OMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

JAMES LYONS, RAYLA CAMPBELL, EVELYN CURLEY, RAYMOND XIE, AND ROBERT MAY

Plaintiffs-Appellants,

vs.

SECRETARY OF THE COMMONWEALTH WILLIAM GALVIN

Defendant-Appellee.

On reservation and report from the Single Justice

Docket No. SJC-13307

BRIEF OF PLAINTIFFS

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Statement of Facts

The Parties were ordered to produce an agreed upon statement of facts separately.

Statement of the Case

This case was filed on June 23, 2022 in the County Court before the Single Justice. The Plaintiffs sought emergency equitable relief from a statute signed the previous day due to go into immediate emergency effect. The Secretary appeared and moved to dismiss on June 28, 2022. The Plaintiff was in the process of assembling an opposition, including filing three affidavits, when the Court, (Kafker, J.) reserved and reported the case.

Statement of the Issues

Whether the VOTES Act, St. 2022, c.92, is a constitutional exercise of the Legislature's power.

Argument

Constitutional Interpretation

> Our analysis is informed by our traditional principles of constitutional interpretation. We look first to the plain language of the constitutional provision. Schulman v. Attorney Gen., 447 Mass. 189, 191 (2006), and cases cited. "We bear in mind that the Constitution 'was written to be understood by the voters to whom it was submitted for approval' and that '[i]t is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage of the language.' " Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 665 (2011), *S.C., ante* 232 (2012),

quoting Buckley v. Secretary of the Commonwealth, 371 Mass. 195, 199 (1976).

Second, we construe the language of a provision "in the light of the conditions under which it was framed, the ends designed to be accomplished, the benefits expected to be conferred, and the evils hoped to be remedied." Carney v. Attorney Gen., 447 Mass. 218, 224 (2006), quoting Loring v. Young, 239 Mass. 349, 372 (1921). *See* McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 558 (1993), *quoting* Lincoln v. Secretary of the Commonwealth, 326 Mass. 313, 317 (1950) (language and structure of provision to be "construed so as to accomplish a reasonable result and to achieve its dominating purpose").

Third, we recognize "that every word and phrase in the Constitution was intended and has meaning." Powers v. Secretary of Admin., 412 Mass. 119, 124 (1992). *See* Commonwealth v. Bergstrom, 402 Mass. 534, 541 (1988), *quoting* Mount Washington v. Cook, 288 Mass. 67, 70 (1934) ("All [the] words [of the Constitution] must be presumed to have been chosen advisedly"); Opinion of the Justices, 332 Mass. 769, 777 (1955) ("Words of the Constitution cannot be ignored as meaningless").

Fourth, we interpret the provisions of the Constitution "in combination with each other and all other parts of the Constitution as forming a single harmonious instrument for the government of the Commonwealth." Opinion of the Justices, 291 Mass. 578, 586 (1935). *See* Opinion of the Justices, 384 Mass. 820, 823 (1981) ("We must construe a constitutional amendment as an harmonious whole, giving words and phrases in different places in the amendment the same meaning unless used in manifestly different senses").

Opinion of the Justices, 461 Mass. 1205, 1209-1210 (2012). As Chief Justice Marshall said, "we must never forget that it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. 159, 200 (1819). Faithful adherence to its words and principles are rigorously required and social policy, even beneficial and useful must bend to it. "This is not a matter of social policy but of constitutional interpretation." Opinion of the Justices, 440 Mass. 1201 (2004). "Certainly constitutional interpretation must respond to social change," but that does not abrogate the requirement of fidelity to both text and principles of the constitutional documents. Commonwealth v. Horton, 365 Mass. 164, 177 (1974) (Hennessey, J. concurring). "Certainly this court must not indulge trivial shifts in our constitutional interpretation." Hancock v. Commissioner of Education, 443 Mass. 428, 470 (2005) (Cowin, J. concurring). The interpretation of the Massachusetts Constitution is finally and fully committed to this Court. Commonwealth v. Wilkins, 243 Mass. 356, 361 (1923).

I-Absentee Voting

The Attorney General proceeds under the assumption that this case is governed by the sliding scale test for voting rights, originally articulated in Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), providing different levels of scrutiny. *See* Libertarian Association of Massachusetts v. Secretary, 462 Mass.

538, 558 (2012) (adopting federal test for use in Massachusetts); Chelsea Collaborative v. Secretary, 480 Mass. 27, 35 (2018) (qualifying use of sliding scale in Massachusetts voter rights questions because on some occasions, the Massachusetts Constitution may command a different result). The sliding scale test dictates the constitutional level of review given a clash between the fundamental rights of voters and the "grant of police power to the Legislature…to regulate that right." Chelsea Collaborative, at 35; id. at 41 (noting "legislative objective of conducting orderly and legitimate elections.").

Instead, this case hems at the ability of the Legislature to make any provision at all. Unlike the flexible approach of the sliding scale test, this Court's separation of powers jurisprudence is a binary test, driven by the facially absolute provisions of Article 30 of the Declaration of Rights. New Bedford Standard-Times v. Clerk of Third District Court of Bristol, 377 Mass. 404, 410 (1979) ("Article 30 of the Declaration of Rights is more explicit than the Federal Constitution in calling for the separation of the powers of the three branches of government, and we have insisted on scrupulous observance of its limitations."). Questions about the power of the Legislature to make provisions do not often arise, because of a whole and fulsome grant of power to it to make any reasonable provision of law not contrary to the Constitution.

And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; s**o as the same be not repugnant or contrary to this constitution**, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said commonwealth; the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, **so as the same be not repugnant or contrary to this constitution**; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the governor of this commonwealth for the time being, with the advice and consent of the council, for the public service, in the necessary defence and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same.

Mass. Constitution, Pt. 2, c.1, §1, Art. IV (1780) (emphasis added). In short, the government of the Commonwealth is not one of limited power like the Federal Government. However, for that reason, the chains with which the people have chosen to restrain the Legislature's general and largely unlimited power are all the more important.

> The Constitution, being the fundamental law of the Commonwealth, established by the people, binds and controls all their servants, legislative, executive and judicial. Every person chosen or appointed to any office is expressly required, before entering upon the discharge of its duties, to take an oath to support the Constitution. And by the eighteenth article of the Declaration of Rights a frequent recurrence to the fundamental principles of the Constitution is declared to be absolutely necessary to preserve the advantages of liberty and to maintain a free government.
>
> The Legislature is vested by the Constitution with full power and authority from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, "s**o as the same be not repugnant or contrary to this Constitution**," as they shall judge to be for the good and welfare of this Commonwealth, and for the governing and ordering thereof, and of the subjects of the same. Every reasonable inference is to be drawn in favor of the validity of the acts of each branch of the government. But whenever application is made to the judiciary to carry into effect any statute in a particular case, and the statute in question appears to be clearly repugnant to the Constitution, it is the duty of the judges to obey the Constitution and disregard the statute.

Case of Election Supervisors, 114 Mass. 247, 248-249 (1873) (holding that despite general of power to Legislature, statute appointing judges as supervisors of elections was unconstitutional) (emphasis added). This case is not, substantially, about voting rights but rather about the power of the Legislature to enact the current measures in relation to absentee and early voting.

a-original requirement for personal presence

At common law, in relation to voting and Parliament, voting by proxy was allowed if the matter was a personal right but not if it was a matter of public trust: to the effect that the House of Lords could use proxies but the House of Commons was generally denied the power. 4 Institutes of Coke 12 ("Any Lord of Parliament, by License of the King, upon just cause to be absent may make a proxy…A Knight, Citizen, or Burgess of the House of Commons, cannot by any means make a proxy; Because he is elected and trusted by a Multitude of People."). The Massachusetts Colonial experience endorsed voting by proxy during the first charter period (1628-1684), but affirmatively prohibited it by means of a personal presence requirement under the Provincial Charter.[1] This history

[1] Massachusetts Bay Colony was compelled, after decades of legal proceedings, to surrender its Charter in 1684. The Plymouth Colony, consisting of what is now Barnstable, Plymouth, and Bristol Counties, also had its independence revoked, having only had a

was adequately summed up by the Secretary of the Commonwealth in 1917, in a report recommending the adopting of the Absentee Voting Amendment (Art. 45):

> Absentee voting, or voting by proxy, as it was called in colonial days, is not an untried experiment in this Commonwealth.
> It is to be recalled that in the early history of the Massachusetts Bay Colony elections were conducted at a meeting of the Great and General Court, held generally in Boston, at which every freeman was entitled to cast his vote.
> As early as 1635 it was ordered:-
>
> > That the General Court, to be holden in May nexte, for election of magistrates, &c., shalbe holden att Boston, & that the townes of Ipswch, Newberry, Salem, Saugus, Waymothe, & Hingham shall have libertie to stay soe many of their ffreemen att home, for the safety of their towne, as they [j]udge needefull, & that the saide ffreemen that are appoyneted by the towne to stay att home shall have liberty for this Court to send

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patent not a formal royal charter, in an experiment in colonial reorganization of King James II. Both Plymouth and Massachusetts were combined into the hated Dominion of New England, with the Colonies in Connecticut, Rhode Island, New York, and New Hampshire. The experiment did not survive long, with the 1688 arrest of Governor Edmund Andros by a mob in Boston, being a celebrated event in Massachusetts history. Governor Andros's term came to a sudden end when news that his patron, King James II, was deposed in the Glorious Revolution of 1688 reached Massachusetts Newly ascended monarchs William III and Mary II, after deliberation, refused full restoration, instead reorganizing the colonies in provinces. Massachusetts absorbed the Plymouth Colony and, initially, Nova Scotia. The Provincial Charter also had some distinct differences from its predecessors, among other things, ending the practice of a local popularly elected Governor in favor of an appointed Royal Governor. The timely arrival of Governor Phips with Royal Charter in hand, establishing this Court's predecessor, the Superior Court of Judicature, also brought an end to the Salem Witch Trials.

