SJC-13307

JAMES LYONS[1] & others[2] vs. SECRETARY OF THE COMMONWEALTH.

Suffolk. July 6, 2022. - August 30, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Constitutional Law, Elections, General Court. Elections, Ballot, Absentee ballot, Primary. Secretary of the Commonwealth. General Court.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on June 23, 2022.

The case was reported by Kafker, J.

Michael Walsh for the plaintiffs.

Adam Horstine, Assistant Attorney General (Anne Sterman, Assistant Attorney General, also present) for the defendant.

The following submitted briefs for amici curiae:

John Paul Moran, pro se.

Joseph N. Schneiderman for Jewish Alliance for Law and Social Action.

Lisa C. Goodheart, Christine M. Netski, Dylan Sanders, Anthony V. Agudelo, John G. O'Neill, Andrea Studley Knowles,

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[1] In his capacity as chair of the Massachusetts Republican Party.

[2] Rayla Campbell, Evelyn Curley, Raymond Xie, and Robert May.

Jessica H. Park, Gwen Nolan King, Kenneth C. Thayer, Lon F. Povich, Tamara S. Wolfson, David S. Mackey, M. Patrick Moore, Jr., & Clinton R. Prospere for Common Cause Massachusetts & another.

KAFKER, J. On June 16, 2022, the Legislature passed "An Act fostering voter opportunities, trust, equity and security" (VOTES act), which expanded opportunities to vote in Massachusetts. St. 2022, c. 92. The VOTES act provided that any qualified voter in Massachusetts, without need for excuse, can vote early, in person or by mail (universal early voting), in primaries and biennial State elections.[3] Id. This expanded early voting options first enacted in 2014 and then further enlarged in 2020 due to the COVID-19 pandemic. See St. 2014, c. 111, § 12; St. 2020, c. 115, §§ 6, 7, 10. The VOTES act also made other changes in the Commonwealth's election laws. See St. 2022, c. 92. Six days later, the Governor approved the act, and it went into effect as an emergency law. See St. 2022, c. 92, preamble.

[3] The "biennial state election" is "held on the Tuesday next after the first Monday in November in every even-numbered year" and, depending on the year and the applicable term of office (two, four, or six years), can involve the election of State officers (i.e., Governor, Lieutenant Governor, Secretary of the Commonwealth, Treasurer, Auditor, Attorney General, councillors, senators, and representatives), Federal officers (i.e., presidential electors, senators, and representatives), county officers (i.e., district attorneys, clerks of courts, registers of probate, registers of deeds, county commissioners, sheriffs, and treasurers), and regional district school committee members. See G. L. c. 54, §§ 62, 150-160, 162.

The following day, the plaintiffs, all associated with the Massachusetts Republican party,[4] initiated this action in the county court against the Secretary of the Commonwealth (Secretary), raising facial constitutional challenges to various aspects of the VOTES act, including the universal early voting provisions, and seeking to enjoin the Secretary from putting the act into effect for the September 6, 2022, primary and the November 8, 2022, biennial State election. On June 29, 2022, after the Secretary moved to dismiss the plaintiffs' complaint, the single justice reserved and reported the matter to the full court for decision due, in large part, to the significant time constraints involved, including, most urgently, the requirement in the VOTES act that the Secretary mail applications for early voting ballots to all registered voters by July 23, 2022. See G. L. c. 54, § 25B (a) (7) (i), as appearing in St. 2022, c. 92, § 10. Thereafter, on July 11, 2022, following briefing[5] and oral argument, the court issued an order entering judgment in the

[4] James Lyons, chair of the Massachusetts Republican Party; Rayla Campbell, Republican candidate for Secretary of the Commonwealth; Evelyn Curley, member of the Massachusetts Republican State committee; Raymond Xie, member of the "ballot question committee"; and Robert May, Republican candidate for the United States House of Representatives in the sixth Massachusetts congressional district.

[5] We acknowledge the amicus briefs submitted by John Paul Moran; the Jewish Alliance for Law and Social Action; and Common Cause Massachusetts and the League of Women Voters of Massachusetts.

county court for the Secretary on all claims in the plaintiffs' complaint and denying the plaintiffs' request for injunctive relief. As the court further stated, while time constraints dictated the immediate issuance of the order, the underlying reasoning was to follow in due course. We now set forth that reasoning.

The self-professed "heart" of the plaintiffs' complaint is the claim that the universal early voting provisions are facially unconstitutional because, except for in three limited circumstances where "absentee voting" is authorized under art. 45 of the Amendments to the Massachusetts Constitution, as amended by art. 105 of the Amendments, the Legislature is prohibited from providing for any form of voting other than in person on the day of the primary or election. We disagree. Voting is a fundamental right, and nothing in art. 45, as amended by art. 105, or in other parts of the Constitution cited by the plaintiffs, prohibits the Legislature, which has plenary constitutional powers, including broad powers to regulate the process of elections and even broader powers with respect to primaries, from enhancing voting opportunities. This is particularly true with respect to the universal early voting provisions in the VOTES act, which, in stark contrast to the narrow and discrete absentee-voting provisions of art. 45, enhance voting opportunities equally for all voters.

The plaintiffs also claim that the VOTES act (1) violates the elections clause of the United States Constitution, U.S. Const. art. I, § 4, by allowing municipalities to fill poll worker vacancies in the six weeks leading up to the election without regard to political party affiliation; (2) violates the First Amendment to the United States Constitution and its State constitutional equivalents by extending the ban on electioneering in and around polling places to the early voting period; (3) violates art. 38 of the Amendments to the Massachusetts Constitution by allowing disabled, overseas, and military voters to cast votes electronically; and (4) arbitrarily and irrationally counts the votes of people who lawfully cast their ballots during the early voting period but die before election day, which the plaintiffs characterize as allowing "dead people to vote." We discern no merit to these claims as well.

1. Background. a. Universal early voting introduced in 2014. In 2014, years before the COVID-19 pandemic and the enactment of the VOTES act, the Legislature passed and the Governor approved "An Act relative to election laws" (2014 voting act), which, among other things, provided for universal early voting in biennial State elections and any municipal election held on the same day, whereby any voter, without excuse, could apply for and vote by mail or vote in person at an

early voting location.[6] See St. 2014, c. 111, § 12, inserting G. L. c. 54, § 25B. Voters who applied and chose to vote early by mail would mark their ballot, seal it in an envelope provided for that purpose, execute an affidavit on the envelope, and mail it in a second envelope provided for that purpose in time for it to be received by the city or town clerk before the closing of the polls on election day. See St. 2014, c. 111, § 12, inserting G. L. c. 54, § 25B (b), (e), (h). For those who chose to vote early in person, voting was to take place over ten business days preceding a biennial State election. St. 2014, c. 111, § 12, inserting G. L. c. 54, § 25B (c). During that period, early voting locations were required to be open during

