to vote.¹⁰ G.L. c. 51, § 26. One may register in person with any registrar of voters, not just in the city or

⁷ In North Dakota, voters need not formally register, but generally must show identification at the polls. See N.D. Cent. Code. § 16.1-05-07.

⁸ Of those 33 States, 25 States have deadlines longer than 20 days; two States have 20-day deadlines; and six have shorter deadlines. See AD73-76.

⁹ Maine and Wyoming have EDR, though they do not appear in the Superior Court's appendix. See Me. Rev. Stat. tit. 21-A, §§ 121-A, 122; Wyo. Stat. Ann. § 22-3-104.

¹⁰ Certain "specially qualified voters" as defined in G.L. c. 50, § 1, and new citizens naturalized after the 20-day deadline has passed, are not subject to the 20-Day Rule, but they must register before 4 p.m. on the day before the election. See G.L. c. 51, § 50.

town where one resides. *Id.* § 42F.¹¹ In-person registration is also available while conducting any Registry of Motor Vehicles transaction, and through "all state agencies that provide public assistance or assistance to people with disabilities." G.L. c. 50, § 1, "Registration agency"; G.L. c. 51, § 42G. Mail-in registrations are also accepted and valid for the upcoming election if postmarked before midnight on the deadline, and one can register to vote online until midnight on the deadline. *Id.* §§ 26, 33A.

Registration involves completing a brief form, reproduced at A1594. Plaintiff Rafael Sanchez testified that filling out the form was easy and took only a few minutes. A446.¹² He also testified that he had been offered the opportunity to register in the past, had understood that he was being offered this opportunity, and had declined to take it. A445.

3. Voter registration outreach in Massachusetts

Voter registration forms are available at local and state offices and post offices and are provided in large quantities to organizations such as plaintiffs Chelsea Collaborative and MassVOTE. A423-25. They are also available at universities, public and private

¹¹ Registration is open until 8:00 p.m. on the last day of the registration period. See G.L. c. 51, § 26.

¹² Former plaintiff Ortiz similarly testified that filling out the form took just a few minutes. A447.

colleges, and high schools, which must publicize information to students on how to register. G.L. c. 51, § 42E.

Before each biennial state election, the Secretary produces and mails to every Massachusetts residential address an "Information for Voters" guide. G.L. c. 54, § 53; A424. This guide includes a detachable mail-in registration form and other information on how to register. A425. It is available in English, Spanish, and Chinese and, where the booklet is printed in a language other than English, the mail-in form is printed in that language as well. A424-25. The English-language version of the guide includes notification in Spanish and Chinese that it is also available in those languages and how to obtain it. *Id.*; see also A1500-99.

Booklets in Spanish and Chinese are distributed to community organizations. A424. Large-print, Braille, and audio versions are provided to the Perkins Library and the Massachusetts Commission for the Blind. A426. English, Spanish, Chinese, large-print, audio, and accessible HTML versions of the booklet were available on the Secretary's website starting September 21, 2016. *Id.*

For the November 8, 2016 election, the 20-day deadline was October 19. Beginning September 19, 2016, the Information for Voters guide was mailed to every

residential address in the Commonwealth, as well as group homes, city and town halls, libraries, senior centers, and councils on aging. A425. The guide contains 14 references to the October 19 deadline to register to vote, including a graphic representation of a calendar, and detailed instructions on how to register in-person, by mail, or online. A1500-31.

In addition, beginning in early September, 2016, the Secretary ran public-service television announcements with information on the October 19 deadline and how to register. A424. The Secretary also issued a widely distributed press release on September 26 with this information. *Id.* Between August 18 and October 19, 168,262 new voters registered in Massachusetts. A426.

4. Role of local election officials in voter registration

Local election officials are responsible for processing voter registrations. A420. Upon receiving paper voter registration forms, these officials timestamp them, document the method of receipt, and ascertain that all required information is included, that the registration is not a duplicate, and that the street address information is correct. A429, 434-35. The officials then enter the registrations into the state Voter Registration Information System ("VRIS") maintained by the Secretary. A435. The officials

access online applications through VRIS and confirm them after checking the completeness and accuracy of the information. *Id.* When all required information appears correctly on a paper application, processing that registration takes just a few minutes. *Id.* When information is missing or incorrect, it can take much longer. A839-40. In the experience of the Revere Election Commissioner, up to one third of voter registration forms can have problems requiring rectification before those registrations can be completed. *Id.*

VRIS was created in 1995 as a statewide database of registered voters connected to the Secretary's office on a closed network. A805.¹³ Local election officials access VRIS through dedicated computer terminals provided by and networked directly to the Secretary's office. A805-06. VRIS terminals are not generally available at polling places and VRIS cannot be accessed via the internet. *Id.* Somerville has five such terminals while Revere has four. A436, 439.

5. Election administration in Massachusetts

a. Preparing for an election

In the weeks leading up to an election, local election officials must appoint and train poll

¹³ That is, VRIS is hard-wired to municipal offices. Because VRIS is not connected to the internet, it is not susceptible to internet-based compromise. A806.

workers, receive ballots, envelopes, and supplies from the Secretary's office, conduct early voting, conduct absentee voting, respond to voter inquiries, prepare voting lists, assemble supplies for polling places, schedule poll workers and arrange replacements to deal with cancellations, and test voting equipment. A431-32, 436, 807. Each of these tasks takes time.

Voting equipment must be tested in an open, publicly noticed process which may not begin until ballots are received. A808-09. Fifty ballots of each style must go through each tabulator to be used for that ballot style and then be hand-counted. A808.¹⁴ AutoMARK machines, which facilitate voting by persons with disabilities, must also be tested. *Id.*

Somerville, with 21 precincts, has 25 tabulators and 23 AutoMARK machines. A432. Testing just the tabulators in Somerville takes three full days. *Id.* Testing voting machines in Revere takes about two days. A436.

Local election officials must prepare voter lists in advance of election day. A809. Printing these lists can take up to one day, assuming no problems arise. A809, 841, 846.

From October 19 through October 24, 2016, the

¹⁴ There were over 500 ballot styles for the November 2016 biennial statewide election. A807. Each city or town has at least one ballot style but may have more depending on the geographic layout of districts. *Id.*

Revere Election Commissioner and her one staff member worked past business hours daily and worked both weekend days. A436. Revere's Assistant Election Commissioner accrued 40 hours of overtime in connection with the 2016 election. *Id.* Where elections are handled by a city or town clerk rather than by a dedicated election commissioner, those officials have ongoing responsibilities in other areas such as parking, public records, census, vital statistics, open meetings, and issuance of licenses. A439.

b. Early voting

Early voting was first offered in Massachusetts for the November 2016 election. A812; St. 2014, c. 111, § 12. In 2016, the law required cities and towns to offer early voting during regular business hours on weekdays from October 24 through November 4; offering weekend early voting was optional. A812-31. The Somerville election commissioner worked from 7 a.m. until 11 p.m. each day of the early voting period, and other Elections Department staff spent 30-35% of their time on early voting. A433-34; AD26. Nine to eleven extra poll workers were required in Somerville to staff the early voting location each day. A433.