> their voiced by proxie.[1 Records of Massachusetts, pg 166]

This experiment was apparently found satisfactory, for in the following year it was enacted:-

> This Courte, taking into serious consideration the greate danger & damage that may accrue to the state by all the freemens leaveing their plantations to come to the place of elections, have therefore ordered it, that it shalbee free & lawfull for all freemen to send their votes for elections by proxie the next Generall Courte in May, & so for hereafter, wch shalbee done in this manner: The deputies wch shalbee chosen shall cause the freemen of their townes to be assembled, & then to take such freemens votes as please to send by proxie for every magistrate, & seale them vp, severally subscribing the magistrates name on the backside, & soe to bring them to the Courte sealed, with an open roule of the names of the freemen that so send by proxie. [1 Records of Massachusetts, pg 188]

In 1647 voting in this manner was made compulsory in most cases. Laws prescribing in greater detail the manner of collecting and transmitting the proxies, both in the case of direct nominations and of election of officers, were passed in 1649, 1663, 1679, and 1680.

That personal presence was not always required even at the meetings in the towns for collection of proxies seems to be indicated by the provision in 1663 that-

> The constable of each toune shall, some convenjent tjme before the day of election giue due notice to all the freemen of that toune to meete together to giue their votes for elections, and that none shall be admitted to giue votes for any other, *unlesse the person voteing be also present, or send his vote sealed vp, in a note directed to the deputy or tounesmen mett together for that worke.*

> [4 Records of Massachusetts, pt.2, pg 86].
>
> The following year, however, this law was repealed.
>
> The Province Charter, granted by William and Mary in 1691, required as to some elections personal presence on the part of the voter, and from that time the provisions for voting by proxy disappeared.

Report of Secretary and Attorney General in favor of Absentee Voting Provision, 1917 House Bill 1537, at 2-3 (providing the language adopted into Article 45 of Amendment) (emphasis original).[2]

> The election of other State Offices under the Constitution and its amendments now in force must be in the same manner as required in the election of governor.
>
> It thus appears that as to senators, at least, there is an express requirement of personal presence in the meeting in the town or city of which the voter is an inhabitant, and it seems reasonably clear that the 'meeting' at which the voters for governor are to be given in is the same meeting as that prescribed for the election of senators.
>
> While, as state above, voting by proxy was not unknown in this Commonwealth at the time of the adoption of the Constitution…it is true that for nearly one hundred years prior to the adoption of the Constitution, or, rather, since the charter of William and Mary, town meetings and State elections had been conducted under the requirement of personal attendance.
>
> The Province Charter provides for a General Court composed of Governor and Council and of such representatives "as shall be from time to time elected or deputed by the major part of

[2] The Attorney General was asked to stipulate to this language for the statement of facts but declined, not for any concern that it was untrue but because they felt it was not material.

> the freeholders and other inhabitants of the respective towns or places, *who shall be present at such elections*."

Id. at 8. Indeed, there is still a requirement that senators be chosen at a "meeting" although the provision has been heavily amended. *Massachusetts Constitution*, Pt.2, c.1, §2, Art.2. The similar provision for town meetings for the election of governor has been surpassed in the process of altering and extending the gubernatorial term from annual, to biennial, to quadrennial and the changes to the political year. *Massachusetts Constitution*, Pt.2, c.2, §1, Art.3.

b. early voting is absentee voting

The Attorney General asserts that early voting is an entirely different species of balloting. This is nothing more than a legal slight of hand, to pretend that constitutional limitations do not apply simply because of a terminology change. Such a reading of the Constitution is faithful to neither the requirement that every word be given effect, nor the requirement that the Constitution be interpreted in light of its history. As laid out above by the 1917 Report, originally personal presence, on election day, at the polls was required of the voters under the 1780 Constitution. Indeed the express textual requirement of a meeting for choosing representatives, contained in Amendment Article 21, persisted under the 1930 adoption of Article 71. *Compare* Art. 21 ("The manner of calling and conducting the meetings for the choice of

representatives, and of ascertaining their election, shall be prescribed by law.") *with* Art. 71 ("The manner of calling and conducting the elections for the choice of representatives, and of ascertaining their election, shall be prescribed by law").[3] This background of personal presence at elections was in full effect when the 1917 Absentee Voting Amendment provision was enacted in the form of Article 45. Thus the requirement of a personal presence, then existing expressly, informs the interpretation of Article 45, and the same language repeated in Articles 76 and 105.

The Attorney General must choose between Scylla and Charbidis. The argument that early voting is not absentee voting begs the question from where did the Legislature obtain the authority to enact early voting? Indeed, as argued in the Complaint before the Single Justice, if early voting is not absentee voting then it is unconstitutional as a violation of Art. 82 §3 and 79. *See* Article 82 §3 (providing for biennial elections "on the Tuesday next after the first Monday in November" of representatives, councillors and senators and the quadrennial

[3] Article 71 has itself been amended and superseded by Articles 92, 101, and 109. However the language covering election has remained constant. Art. 92 ("The manner of calling and conducting the elections for the choice of representatives, and of ascertaining their election, shall be prescribed by law.); Art. 101 ("The manner of calling and conducting the elections for the choice of representatives, and of ascertaining their election, shall be prescribed by law…The manner of calling and conducting the elections for the choice of senators and councillors, and of ascertaining their election, shall be prescribed by law.);

election of state officers on the same day); Art. 79 (providing for filling of vacancies "In case of a failure to elect either of said officers on the day in November aforesaid…such officer shall be chosen on or before the third Wednesday in January next thereafter, from the people at large, by joint ballot of the senators and representatives, in one room."). Article 79 clearly comes into effect in the event of an electoral failure on Election Day in November, back-ending a requirement that Election Day be, in fact, a single day. Article 89, although aimed primarily at providing a quadrennial term for state officers, clearly provides that the election of officers will occur on a specific, chosen day. As discussed above, the provisions of the Constitution must be read together for a harmonious whole. In light of both of these requirements, there is no possibility that the Legislature could change around the date and timing of the elections: they are constitutionally fixed.

Nor is this a small problem as the Legislature, in the VOTES ACT, clearly wanted to push the envelope of its power. The law provides, as agreed in the statement of facts, for an early tabulation of votes. St. 2022, c. 92 §21 *amending* G. L. c. 54 §95 (allowing elections officials to, before election day, place absentee and early ballots into either a locked ballot box or a tabulator; assuming public posting and public ceremony). The VOTES Act open intends to push the election forward, despite a specific

constitutional date, provided by Article 82 §3, and a requirement that the election reach a result on the specific day, as under Article 79. If people are freely receiving and casting votes, before Election Day, and those votes are also being counted by officials, before Election Day, then hardly any meaning is left to be ascribed to the constitutional specification of a biennial election occurring "on the Tuesday next after the first Monday in November." Even though the section (§21) of the VOTES Act would theoretically ban election workers from announcing or leaking the election results in advance of the election, it would make early tabulation a public ceremony which the candidates could attend. This would provide the simple information, to the candidates, of how many people had voted early.

As noted in the Complaint's attachments, the proponents of the law, when lobbying the Legislature openly pushed the idea that this law, the VOTES Act, would supplant absentee voting. Common Cause of Massachusetts, in advocating for the VOTES Act, said that it would "Codify 2020 reforms, including: 1 No-excuse mail voting in all elections (in place of absentee voting) [Sections 13, 26, 26, passim]". Common Cause noted that the law would have the Secretary mail applications to all registered voters by July 15. Common Cause argued that it would allow for permanent requests for absentee ballots. Common Cause noted that it would allow for locally optional advance processing of mail and early voting in

person ballots. Common Cause argued that "Local officials may appoint poll workers without regard to political party membership, voter status, residence in city or town or inclusion on a list filed by a political party committee, if the city or town clerk determines in writing that there is a lack of poll workers." Common Clause claimed that "Local election officials can opt not to require a check-out table at the ballot box." Common Cause, anticipating this lawsuit, boasted that the law would provide that "Any state constitutional challenge to mail voting under this act must be brought within 180 days in the Supreme Judicial Court, and cannot affect an election in which anyone has already cast a ballot." An ACLU fact sheet on the proposed law, joined by the League of Women Voters, Common Cause, MassVote, Massachusetts Voter Table, MassPIRG, the Boston Chapter of Lawyers for Civil Rights, argued that the bill's mail-in and early voting provisions were popular in 2020 and that it would be going backwards to allow the provisions to lapse. Testimony that the ACLU gave to the legislative committee hearing the law said it would make successful 2020 reforms permanent and that it was a "no-brainer." Progressive Massachusetts, also lobbying for the bill, heralded it as "Permanent No-Excuse Mail-In Voting." Progressive Massachusetts also noted that it "allows election officials to pre-process mail-in and early voting ballots in advance of Election Day." The proponents of the law, some championing sections which did not

make the final version of the law, nonetheless heralded that St. 2022, c. 92, would allow for no-excuse absentee voting and early tabulation of electoral results.