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[6] Massachusetts is not alone in providing no-excuse early or absentee voting. By our count, at least twenty-four other States and the District of Columbia do not require an excuse to vote early and by mail. See Alaska Stat. § 15.20.010; Ariz. Rev. Stat. Ann. § 16-541; Fla. Stat. §§ 101.62, 101.657; Ga. Code Ann. § 21-2-380; Idaho Code Ann. § 34-1001; 10 Ill. Comp. Stat. 5/19-1, 5/19A-1; Kan. Stat. Ann. § 25-1119(a); Me. Rev. Stat. tit. 21-A, § 751; Md. Code Ann., Elec. Law § 9-304; Mich. Comp. Laws § 168.759; Minn. Stat. § 203B.02; Mont. Code Ann. § 13-13-201; Neb. Rev. Stat. § 32-938; N.J. Stat. Ann. §§ 19:15A-1, 19:63-3; N.M. Stat. Ann. § 1-6-3; N.C. Gen. Stat. § 163-226; N.D. Cent. Code § 16.1-07-01; Ohio Rev. Code Ann. § 3509.02; Okla. Stat. tit. 26, § 14-105; 25 Pa. Stat. Ann. § 3150.11; S.D. Codified Laws § 12-19-1; Va. Code Ann. § 24.2-700; Wis. Stat. § 6.20; Wyo. Stat. Ann. § 22-9-102; D.C. Mun. Regs. tit. 3, § 720. Eight other States go even further and automatically mail ballots to all voters. See Cal. Elec. Code § 3000.5; Colo. Rev. Stat. § 1-5-401; Haw. Rev. Stat. § 11-101; Nev. Rev. Stat. § 293.269911; Or. Rev. Stat. § 254.465; Utah Code Ann. § 20A-3a-202; Vt. Stat. Ann. tit. 17, § 2537a; Wash. Rev. Code § 29A.40.010.

the usual business hours of the city or town clerk, although cities and towns were permitted to provide additional early voting hours, including on weekends. St. 2014, c. 111, § 12, inserting G. L. c. 54, § 25B (d).

Universal early voting under the 2014 voting act did not apply to primaries and was first implemented for the 2016 and then 2018 biennial State elections. See St. 2014, c. 111, § 26. Reportedly, more than twenty percent of voters chose to take advantage of the new voting option during both of those elections.[7]

b. Universal early voting expanded following declaration of COVID-19 pandemic. The adoption of universal early voting in 2014 proved to be prescient when, in 2020, a presidential election year, the COVID-19 pandemic struck. On July 26 of that year, slightly over four months after the pandemic had been declared,[8] the Legislature and Governor, concerned "for the immediate preservation of the public health and convenience," passed and approved an emergency law that further expanded

[7] See Secretary of the Commonwealth, 2016 Early Voting Statistics, https://www.sec.state.ma.us/ele/ele16/early-voting_16/ev16idx.htm [https://perma.cc/2K3W-DAUR]; Secretary of the Commonwealth, 2018 Early Voting Statistics, https://www.sec.state.ma.us/ele/ele18/early-voting_18/ev18idx.htm [https://perma.cc/23YJ-TVUV].

[8] The World Health Organization declared COVID-19 to be a global pandemic on March 11, 2020. See Goldstein v. Secretary of the Commonwealth, 484 Mass. 516, 522 (2020).

voting opportunities. See St. 2020, c. 115, preamble, "An Act relative to voting options in response to COVID-19" (COVID-19 voting act). Most notably, the act further expanded universal early voting, which already applied to the November 2020 biennial State election by virtue of the 2014 voting act, to the September 2020 primary and city and town elections held before December 31, 2020. See St. 2020, c. 115, §§ 6 (b), 7, 10.

With respect to early mail-in voting, the COVID-19 voting act required the Secretary to mail applications for early voting ballots to all registered voters by July 15, 2020, for the primary and by September 14, 2020, for the biennial State election, rather than waiting for them to request an application. See St. 2020, c. 115, § 6 (d) (1)-(2). It expanded the ways in which early voting ballots could be returned to the city or town clerk by allowing for voters to deliver them in person or place them in a secured municipal drop box. See St. 2020, c. 115, § 6 (h) (1)-(2). And whereas early voting ballots still had to be received from voters before the hour fixed for the closing of polls on the day of the primary or biennial State election, those that were mailed on or before the day of the biennial State election and received within three days after the election (by 5 P.M. on November 6, 2020) would be counted. See St 2020, c. 115, § 6 (h) (3).

The COVID-19 voting act also changed the early in-person

voting period from ten business days to fourteen calendar days for the biennial State election (October 17, 2020, through October 30, 2020) and added seven calendar days of early in-person voting for the primary (August 22, 2020, through August 28, 2020). See St. 2020, c. 115, § 7 (b) (1)-(2). In addition to continuing to require early voting locations to be open during the usual business hours of the city or town clerk on weekdays during those periods, the act required them to be open on the weekend days for at least a minimum number of hours determined based on the size of a municipality's electorate. See St. 2020, c. 115, § 7 (c) (1)-(2).

The Secretary reported that for the 2020 biennial State election, forty-two percent of voters chose to vote early by mail, twenty-three percent voted early in person, and thirty-five percent voted in person on election day.[9]

The COVID-19 voting act was extended to March 31, 2021, St. 2020, c. 255; to June 30, 2021, St. 2021, c. 5, § 4; and finally to December 15, 2021, St. 2021, c. 29, §§ 51-55. By the beginning of 2022, therefore, the options for universal early voting in Massachusetts had reverted to those that had been available prior to the enactment of the COVID-19 voting act.

[9] See Secretary of the Commonwealth, 2020 Early Voting & Vote by Mail Statistics, https://www.sec.state.ma.us/ele/ele20/early-voting_20/ev20idx.htm [https://perma.cc/ACN6-TRS3].

c. The VOTES act. With the approval of the VOTES act on June 22, 2022, however, the Legislature and the Governor have, among other things, made the expanded universal early voting provisions from the COVID-19 voting act permanent. G. L. c. 54, § 25B, as appearing in St. 2022, c. 92, § 10. Under the VOTES act,

- universal early voting is again extended to primaries and municipal elections,[10] and now further extended to primaries or elections to fill vacancies for senator or representative in Congress, see G. L. c. 54, § 25B (a) (1);
- early voting ballots again can be returned by voters, or now by a family member, by delivering such ballots in person or placing them in a secured municipal drop box, in addition to mailing them, see G. L. c. 54, § 25B (a) (13);
- early voting ballots mailed on or before the day of a biennial State election and received within three days after the election can again be counted and the same is now true for absentee ballots, see G. L. c. 54, §§ 25B (a) (13), 93;

[10] Municipalities can opt out of the early voting provision for municipal elections that are not held on the same day as a Federal or State election, and special or annual town meetings were exempted. G. L. c. 54, § 25B (a) (1).