As of the first day of early voting on October 24, about 5,000 voter registrations in the City of Boston - out of the 35,135 registrations the City received between October 1 and October 19 - remained

unprocessed. A439, 813. The City had to ask the Secretary's office for processing assistance and had to give out several hundred provisional ballots to early voters. A813.¹⁵ Somerville required extra staff hours to complete pending voter registrations by the start of early voting. A433. As of the October 19 registration deadline, Revere had 900 voter registrations awaiting processing. A435-36.

Early voting ballots were counted on Election Day. A813.¹⁶ Additional staff was necessary to conduct this count. *Id.* In Somerville, it took 12 hours on Election Day to unpack and tabulate all early voting ballots. A431.

In 2017, the Massachusetts Town Clerks Association surveyed its members concerning early voting implementation, with a response rate of 71.7%. A487-89. Respondents represented communities of all sizes. Half of the responding clerks reported that early voting had "significant" to "major" impacts to their operations that reduced service levels to other constituents by 50% or more. A507. Clerks' concerns

¹⁵ Boston received the last voter registration effective for the November 8 election on November 7. A439.

¹⁶ Because early voting ballots are not counted until Election Day, the period between submission of a vote and Election Day was available for local election officials to resolve outstanding registration issues. A813.

about early voting centered on costs, extra work hours, staffing, and overtime. A507-12.

c. Polling places on Election Day

Massachusetts currently has 2,174 election precincts. A420. In 2016, there were 1,316 unique polling places. *Id.* For every polling location, local election officials must ensure accessibility, signage, proper staffing, and availability of equipment and supplies. A813-14. They must resolve issues with registration and voter lists, enforce rules about campaigning near polling places, manage problems with election observers, and address equipment malfunctions. *Id.*

In addition to standard election-related duties, poll workers assist voters on the inactive list and voters needing to cast provisional ballots, and they accept and record challenges to voters. A814. In polling locations with multiple precincts, workers must ensure that voters from each precinct use the proper ballot style. A814-15.

6. Election Day Registration

Although plaintiffs neither mentioned EDR in their complaint nor sought its imposition as a remedy, A15-93, much of their evidence at trial focused on what might happen were Massachusetts to adopt EDR. Plaintiffs' expert agreed that "EDR affects voter

turnout but not voter registration," A733, most likely by "enabling people who were previously registered to vote to update their information at the polls." A734. He opined that Massachusetts could see an 8% increase in voter turnout by adopting EDR, A717, but the Superior Court found instead a likely increase of 2-3%. AD44.¹⁷ Plaintiffs' expert conceded that any increased turnout due to EDR would consist primarily of people who had previously been registered to vote, not of new voters, and expected to see no increase in registration rates of new voters. A733-34.¹⁸ The Secretary's expert testified, and the Superior Court concluded, that "there is currently no reliable set of estimates to draw any conclusions about whether any given subpopulation in Massachusetts would gain relatively more or less than other groups from EDR in terms of voter turnout." AD42; see also A907.

Both experts agreed that a well-designed EDR program can be good public policy. A910, 1479. They also agreed that adopting EDR may entail unintended consequences and policy trade-offs.¹⁹ A732-33, 905.

¹⁷ The Secretary's expert thought that EDR could modestly increase Massachusetts turnout by 1-2%. A907.

¹⁸ The Superior Court's purported finding that "EDR increases turnout of new voters," AD41, was thus clearly erroneous. See A733-34, 905-06.

¹⁹ Plaintiffs' expert testified that "when we have the combination being analyzed of EDR and early voting,

SUMMARY OF ARGUMENT

This Court has long recognized the Legislature's authority to enact reasonable voter registration regulations as a means of ascertaining voter qualifications and ensuring fair and orderly elections. Such regulations are not an additional voting "qualification." Pages 16-18.

The proper standard of review for voter registration rules, as for other voting-related regulations, is the "sliding scale" test developed in the federal courts and adopted by this Court in the ballot access context. That test gives appropriate weight to all of the relevant factors by imposing strict scrutiny on those regulations that severely burden the right to vote, while evaluating less burdensome rules under the rational basis standard. This Court should apply the sliding scale test here, as courts in several other jurisdictions have done in cases much like this one. Pages 18-25. This Court's early cases, though predating the sliding scale test, assess the reasonableness of voter registration rules in similar terms. In contrast, the Superior Court's "necessity test" finds no support in this Court's cases. Pages 25-35.

Under the sliding scale test, the 20-Day Rule

the effect [on turnout] is sometimes negative." A747; see AD43.

does not impose a "severe" burden on voting rights. One registers to vote on a brief form that requires only a few minutes to fill out. Registration materials are widely available, and both the Commonwealth and independent organizations undertake extensive publicity efforts to encourage eligible citizens to vote. Far lengthier deadlines have often been upheld, and the only recent case in which a voter registration deadline has been found to impose a "severe" burden involved a massive hurricane that closed government offices during the registration period. Pages 35-43.

Because the burden on voters is not severe, the sliding scale test provides that the 20-Day Rule be evaluated under the rational basis standard. And, as the Superior Court concluded, the 20-Day Rule easily survives rational basis review. It is undisputed that the Commonwealth has compelling interests in ascertaining voter qualifications and in running orderly elections, as well as legitimate interests in efficiency and in reducing the burden on election officials. The 20-Day Rule is a rational, reasonable, and nondiscriminatory means to advance those goals.

Pages 43-45.

Even if this Court concludes that the 20-Day Rule must meet strict scrutiny, it should not affirm. The evidence did not show that shortening the registration deadline would have a statistically significant effect

on voter registration or turnout, and the Superior Court made no findings as to the impact of processing thousands of new voter registrations during the period in which election officials are already most busy. And election-day registration, which plaintiffs did not seek as a remedy, is irrelevant to the 20-Day Rule's validity and involves policy tradeoffs that are properly left to the Legislature. Pages 45-50.

ARGUMENT

"[V]oting has long been recognized as a fundamental political right and indeed the 'preservative of all rights.'" *Mass. Pub. Int. Research Grp. v. Secretary*, 375 Mass. 85, 94 (1978) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Yet, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

Storer v. Brown, 415 U.S. 724, 730 (1974). And courts have recognized that regulations to achieve the "necessary objectives" of fairness, honesty, and order will "inevitably affect[] - at least to some degree - the individual's right to vote." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The policy choices needed to achieve those objectives are for the Legislature to make. With respect to voter registration, the Constitution requires only that

those choices be within the realm of reasonableness.

The question in this case, then, is whether the 20-Day Rule is a permissible "regulation of elections" to promote "order, rather than chaos." It is. No election regulation resembling this rule has ever been invalidated on state or federal constitutional grounds, absent extraordinary circumstances. The 20-Day Rule is a reasonable exercise of the Commonwealth's constitutional authority and obligation to regulate elections. It should be upheld as such.