The Attorney General supposes that the plenary and general authorization of the Legislature to provide election rules allows it to erect a different specimen of balloting, not constrained by the Absentee Voting Amendments (Art. 45, 76. 105). This runs contrary the historical understanding of physical presence which governs the interpretation of those provisions. Moreover the Legislature has been chastised before for opting to undertake electoral innovations, without constitutional authority. *Ex.* Opinion of the Justices, 160 Mass. 586 (1894) (majority of court advising, based on constitutional history and structure, that Legislature was not empowered to pass state statutes conditioned upon a referendum) *superseded by* Art. 42 (1913).

The Attorney General's position also runs contrary to the plain text of the provisions of Articles 45, 76, 105 which start out "The general court shall have power to provide by law for voting [absentee]…" Art. 105. The provision of a power to act necessarily negates any implication to act in similar but not specified cases. *See* United States v. Hernandez-Ferrer, 599 F.3d 63, 67 (1st Cir. 2010) ("The maxim '*expressio unius est exclusio alterius*' — which translates roughly as 'the expression of one thing is the exclusion of other things' — is a venerable canon of

statutory construction"). If the Legislature needed authorization to provide for absentee voting, and needed to expand that authorization twice, there is no reason to believe that it could, without authorization, provide a similar parallel system of balloting. In a more concrete sense, the Constitution does not provide for early voting, a *casus ommisus*, and therefore the omitted case cannot be supplied. Cox v. Boston Consolidated Gas Co., 67 F.Supp. 742, 745 (D.Mass 1946) ("A casus omissus does not justify judicial legislation.").

Failing to hold that early voting is not constitutionally authorized does violence to the express authorizations for absentee voting. A provision for absentee voting would not be necessary to extend the Legislature's authority if the Legislature could simply pass a statute (as has been done for early voting) to accomplish the same end. Puzzling, the Attorney General cites to a case which the Plaintiffs believe help them. "Except where the Constitution makes express provision, the Legislature has broad powers to deal with elections." Opinion of the Justices, 359 Mass. 775, 777 (1971). Yet when presented with exactly specific provisions, Article 105, 79 and 82, the Attorney General calls them inapplicable. This is wishful thinking that by simply applying a different terminology a different result may be obtained, or that the strictures upon the additional grant of power to the Legislature may be simply circumvented.

c. Intricate and interlocking provisions for voting show careful control, by framers, of electoral innovations

As argued in the complaint, the Constitution and its amendments provided an intricate and interlocking series of provisions governing elections. These provisions added and amended over the centuries show in whole a careful and considered grasp of how, when, and under what circumstances elections can be and are conducted. Article 48, as amended, excludes freedom of election from the reach of the referendum and the popular initiative. Article 89, the Home Rule Amendment, prohibits any regulation of elections by municipalities. Over the years, the Massachusetts Constitution has experimented with different districting schemes, with running a separate state census instead of using the federal decennial census. The membership and number of the houses of the Legislature have been amend. The Councilors have been made popularly elected instead of indirect election. The Senate was initially elected on different terms than the Representatives, with Senators being by multi-member district while Representatives were chosen by town. The terms of state executive officials have gone from annual to biennial to quadrennial. Voting machines and compulsory voting have been authorized. Absentee voting has been authorized and expanded twice more. The referendum has been adopted and then repealed and replaced, to then be amended thrice. The Constitution provides

for both continuity of government, the failure to elect, and vacancies. The Constitution has been amended many times to alter the franchise, privileging military service, making paupers eligible, making those convicted of corrupt election practices ineligible, adding and then removing foreign citizenship exclusions, lowering the voting age twice, including woman, removing property qualifications to vote. While it cannot be doubted that the Legislature has broad power to fill in the interstitial gaps in our electoral system, it equally cannot be doubted that the people of Massachusetts have exercised exacting care and control, through their Constitution, of how their government is constructed and how its electoral selection mechanisms work.

II-Primaries

The Court ordered briefing on the topic of the application of constitutional absentee voting provisions to primary elections. The Plaintiffs acknowledge that in relation to constitutional positioning, primary elections stand on a fundamentally different footing from the general elections (biennial state elections). The Plaintiffs do, however, offer three observations which the Court must take into consideration.

A. Severability

The Legislature enacted the VOTES Act, St. 2022, c. 92, without a severability clause. This leaves the Court to apply the traditional test of whether the unconstitutional portions of an act may be cleaved off, or whether a narrowing construction can save the law. Severability principles are easy to articulate but difficult to apply.

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion). It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921). Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985); *see also* Tennessee v. Garner, 471 U.S. 1 (1985); United States v. Grace, 461 U.S. 171, 180-183 (1983).
>
> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements" even as we strive to salvage it. Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 397 (1988). Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy…But making

> distinctions in a murky constitutional context, or where linedrawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake. Ibid.
>
> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." Califano v. Westcott, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part); *see also* Dorchy v. Kansas, 264 U.S. 286, 289-290 (1924) (opinion for the Court by Brandeis, J.). After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? *See generally* Booker, *supra*, at 227; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Champlin Refining Co. v. Corporation Comm'n of Okla., 286 U.S. 210, 234 (1932); The Employers' Liability Cases, 207 U.S. 463, 501 (1908); Allen v. Louisiana, 103 U.S. 80, 83-84 (1881); Trade-Mark Cases, 100 U.S. 82, 97-98 (1879). All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. United States v. Reese, 92 U.S. 214, 221 (1876). "This would, to some extent, substitute the judicial for the legislative department of the government."

Ayotte v. Planned Parenthood of New England, 546 U.S. 320, 329 (2006). In many cases the Legislature, when acting a comprehensive fashion on a specific topic, will include a severability clause or sometimes a non-severability clause. The absence of such a clause does not generate a presumption in favor, or against, severability,

it is merely legislative silence. As a general matter, the Legislature has expressed a preference for severability. G. L. c. 4, §6, Eleventh ("The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof."). There is also a judicial policy in favor of partial invalidation, if possible.

The other side of the coin holds both a respect for the proper role of the Judiciary and a respect for the will of the Legislature. "Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985). In essence, the Court must look at "what is left" and determine whether if the half-loaf in question is all that the Legislature could have, would it have still wanted it. Buckley v. Valeo, 424 U.S. 1, 109 (1976).

In this case, the Legislature passed an extensive elections package. They have provided changes to voter registrations. They have provided extensively for mail voting. They have created a scheme designed to comprehensively address voting by incarcerated people. They have advanced deadlines and provided for early voting. They have also promoted experiments for electronic voting for both overseas voters as well as disabled voters. This is to

say that the law is not easily severable along the lines of general vs. primary elections. Rather than cleaving off individual sections in a horizontal fashion, *see* Peterson v. Commissioner of Revenue, 444 Mass. 128 (2005), a decision on a basis of primary elections would cut vertically through the statue affecting almost every section. Such a decision would be a large encroachment toward the legislative sphere.

b. The Bush v. Gore problem

Bush v. Gore, 531 U.S. 98 (2000) (*Bush II*) was a landmark case in election law. The Supreme Court noted, at core, that there is no actual right to vote for president (electors being determined by the state legislatures), but that the right is given it must be exercised equally. *See* Bush II, at 104 ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."); id. ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

In the Opinion of the Justices, 359 Mass. 775 (1971) the Court "conclude[d] that no constitutional issue is involved. The

Massachusetts Constitution does not refer to primaries and nominations as such, but concerns itself only with elections." Id., at 777 (deciding that primary elections are statutory creates not reached by the constitutional absentee voting limitations). Indeed, the system of primary elections has only existed since 1911. *Id.* at 777 (citing St. 1911, c. 550).

> Confidence in party government grew until it became almost a fetish. The issues engendered by the Civil War added tremendously to its vitality…Nevertheless, a distinct public sentiment favored more independence in nomination than was supposed to exist under the system of convention nominations. To much control was thought to rest in the hands of a few party bosses. It has been in recognition of this opinion that legislation providing for nomination of candidates by filing a petition signed by a certain number of voters and for a general primary has been adopted. The Western States were the first to experiment with the scheme. Massachusetts, after trying this system of direct primary nominations on a small scale in various municipalities, finally bowed to public opinion and in 1911 adopted this plan for all state offices.

Louis Frothingham, *A Brief History of the Constitution and Government of Massachusetts* (1925) at 89-90. (1925) at 89-90. The Legislature is not obliged to have or hold primary elections, certainly not at public expense as it currently does, but if it does opt to offer them it must ensure that all voters are equal. Even in relation to the constitutional flexibility which the Legislature enjoys, it is subject to constitutional restrictions especially in relation to parties. "[W]e have continually stressed

that when States regulate parties' internal processes they must act within limits imposed by the Constitution…[The cases] do not stand for the proposition that party affairs are public affairs, free of First Amendment protections—and our later holdings make that entirely clear." California Democratic Party v. Jones, 530 U.S. 567. 573 (2000) (holding that California could not require a political party to allow adherents of other parties, by means of an open blanket primary, to determine who would carry the flag for the Democratic party). *See Also* Langone v. Secretary, 388 Mass. 185 (1983) (party rule requiring that candidate receive 15% support of delegates at convention to appear on primary ballot was constitutional).

If the extensive early voting and vote by mail stand unaltered for the primary, but not the general election, then party candidates are given a huge advantage over independent candidates. In other terms, the Government would run a huge polling effort for primary candidates by mailing out millions of ballot to people across the Commonwealth with the party candidates name printed on it. However when it comes for the independent candidates, they have not received state-funded mailers but must get their voters to the polls in the general election. The mailed primary ballots would become a state endorsed invitation to join a party and support a party candidate, which the independent candidate does not have the benefit of. This also place more weight upon voters

who can, or choose to, vote in the primary elections. The rationale of Bush II is plain that, although a state is frequently not required to offer the right to vote, when it does it must assure that the equality dignity of each voter is not disturbed by vote dilution.

c. The 1971 Opinion of the Justices is an advisory opinion

This Court has made clear, many times, that advisory opinion are just that, advisory.