- early voting periods are again set at fourteen calendar days for a biennial State election (the seventeenth through fourth day preceding the election) and seven calendar days for a primary (the tenth day through fourth day preceding the primary), see G. L. c. 54, § 25B (b) (2); and
- weekend voting during early voting periods is again made mandatory, rather than discretionary, for at least a minimum number of hours determined based on the size of the municipality's electorate, while the minimum number of hours of early in-person voting on weekdays during the period is either discretionary or mandatory, again depending on the size of the electorate, see G. L. c. 54, § 25B (b) (3).

As noted at the outset, the Secretary is again required under the VOTES act to automatically mail early voting ballot applications to all registered voters, now by "[n]ot later than [forty-five] days before" a primary or election. See G. L. c. 54, § 25B (a) (7). In the case of the upcoming September 6, 2022, primary, therefore, this had to be accomplished by not later than July 23, 2022. Given the number of registered voters in Massachusetts[11] and the capacity of the United States Postal

[11] According to statistics published by the Secretary, there

Service, however, the Secretary, as a practical matter, understandably could not wait until the last day to commence that mailing.

d. Procedural history. This case proceeded on an expedited schedule. With the Secretary's mass mailing of early voting ballot applications looming, the plaintiffs filed their complaint in the county court on June 23, 2022, requesting a preliminary and permanent injunction, as well as declaratory, certiorari, and mandamus relief. They also filed an emergency motion for a temporary restraining order enjoining the Secretary from implementing the VOTES act for the upcoming primary and general elections. On June 28, 2022, the Secretary filed an opposition to the temporary restraining order and a motion to dismiss the complaint under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). The next day, the single justice reserved and reported the case to the full panel, ordered expedited briefing by July 5, 2022, and scheduled oral argument for July 6, 2022. Five days after the oral argument, the court, due to the statutorily mandated deadline for mailing early voting ballot applications, issued an order "that judgment shall enter in the

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were 4,731,940 registered voters in Massachusetts as of February 1, 2021. See Secretary of the Commonwealth, Enrollment Breakdown as of 02/01/2021, at 1, https://www.sec.state.ma.us/ele/elepdf/enrollment_count_20210201.pdf [https://perma.cc/7AY5-9RUP].

county court for the Secretary on all claims in the plaintiffs' complaint. The plaintiffs' request to enjoin the Secretary from putting the VOTES act into effect is denied." The court further noted that a full opinion would "follow in due course."

2. Discussion. a. Universal early voting. We begin our analysis by addressing the plaintiffs' principal claim: that the Legislature, in effect, acted ultra vires (i.e., beyond its constitutional authority) insofar as it provided in the VOTES act for universal early voting at primaries and biennial State elections. Specifically, the plaintiffs maintain that universal early voting is repugnant or contrary to the absentee-voting amendment to the Massachusetts Constitution, art. 45, as amended by art. 105. The plaintiffs' claim amounts to a facial constitutional challenge. See Commonwealth v. Harris, 481 Mass. 767, 771 (2019) ("A facial challenge is an attack on a statute itself as opposed to a particular application" [citation omitted]). It is, we might add, a narrow challenge. In the plaintiffs' own words: "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." Thus, they do not argue that the right to vote has been restricted or that the equal protection of that right has been violated. They simply argue that the Legislature lacks the power to pass the VOTES act due to art. 45. Before we proceed

to address this limited argument, we take a moment to outline certain well-established principles that guide our analysis.

i. Constitutional interpretation. We must be mindful that when construing the Constitution, "we look to its language and structure, bearing in mind that the Constitution is a statement of general principles and not a specification of details. It is to be interpreted as the Constitution of a State and not as a statute or an ordinary piece of legislation" (quotation, citation, and alteration omitted). Brookline v. Secretary of the Commonwealth, 417 Mass. 406, 419 (1994). As this court counselled nearly 200 years ago, "it must never be forgotten, that [our Constitution] was not intended to contain a detailed system of practical rules, for the regulation of the government or people in after times; but that it was rather intended, after an organization of the government, and distributing the executive, legislative and judicial powers, amongst its several departments, to declare a few broad, general, fundamental principles, for their guidance and general direction." Commonwealth v. Blackington, 24 Pick. 352, 356 (1837). See Moore v. Election Comm'rs of Cambridge, 309 Mass. 303, 312 (1941), citing Blackington, supra.

ii. Plenary legislative power. We also must recognize that, under our Constitution, "full power and authority [was] given and granted to the [Legislature], 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." Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution. This grant of legislative authority has been described as plenary. As this court acknowledged in Blackington, 24 Pick. at 357, a "large discretion is thus given to the legislature to judge what the welfare of the Commonwealth may require; and this power is restrained only so far, as not to be expressly, or by necessary implication, repugnant to the constitution. The power is the general rule; the restraint of it the specific exception." Notably, included in this constitutional grant of plenary "legislative authority are broad powers to regulate the process of elections." Opinion of the Justices, 375 Mass. 795, 810 (1978), citing Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution. See Opinion of the Justices, 368 Mass. 819, 821 (1975); Opinion of the Justices, 359 Mass. 775, 777 (1971).

Given these plenary powers, a party asserting that the Legislature has acted ultra vires bears a heavy burden. The legislative action must be shown "to be plainly inconsistent

with the provisions of the constitution," Merriam v. Secretary of the Commonwealth, 375 Mass. 246, 253-254 (1978), quoting Blackington, 24 Pick. at 355, including the constitutional grant of plenary legislative power. Recognizing our constitutional power to overturn legislation, we exercise it with restraint: such power "is to be resorted to and exercised with great caution and deliberation, and it is always to be presumed that a coordinate branch of the government has acted within the limits of its constitutional authority, until the contrary shall clearly and satisfactorily appear." Merriam, supra at 254, quoting Blackington, supra at 356. See Atwater v. Commissioner of Educ., 460 Mass. 844, 853 (2011) (statute subjected to facial challenge "is presumed constitutional" [citation omitted]). See also Boston v. Merchants Nat'l Bank of Boston, 338 Mass. 245, 248 (1958) ("All rational presumptions are to be made in favor of [statute's] validity").

iii. Constitutional provisions on absentee voting. With this constitutional backdrop in mind, we turn to the provision relied on by the plaintiffs to limit this authority. Article 45 of the Amendments, when it was ratified in 1917, declared that the Legislature "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."[12]

Twenty-seven years later, in 1944, art. 45 was amended by art. 76 of the Amendments to the Massachusetts Constitution to empower the Legislature to provide for absentee voting by voters who, at the time of "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."[13]

Then, in 1976, art. 45 was amended for a second time by art. 105 of the Amendments to authorize the Legislature to provide "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

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[12] A year after the ratification of art. 45, the Legislature enacted a statute providing for voting by those in "the military or naval service" who were absent "at the time of a regular state or national election." St. 1918, c. 293, § 1. Then, in 1919, it enacted a statute that more broadly provided for voting by "[a]ny voter" who was absent "on the day of the annual state election." St. 1919, c. 289, § 1.