I. Because Voter Registration Regulations Are Not Additional Voter "Qualifications," The Legislature Has Authority To Enact Them.

The qualifications for voting in Massachusetts - age, citizenship, and the like - are defined in Art. III,²⁰ and legislation "cannot add to nor diminish the qualifications of a voter which [the Constitution] has prescribed." *Kinneen v. Wells*, 144 Mass. 497, 499 (1897); see also, e.g., *Opinion of the Justices*, 247 Mass. 583, 586 (1924). However, "[t]he constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing those qualifications, must at some time be had by those who

²⁰ The present list of Art. III qualifications is that a voter must be a U.S. citizen, 18 years old, a resident of Massachusetts, not incarcerated for a felony, not under guardianship, and not disqualified because of corrupt election practices. See AD95.

are to decide on them." *Capen v. Foster*, 12 Pick. 485, 497 (1832).

Capen concluded that an examination of voter qualifications "constitutes one of those subjects, respecting the mode of exercising the right [to vote], in relation to which it is competent to the legislature to make suitable and reasonable regulations." *Id.* at 497. Thus, *Capen* held that the voter registration law before it "cannot be justly regarded as adding a new qualification to those prescribed by the constitution." *Id.* at 498.

Capen's holding that voter registration rules are not additional "qualifications" for voting has been repeatedly reaffirmed. See, e.g., *Kinneen*, 144 Mass. at 500; *Opinion of the Justices*, 247 Mass. 583, 587 (1924) ("[T]he Legislature ... may make reasonable rules and regulations for ascertaining those who possess such qualifications."). Over the years, universal agreement has emerged on this point. See, e.g., *Ga. St. Conf. of the NAACP v. Georgia*, No. 1:17-cv-1397-TCB, Order at 8 (N.D. Ga. May 4, 2017) ("[E]very legal authority the Court has located supports the conclusion that voter registration is not itself a substantive qualification to vote, but rather a procedural method which an otherwise qualified voter must follow to exercise his or her right to vote.") (citation and internal quotation marks omitted)

(reprinted at AD99-117).

**II. The Constitutionality Of Voter Registration
Regulations Should Be Evaluated According To The
Sliding Scale Test**

The proper standard of review of voter registration regulations has been a topic of considerable debate in this case. The Secretary has argued that the "sliding scale" test, developed by the federal courts and adopted by this Court in the context of an Art. IX challenge to ballot access regulations, see *Libertarian Ass'n of Mass. v. Secretary of the Com.*, 462 Mass. 538, 560 (2012) ("LAM"), should apply. A361-70. Plaintiffs below argued for strict scrutiny. See, e.g., A16, 25-26, 32, 930; AD58. And the Superior Court devised its own novel "'necessity' test", AD51, 58, based on a misreading of this Court's precedent, as explained *infra* Part II-C-2. As explained below, this Court should apply the sliding scale test to the 20-Day Rule.

A. The sliding scale test appropriately weighs the individual and governmental interests at stake in the context of voting.

The sliding scale test is the only one that takes all relevant factors into account and affords them their proper weight. This Court has recognized that legislation alleged to infringe on constitutional rights falls somewhere on "a continuum of constitutional vulnerability determined at every point

by the competing values involved." *Marcoux v. Attorney General*, 375 Mass. 63, 65 n.4 (1978) (emphasis added). Some such legislation exists only at one end of *Marcoux's* "continuum of constitutional vulnerability." For example, "classifications based on race are inherently suspect and, therefore, are subject to strict judicial scrutiny." *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 243 (2006). But in other areas, where both fundamental individual rights and well-recognized and compelling state interests are at stake, this Court has taken "a more flexible approach to the weighing of interests that must take place." *Moe v. Sec. of Admin. & Fin.*, 382 Mass. 629, 656 (1981) (assessing constitutionality of regulation barring the use of Medicaid funds for medically-necessary abortions) (emphasis added).

Unlike race-based regulation, courts have long recognized the importance of governmental interests in regulating voting. See, e.g., *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) ("States have valid and sufficient interests in providing for some period of time prior to an election - in order to prepare adequate voter records and protect its electoral processes from possible frauds.") (emphasis in original); *Dunn v. Blumstein*, 405 U.S. 330, 346-47 (1972); *Kinneen*, 144 Mass. at 499. The right to vote is fundamental; but the practicalities of millions of

people casting votes more or less simultaneously in "some sort of order, rather than chaos," require that "there must be a substantial regulation of elections." *Storer*, 415 U.S. at 730.

To balance the fundamental right to vote against valid state interests in regulating elections, the federal courts devised the sliding scale test that takes all of these factors into account. The extent of the "burden" that the challenged regulation places on constitutional rights determines the level of scrutiny applicable to the regulation in question: "'severe' restrictions" on constitutional rights entail strict scrutiny under which "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" However, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the [constitutional] rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citations omitted).

Although the sliding scale framework arose in the context of federal constitutional challenges to ballot access rules, it is the proper framework for this case for three reasons. First, every recent case that has considered challenges to voter registration deadlines has applied the sliding scale test. See *Rutgers Univ.*

Student Assembly v. Middlesex Cty. Bd. of Elec., 141 A.3d 335, 339-40 (N.J. Super. App. Div. 2016); *Florida Dem. Party v. Scott*, 215 F. Supp. 3d 1250, 1256-57 (N.D. Fla. 2016); *Bethea v. Deal*, No. CV216-140, 2016 WL 6123241, at *2 (S.D. Ga. Oct. 19, 2016); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1329-33 (S.D. Fla. 2008); *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 142-43 (D. Conn. 2005). These courts' recognition that voter registration rules need not always be strictly scrutinized is consistent with the fact that voter registration to ascertain voters' qualifications is valid if done reasonably, see *infra* Part II-B; II-C-1, -3, even though it "inevitably affects - at least to some degree - the individual's right to vote."

Anderson, 460 U.S. at 788. Indeed, the Supreme Court has agreed that "the State is certainly justified in imposing some reasonable cutoff point for registration." *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973) (emphasis added). "[T]o subject every voting regulation to strict scrutiny ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Rutgers*, 141 A.3d at 341 (quoting *Burdick*, 504 U.S. at 433).

Second, this Court has already adopted the sliding scale framework in *LAM*, see 462 Mass. at 560. Although *LAM* is a ballot access case, our Constitution speaks identically of ballot access and voting rights:

"all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." Mass. Const. pt. 1, art. IX (emphasis added).

Third, and relatedly, courts "have recognized" that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Anderson*, 480 U.S. at 786; see also *LAM*, 462 Mass. at 560; *Langone v. Secretary of the Com.*, 388 Mass. 185, 196 (1983) ("[R]estrictions on the access of candidates to the ballot inevitably have impact on voters' rights...."). Accordingly, courts analyze statutes burdening voters and statutes burdening candidates using the same test. See, e.g., *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 190, 204-05, 209 (2008) (applying sliding scale test to "voter ID" law); cases cited *supra* pp. 20-21. This Court should follow suit by applying here the test adopted in *LAM*.