> That opinion, like all others given under that constitutional mandate, was advisory in character, was delivered by the Justices as individuals and not sitting as a court, and was formed without the aid of counsel or the benefit of argument…It often has been decided that an opinion formed and expressed under such circumstances is liable to incorrectness and must be regarded, not as conclusive and binding, but open to reconsideration and revision; yet it imports a view resting upon judicial consideration and examination of the subject. When called to decide the same matter coming before them as a court, the Justices are bound most sedulously to guard against any influence flowing from their previous consideration in their advisory capacity.

Loring v. Young, 239 Mass. 349, 361 (1921). *See* Dodge v. Prudential Insurance Co., 343 Mass. 375, 379-380 (1961) ("Many of the same questions are now raised by the bank, and we shall, as we proceed, consider them anew unaffected by the advisory opinion."); Lincoln v. Secretary, 326 Mass. 313, 314 (195) ("In accordance with our duty, we examine the question anew, unaffected by the advisory opinion.").

> It has been uniformly and many times held that such opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the justices as individuals in their capacity as constitutional advisers of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis. When the same questions are raised in litigation, the justices then composing the court are bound sedulously to guard against any influence flowing from the previous consideration, to examine the subject anew in the light of arguments presented by parties without reliance upon the views theretofore expressed, and to give the case the most painstaking and impartial study and determination that an adequate appreciation of judicial duty can impel.

Commonwealth v. Welosky, 276 Mass. 398, 400 (1931). The Court must view the question of absentee ballots in primary elections fresh and with keen eye.

Proceeding from basic principles, so long as the Legislature's statutes respect the constitutional freedoms of the parties they are given a great deference under a rational basis review. The Legislature may, but need not, provide for nomination by direct primary. The Legislature may invite unenrolled voters to chose to affiliate, temporarily, and cast a vote in a party's primary, so long as the party does not object to the practice. The Legislature may proscribe reasonable ballot access restrictions and may require candidates to show a modicum of support, before printing their name on the ballot. Winnowing a

field of choices is, in electoral law, a legitimate state interest. *See* US Term Limits v. Thornton, 514 U.S. 779, 834 (1995) (Speaking favorably in relation to a "States' interests in avoiding 'voter confusion, ballot overcrowding, or the presence of frivolous candidacies'" on the ballot).

Several of the State Constitutional provisions discussed above relate directly and exclusively to general elections. *See* Art. 82, §3 (providing date of biennial elections); Art. 79 *Amending* Art. 17 (laying out procedure upon failure to elect on election day in November); Article 48, as amended (regulating initiative and referendum for the State Election, with form of ballot question and other specifics); Art. 42 (superseded provision providing for referendum at state election); Art. 10 (partially superseded provision providing when terms of elected officers start following election). Other provisions relate to all elections. *See* Art. 38 (allowing, at "all elections" voting machines); Art. 31 (allowing paupers the right to vote); Art. 28 (allowing military members to vote irrespective of their standing in relation to poll taxes); Art. 68 (providing that no one shall be denied to the right to vote based on sex). Between these two extremes, encompassing all elections or referring only to the general state biennial election, exists the Absentee Voting Amendments. Art. 45, 76, 105. The absentee voting provisions neither mention nor exclude primary elections, they just say:

- “The general court shall have power to provide by law for voting by qualified voters of the commonwealth who, at the time of an election, are absent…in the choice of any officer to be elected or upon any question submitted at such an election” Art. 45
- “The general court shall have power to provide by law for voting, in the choice of any officer to be elected or upon any question submitted at an election, by qualified voters of the commonwealth who, at the time of such an election, are absent…” Art. 76.
- “The general court shall have power to provide by law for voting, in the choice of any officer to be elected or upon any question submitted at an election, by qualified voters of the commonwealth who, at the time of such an election, are absent…” Art. 105.

Certainly the original Article 45 formulation “at the time of an election” is more conducive to including primary elections within its textual reach than its two successors which qualify the matter “at the time of such an election.” Textually, the difference between “an election” or “such an election” is small but the latter imports the requirement of an election of an officer or ballot question. The ‘officer or question’ caveat textually falls in line better with the exclusion of primary elections from the provisions of Art. 76 & 105. This is because “question” “submitted” at an election to the people imports a cross-reference to Article 48, as amended, which is only concerned with biennial state elections. The caveat’s reference to ‘officer” to be elected also appears to comfortably import a cross-reference to the provisions regarding failure to elect and the terms of elected officials, both of which are specific the general biennial elections.

The framers of Article 45 were well aware of how direct primary elections worked, with it only recently being enacted. Indeed, although nothing direct came from it primary elections were a topic of discussion at the 1917-1919 Constitutional Convention. 2 *Debates of the 1917 Constitutional Convention*, 26 (quoting telegram from President of United States to Colorado asking for the preservation of initiative, referendum, and primary election because "They are the instrumentalities by which government is brought nearer to the people, and they should be preserved."); at 68 (noting that voters had voted 5 to 1 in favor of direct primary elections despite legislative predictions that only three percent of electorate would agree to such a thing in 1904); at 88 (different speaker contending that popular primary elections should be called unpopular primaries for having seen no increase in voter participation); at 150 (contending that Legislature reformed when given the chance, including by passage of direct nomination and popular direct primary election laws); at 176 (speaker contending that voters could cross party lines in caucus why should they not be able to in primary elections at the ballot); at 290 (noting lack of party leadership faith in primary elections as "fallible human democratic machinery"); at 382 (speaker, arguing against referendum, referring to direct primary as failed "laboratory experiment."); at 545 (another speaker arguing against referendum because primary elections were a

failure, according to 4 of 5 people and popularity put government in the hands of unseen invisible hand of corporate agents).

There is no express provision in Articles 45, 76, 105 relating to primaries. The also is nothing to exclude it. Concluding from a simple constitutional silence that primary elections are excluded from the reach of the absentee voting provisions is to infer content from an absence thereof, which is a risky and fraught method of constitutional interpretation. "The Legislature's silence on [a] subject cannot be ignored." Commonwealth v. Jose Nascimento, 479 Mass. 681, 684 (2018).

III-Electioneering Ban

G. L. c. 54 §65 provides that:

> no other poster, card, handbill, placard, picture or circular intended to influence the action of the voter shall be posted, exhibited, circulated or distributed in the polling place, in the building where the polling place is located, on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place…
>
> Pasters, commonly called stickers, shall not be posted, circulated or distributed in the polling place, in the building where the polling place is located, on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place…
>
> No person shall be allowed to collect signatures upon petitions, referendum petitions or nomination papers within one

> hundred and fifty feet from the building entrance door to a polling place.
>
> Whoever posts, exhibits, circulates or distributes any poster, card, handbill, placard, picture or circular intended to influence the action of a voter, or any paster to be placed upon the official ballot, in violation of any provision of this section, shall be punished by a fine of not more than twenty dollars.

G. L. c. 54 §65. This is a general broadscale ban on any form of political speech within a polling place. The Secretary's office has, slightly, expanded the prohibitions to including anything with influences voters or solicits votes. 950 C.M.R. §§ 52.03(22)(d), 54.04(22)(d). *See Also Memorandum from Elections Division #20-12*. Indeed the Secretary's interpretation, and his regulations, even extend to passive political speech such as a message on a t-shirt that a voter wears when going into the polling place. Section 11 of the VOTES Act extends this ban to include early voting languages. St. 2022, c. 92, §11 ("Section 65 of said chapter 54, as so appearing, is hereby amended by adding the following paragraph:- This section shall apply to early voting locations under section 25B while voting is being conducted."). Early voting is conducted during business hours.

Early voting locations are currently required under G. L. c. 54 §25B(f), but the VOTES Act rewrites that section in full, moving the provision to G. L. c. 54 §25B(b)(4). Early voting locations include the 'election office' which is the office of the city or

town clerk. *Id.* Thus the VOTES Act now extends a total First Amendment ban, which the Secretary's interpretation and regulations include even small acts of political speech like passive speech on a t-shirt, to cover municipal town halls. The electioneering ban, G. L. c. 54 §65, which before only applied to polling places on the narrow occasion of Election Day, now covers town hall for weeks at a time. It is by definition no longer a narrowly-tailored impingement upon free speech. Since the ban is now not restricted to a single-use facility, the geographic location conscripted for 12 hours of polling on election day, it restricts all manner of access to the government. It prevents speech or petition of the local governments in their central halls. There are a thousand different pieces of business which the public must do in Town Hall, pay taxes, register dogs, make public records requests, access the veterans agent. The Town Clerk is necessarily the centerpiece of Town Hall, itself the center of civic life. The Supreme Court, in Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018), held that polling locations are not a public forum since people are there only for one purpose of limited duration, who may be there is regulated, and the government is conducting business there. LA Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 572 (1986) ("Much nondisruptive speech — such as the wearing of a T-shirt or button that contains a political message — may not be "airport related," but is still protected speech even

in a nonpublic forum.") However, this analysis does not apply to a total electioneering ban descending upon municipal town halls for weeks at a time, because Town Halls are public forums. It is where municipal meetings are held, where citizens keeps an eye upon their local government and, if necessary, express their displeasure or disappointment. The distinction between a single-use offered by a polling place and the manifold uses of Town Hall make all the difference.[4]

The extension of the electioneering ban is all the more insidious because the Secretary's definitive interpretation is, openly, a content-based restriction. *See Memorandum from the Elections Division #20-12*. In the Secretary's interpretation he draws a distinction between election speech and general political speech, prohibiting speech relating to the topics on the ballot:

> PROHIBITIONS UNDER THE 150-foot RULE
> The 150-foot Rule applies only to activities, behaviors, and practices defined in the following section. The following activities are prohibited within 150 feet of a polling place on Election Day.
>
> **Exhibition, Circulation, and Distribution of Materials**
> Materials intending to influence the action or decision of a voter at the ongoing election may not be exhibited, circulated, distributed, posted, or otherwise displayed within the area subject to the 150-foot Rule…Materials are understood to be intended to influence the action of decision of a voter when they contain the name, policy proposals, or campaign slogan

[4] Indeed the single-purpose/singe-use was the predominant factor in the Supreme Court holding in Minnesota Voter Alliance that polling locations are not public forums.

of a particular candidate or political party on the ballot or when they advocate for or against a position on a ballot question on the ballot…Please note that voters may bring materials to assist them in the voting process, including campaign literature which is otherwise prohibited in the polling place. Such voters may be asked to act with discretion and cannot be found in violation of these prohibitions so long as they do not otherwise display such materials in a manner described above.