[13] In 1945, following the amendment of art. 45 by art. 76, the Legislature followed suit and amended the statute to allow for absentee voting by those "who will be unable by reason of physical disability to cast his vote in person at the polling place." See St. 1945, c. 466, § 1, amending G. L. c. 54, § 86.

such an election is to be held."[14]

iv. Analysis. A. Primaries. As an initial matter, the plaintiffs concede that their principal claim "stand[s] on a fundamentally different footing" with respect to primaries from that with respect to biennial State elections. That is an understatement, given the express language of art. 45, which refers only to elections and not primaries, and prior opinions from the justices of this court. In fact, the justices of this court, more than fifty years ago, rejected the foundational premise of that aspect of the plaintiffs' principal claim -- that art. 45 governs primaries. See Opinion of the Justices, 359 Mass. at 776-777.

In 1971, the Legislature was contemplating extending absentee voting, which, at the time, only was available in connection with biennial State elections, to voters at primaries. See id. at 775-776. To accomplish this, it considered two options: proposing a constitutional amendment for consideration by voters or passing a law. See id. Uncertain of its authority to do the latter, the Legislature propounded the following question to the justices: "May the general court provide by statute for voting, at primaries and

[14] In 1977, following the amendment of art. 45 by art. 105, the Legislature again amended the statute accordingly. See St. 1977, c. 426, amending G. L. c. 54, § 86.

preliminary elections, by qualified voters of the commonwealth who are, at the time of such primary or preliminary election, absent from the city or town of which they are inhabitants or who are unable by reason of physical disability to cast their votes in person at the polling places?" Id. at 776. The justices responded in the affirmative. Id. at 777.

In reaching that conclusion, the justices first noted that the "Massachusetts Constitution does not refer to primaries and nominations as such, but concerns itself only with elections." Id. at 776-777, citing arts. 8 and 9 of the Massachusetts Declaration of Rights and arts. 14, 15, 16, 17, 19, 24, 38, 45, 61, 64, and 76 of the Amendments to the Massachusetts Constitution. In particular, the justices interpreted the absentee voting amendment, art. 45, as then amended by art. 76, "to apply only to State and other final elections." Opinion of the Justices, supra at 777.[15] A primary, as the justices noted, "is not an election to public office. It is merely the selection of candidates for office by the members of a political party in a manner having the form of an election" (citation

[15] The justices noted that, in the debates in 1917 preceding the ratification of art. 45, a proposal to extend the absentee voting under consideration to primaries was deemed unnecessary because there was no question that the Legislature had the authority to do so. See Opinion of the Justices, 359 Mass. 775, 776 (1971), citing 3 Debates in the Massachusetts Constitutional Convention 1917–1918, at 3, 13 (1918).

omitted). Id. Moreover, primaries are not a creation of the Constitution, but, rather, of legislation, first enacted in 1911. See id., citing St. 1911, c. 550. "Prior to the 1911 statute, nomination was largely by party conventions the delegates to which were elected or selected by caucus methods." Opinion of the Justices, supra, citing St. 1893, c. 417, §§ 71—91, and R. L. c. 11, §§ 85—155. For these reasons, the justices concluded that "[n]o constitutional provisions prevent the Legislature from enacting [a statute to extend absentee voting to primaries]." Opinion of the Justices, supra.[16]

Four years later, the justices reinforced this conclusion in Opinion of the Justices, 368 Mass. 828 (1975). The Legislature asked the justices whether a proposed statute requiring candidates for Governor and Lieutenant Governor to run together as a group in primaries would violate art. 9 of the Massachusetts Declaration of Rights. Id. at 828-829. In response, the justices noted that they had been "asked a similar question in a parallel situation" in 1971 and had "concluded that the Massachusetts Constitution, including art. 9 of the Declaration of Rights, did not refer to primaries and

[16] Following the justices' 1971 opinion, the Legislature amended the statute to extend absentee voting to primaries. See St. 1971, c. 920, § 9 (amending G. L. c. 54, § 86, to provide for absentee voting during "a special state election or the biennial state election or . . . any special or regular state primary or . . . a presidential primary").

nominations as such, but concerned itself only with elections." Id. at 830-831, citing Opinion of the Justices, 359 Mass. at 776-777. The justices then went on to conclude that because the proposed statute at issue "[s]imilarly . . . deal[t] only with primaries," art. 9 did not apply and "the answer to the question submitted [was], 'No.'" Opinion of the Justices, supra at 831.

We see no reason to reconsider the 1971 opinion now, as the plaintiffs suggest we should. Our resolve in this regard starts with recognition of the Legislature's plenary powers under the Constitution, as discussed above. See part II, c. 1, § 1, art. 4, of the Massachusetts Constitution. As the justices effectively concluded in 1971, there is nothing in the Constitution that expressly, or by necessary implication, restrains the Legislature's authority to provide for voting prior to the day of a primary. Certainly, there is nothing in art. 45, in any of its iterations, that does so. Article 45 makes no mention of primaries; all three iterations speak of "elections" and apply to voters who are absent at the time of "the choice of any officer to be elected or upon any question submitted at an election." See arts. 45, 76, and 105 of the Amendments. Also, it is noteworthy that art. 105 was proposed and ratified after the justices' 1971 opinion, and the language was not altered to bring primaries within its reach. Accordingly, we conclude that whatever import art. 45 may or may

not have with respect to universal early voting, it does not prevent the Legislature from providing it for primaries.

B. Elections. We now turn to the question that was not answered by the justices in 1971: whether the Legislature's provision of universal early voting for biennial State elections is "repugnant or contrary" to the Massachusetts Constitution. We conclude just the opposite. In addressing any claim that the Legislature has exceeded its constitutional authority, we must view the Constitution as a whole, considering all relevant provisions, including those defining its plenary powers, the conduct of elections, and the right to vote. We conclude that the Legislature's enactment of universal early voting is well within its plenary powers and fully consistent with the principles set out in the many different provisions governing the right to vote in the Massachusetts Constitution, including art. 45.

As this court has recently explained:

> "'[V]oting has long been recognized as a fundamental political right and indeed the "preservative of all rights."' Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth, 375 Mass. 85, 94 (1978), quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). The Constitution of the Commonwealth expressly protects the right to vote for qualified voters in both art. 9[17] of the

[17] "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

Massachusetts Declaration of Rights and in art. 3[18] of the Amendments to the Massachusetts Constitution, as amended . . . .

"We have established that the fundamental right to vote is also implicitly protected under other provisions of the Declaration of Rights. See Dane v. Registrars of Voters of Concord, 374 Mass. 152, 160 (1978) (right to vote is protected as 'natural, essential, and unalienable right[]' under art. 1 of Declaration of Rights[19] [citation omitted]); Swift v. Registrars of Voters of Quincy, 281 Mass. 271, 276 (1932) ('The right to vote is a precious personal prerogative to be sedulously guarded' under

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Art. 9 of the Declaration of Rights of the Massachusetts Constitution.

[18] "Every citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and, excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election." Art. 3 of the Amendments to the Massachusetts Constitution, as amended through art. 100 of the Amendments.