The Superior Court declined to apply *LAM*, noting that, while *LAM* arose under Art. IX, "the plaintiffs have grounded their arguments primarily in art. III, which contains an affirmative grant of voting rights to qualified citizens and therefore raises entirely different issues from ballot access legislation or federal constitutional interpretation." AD66-67. This is a *non sequitur*. Of course, Art. III grants

qualified citizens the right to vote. But it also expressly forbids non-qualified persons from voting,²¹ and the Commonwealth is permitted - indeed, required - to tell the two classes apart. See *Kinneen*, 144 Mass. at 500; *Capen*, 12 Pick. at 497; *Opinion of the Justices*, 247 Mass. at 586-87. On this basis, as explained *infra*, this Court has long recognized the legitimacy of "reasonable" voter registration rules as a means of ascertaining whether voters possess the necessary qualifications, and it has done so in terms consistent with the sliding scale test.

Moreover, any relief based on Art. III alone would be limited to elections for the four offices to which that article applies: "governor, lieutenant governor, [state] senators, or [state] representatives." See, e.g., *Opinion of the Judges*, 5 Met. 591, 591 (1844). It would not extend to, *inter alia*, federal elections. The Superior Court speculated that "there is no realistic possibility that the Legislature would deem it wise to have two sets of voter qualifications,[²²] depending on the nature of the election," AD71, but speculation does not justify

²¹ After stating that persons possessing the listed qualifications "shall have a right to vote in such election," Art. III concludes: "and no other person shall be entitled to vote in such election."

²² The Superior Court erred in referring to voter registration as a "qualification." See *supra* Part I.

a remedy beyond the scope of the constitutional provision at issue. Further, current law does contemplate that some elections may involve two different registration deadlines.²³

New Jersey law supplies a useful analogue. New Jersey, like Massachusetts, has a state constitutional provision delineating voting qualifications, and providing that persons meeting those qualifications "shall be entitled to vote." N.J. Const. Art. II, § 1, ¶ 3(a).²⁴ The New Jersey state courts recently considered a claim that the state's 21-day voter registration deadline deprived plaintiffs of their right to vote under the New Jersey constitution, and that the deadline should be evaluated under strict scrutiny. See *Rutgers*, 141 A.3d at 336, 340. The court rejected the argument, holding instead that "the *Burdick* balancing test was the appropriate method for determining the constitutionality of [the 21-day deadline]." *Id.* at 340. The court approved "a flexible analytical approach, rather than strict scrutiny." *Id.*

²³ The deadline to register for special town meetings is 10 days, and in some cases these meetings may coincide with regular town meetings, for which the deadline is 20 days. See G.L. c. 51, § 26; G.L. c. 39, § 10. Nothing in the record suggests that this arrangement is administratively unworkable.

²⁴ And, like Massachusetts, New Jersey courts have long held that voter registration "is not a qualification for voting," but rather "is upheld as part of the regulatory machinery intended to protect the right to vote." *Gangemi v. Rosengard*, 207 A.2d 665, 668 (N.J. 1965).

at 341. Thus, the *Rutgers* court imported the *Anderson/Burdick* framework, originally developed in the context of federal constitutional challenges to ballot access laws, into a state constitutional challenge to a voter registration law. This Court should do the same.

B. This Court's emphasis on "reasonableness" in its early case law aligns with the sliding scale test.

Capen v. Foster, the leading Massachusetts case on how to evaluate voter registration rules, predates the development of the sliding scale test by well over a century. Nonetheless, *Capen* repeatedly stated that voter registration rules will be upheld if they are "reasonable," and then analyzed "reasonableness" by looking to factors similar to those that now comprise the sliding scale test. The fact that *Capen* saw burden on the voter, importance of governmental interests, and degree to which the statute advanced those interests as integral to "reasonableness" further bolsters applying the sliding scale test in this case.

Capen recognized the Legislature's authority in areas where the Constitution confers a right but does not specify "the manner, in which that right is to be exercised." 12 Pick. at 494. In such cases, the Legislature may enact "any reasonable and uniform regulations in regard to the time and mode of exercising that right." *Id.* (emphasis added). *Capen*

accordingly held that, on voter registration, the Legislature is empowered "to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right." *Id.* at 497 (emphasis added).

The Court therefore upheld the law before it, which barred the plaintiff from voting because he did not appear on the voter list at his polling place, as "highly reasonable and useful," and as "a reasonable and convenient regulation of the mode of exercising the right of voting." *Id.* at 498 (emphasis added).²⁵ In the course of making that determination, *Capen* considered each of the sliding scale's three factors.

Capen made clear that if a voter registration regulation was too burdensome on voters, the regulation's constitutionality would be in question. The Court explained that "if the provision of this law is such as to afford the voter no opportunity to know seasonably whether his name is on the list or not, and to have it inserted if previously omitted, it would constitute a serious objection to its validity." 12

²⁵ *Capen*'s emphasis on whether voter registration rules are "reasonable" was recognized in *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886) (quoting *Capen* at length as holding that rules requiring registration and "establishing means for ascertaining the qualifications of those entitled to vote" are analyzed as to whether they "were or were not reasonable regulations, and accordingly valid or void").

Pick. at 499. But it concluded that the law before it did not pose this problem because the law did "give every voter the means of knowing whether his name was borne on the list, and opportunity to place it there if omitted." *Id.* at 500. Thus, it held that "[n]othing therefore but the carelessness or neglect of the voter himself, or some accident not attributable to the law or the officers who are to execute it," could explain failure to comply with the law's terms. *Id.* at 498. In short, *Capen* found the burden of complying with the law before it (in contemporary parlance) not "severe."

Capen also recognized the importance of the governmental interest at stake. As noted *supra* Part I, *Capen* (and later cases) held that an inquiry into whether voters claiming the right to vote are actually qualified is not only permissible, but mandatory. See 12 Pick. at 497 ("[A]n examination of the claims of persons to vote, on the ground of possessing those qualifications, must at some time be had...."); see also *Kinneen*, 144 Mass. at 501 (quoting *Capen*); *Opinion of the Justices*, 247 Mass. 583, 586 (1924) ("Manifestly such an ascertainment must be made before the franchise can be exercised in an orderly and expeditious fashion."). Other courts have universally recognized the importance of state interests in this area. See *supra* pp. 19-20.

Finally, *Capen* described the law before it as

"requir[ing] that the qualifications of voters shall be previously offered and proved, in order to entitle them to vote, [and] that their names shall be entered upon an alphabetical register or list of voters." 12 Pick. at 497-98. It concluded that this law was "highly reasonable and useful," and that it was "calculated to promote peace, order and celerity in the conduct of elections, and as such to facilitate and secure this most precious right to those who are by the constitution entitled to enjoy it." *Id.* at 498. The Court concluded, in other words, that the law effectively advanced the governmental interest in ensuring orderly elections and in ascertaining the qualifications of voters.