Solicitation of Votes
No person or group of people may solicit or attempt to solicit one or more votes for or against any person, political party, or ballot question to be voted on at the current election…

Influencing One or More Voters
No person or group of people may hold any campaign sign; wear any campaign buttons, clothing, or identifying signs or symbols; hand any person literature intended to influence their action at the polls; solicit a person's vote for or against a candidate or question on the ballot; or, in any way promote or oppose any person or political party or ballot question on the ballot…

ACTIVITIES NOT PROHIBITED BY THE 150-FOOT RULE
The 150-foot Rule applies only to activities, behaviors, and practices defined in the previous section. It does not prohibit other activities. The following activities are allowed within the 150-foot Rule to the extent they do not interfere with election administration…

Issue Phrases and Slogans
The display of materials, phrases, and slogans which promote an issue, position, or ideology which is not explicitly tied to the campaign or campaign material of a candidate, political party, or ballot question printed on the ballot cannot be prohibited under the 150-foot Rule. Examples of such protected materials,

> phrases, and slogans include but are not limited to the following:
> - “Black Lives Matter”
> - “Blue Lives Matter”
> - “Defund the Police”
> - “Thin Blue Line”
> - “Back the Blue”
> - “Obey”
> - “Resist”
>
> Note that any such phrase which is explicitly used by a candidate, political party, or ballot question campaign in campaign materials or messaging must be prohibited under the 150-foot Rule at polling places within the district in which such candidate, political party, or ballot question is printed on the ballot.

Memorandum of Elections Division, #20-12, at 3-4. Thus the Secretary draws a distinction between political speech which is at-issue in an election and other political speech. This direction is also given out to local election officials for them to enforce. *Cf.* West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”). Although the government is generally not allowed to have “First Amendment Free Zones,” even in non-public forums Jews for Jesus, 482 U.S. 569, 572 (1986), the highest sin in the pantheon of First Amendment Prohibitions is to engage in content censorship. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment,

it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). There is an academic dispute whether the Secretary’s rule is a content discrimination (banning all political speech in the polling place) or simply viewpoint discrimination (allowing speech not at issue in election within the 150-foot zone but prohibition election speech). Rosenberger v. University of Virginia, 515 U.S. 819, 830-831 (1995) (“As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination…And, it must be acknowledged, the distinction is not a precise one.”); Id., at 829 (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”); McCullen v. Coakley, 134 S.Ct. 2518, 2531 (2014) (“The Act would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.”) (quotation marks omitted). Either way there is no doubt that the electioneering ban is constitutionally suspect. It could conceivably be saved by a compelling state interest, if narrowly tailored, say to a single purpose limited forum for a short duration rather than a weeks long ban covering a multi-use, multi-purpose public-forum government facility. The extension of the electioneering ban to

cover Town Halls for weeks at a time plainly makes the statute unconstitutional facially under the overbreadth doctrine. "Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct…The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression" Broadrick v. Oklahoma, 413 U.S. 601, 612-613 (1973).

Even though an electioneering ban is aimed at laudable goals, to protected the integrity and free choice of the ballot, the practical realities of the many needs and uses of Town Hall to the public make it impossible and impractical to ban all electioneering. Jews for Jesus, 482 U.S. at 575 ("We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech."). This has the effect of prohibiting free speech right where it is needed most, when dealing with the government. With a single sentence, applying §65 to early voting locations, what was once a carefully tailored, limited application, limited duration restriction

becomes a gargantuan first-amendment black-out period for weeks at a time over the central halls of municipal government.

IV-Partisanship in election worker

The Attorney General has made a mistake of law under this heading, analyzing the claims of the Complaint under the Declaration of Rights, Art. 9. The Complaint, however, expressly references the Federal Elections Clause. U.S. Const. Article I, §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."). The Federal Elections Clause places a relatively wide grant of power to the Legislature. In fact, the Supreme Court of the United States has grant certiorari in a case challenging the reaches of the Federal Election clause. *See* Morton v. Harper, docket no. 21A455 (U.S. Supreme Court cert. granted June 30, 2022).

A lack of overt partisanship is an important element in the federal elections caselaw, generally. "[W]e have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls" Burdick v. Takushi, 504 U.S. 428, 439 (1992). This case law has taken on particular emphasis under the Elections Clause, an area where State Power is put to Federal purpose in an uncomfortable constitutional compromise. Cook v. Gralike, 531 U.S. 510, 523 (2001).

There is no question that the VOTES Act, in Section 9 amending G. L. c. 54 §14, brings about changes to how election workers are appointed in the event of a vacancy. As in effect before the VOTES Act, the law provided, in part, that "if the party representation requirements of section thirteen apply, the appointment shall be so made as to preserve the equal representation of the two leading political parties." G. L. c. 54 §14. As amended by St. 2022, c. 92, the VOTES Act, the law now provides that "the appointing authority may appoint election officers without regard to political party membership, voter status, residence in the city or town or inclusion on a list filed by a political party committee pursuant to sections 11B and 12." This unquestionably removes the requirement to conform to party proportional representation.

The Federal Elections Clause prohibits a slanting of the election laws for a partisan benefit. U.S. Term Limits Inc. v. Thornton, 514 U.S. 779, 833-834 (1995) ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."). The proportional partisan representation requirement is a law made for the ultimate benefit of the public by ensuring that the minority party, Mr. Lyon's Republican Party, is fairly represented and able to help keep its opposition honest. Removing this requirement may tend to harm the

public good but, more discretely, it favors the candidates of the majority party. It removes a requirement that the authority appointing election officers try to ensure roughly equal representation. This is, contrary to the view of the Secretary, an open call to install partisanship realities into the laws and the administration of elections. Aside from the disservice to the public of making election outcomes less trustworthy, it takes a valuable right of proportional representation away from Massachusetts Republicans. This right was not a matter of legislative grace, but a clever method of ensuring that election administration was equal and even-handed, thereby complying with the Federal Elections Clause. This right was removed without any countervailing change to election procedure which would ensure continued compliance with the Federal Elections Clause. This change, as the Court already knows, was made mere weeks before an election and consequently the legal change, voted against by every single Republican legislator, reeks of rank political partisanship.

V-Dead People Voting

Section 19 of the VOTES Act, amending G. L. c. 54 §92, adds a new subsection (d) which provides, in part, “The absent voting ballot of any voter who was eligible to vote at the time the ballot was cast shall not be deemed invalid solely because the voter became ineligible to vote by reason of death after cast the

ballot." Section 22 of the VOTES Act, repeals G. L. c. 54 §100. Among other provisions, §100 had required election officials to remove, and not count, the absentee ballot of someone who, they came to learn had deceased in advance of Election Day. As previously existing, §100 was a quite reasonable regulation, it required election officials to use best efforts but did not allow the election to be invalidated if some so-called "zombie votes" slipped the net. The two new provisions of the VOTES Act prohibit the discounting of votes cast by people who die in advance of Election Day. Even if the Town Clerk becomes aware of the death, the vote musts still be counted.

There is a shocking lack of caselaw upon the topic of dead voters, probably for the reason that, up until recently it was self-evident that dead people were not eligible to vote. *See* Derringe v. Donovan, 162 A. 439 (Pa. 1932) (votes for dead candidates are counted for their effect in relation to live losing candidates); McCarthy v. Reichenstein, 142 A.2d 914 (NJ App. Div. 1958) (citing 133 A.L.R. 320 "The general rule is that votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the result of the election as to other candidates."). In Massachusetts, 45 votes were rejected due to the voter's demise in 2018 and 50 votes were rejected in 2020. David Horton, *The Dead*

Voter Rule, 73 Ala. L. R. 341, 358 (2021) (arguing that the rule prohibiting the counting of dead voter ballots is arbitrary and potentially unconstitutional).

The Plaintiffs allow the prior rule, of G. L. c. 54 §100, was the model of a reasonable election administration rule, concerned with the burden screening out dead voters it required only a good faith effort on the part of election officials. The two new sections of the VOTES Act openly embrace the idea of zombie votes and prohibit their discounting. The Plaintiffs press that allowing dead people to vote is simply arbitrary and irrational. Even under the generous allowance for legislative determination under the sliding scale test, it is simply arbitrary to allow dead people to vote. This portion of the law clearly exceeds the reasonableness allowed to election administration rules.