[19] "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Art. 1 of the Declaration of Rights of the Massachusetts Constitution, as amended by art. 106 of the Amendments to the Massachusetts Constitution.

> '[a]rts. 4,[20] 7,[21] 8,[22] [and] 9 of the Declaration of Rights'); Attorney Gen. v. Suffolk County Apportionment Comm'rs, 224 Mass. 598, 601 (1916) ('The right to vote is a fundamental personal and political right' protected under arts. 1 through 9 of Declaration of Rights)." (Footnotes omitted.)

Chelsea Collaborative, Inc. v. Secretary of the Commonwealth, 480 Mass. 27, 32-33 (2018).

Indeed, we have emphasized: "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Id. at 32 n.19, quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964). Not

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[20] "The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America in Congress assembled." Art. 4 of the Declaration of Rights of the Massachusetts Constitution.

[21] "Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it." Art. 7 of the Declaration of Rights of the Massachusetts Constitution.

[22] "In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments." Art. 8 of the Declaration of Rights of the Massachusetts Constitution.

surprisingly, therefore, "Massachusetts follows a clear policy of facilitating voting by every eligible voter" (citation omitted). Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930, 934 (1983). To that end, Chief Justice Parker counselled as follows almost 200 years ago:

> "In construing so important an instrument as a constitution, especially those parts which affect the vital principle of a republican government, the elective franchise, or the manner of exercising it, we are not, on the one hand, to indulge ingenious speculations, which may lead us wide from the true sense and spirit of the instrument; nor on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. . . . If an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as the convenient exercise of the fundamental privilege or right, that of election, such sense must be attributed."

Henshaw v. Foster, 9 Pick. 312, 317 (1830). See Tobias v. Secretary of the Commonwealth, 419 Mass. 665, 674 (1995), quoting Henshaw, supra (when interpreting provision of Constitution concerning voting, "words should be capable of being extended, if consistent with the general object of the authors, 'to other relations and circumstances which an improved state of society may produce'").

Additionally, we must respect the express plenary powers of the Legislature set out in part II, c. 1, § 1, art. 4, of the Massachusetts Constitution, discussed above, and its essential role in enacting the laws that will transform fundamental constitutional principles, including the right to vote, into

practical realities. Blackington, 24 Pick. at 356. In performing this task, the Legislature was given substantial power, so long as the exercise of that power was not repugnant to another provision in the Constitution.

Finally, we are attentive to the considerations expressly recognized in art. 9 of the Massachusetts Declaration of Rights, which provides, in pertinent part, that "[a]ll elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers."[23] As this court has previously observed, it "is obvious . . . that the primary, if not the exclusive, purpose of [art. 9] is to guarantee equality among all qualified voters" (citation and alterations omitted). Opinion of the Justices, 368 Mass. at 821.

All of these considerations support the constitutionality of universal early voting. In the VOTES act, and in the COVID-19 voting act and 2014 voting act before that, the Legislature, pursuant to its plenary powers, sought to protect and enhance

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[23] The plaintiffs suggested in their motion for a temporary restraining order that voting by mail is more susceptible to fraud than voting in person, but at oral argument they expressly disavowed having any evidence of such fraud, even though absentee voting has been occurring by mail for over one hundred years in Massachusetts. See St. 1918, c. 293, §§ 16-32 (establishing procedures for mailing, marking, return mailing, and counting of absentee ballots).

the exercise of the right to vote guaranteed by these different constitutional provisions. It also did so universally and equally, without granting any particular group special privileges or imposing any special burdens on others as required by art. 9.

I. Article 45. Article 45 is not to the contrary. First, we observe that the plaintiffs have not cited to any express language in art. 45 negating the Legislature's power to enact universal early voting. Instead, the plaintiffs maintain that we must necessarily imply such a requirement from art. 45's grant of authority to the Legislature to provide for absentee voting in the three identified circumstances. This novel constitutional "negative implication" argument, based on the maxim of expressio unius est exclusio alterius, ignores not only the other constitutional provisions discussed above and the fundamental purposes of those provisions, but also the specific problem art. 45 was designed to address. For all of these reasons, we reject it.

The plaintiffs have not cited to any case that discusses the appropriateness or contours of applying the maxim of expressio unius est exclusio alterius to interpret the Massachusetts Constitution. It is a maxim that has oft been considered in connection with interpreting statutes. See, e.g., Commonwealth v. Perry, 455 Mass. 1010, 1011 (2009); Harborview

Residents' Comm., Inc. v. Quincy Hous. Auth., 368 Mass. 425, 432 (1975); County of Bristol v. Secretary of the Commonwealth, 324 Mass. 403, 406-407 (1949). Even in the statutory context, however, it "requires great caution in its application," Reuter v. Methuen, 489 Mass. 465, 474 (2022), quoting Halebian v. Berv, 457 Mass. 620, 628 (2010), and "will be disregarded where its application would thwart the legislative intent made apparent by the entire act," Reuter, supra, quoting Halebian, supra, or "lead to an illogical result," Bank of Am., N.A. v. Rosa, 466 Mass. 613, 620 (2013). It is "a guide to construction, not a positive command" (citation omitted), Halebian, supra, and "at most only a fallible aid to decision" (citation omitted), Sellers's Case, 452 Mass. 804, 813 (2008).

Cases from other jurisdictions have consistently counselled that the maxim should be applied with even greater caution when interpreting a State constitution, especially where its application would act as a restraint on the plenary power of the Legislature. See, e.g., Earhart v. Frohmiller, 65 Ariz. 221, 225 (1947) (maxim "applied with greatest caution to provisions of constitutions relating to the legislative branch of the government, as it cannot be made to restrict the plenary power of the legislature" [quotation and citation omitted]); State ex rel. Normile v. Cooney, 100 Mont. 391, 409 (1935) (maxim "cannot be made to serve as a means to restrict the plenary power of the

legislature"); Baker v. Martin, 330 N.C. 331, 337 (1991) (application of maxim "flies directly in the face of" Legislature's plenary powers under State Constitution); State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County, 9 Ohio St. 2d 159, 163 (1967) ("Since the legislative power of the General Assembly is plenary, the judiciary must proceed with much caution in applying the [maxim] to invalidate legislation"); Myers v. Oklahoma Tax Comm'n, 303 P.2d. 443, 447 (Okla. 1956) ("maxim should be applied with caution to provisions of constitutions relating to the legislative branch of the government, since it cannot be made to restrict the plenary power of the legislature" [citation omitted]); Pine v. Commonwealth, 121 Va. 812, 821 (1917) (maxim "will be resorted to with hesitation, especially when it would . . . hamper the Legislature in amply providing for the health, morals, safety, and welfare of the people"). See also Bush v. Holmes, 919 So. 2d 392, 420 (Fla. 2006) (Bell, J., dissenting) ("It is generally agreed in courts across this nation that expressio unius is a maxim of statutory construction that should rarely be used when interpreting constitutional provisions and, then, only with great caution"). Given the plenary power of the Legislature under our Constitution, and particularly its "broad powers" with respect to elections, see Opinion of the Justices, 375 Mass. at 810, we likewise proceed with great caution to consider

application of the maxim in the constitutional context.