In sum, *Capen* assessed whether a voter registration law was "reasonable" by inquiring into factors very similar to those that make up the sliding scale test. *Capen* thus further supports application of the sliding scale test here.

C. *Kinneen* and later cases are consistent with *Capen's* emphasis on reasonableness, and refute the Superior Court's "necessity test."

Nothing in this Court's cases departs from *Capen's* emphasis on reasonableness to impose a "necessity" rule. The Superior Court's contrary conclusion is based on a misreading of *Kinneen*.

1. ***Kinneen* echoes *Capen's* "reasonableness" standard, and any comments suggesting "necessity" are dicta**

The Superior Court relied heavily on *Kinneen* in creating its "necessity" test. See AD49-53. But *Kinneen* echoed *Capen's* reasonableness standard throughout, stating that the Constitution "contemplates that equal and reasonable rules will be made by legislation as to the method of exercising the privilege [of voting]." 144 Mass. at 500 (emphasis added). *Kinneen* also discussed *Capen* itself, reiterating its holding that the voter registration rules there were "reasonable regulations of the mode of exercising the right of voting." *Id.* (emphasis added). It further noted that *Capen* allowed for "suitable regulations," as long as they were not enacted as a pretext to "subvert or injuriously restrain the right itself." *Id.* at 500-01 (emphasis added). And it quoted *Capen* at length, including *Capen's* reference to the validity of "suitable and reasonable regulations." *Id.* at 501 (emphasis added).

Kinneen contrasted the invalid law before it (which, as noted below, was not a voter registration law) to "a reasonable regulation for the purpose simply of ascertaining qualifications and determining whether an applicant actually possessed them." *Id.* at 502 (emphasis added). Thus, in *Kinneen* as in *Capen*, the touchstone of constitutionality is reasonableness.

Finally, *Kinneen* is ultimately a case about voter qualifications, not registration. The issue in *Kinneen* was whether the Legislature could impose a 30-day waiting period on newly naturalized citizens before they could register, even though they met all the constitutional qualifications for voting. *Id.* at 497. The Court invalidated this rule because it "add[ed] another qualification to those required by the Constitution," and the Court discussed voter registration rules by way of contrast to the statute before it. *Id.* at 501; see also *id.* at 503-04. The comments in that case about voter registration - seized upon by the Superior Court, as discussed in the next section - were thus unnecessary to the result, and are *dicta*. See, e.g., *Commonwealth v. Rahim*, 441 Mass. 273, 284 (2004) ("We have long held that we are not bound by 'language which was unnecessary' in an earlier decision 'and which passed upon an issue not really presented.'") (quoting *Old Colony Trust Co. v. Comm'r of Corps. & Tax'n*, 346 Mass. 667, 676 (1964)).

2. The Superior Court's "necessity test" is not supported by *Kinneen*.

The Superior Court misread isolated portions of *Kinneen* to devise its "'necessity' test." AD51, 58. Under this test - never before applied to election-related matters in any court of this Commonwealth - the 20-Day Rule may "allow[] only for the time needed"

to ensure voter qualifications and orderly elections." AD51 (emphasis added).²⁶ The test intentionally ignores "the strength of the governmental interest, whether alternatives are less restrictive or even 'reasonableness,'" *id.*, contrary both to Capen's emphasis on reasonableness and to this Court's general insistence that constitutionality must be "determined at every point by the competing values involved."

Marcoux, 375 Mass. at 65 n.4. It should be rejected.

The Superior Court focused on a single sentence in *Kinneen* stating that legislation "postpon[ing]" the right to vote "must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary, in order that the rights of the proposed voter may be ascertained and proved." 144 Mass. at 499, quoted in AD50. That single use of the word "necessary," conjoined with "reasonable" and not further explained, does not undo Capen's emphasis on reasonableness as the standard - especially because it appears in the context of a holding that the rule at issue was not a voter registration rule at all. Moreover, the Superior Court's construction cannot be squared with *Kinneen*'s substantial deference to legislative judgments in this area. According to *Kinneen*, "if the legislature deems that such an

²⁶ The Superior Court noted that its test was "virtually the same" as strict scrutiny. AD63.

inquiry [into voter qualifications] could not proceed concurrently with the actual voting or election, and both be conducted in a deliberate and orderly manner, it is not unreasonable that it should provide that such an inquiry should terminate before the election actually commences, at a previous time sufficiently long to make proper preparation therefore." *Id.* at 500 (emphasis added).²⁷ Nothing in that passage limits the Legislature to what is strictly "necessary."

The other passage relied upon by the Superior Court offers even less support for the "necessity" test. *Kinneen* said - in *dicta* - that

[n]o 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.

Id. at 502, quoted in AD50. That sentence states that a registration deadline must be "consistent with" (not "as short as possible for") ascertaining voter qualifications by means of "reasonable" scrutiny of the voter list.²⁸ The word "necessary" in that sentence

²⁷ Similarly, *Kinneen* declared that "[i]t is not an unreasonable provision that all persons entitled as voters shall be registered as such previously to depositing their ballots." *Id.* at 500.

²⁸ At trial, the Superior Court misstated this portion of *Kinneen*, opining that it meant that "the legislature can adopt something that is ... as close to the election as is required in order to check for

modifies only the "preparation" needed to hold an orderly election - in keeping with *Capen*'s indication that some inquiry into voter qualifications is required. See 12 Pick. at 497. This passage from *Kinneen* simply confirms what appears elsewhere in the opinion: that voter registration rules must be reasonable measures to ascertain voter qualifications.

Thus, contrary to the Superior Court's conclusion that "*Kinneen* ... gave content to some of the broad language ... from *Capen*," AD53, *Kinneen* nowhere purports to adjust any principle laid down in *Capen*. Instead, *Kinneen* adopts *Capen*'s reasoning wholesale, quoting from it at length, see 144 Mass. at 501, and even describing *Capen* as "[t]he leading case, not only in this Commonwealth, but in the whole discussion that has taken place in this country in regard to the right of legislatures to provide for judging the qualifications of voters." *Id.* at 500. The Superior Court's "necessity test" stems from its misinterpretation of *Kinneen* and its failure to recognize that, since *Capen* was decided in 1832, this Court has consistently held voter registration

accuracy and make sure the election runs smoothly. But if it goes any earlier than that, it's imposing a new requirement." A853. As explained in the text, *Kinneen* stated that the deadline must be "consistent with" the "necessary preparation," not that a deadline that "goes any earlier" than the time "required" is necessarily invalid.

regulations to a standard of "reasonableness," rather than "necessity."