VI-Electronic Voting

The VOTES Act opens up electronic voting in two channels.[5] Section 10, inserting a new G. L. c. 54 §25B, provides in

[5] As acknowledge below in relation to residency, the Plaintiffs made assertions about the content of the law from the available legislative materials. Some of those provisions were not in the law as signed by the Governor. The Plaintiffs are unable to reconcile the disappearance of language which would have amended G. L. c. 51 §3 in a way violating constitutional residency restrictions with its presence in the report of the legislative conference committee. However, official versions exist for a reason and the Plaintiffs are not in a position to, and do not, raise claims relating to legislative procedural irregularities. Much like the mistake in relation to residency, acknowledged below,

§25B(a)(4) that electronic ballots are allowable for those voting absentee based on disability. Section 18 of the VOTES Act, replacing G. L. c. 54 §91C, provides that an overseas or military voter may cast their vote electronically, by email, by fax, or through an electronic system on similar terms to disabled absentee voters.

The Plaintiffs, in their complaint and here, press three concerns about electronic voting. Firstly, electronic voting is not within the constitutional bounds as laid out in Article 38 of Amendment to the Massachusetts Constitution. Art. 38 ("Voting machines or other mechanical devices for voting may be used at all elections under regulations as may be prescribed by law; provided, however, that the right of secret voting shall be preserved."). For the same reasons as argued above in relation to absentee voting, the authorization to do one thing necessarily implicitly excludes a similar thing not mentioned. The authorization in Art. 38 is limited to "mechanical devices" which the Secretary cannot claim that an electronic system is. Likewise the general power to provide in relation to elections cannot aid, since a specific authorization was required for the use of mechanical voting devices.

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language requiring the Secretary's electronic balloting system to produce anonymous auditable ballots is not in the final law as signed by the Governor.

Under the case law relating to this topic, there are two requirements for the use of devices, there must be an output reviewable by the election officials and an output reviewable by the voter. Nichols v. Election Commissioners, 196 Mass. 410 (1907) (holding the use of voting machines which did not leave a written record of vote was not consonant with the Constitution's requirement of a written vote); Opinion of the Justices, 178 Mass. 605 (1901) (opining that use of voting machines allowable only if the vote produced a writing which could be reviewed). The law proposes that the electronic system for balloting not store or collect any personal identifying information. By not storing some modicum of information, the ballot does, theoretically, remain secret. However, the output would not comply with the Nichols hold that it must produce something reviewable by elections officials and the voter. The Nichols court was interpreting a provision of the original constitution which remains in effect, requiring that "Every member of the house of representatives shall be chosen by written votes." *Massachusetts Constitution*, Pt.2, c.1, §3, Art.3 (amended several times but the quoted language survives to the present day). Article 38, in essence, allows mechanical devices which have a reviewable output to meet this requirement. Even if Article 38 did not implicitly ban an electronic system, an electronic system cannot meet the requirement of a "written vote."

VII-Residency

The Plaintiffs, working off of the available legislative materials, asserted in their complaint before the Single Justice that the change in the voter registration law violated the Constitutional residency provision as provided in Article 3, as amended, of the Constitution. This was in error. The section of law, which would have amended G. L. c. 51 §3. Apparently the section of law was cut sometime before the law was laid before the Governor for his signature. A copy of the law, as signed by His Excellency, is appended to the Complaint and does not possess any amendment of §3. The Plaintiff hereby withdraws its claims relating to violations of the constitutional residency provision.

Conclusion

Wherefore the Court should enjoin the VOTES Act.

Respectfully Submitted,
July 5, 2022
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Certificate of Service

I, Michael Walsh, hereby certify that a copy of this filing has been served electronically upon AAG Adam Horstine and AAG Anne Sterman on this 5th day of July 2022.
/S/ Michael Walsh

OMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

JAMES LYONS, RAYLA CAMPBELL, EVELYN CURLEY,
RAYMOND XIE, AND ROBERT MAY

Plaintiffs,

vs.

SECRETARY OF THE COMMONWEALTH WILLIAM GALVIN

Defendant.

On reservation and report from the Single Justice

Docket No. SJC-13307

Addendum to BRIEF OF PLAINTIFFS

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July 2022

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Declaration of Rights Art. 18
Article XVIII
A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.

Declaration of Rights Art. 30
Article XXX.
In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Body of Massachusetts Constitution

Pt. 2, c.1, §1 Art.4.—Power of General Court
And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects

of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said commonwealth; the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the governor of this commonwealth for the time being, with the advice and consent of the council, for the public service, in the necessary defence and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same.

Pt.2, c.1, §2, Art. 2—Selection of Senators (heavily amended)

he senate shall be the first branch of the legislature; and the senators shall be chosen in the following manner, viz. there shall be a meeting on the [], forever, of the inhabitants of each town in the several counties of this commonwealth; to be called by the selectmen, and warned in due course of law, at least seven days before the [], for the purpose of electing persons to be senators and councillors; [] And to remove all doubts concerning the meaning of the word "inhabitant" in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this state, in that town, district or plantation where he dwelleth, or hath his home.

The selectmen of the several towns shall preside at such meetings impartially; and shall receive the votes of all the inhabitants of such towns present and qualified to vote for senators, and shall sort and count them in open town meeting, and in presence of the town clerk, who shall make a fair record, in presence of the selectmen, and in open town meeting, of the name of every person voted for, and of the number of votes against his name: and a fair copy of this record shall be attested by the selectmen and the town clerk, and shall be sealed up, directed to the secretary of the commonwealth for the time being, with a superscription, expressing the purport of the contents thereof, and delivered by the town clerk of such towns, to the sheriff of the county in which such town lies, thirty days at least before []; or it shall be delivered into the secretary's office seventeen days at least before the said []: and the sheriff of each county shall deliver all such certificates by him received, into the secretary's office, seventeen days before the said [].

And the inhabitants of plantations unincorporated, qualified as this constitution provides, who are or shall be empowered and required to assess taxes upon themselves toward the support of government, shall have the same privilege of voting for councillors and senators in the plantations where they reside, as town inhabitants have in their respective towns;[] at such place in the plantations respectively, as the assessors thereof shall direct; which assessors shall have like authority for notifying the electors, collecting and returning the votes, as the selectmen and town clerks have in their several towns, by this constitution. And all other persons living in places unincorporated (qualified as aforesaid) who shall be assessed to the support of government by the

assessors of an adjacent town, shall have the privilege of giving in their votes for councillors and senators in the town where they shall be assessed, and be notified of the place of meeting by the selectmen of the town where they shall be assessed, for that purpose accordingly.

Pt.2, c. 1, §3, Art.3—Selection of Representatives
Every member of the house of representatives shall be chosen by written votes; **[]**

Pt.2, c.2, §1, Art.3—Selection of Governor
Those persons who shall be qualified to vote for senators and representatives within the several towns of this commonwealth, shall, at a meeting to be called for that purpose, on the [], give in their votes for a governor, to the selectmen, who shall preside at such meetings; and the town clerk, in the presence and with the assistance of the selectmen, shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person against his name; and shall make a fair record of the same in the town books, and a public declaration thereof in the said meeting; and shall, in the presence of the inhabitants, seal up copies of the said list, attested by him and the selectmen, and transmit the same to the sheriff of the county thirty days at least before the []; and the sheriff shall transmit the same to the secretary's office, seventeen days at least before the said []; or the selectmen may cause returns of the same to be made to the office of the secretary of the commonwealth, seventeen days at least before the said day; and the secretary shall lay the same before the senate and the house of representatives, on the [], to be by them examined: and in case of an election by a [] of all the votes returned, the choice shall be by them declared and published. But if no person shall have a [] of votes, the house of representatives shall, by ballot, elect two out of four persons who had the highest number of votes, if so many shall have been voted for, but, if otherwise, out of the number voted for; and make return to the senate of the two persons so elected; on which the senate shall proceed, by ballot, to elect one, who shall be declared governor

<u>Articles of Amendment to the Massachusetts Constitution</u>

Article 45—Absentee Voting #1
Article XLV.
The general court shall have power to provide by law for voting by qualified voters of the commonwealth who, at the time of an election, are absent from the city or town of which they are inhabitants in the choice of any officer to be elected or upon any question submitted at such election.

Article 76—Absentee Voting #2
Article LXXVI
Article XLV of the articles of amendment is hereby annulled and the following is adopted in place thereof:--

Article XLV. The general court shall have power to provide by law for voting, in the choice of any officer to be elected or upon any question submitted at an election, by qualified voters of the commonwealth who, at the time of such an election, are absent from the city or town of which they are inhabitants or are unable by reason of physical disability to cast their votes in person at the polling places.

Article 105—Absentee Voting #3
Article CV.
Article XLV of the articles of amendment to the constitution, as amended by Article LXXVI of said articles of amendment, is hereby annulled and the following is adopted in place thereof:-

Article XLV. The general court shall have power to provide by law for voting, in the choice of any officer to be elected or upon any question submitted at an election, by qualified voters of the commonwealth who, at the time of such an election, are absent from the city or town of which they are inhabitants or are unable by reason of physical disability to cast their votes in person at the polling places or who hold religious beliefs in conflict with the act of voting on the day on which such an election is to be held.

Article 21—Selection of Representatives (annulled)
A census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of the secretary of the commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter. In the census aforesaid, a special enumeration shall be made of the legal voters; and in each city, said enumeration shall specify the number of such legal voters aforesaid, residing in each ward of such city. The enumeration aforesaid shall determine the apportionment of representatives for the periods between the taking of the census.