Most importantly, neither the language, history, nor purpose of art. 45, as amended by art. 105, provides clear support for the adoption of the plaintiffs' negative implication argument. The amendment grants authority to the Legislature to provide for absentee voting to voters who can satisfy any of the three specified criteria but makes no mention of limiting the Legislature's plenary authority to provide for other forms of voting or otherwise restricting voting to in person on election day. Silence is subject to multiple interpretations; it is not sufficient to rebut the presumption of constitutionality or to prove repugnancy.[24] We need only look at other provisions in our Constitution to see that its framers knew how to expressly restrict legislative authority when they wanted to do so. The most relevant example may be art. 3, as amended through art. 100, which lays out very specific qualifications for voters and ends by expressly providing that "no other person shall be

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[24] The presumption underlying the maxim of expressio unius est exclusio alterius -- that specific intent can be inferred from silence -- has been viewed with some skepticism. As one court put it, "Not every silence is pregnant; expressio unius est exclusio alterius is therefore an uncertain guide . . . ." Illinois, Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983) (Posner, J.). See Sunstein, Law and Administration after Chevron, 90 Colum. L. Rev. 2071, 2109 n.182 (1990) (declaring maxim to be "a questionable one in light of the dubious reliability of inferring specific intent from silence").

entitled to vote." The failure to expressly include similar limiting language in art. 45 is noteworthy because we know from the debates during the constitutional convention preceding its submission to the voters in 1917 that there was much back-and-forth discussion over who should be specifically identified in art. 45. See 3 Debates in the Massachusetts Constitutional Convention 1917–1918, at 3-8 (1918) (Debates) (discussing whether various types of laborers, such as fishers, firefighters, locomotive operators, and traveling salespersons, as well as soldiers and sailors, should be referenced in art. 45). Having engaged in such debate, it is reasonable to assume that the drafters would have included language expressly foreclosing the Legislature's authority to further expand voting opportunities if that was the result they intended. In the end, art. 45's silence in this regard only leaves us to speculate regarding their intentions. It is the speculative nature of the maxim that has led at least one jurisdiction to rule that it "applies to provisions of [its State Constitution] that expressly limit power, but it does not apply to provisions that merely enumerate powers" (citation omitted). Idaho Press Club, Inc. v. State Legislature of the State, 142 Idaho 640, 642-643 (2006) ("[T]here is no reason to believe that a Constitutional provision enumerating powers of a branch of government was intended to be an exclusive list. The branch of government

would inherently have powers that were not included in the list"). It is enough to say that the framers' silence in this instance is not enough to rebut the presumption of constitutionality of legislation or to prove repugnancy.

Finally, we note that the concern that prompted the Legislature in 1917 to pursue a constitutional amendment, as opposed to merely passing a law, to provide for absentee voting was a very limited concern. The 1917 report from the Secretary and Attorney General that proposed the original absentee voting amendment and the debates that followed at the constitutional convention reflect a general acceptance that, at least as to the election of Federal officers and State representatives, the Legislature already had the authority to provide for voting other than in person on election day. See 1917 House Doc. No. 1537, at 5, 8; Debates, supra at 6, 12.

There was some concern at the time, however, that the same was not true for State senators and the Governor due to the allegedly then-existing requirement in the Constitution of a "meeting" for the election of those officers. See part II, c. 1, § 2, art. 2, and part II, c. 2, § 1, art. 3, of the Constitution of the Commonwealth; 1917 House Doc. No. 1537, at 7-8; Debates, supra at 6, 12. Addressing the uncertainty of the meaning of "meeting," the Secretary and the Attorney General concluded, "It hardly seems advisable to have elections to

Federal and State offices conducted on one basis as to some, and a different basis as to others, because of the confusion likely to result therefrom . . . ." 1917 House Doc. No. 1537, at 8.

Whether the meeting requirement was actually a constitutional problem that needed to be resolved we need not answer. At no time prior to 1917 had there been a judicial interpretation that the "meeting" requirement with respect to the election of State senators and the Governor required all voters to vote in person on the day of that "meeting." Moreover, as the plaintiffs acknowledge, the provisions containing historical references to "meetings" to elect State senators, see part II, c. 1, § 2, art. 2, and the Governor, see part II, c. 2, § 1, art. 3, have been "heavily amended" and "surpassed" by subsequent amendments, rendering the meaning of "meeting" only a matter of historical interest. The use of the word "meeting" has been overtaken by use of the word "election," and the Legislature long ago was granted express authority with respect to the manner of calling, holding, and conducting elections.[25]

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[25] Long before art. 45 was ratified, the Legislature was vested with "full power and authority . . . to prescribe the manner of calling, holding and conducting" meetings within each town "for the election of officers under the constitution" (Governor, Lieutenant Governor, councillors, Secretary, Treasurer and Receiver General, Attorney General, and Auditor). See art. 29 of the Amendments to the Massachusetts Constitution

II. Article 64. The plaintiffs also make a subsidiary argument based on art. 64, § 3, of the Amendments to the Massachusetts Constitution, as amended by art. 82 of the Amendments, which provides: "[E]lections 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." Specifically, the

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(ratified in 1885). Then, in 1918, a year after art. 45's adoption, the Constitution was amended to provide for a biennial "election" (rather than a "meeting") for constitutional officers, senators, and representatives. See art. 64, §§ 1, 4, of the Amendments to the Massachusetts Constitution. The same language was retained when art. 64 was amended in 1950, see art. 80 of the Amendments to the Massachusetts Constitution, and when it was amended again in 1964 to provide for a quadrennial "election" for constitutional officers. See art. 82 of the Amendments to the Massachusetts Constitution (continuing to provide for senators and representatives to be "elected" biennially). In 1974, the Constitution was further amended to provided that the "manner of calling and conducting the elections for the choice of senators and councillors . . . shall be prescribed by law" (emphasis added). Art. 101 of the Amendments to the Massachusetts Constitution. By that time, the same already had been true for State representatives for well over one hundred years. See art. 21 of the Amendments to the Massachusetts Constitution ("The manner of calling and conducting the meetings for the choice of representatives, and of ascertaining their election, shall be prescribed by law") (ratified in 1857), as amended by art. 71 of the Amendments ("The manner of calling and conducting the elections for the choice of representatives, and of ascertaining their election, shall be prescribed by law") (ratified in 1930).

plaintiffs contend that art. 45, when viewed in connection with art. 64's requirement that the election "be held" on a set date, must be read to imply that no votes can be cast other than on that day unless a voter falls within one of the three limited categories of persons eligible for absentee voting.

We reject the plaintiffs' arguments in regard to art. 64. Articles 45 and 64 serve different purposes. Article 64 sets the date and frequency of the election (and thereby the length of term) for certain State government offices. It is not directed at the manner of voting. Its timing provisions also do not preclude early or absentee voting, alone or in combination with art. 45. Although the parties have not identified any Massachusetts cases interpreting art. 64's requirement that the election "be held" on a certain day, similar issues and arguments have arisen under Federal law. Although our State constitutional analysis is in no ways bound by these Federal statutory interpretations, their reasoning is helpful to our resolution here.