3. Later cases confirm that "reasonable" voting regulations are constitutional.

In *Opinion of the Justices*, 247 Mass. 583 (1924), the Justices again affirmed that voter registration regulations are valid if they are "reasonable." Noting that "[t]he names of those [voters] thus found to be qualified must, as a practical matter, be listed and arranged so that elections may be conducted with such speed as to enable all the large numbers of voters to exercise their franchise in a reasonable time and under proper conditions," the Justices declared that "[i]t is within the jurisdiction of the Legislature to make suitable and wholesome laws upon this subject." *Id.* at 578 (emphasis added). They also opined that "no one is entitled in fact and law to vote unless he ... has complied with all reasonable regulations imposed by the General Court to prove his possession of those [constitutional] qualifications and to cause his name to be put on the voting list." *Id.* (emphasis added).

Several other cases consider the validity of election regulations in terms of "reasonableness." See, e.g., *Opinion of the Justices*, 368 Mass. 819, 821 (1975) ("The court has sustained statutes which reasonably regulate elections and access to a place on the ballot."); *O'Brien v. Bd. of Elec. Comm'rs of*

Boston, 257 Mass. 332, 338 (1926) ("[T]he Legislature is clothed with power to enact appropriate laws to regulate the orderly conduct of elections and to facilitate the counting of votes. Where reasonable statutes have been enacted to this end, the voters must observe their terms and exercise the franchise under the law."); *Morrissey v. State Ballot Law Comm'n*, 312 Mass. 121, 133 (1942) (quoting *O'Brien*); *Commonwealth v. Rogers*, 181 Mass. 184, 186 (1902) (Holmes, C.J.) ("The right of the Legislature to pass laws which provide 'an easy and reasonable mode of exercising the constitutional right' and which are 'calculated to prevent error and fraud, to secure order and regularity in the conduct of elections, and thereby give more security to the right itself,' is settled.") (quoting *Capen*, 12 Pick. at 490); *Cole v. Tucker*, 164 Mass. 486, 488 (1895) ("The principal question, then, is whether [the law] is a reasonable regulation of the manner in which the right to vote shall be exercised, or whether it subverts or injuriously restrains that right.") (all emphasis added). None of these cases supports a necessity test.

III. The 20-Day Rule Passes The Sliding Scale Test.

As noted *supra*, the sliding scale test first considers the severity of the burden the challenged regulation places on voters. See, e.g., *LAM*, 462 Mass. at 560-67. Where the burden is severe, strict scrutiny

applies, but “[l]esser burdens ... trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.’’ *Id.* at 560 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)) (internal quotation marks omitted).

Applying this test to the 20-Day Rule shows that it passes constitutional muster as a reasonable, nondiscriminatory measure.

A. The burden of complying with the 20-Day Rule is not severe.

Clingman v. Beaver makes clear that “voter registration generally” is a “minor barrier[]” that “do[es] not compel strict scrutiny.” 544 U.S. 581, 593 (2005). “To deem ordinary and widespread burdens like these severe would ... hamper the ability of States to run efficient and equitable elections.” *Id.*; see also, e.g., *Buckley v. Am. Const. Law Fdn.*, 525 U.S. 182, 196 n.17 (1999) (“[R]egistration requirements for primary election voters and candidates for political office are ‘classic’ examples of permissible regulation”). That general rule applies here.

1. Compliance with the 20-Day Rule is not impossible or unreasonably difficult.

A voting regulation’s burden may be “severe,” and strict scrutiny therefore appropriate, when compliance is unreasonably difficult. An example is *Kusper v. Pontikes*, 414 U.S. 51 (1973), where state law

prevented someone who had voted in a party primary from voting in a different party's primary the following year.²⁹ The Supreme Court noted that "there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary," and held that such "a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." *Id.* at 58, 60; see also, e.g., *Williams v. Rhodes*, 393 U.S. 23, 24-25, 31 (1968) (applying strict scrutiny because restrictive ballot access law was "virtually impossible" to comply with, and hence imposed "heavy burdens" on constitutional rights).

Another case presenting this kind of "severe burden" triggering strict scrutiny is *Cepulonis v. Secretary of the Com.*, 389 Mass. 930 (1983). In *Cepulonis*, under then-existing law, prisoners who were qualified to vote were "unable to register to vote, and thus [we]re denied the right to vote." *Id.* at 935. This Court held that, in such circumstances, "the State must demonstrate affirmatively that the challenged provision promotes a compelling State interest which could not be achieved in any less restrictive manner." *Id.* (citation and internal

²⁹ The state law provided that "a person is prohibited from voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months." 414 U.S. at 52.

quotation marks omitted). The Court distinguished *Rosario*, which had upheld (under lesser scrutiny) a requirement that voters register as party members eight months before a primary, observing that “[t]he time limit in that case did not absolutely disenfranchise voters or deprive them of the right to vote for a lengthy period.” 389 Mass. at 937.³⁰

The 20-Day Rule presents nothing like the disenfranchisement at issue in *Kusper* and *Cepulonis*. To the contrary, as set forth in detail *supra* pp. 3-6, the record here resoundingly demonstrates that voter registration in Massachusetts is not difficult, is widely available, and is extensively publicized.³¹ Indeed, the Superior Court hailed “[t]he conscientious efforts of the Commonwealth’s legislative and executive branches to inform and register voters by the deadline,” and in particular “the extensive efforts of the Secretary of the Commonwealth to publicize virtually all significant aspects of the

³⁰ *Cepulonis* did not expressly adopt the sliding-scale framework (*Cepulonis* predates *Burdick* and was argued before *Anderson* was decided), but its application of strict scrutiny to regulations as to which compliance is impossible for a particular class of qualified voters, its citation to *Kusper*, and its distinguishing of *Rosario*, 389 Mass. at 937, are consistent with the sliding-scale analysis in federal cases.

³¹ In addition, voters who face certain practical barriers to registration (e.g., absence from the State in the seven days before the deadline) are not subject to the 20-Day Rule. See G.L. c. 50, § 1, “Specially qualified voter”; G.L. c. 51, § 50.

registration process, and the candidates and questions on each ballot, well before the election, in many way[s], in several languages." AD69.

Thus, the record in this case is very much like those in recent cases in other jurisdictions which held that 29-, 21-, and 7-day voter registration deadlines were not severe burdens on the right to vote. See *Diaz*, 541 F. Supp. 2d at 1333 (holding that Florida's 29-day registration deadline "does not impose severe burdens"); *ACORN*, 413 F. Supp. 2d at 146 (holding that Connecticut's 7-day deadline "does not constitute a severe burden"); *Rutgers*, 141 A.3d at 343 (holding under state law that New Jersey's 21-day deadline "imposes no more than a minimal burden upon plaintiffs' right to vote"). In each of those cases, the evidence showed multiple means of registering, widespread availability, and extensive outreach by both the government and outside groups, much like that in the record here. See *Rutgers*, 141 A.3d at 343-44; *Diaz*, 541 F. Supp. 2d at 1333-35; *ACORN*, 413 F. Supp. 2d at 146-47.