The house of representatives shall consist of two hundred and forty members, which shall be apportioned, by the legislature, at its first session after the return of each enumeration as aforesaid, to the several counties of the commonwealth, equally, as nearly as may be, according to their relative numbers of legal voters, as ascertained by the next preceding special enumeration; and the town of Cohasset, in the county of Norfolk, shall, for this purpose, as well as in the formation of districts, as hereinafter provided, be considered as part of the county of Plymouth; and it shall be the duty of the secretary of the commonwealth, to certify, as soon as may be after it is determined by the legislature, the number of representatives to which each county shall be entitled, to the board authorized to divide each county into representative districts. The mayor and aldermen of the city of Boston, the county commissioners of other counties than Suffolk, -- or in lieu of the mayor and aldermen of the city of Boston, or of the county commissioners in each county other than Suffolk, such board of special commissioners in each county, to be elected by the people of the county, or of the towns therein, as may for that purpose be provided by law, shall, on the first Tuesday of August next after each assignment of representatives to each county, assemble at a shire town of their respective counties, and proceed, as soon as may be, to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the relative number of legal voters in the several districts of each county; and such districts shall be so formed that no town or ward of a city shall be divided therefor, nor shall any district be made which shall be entitled to elect more than three representatives. Every representative, for one year at least next preceding his election, shall have been an inhabitant of the district for which he is chosen, and shall cease to represent such district when he shall cease to be an inhabitant of the commonwealth. The districts in each county shall be numbered by the board creating the same, and a description of each, with the numbers thereof

and the number of legal voters therein, shall be returned by the board, to the secretary of the commonwealth, the county treasurer of each county, and to the clerk of every town in each district, to be filed and kept in their respective offices. The manner of calling and conducting the meetings for the choice of representatives, and of ascertaining their election, shall be prescribed by law.] [Not less than one hundred members of the house of representatives shall constitute a quorum for doing business; but a less number may organize temporarily, adjourn from day to day, and compel the attendance of absent members.

Article 71—Selection of Representatives (annulled and superseded)

Article XXI of the articles of amendment is hereby annulled and the following is adopted in place thereof:

Article XXI. In the year nineteen hundred and thirty-five and every tenth year thereafter a census of the inhabitants of each city and town shall be taken and a special enumeration shall be made of the legal voters therein. Said special enumeration shall also specify the number of legal voters residing in each precinct of each town containing twelve thousand or more inhabitants according to said census and in each ward of each city. Each special enumeration shall be the basis for determining the representative districts for the ten year period beginning with the first Wednesday in the fourth January following said special enumeration; provided, that such districts as established in the year nineteen hundred and twenty-six shall continue in effect until the first Wednesday in January in the year nineteen hundred and thirty-nine.

The house of representatives shall consist of two hundred and forty members, which shall be apportioned by the general court, at its first regular session after the return of each special enumeration, to the several counties of the commonwealth, equally, as nearly as may be, according to their relative numbers of legal voters, as ascertained by said special enumeration; and the town of Cohasset, in the county of Norfolk, shall, for this purpose, as well as in the formation of districts as hereinafter provided, be considered a part of the county of Plymouth; and it shall be the duty of the secretary of the commonwealth to certify, as soon as may be after it is determined by the general court, the number of representatives to which each county shall be entitled, to the board authorized to divide such county into representative districts. The county commissioners or other body acting as such or, in lieu thereof, such board of special commissioners in each county as may for that purpose be provided by law, shall, within thirty days after such certification by the secretary of the commonwealth or within such other period as the general court may by law provide, assemble at a shire town of their respective counties, and proceed, as soon as may be, to divide the same into representative districts of contiguous territory and assign representatives thereto, so that each representative in such county will represent an equal number of legal voters, as nearly as may be; and such districts shall be so formed that no town containing less than twelve thousand inhabitants according to said census, no precinct of any other town and no ward of a city shall be divided therefor, nor shall any district be made which shall be entitled to elect more than three representatives. The general court may by law limit the time within which judicial proceedings may be instituted calling in question any such apportionment, division or assignment. Every representative, for one year at least immediately preceding his election, shall have been an inhabitant of the district for which he is chosen and shall cease to represent such district when he shall cease to be an inhabitant of the commonwealth. The districts in each county shall be numbered by the board creating the same, and a description of each, with the numbers thereof and the number of legal voters therein, shall be returned by the board, to the secretary of the commonwealth, the county treasurer of such county, and to the clerk of every city or town in such

county, to be filed and kept in their respective offices. The manner of calling and conducting the elections for the choice of representatives, and of ascertaining their election, shall be prescribed by law.

Article XXII of the articles of amendment is hereby annulled and the following is adopted in place thereof:

Article XXII. Each special enumeration of legal voters required in the preceding article of amendment shall likewise be the basis for determining the senatorial districts and also the councillor districts for the ten year period beginning with the first Wednesday in the fourth January following such enumeration; provided, that such districts as established in the year nineteen hundred and twenty-six shall continue in effect until the first Wednesday in January in the year nineteen hundred and thirty-nine. The senate shall consist of forty members. The general court shall, at its first regular session after the return of each special enumeration, divide the commonwealth into forty districts of contiguous territory, each district to contain, as nearly as may be, an equal number of legal voters, according to said special enumeration; provided, however, that no town or ward of a city shall be divided therefor; and such districts shall be formed, as nearly as may be, without uniting two counties, or parts of two or more counties, into one district. The general court may by law limit the time within which judicial proceedings may be instituted calling in question such division. Each district shall elect one senator, who shall have been an inhabitant of this commonwealth five years at least immediately preceding his election, and at the time of his election shall be an inhabitant of the district for which he is chosen; and he shall cease to represent such senatorial district when he shall cease to be an inhabitant of the commonwealth

Article 79—Filling Vacancies by failure to elect or otherwise

Article XVII of the amendments of the constitution, as amended, is hereby further amended by striking out, in the third sentence, the words "two persons who had the highest number of votes for said offices on the day in November aforesaid" and inserting in place thereof the words: - people at large, - so that said sentence will read as follows: - In case of a failure to elect either of said officers on the day in November aforesaid, or in case of the decease, in the meantime, of the person elected as such, such officer shall be chosen on or before the third Wednesday in January next thereafter, from the people at large, by joint ballot of the senators and representatives, in one room; and in case the office of secretary, or treasurer and receiver-general, or auditor, or attorney-general, shall become vacant, from any cause, during an annual or special session of the general court, such vacancy shall in like manner be filled by choice from the people at large; but if such vacancy shall occur at any other time, it shall be supplied by the governor by appointment, with the advice and consent of the council.

Article 82—Selection of State Officers for Quadrennial Terms

Article LXIV of the Amendments to the Constitution, as amended by Article LXXX of said Amendments, is hereby annulled, and the following is adopted in place thereof:-

Article LXIV. Section 1. The governor, lieutenant-governor, secretary, treasurer and receiver-general, attorney general, and auditor shall be elected quadrennially and councillors, senators and representatives shall be elected biennially. The terms of the governor and lieutenant-governor shall begin at noon on the Thursday next following the first Wednesday in January succeeding their election and shall end at noon on the Thursday next following the first Wednesday in January in the fifth year following their election. If the governor elect shall have died before the qualification

of the lieutenant-governor elect, the lieutenant-governor elect upon qualification shall become governor. If both the governor elect and the lieutenant-governor elect shall have died both said offices shall be deemed to be vacant and the provisions of Article LV of the Amendments to the Constitution shall apply. The terms of the secretary, treasurer and receiver-general, attorney general, and auditor shall begin with the third Wednesday in January succeeding their election and shall extend to the third Wednesday in January in the fifth year following their election and until their successors are chosen and qualified. The terms of the councillors shall begin at noon on the Thursday next following the first Wednesday in January succeeding their election and shall end at noon on the Thursday next following the first Wednesday in January in the third year following their election. The terms of senators and representatives shall begin with the first Wednesday in January succeeding their election and shall extend to the first Wednesday in January in the third year following their election and until their successors are chosen and qualified.

Section 2. The general court shall assemble every year on the first Wednesday in January.

Section 3. The first election to which this article shall apply shall be held on the Tuesday next after the first Monday in November in the year nineteen hundred and sixty-six, and thereafter elections for the choice of a governor, lieutenant-governor, secretary, treasurer and receiver-general, attorney general, and auditor shall be held quadrennially on the Tuesday next after the first Monday in November and elections for the choice of councillors, senators and representatives shall be held biennially on the Tuesday next after the first Monday in November.

Article 42—First Provision for Referendum (annulled and superseded by Article 48)
Full power and authority are hereby given and granted to the general court to refer to the people for their rejection or approval at the polls any act or resolve of the general court or any part or parts thereof. Such reference shall be by a majority yea and nay vote of all members of each house present and voting. Any act, resolve, or part thereof so referred shall be voted on at the regular state election next ensuing after such reference, shall become law if approved by a majority of the voters voting thereon, and shall take effect at the expiration of thirty days after the election at which it was approved or at such time after the expiration of the said thirty days as may be fixed in such act, resolve or part thereof

Article 48, The Initiative II, Section 2—Excluded Matters (precluding initiative from interfering in freedom of election)
Section 2. Excluded Matters. - No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the eighteenth amendment of the constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

Article 89—Home Rule Amendment limitation on local powers (prohibiting the regulation of elections).
Section 7. Limitations on Local Powers. - Nothing in this article shall be deemed to grant to any city or town the power to (1) regulate elections other than those prescribed by sections three and four; (2) to levy, assess and collect taxes; (3) to borrow money or pledge the credit of the city or town; (4) to dispose of park land; (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power; or (6) to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law; provided, however, that the foregoing enumerated powers may be granted by the general court in conformity with the constitution and with the powers reserved to the general court by section eight; nor shall the provisions of this article be deemed to diminish the powers of the judicial department of the commonwealth.