Federal law provides that "[t]he Tuesday next after the [first] Monday in November, in every even numbered year, is established as the day for the election" for representatives, senators, and presidential electors. See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. The United States Supreme Court has defined "the election" for purposes of these statutes as "the combined

actions of voters and officials meant to make a final selection of an officeholder." Foster v. Love, 522 U.S. 67, 71 (1997). In Foster, the Court struck down a Louisiana law that effectively dispensed with the November election if a candidate for representative or senator received a majority of the votes in an "open primary" conducted in October because it clearly violated Federal law by leaving "no act in law or in fact to take place on the [election] date chosen by Congress." Id. at 72. In other words, "if an election does take place, it may not be consummated prior to federal election day." Id. at 72 n.4.

Federal courts applying the definition from Foster have rejected claims that State laws allowing early voting violate provisions in Federal statutes regarding the day of election. See Voting Integrity Project, Inc. v. Keisling, 259 F.3d 1169, 1174-1175 (9th Cir. 2001), cert. denied sub nom. Decker v. Bradbury, 535 U.S. 986 (2002) (Keisling) (Oregon law); Millsaps v. Thompson, 259 F.3d 535, 545-547 (6th Cir. 2001) (Tennessee law); Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773, 775-776 (5th Cir.), cert. denied, 530 U.S. 1230 (2000) (Bomer) (Texas law); Donald J. Trump for President, Inc. v. Way, 492 F. Supp. 3d 354, 366-368 (D.N.J. 2020) (New Jersey law). Under those early voting systems, voting was still held on election day and no winners were determined or announced until after polls closed. See, e.g., Keisling, supra at 1176 ("Although

voting takes place, perhaps most voting, prior to election day, the election is not 'consummated' before election day because voting still takes place on that day"); Millsaps, supra at 547 ("So long as no combined action occurs on any day other than federal election day, or so long as any such combined action is not intended to make a final selection of a federal officeholder, a State has complied with the federal elections statutes"); Bomer, supra at 774 (early voting is not preempted "[b]ecause the election of federal officials in Texas is not decided until Texas voters go to the polls on federal election day"). In addition, the courts noted that the Federal law was intended to facilitate rather than limit voting, and thus was unlikely to be inconsistent with a law providing for early voting. See Bomer, supra at 777 ("[W]e cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote"). See also Millsaps, supra at 548 (statute intended "to remove the burden of voting in multiple elections in a single year").

We see no reason to interpret art. 64 narrowly to preclude early voting. The election is not "consummated" during the early voting period, and the "final selection" of winners must wait for the polls to close on the day designated in the Constitution. See Foster, 522 U.S. at 71, 72 n.4. Although the VOTES act allows early and absentee ballots to be "deposited

into a tabulator" or ballot box in advance of the date of the primary or election in accordance with regulations promulgated by the Secretary, it also provides that "no results shall be determined or announced until after the time polls close on the date of the preliminary, primary or election" (emphasis added). G. L. c. 54, §§ 25B (h), 95. See Millsaps, 259 F.3d at 546 ("an official's mere receipt of a ballot without more is not an act meant to make a final selection"). Early disclosures of results are punishable by fines and imprisonment. G. L. c. 54, § 95. See Bomer, 199 F.3d at 777, citing Tex. Elec. Code §§ 61.007, 81.002; Donald Trump for President, Inc., 492 F. Supp. 3d at 368-369 (noting that although votes are "canvassed" before election day, laws making voting results confidential and punishing disclosures negate any "appreciable risk that the results of New Jersey's election will be reported prior to Election Day"). Unlike the Louisiana open-primary system at issue in Foster, traditional in-person voting still takes place on election day under the VOTES act, and voters do not receive notice of results or vote counts that could influence the outcome of the election until after polls close. Also, as discussed above, in connection with art. 45, we cannot conceive that the framers of art. 64 intended to impede the Legislature's authority to enhance opportunities to exercise the fundamental right to vote, as it has done, equally, by providing for

universal early voting.

Taking into consideration the foregoing, we conclude that the plaintiffs have failed to sustain their burden of establishing that universal early voting for biennial State elections as provided under the VOTES act is repugnant or contrary to the Constitution.

b. Elections clause. General Laws c. 54, §§ 11-16A, govern the appointment of "election officers," also known as election workers or poll workers.[26] The statutory scheme found therein permits political party committees to compile lists of individuals, drawn from the ranks of registered members of their party, who are willing and able to serve as election officers. G. L. c. 54, §§ 11B-12. Those lists are submitted to the local registrar of voters, who confirms that the candidates are eligible and then transmits the lists to the local appointing authority. Id. The authority then "shall" appoint election officers, G. L. c. 54, §§ 11-12, but in doing so its discretion is constrained by the party affiliation requirements of § 13:

> "Such election officers shall be enrolled voters so appointed as equally to represent the [two] leading political parties, except that, without disturbing the

[26] There are several different varieties of election officer, each with distinct responsibilities at the polling place. Each voting precinct generally requires a warden, a clerk, and at least two inspectors. In addition, precincts may have a deputy clerk, a deputy warden, additional inspectors, and as many tellers as are necessary to count the votes after the election. See generally 950 Code Mass. Regs. § 52.01 (2011).

> equal representation of such parties, not more than [one third] of the election officers not representing either of them may be appointed. The warden shall be of a different political party from the clerk, and not more than one half of the inspectors shall be of the same political party. In each case the principal officer and his deputy shall be of the same political party."

Should the party committees fail to submit lists, however, the party affiliation constraints do not apply. G. L. c. 54, §§ 11B-12. Additionally, strict attention to political party affiliation is sometimes, although not always, required when officers are absent on election days.[27] G. L. c. 54, §§ 16-16A.

The VOTES act changed the procedure for filling election officer vacancies that arise after initial appointments but before polls open on election days. See G. L. c. 54, § 14, as appearing in St. 2022, c. 92, § 9. Prior to the act's passage, such appointments were to be made so "as to preserve the equal representation of the two leading political parties." G. L.