The Secretary has located only one recent case in which a pre-election registration deadline was held to impose a "severe" burden, and that case involved extraordinary circumstances. In *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016), a massive hurricane struck the state five days before

the deadline to register. The storm resulted in thousands of people fleeing their homes, and in the closure of numerous government offices through the end of the registration period that otherwise would have been open for voters to register. *Id.* at 1254, 1257 & n.2. Thus, during the five days before the deadline, the storm "foreclosed the only methods of registering to vote: in person or by mail." *Id.* at 1257. The court held that, because the storm made it impossible for voters to register before the deadline, "Florida's statutory framework completely disenfranchises thousands of voters, and amounts to a severe burden on the right to vote." *Id.* (emphasis added).³²

Thus, in *Scott*, the combination of the voter registration deadline and the storm functioned much like the rules in *Cepulonis* and *Kusper* - that is, it made it impossible for a large group of voters who wished to register within the statutory period to do so. See *id.* ("[B]ecause Florida's statutory framework would categorically deny the right to vote to those individuals [affected by the storm], it is a severe burden that is subject to strict scrutiny.") (emphasis added). But here, as in *Rutgers*, *Diaz*, and *ACORN*, the

³² A different court found no severe burden where the same storm made it "difficult, but not impossible" to register to vote in five Georgia counties. *Bethea v. Deal*, No. CV216-140, 2016 WL 6123241, at *2-*3 (S.D. Ga. Oct. 19, 2016).

20-Day Rule has no such categorical impact.

"The only remaining question, then, is whether the time limitation imposed by [the 20-Day Rule] is so severe as itself to constitute an unconstitutionally onerous burden on the [plaintiffs'] exercise of the franchise." *Rosario*, 410 U.S. at 760. But there is no authority whatsoever for the proposition that ending voter registration 20 days before an election is, *per se*, severely burdensome. To the contrary, longer periods have been upheld as imposing only modest burdens on voters. See, e.g., *Rosario*, 410 U.S. at 761-62 (eight months); *Burns v. Fortson*, 410 U.S. 686 (1973) (per curiam) (50 days); *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam) (50 days);³³ *Diaz*, 541 F.Supp.2d at 1340 (29 days); *Rutgers*, 141 A.3d at 347 (21 days). There is simply no authority, here or elsewhere, supporting the Superior Court's unprecedented determination that 20 days is on its face an unconstitutionally long time between the end of voter registration and an election.

2. The Superior Court misapprehended the "burden" inquiry.

Although the Superior Court rejected the sliding scale test, it nonetheless applied it in the

³³ Since 1993, the National Voter Registration Act has limited the allowable period between the end of voter registration and an election to 30 days. See 52 U.S.C. § 20507(a)(1).

alternative - and did so incorrectly. In erroneously concluding that the 20-Day Rule is a "severe" burden on voters, the Superior Court considered "how severe a burden a voter suffers when denied the right to vote because of the 20-day deadline." AD61 (emphasis added); see also AD67 (holding that burden is "'severe' enough to warrant strict scrutiny" because "[t]he 20-day deadline completely and irrevocably prohibits some qualified voters from casting a ballot in a particular election"). Thus, the court framed the "burden" question as turning on the consequence of failing to comply with the rule.

The Superior Court's approach proves far too much. The consequence of failing to comply with almost any voting-related regulation is being unable to vote. Thus, if the only determinant of a burden's severity is what happens to a voter who fails to comply with a rule, then every rule's burden will be "severe," and strict scrutiny will always apply. That is not the law. See, e.g., *Clingman*, 544 U.S. at 593 (decrying a rule that would "subject virtually every electoral regulation to strict scrutiny"). The severity of the burden depends on the difficulty and consequences of complying with the challenged regulation, not on the consequences of failing to comply. See, e.g., *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (applying strict scrutiny where complying

with "blanket primary" rule created "heav[y] burden on a political party's associational freedom"); *Rosario*, 410 U.S. at 758 (declining to apply strict scrutiny because "it is clear that [plaintiffs] could have [complied with the law], but chose not to," and where plaintiffs' "plight ... was not caused by [the law], but by their own failure to take timely steps to effect their enrollment"); *Cepulonis*, 389 Mass at 935 (applying strict scrutiny where "[m]any prisoners are unable to register to vote, and thus are denied the right to vote").³⁴

B. Because the burden on voters is not severe, rational basis is the appropriate level of scrutiny.

In *LAM*, this Court held that, where the burdens of the challenged regulation were "modest," "'there need be only a rational basis undergirding the regulation in order for it to pass constitutional muster.'" 462 Mass. at 567 (quoting *Barr v. Galvin*, 626 F.3d 99, 110 (1st Cir. 2010)). Indeed, this Court's description of "rational basis" aligns with its decades-long emphasis on "reasonableness" in the voting area: "[u]nder the rational basis standard, a statute is constitutionally sound if it is reasonably

³⁴ Therefore, even if the Superior Court's "severe burden" determination was a factual one, "the 'clearly erroneous' standard of appellate review does not protect findings of fact or conclusions based on incorrect legal standards." *Kendall v. Selvaggio*, 413 Mass. 619, 621 (1992).

related to the furtherance of a valid State interest."

Gillespie v. Northampton, 460 Mass. 148, 153 (2011).

The same analysis applies here. As described above, the burden of complying with the 20-Day Rule is no more than modest. Thus, under *LAM* and the federal authority on which it relies, the 20-Day Rule should be evaluated for reasonableness under the rational basis standard of review.

C. The 20-Day Rule easily survives rational basis review.

The Superior Court easily concluded that "[u]nder the rational basis test, the Court would uphold the 20-day deadline," AD69, adding that even "the plaintiffs correctly do not attempt to argue that the 20-day deadline fails the bare rationality test," *id.* In addition to recognizing the State's "compelling" interests in "the need to ensure accuracy of registrations and to conduct an orderly election," AD63, the court acknowledged that "[t]he state's interest in efficiency and reducing the pressure upon local officials is certainly legitimate," AD69. The court further held that "the 20-day deadline may well make elections administration easier or more convenient." *Id.*

Furthermore, the 20-Day Rule bears none of the indicia of invalidity that this Court has recognized: it is "nondiscriminatory," *LAM*, 462 Mass. at 560, and

it is neither a "pretence" to "subvert or injuriously restrain the right" to vote nor "calculated to defeat or impair the right of voting," *Capen*, 12 Pick. at 494, 497.³⁵ The 20-Day Rule is a neutral rule, rationally related to the Commonwealth's compelling interests in ascertaining voting qualifications and running orderly elections, as well as its legitimate interests in efficiency and reducing burdens on election officials. It is therefore constitutional.