Article 10—Regulating Terms of Office and Political Year
The political year shall begin on the first Wednesday of January instead of the last Wednesday of May, and the general court shall assemble every year on the said first Wednesday of January, and shall proceed at that session to make all the elections, and do all the other acts which are by the constitution required to be made and done at the session which has heretofore commenced on the last Wednesday of May. And the general court shall be dissolved on the next day preceding the first Wednesday of January, without any proclamation or other act of the governor. But nothing herein contained shall prevent the general court from assembling at such other times as they shall judge necessary, or when called together by the governor. []

All the other provisions of the constitution, respecting the elections and proceedings of the members of the general court, or of any other officers or persons whatever, that have reference to the last Wednesday of May, as the commencement of the political year, shall be so far altered as to have like reference to the first Wednesday of January.

This article shall go into operation on the first day of October next following the day when the same shall be duly ratified and adopted as an amendment of the constitution[]

All the provisions of the existing constitution inconsistent with the provisions herein contained are hereby wholly annulled. []

Article 38—Voting Machines
Voting machines or other mechanical devices for voting may be used at all elections under such regulations as may be prescribed by law: provided, however, that the right of secret voting shall be preserved.

Article 61—Compulsory Voting
The general court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved.

Article 31—Right of Paupers to Vote (superseded)
Article twenty-eight of the amendments of the constitution is hereby amended by striking out in the fourth line thereof the words "being a pauper", and inserting in place thereof the words: -- receiving or having received aid from any city or town, -- and also by striking out in said fourth line the words "if a pauper", so that the article as amended shall read as follows: ARTICLE XXVIII. No person having served in the army or navy of the United States in time of war, and having been honorably discharged from such service, if otherwise qualified to vote, shall be disqualified therefor on account of receiving or having received aid from any city or town, or because of the non-payment of a poll tax

Article 68—Removing Gender Qualification to Vote
Article III of the amendments to the constitution, as amended, is hereby further amended by striking out, in the first line, the word "male".

Statute

St. 2022, c. 92 (VOTES Act) Generally.
Specific Section Below.
Section 9—Election Worker Appointment
SECTION 9. Chapter 54 of the General Laws is hereby amended by striking out section 14, as so appearing, and inserting in place thereof the following section:-
Section 14. For any primary or election, if the city or town clerk determines in writing that there is a deficiency in the number of required election officers within the 6 weeks preceding the primary or election, the appointing authority may appoint election officers without regard to political party membership, voter status, residence in the city or town or inclusion on a list filed by a political party committee pursuant to sections 11B and 12. If the position of warden, clerk or inspector, or deputy of any such officer, if any, is vacant within the 3 weeks preceding any primary or election, the city or town clerk may fill the vacancy by appointing a competent person willing to serve, without regard to political party membership, voter status, residence in the city or town or inclusion on a list filed by a political party committee pursuant to said sections 11B and 12.

Section 10 (s.25B(a)(4))—Electronic Balloting for the Disabled

A voter wishing to apply to vote early by mail in any presidential or state primary or election or any primary or election held pursuant to section 140 to fill a vacancy for senator or representative in congress and who needs accommodation by reason of disability and is unable to independently mark a paper ballot may apply for such accommodations in a form and manner prescribed by the state secretary. Accommodations shall include, but not be limited to: (i) clear and accessible electronic instructions for completion, printing and returning of the ballot; (ii) an accessible blank electronic application that can be: (A) completed by the voter electronically; (B) signed with a wet signature, a hand drawn electronic signature or the voter's typewritten name as a signature if the voter is unable to independently insert a hand-drawn signature on the application due to a disability; and (C) submitted electronically, by mail or by delivering it, in person or by a family member, to the office of the appropriate city or town clerk; (iii) an authorized accessible blank electronic ballot that can be filled out electronically, printed and signed; provided, however, that the accessible electronic ballot marking system the voter utilizes to access their blank electronic ballot shall not collect or store any personally identifying information obtained in the process of filling out the ballot; (iv) an accessible electronic affidavit that may be used for certification of an accessible electronic ballot and signed with a wet signature, a hand-drawn electronic signature or the voter's typewritten name as a signature if the voter is unable to independently insert a hand-drawn signature on the ballot due to a disability; (v) an envelope to return the ballot to the voter's town or city clerk with postage guaranteed; and (vi) hole punched markers in place of a wet signature required for certification if an electronic affidavit of certification is not utilized. A voter with accommodations in receipt of a ballot pursuant to this section may complete and return the ballot by: (i) submitting it electronically; (ii) delivering it, in person or by a family member, to the office of the appropriate city or town clerk or a secured municipal drop box for the city or town where the voter is registered; or (iii) mailing it to the appropriate city or town clerk; provided, however, that the state secretary shall provide an envelope to allow for returning the ballot pursuant to clause (ii) or (iii).

Section 10 (s.25B(b)(4))—Early Voting Locations

Each city and town shall establish an early voting site that shall include the local election office for the city or town; provided, however, that if the city or town determines that the office is unavailable or unsuitable for early voting, the registrars of each city or town shall identify and provide for an alternative public building that is centrally-located, suitable and convenient within the city or town as an early voting site; and provided further, that when designating early voting sites, a city or town shall consider, to the extent feasible, diverse geographic locations and whether such sites would have an impact on access to the polls on the basis of race, national origin, disability, income or age. A city or town may also provide for additional early voting sites at the discretion of the registrars for that city or town. Each early voting site shall be accessible to persons with disabilities in accordance with state and federal law.

Section 11—Electioneering Ban

Section 65 of said chapter 54, as so appearing, is hereby amended by adding the following paragraph:- This section shall apply to early voting locations under section 25B while voting is being conducted.

Section 19—Dead People Voting #1

SECTION 19. Section 92 of said chapter 54, as so appearing, is hereby

amended by adding the following subsection:- (d) The absent voting ballot of any voter who was eligible to vote at the time the ballot was cast shall not be deemed invalid solely because the voter became ineligible to vote by reason of death after casting the ballot. For purposes of this subsection, the term "cast" shall mean that the voter has: (i) deposited the absent voting ballot· in the mail for ballots mailed; (ii) returned the absent voting ballot to the appropriate local election official either by hand or by depositing it in a secured municipal drop box, where available, for the city or town where the voter is registered; or (iii) returned the absent voting ballot electronically pursuant to section 91C.

Section 21—Early Tabulation

SECTION 21. Section 95 of said chapter 54, as so appearing, is hereby amended by striking out the first paragraph and inserting in place thereof the following 2 paragraphs:-

Any absent voter ballot cast pursuant to section 86 may be opened and deposited into a tabulator in advance of the date of the primary or election in accordance with regulations promulgated by the state secretary; provided, however, that municipalities that do not have a tabulator may open and deposit early voting ballots into a ballot box; provided further, that such ballots shall be kept secured, locked and unexamined and that no results shall be determined or announced until after the time polls close on the date of the primary or election; and provided further, that notice of the date, time and location of any such opening or depositing shall be posted 2 business days in advance of the opening or depositing; and provided further, that the opening or depositing shall be open to the public. Disclosing any such result before such time shall be punished as a violation of section 14 of chapter 56. If not advance deposited, the city or town clerk, on the day of the election but not later than 1 hour after the hour for the closing of the polls, shall transmit all envelopes purporting to contain official absent voting ballots received on or before the close of business on the day preceding the day of the election, and that have not been marked "Rejected as Defective" as provided in section 94, to the local election officers in the several precincts where the voters whose names appear on such envelopes assert the right to vote or to a central tabulation facility designated in accordance with regulations promulgated by the state secretary. The local election officer in charge of the polling place or central tabulation facility shall immediately, after receipt of any such envelopes, distinctly announce the name and residence of each such voter and check the voter's name on the voting lists referred to_ in section 60 of chapter 51, on the voter's certificate of supplementary registration attached to such lists as provided in section 51 of said chapter 51 or on the lists of specially qualified voters, if it has not already been so checked. The city or town clerk shall open the envelopes in which the ballot is enclosed in such a manner as not to destroy the affidavit thereon, take the ballot therefrom without opening it or permitting it to be examined and deposit it in the ballot box. All envelopes referred to in this section shall be retained with the ballots cast at the election and shall be preserved and destroyed in the manner provided by law for the retention, preservation or destruction of official ballots.

Section 22—Dead People Voting #2

SECTION 22**.** Section 100 of said chapter 54 is hereby repealed.

Section 10—Dead People Voting #3

Section 10 inserting a new G. L. c. 54 §25B(e)

The early voting ballot of any voter who was eligible to vote at the time the ballot was cast shall not be invalid solely because the voter became ineligible to vote by reason of death after casting

the ballot. For purposes of this subsection, the term “cast” shall mean that the voter has: (i) deposited the early voting ballot in the mail for ballots mailed; (ii) returned the early voting ballot to the appropriate local election official either by hand or by depositing it in a secured municipal drop box, where available, for the city or town where the voter is registered; (iii) completed voting in person at an early voting location; or (iv) submitted a ballot electronically pursuant to the accommodations granted to a voter by reason of disability under paragraph (4) of subsection (a).