IV. Whether The 20-Day Rule Survives Strict Scrutiny Cannot Be Determined On The Present Record.

Even if this Court were to conclude that strict scrutiny is the appropriate standard, it should not affirm. As the plaintiffs and the Superior Court acknowledged, the state interests in ascertaining the qualifications of voters, and of running orderly elections, are compelling. See A637; AD63; *Capen*, 12 Pick. at 497; *Opinion of the Justices*, 274 Mass. at 586. The question under strict scrutiny is whether the 20-Day Rule is narrowly tailored to further those interests.

The Superior Court supplied three basic reasons for its conclusion that the 20-Day Rule was not the least restrictive way to advance the State's compelling interests. Those reasons do not suffice, on

³⁵ Plaintiffs did not argue, and the Superior Court did not find, that the 20-Day Rule is in any respect discriminatory or pretextual.

the current record, to strike down the 20-Day Rule.

A. Early voting does not prove the invalidity of the 20-Day Rule.

The Superior Court found that "Massachusetts' own experience with a five-day period between registration and early voting is one example of a feasible, shorter registration cutoff." AD65. It also noted that some other states have deadlines shorter than 20 days. *Id.* But plaintiffs' expert conceded that there is no statistically significant evidence that adjusting a registration deadline by one day affects either registration rates or turnout. A715, 728.

Moreover, the difference between a 5-day (or a 10-day, or a 19-day) and a 20-day registration deadline is one of degree, and "distinctions in degree become significant only when they can be said to amount to differences in kind." *Buckley v. Valeo*, 424 U.S. 1, 30 (1976). Even under strict scrutiny, this sort of legislative line-drawing, whether it be the difference between a 100-foot and a 25-foot no-solicitation zone at polling places, see *Burson v. Freeman*, 504 U.S. 191, 210 (1992), or between a \$2,000 and a \$1,000 campaign contribution limit, see *Buckley*, 424 U.S. at 30, does not present "a question of 'constitutional dimension.'" *Burson*, 504 U.S. at 210 (plurality opinion of Blackmun, J.) (citation omitted). Notably, *Buckley* clarified the meaning of

"distinctions in degree" as opposed to "in kind" by comparing *Rosario*, which upheld an eight-month enrollment deadline, with *Kusper*, where the law effectively barred certain voters from participating in a primary. See 424 U.S. at 30; cf. *Cepulonis*, 389 Mass. at 937. The 20-Day Rule is much shorter than *Rosario*'s eight-month rule, and is different in kind from the rule invalidated in *Kusper*.

Finally, the Superior Court overlooked the significance of the fact that, with early voting, votes are collected early, but are not counted until election day. AD22; A813. In this way, early voting is similar to absentee voting, which Massachusetts has had for many years. See 950 CMR 52.03(7). Thus, despite the fact that early voting allows votes to be deposited five days after the close of registration, the 20-Day Rule affords election officials the ability to resolve outstanding registration issues before any votes are actually counted. See *supra* p. 10 & n.15. The fact of early voting does not obviate the value of the 20-Day Rule.

B. The Superior Court made no findings regarding the processing of thousands of additional registrations in the 20 days before an election.

The Superior Court stated that election officials "are simply doing their job" by completing required tasks by the deadline, AD56, and declared that "[n]o

evidence suggests that they will fail" should the deadline be shortened or eliminated, AD65. These statements ignore the fact (noted by the court elsewhere, e.g., AD25-26, 39-40) that the workload of local election officials increases dramatically in the 20 days prior to an election. Managing early voting, testing voting machines, recruiting and training poll workers, and other responsibilities, account for more than full-time work during that period. See *supra* pp. 7-11; AD26.

The time needed to process a single complete and accurate voter registration may be a relatively brief 2-3 minutes. AD54. But if the Superior Court is right that over 100,000 Massachusetts voters "were deterred from registering for the 2014 federal election" by the 20-Day Rule, AD34, the assumption that those voters would register in the 20 days prior to an election, even if every form is accurate, translates to an average of 250,000 additional minutes of work, i.e., over 4,000 hours, or over 500 full-time days, during the period in which election officials are already most busy. And, of course, the required processing time would increase for every incomplete or inaccurate registration. See *supra* p. 7.

The Superior Court made no findings as to the impact of this additional workload. It concluded that eliminating the 20-Day Rule "would shift their work

from one period to another," AD56, but it never considered the effect of shifting a substantial portion of their work into the period close to election day, thereby effectively combining the processing of registrations with other pre-election responsibilities. Further proceedings would be needed to consider how that issue relates to the narrow tailoring inquiry.

C. Election day registration is not relevant to the issues before the Court.

The Superior Court noted EDR as an available, "less restrictive" approach. AD65. But plaintiffs never sought the imposition of EDR as a remedy in this case, *see* A15-93 (Complaint); A934 ("We're not asking the Court to dictate what the solution should be."). And EDR is not an "alternative" to the 20-Day Rule; several states with EDR also have voter registration deadlines. *See* AD76-77 (listing deadlines among States with EDR). EDR is therefore simply not relevant to this case, as the Secretary urged both via a motion *in limine* and at trial. A12, 927; AD118-26.³⁶

Moreover, whether to adopt EDR is a policy choice that is exclusively within the Legislature's domain. The experts agreed that EDR involves tradeoffs in

³⁶ The Superior Court noted that "[i]t is not clear" that any prediction regarding turnout under EDR "has any relevance to the issues before the Court." AD43.

terms of cost, burdens on election officials, election security, and other matters. A719-20, 732, 909.

Adopting EDR thus "would involve the creation of procedures to be carried out ... for which there is currently no legislative authorization or direction," and "constitutes a policy choice for the Legislature to make." *Pub. Employee Ret. Admin. Comm'n v. Bettencourt*, 474 Mass. 60, 77-78 (2016); see *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 466 (2005) (Cowin, J., concurring) ("Article 30's principle of separation of power prevents the 'judiciary [from] substituting its notions of correct policy for that of a popularly elected Legislature'"') (citations omitted); *Cepulonis*, 389 Mass. at 937-38 ("We refrain from ordering affirmative relief. Legislation providing for an absentee registration process 'is primarily a matter for legislative consideration and determination....'"') (citation omitted). The evidence on EDR should have been excluded, and does not support plaintiffs' claim that the 20-Day Rule is not narrowly tailored.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

Respectfully submitted,

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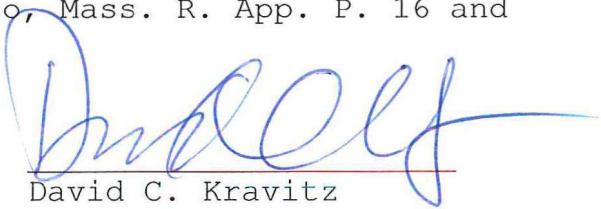
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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.



David C. Kravitz

CERTIFICATE OF SERVICE

I certify under penalty of perjury that, pursuant to the parties' agreement, I caused one paper copy and one electronic copy of this brief, and one paper copy and one electronic (CD-ROM) copy of the Appendix, to be served by hand and by email on the counsel of record listed below.



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