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[27] By default, G. L. c. 54, § 16, mandates that absent wardens, clerks, and inspectors are succeeded by their deputies, who are necessarily from the same party. If both the primary officer and the deputy are absent, then "the voters of the precinct, on nomination and by hand vote, shall fill the vacancy" without regard to political affiliation. Id. In cities where a deputy warden or a deputy clerk was never appointed in the first place, see G. L. c. 54, § 11A, "the senior inspector of the same political party" as the absent warden or clerk is the replacement; the inspector's replacement need not, however, come from the same political party. G. L. c. 54, § 16. Finally, individual municipalities may choose to adopt § 16A, which allows the town or city clerk to fill election day vacancies with "an enrolled voter of the same political party as the absent officer."

c. 54, § 14, as amended through St. 1989, c. 491, § 4. The VOTES act now permits the appointing authority (if within six weeks of an election) or the municipal clerk (if within three weeks) to fill an election officer vacancy "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." G. L. c. 54, § 14, as appearing in St. 2022, c. 92, § 9. The Secretary posits that the purpose of easing the vacancy appointment requirements is to help smaller towns find qualified replacements as an election draws near, thereby ensuring orderly and secure operation of polling places that might otherwise go understaffed.[28]

[28] A survey of our sister States reveals a multiplicity of approaches to staffing the polls. Some require all poll workers to be evenly split between the two major parties. See, e.g., Colo. Rev. Stat. § 1-6-109; N.Y. Elec. Law § 3-400(3); Wis. Stat. § 7.30(2)(a). Others require much less balance, see Fla. Stat. § 102.012(2) (requiring only that not every poll worker in precinct be from same party); Miss. Code Ann. § 23-15-231 (same), or only consider party affiliation for some, but not all, positions, see Ariz. Rev. Stat. § 16-531(A) (affiliation considered for inspectors, marshals, and judges, but not for clerks). Some require vacancies to be filled by a member of the same party as the individual originally appointed. See, e.g., Iowa Code § 49.18; Mo. Rev. Stat. § 115.093. Others, like Massachusetts, require attention to party affiliation for initial appointments but do not always do so for filling vacancies. See, e.g., Ark. Code Ann. §§ 7-4-107, 7-4-108; Kan. Stat. Ann. §§ 25-2802, 25-2805; Me. Rev. Stat. tit. 21-A, § 503-A; N.H. Rev. Stat. Ann. §§ 658:2, 658:6. Although the approaches vary, each reflects the States' consideration of the procedures designed to provide for "orderly, fair, and honest elections 'rather than chaos.'" U.S. Term Limits, Inc. v.

In the plaintiffs' eyes, however, the new procedure injects an impermissible partisan advantage, rendering it unconstitutional under art. I, § 4, of the United States Constitution.[29] This provision, the elections clause, "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections."[30] Cook v. Gralike, 531 U.S. 510, 523 (2001), quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986). "It cannot be doubted" that the clause grants the States "authority to provide a complete code for congressional elections," Smiley v. Holm, 285 U.S. 355, 366 (1932), which "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns,'" Cook, supra at 523-524, quoting Smiley, supra. State regulation of Federal elections may not, however,

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Thornton, 514 U.S. 779, 834 (1995), quoting Storer v. Brown, 415 U.S. 724, 730 (1974).

[29] The plaintiffs' sole challenge to this provision of the VOTES act is under art. I, § 4, of the United States Constitution, and thus, its scope is necessarily limited to elections for Federal office.

[30] The elections clause states in its entirety: "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."

go beyond regulating procedure "to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[31] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833-834 (1995) (Thornton).

We conclude that the procedures included in the VOTES act for the selection of those supervising voting comply with the constitutional requirements set out in the relevant Supreme Court case law. As the Supreme Court emphasized in Cook, States have "broad" powers to impose procedural requirements regarding the time, place, and manner of Federal elections, including the supervision of voting. Cook, 531 U.S. at 523, quoting Tashjian, 479 U.S. at 217.

The procedures at issue here also have nothing in common with the substantive requirements found unconstitutional in Cook. There, the Court struck down an amendment to the Missouri State Constitution that sought to punish individual candidates for their stance on congressional term limits by emblazoning next to their names on the official ballots, "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." Cook, 531 U.S. at 513-515, 525-526. Other regulations struck down under the elections clause were

[31] The plaintiffs have identified no other "constitutional restraints" violated by the poll worker appointment provisions at issue.

likewise ones that were clearly designed to pick electoral winners and losers. See, e.g., Thornton, 514 U.S. at 835, 837-838 (State's imposition of term limits on its members of Congress not permissible procedural regulation under elections clause); Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 117 (2010) (recall of sitting United States Senators outcome-determinative, not procedural).

In contrast, the appointment procedure established by the VOTES act does not unconstitutionally favor or disfavor a class of candidates. As the plaintiffs correctly note, the statutory framework includes a proportional two-party requirement for the initial appointment of election officers. Furthermore, the plaintiffs significantly overstate the impact of the VOTES act, which does not eliminate that two-party oversight requirement. Indeed, the act changes little in the over-all scheme that the Legislature has prescribed for appointing poll workers. The default is, as it was before the VOTES act, that the municipal appointing authority appoints election officers in equal numbers from lists prepared by the local committees of the two largest political parties. G. L. c. 54, §§ 11-13. The appointing authority has no discretion not to make such appointments. Id. On an election day, vacancies must still be filled in accordance with party affiliation in municipalities that have adopted

§ 16A, while in those that have not, certain positions may be filled by a substitute of any affiliation. G. L. c. 54, § 16.

The provision enacted by the VOTES act only permits a local appointing authority (or clerk) to disregard party affiliation when there is a vacancy during a limited window preceding an election. G. L. c. 54, § 14. As the Secretary explains in his brief, this provision "facilitates the conduct of elections by ensuring that there are sufficient poll workers present to ensure that polling places run smoothly and in accordance with all relevant laws." In smaller towns, as the Secretary notes, such additional flexibility may be required to provide the necessary supervision of the election. Finally, regardless of party affiliation or how they are appointed, all election officers must swear the same oath of office before performing their official duties. G. L. c. 54, § 20.

In sum, the procedures for the selection of supervisory officials included in the VOTES act do not impose substantive requirements designed to influence the outcome of the election, nor do they unconstitutionally favor or disfavor one party. For all of these reasons, the VOTES act's vacancy appointment procedures for the supervision of elections are not unconstitutional on their face.[32]

[32] Considering the Secretary's provided rationale for the

c. Anti-electioneering and free speech. General Laws c. 54, § 65, requires election officials to post certain information at polling places and, at the same time, mandates 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 [150] feet of the building entrance door to such polling place."[33]

The forbidden acts are all species of electioneering, and similar anti-electioneering laws can be found in all fifty

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change to § 14, the Legislature's decision to allow appointment without regard to party affiliation in the six weeks before an election, while leaving undisturbed the requirement that party affiliation be considered in election day appointments made under § 16A, seems somewhat curious. But we have never required perfectly crafted statutes, only constitutional ones. See Cuticchia v. Andover, 95 Mass. App. Ct. 121, 128 n.10 (2019) ("It often has been observed that 'people who love sausage and respect the law should never watch either one being made' [a quote of uncertain provenance that has been attributed variously to Mark Twain, Otto von Bismarck, and several others]").

[33] Section 65 also forbids the collection of signatures for petitions and the distribution of "[p]asters, commonly called stickers." The latter prohibition presumably does not ban distribution of the ubiquitous "I Voted" stickers celebrating the discharge of an important civic duty, but rather stickers preprinted with a candidate's name that were designed to be affixed to a paper ballot. See generally O'Brien v. Board of Election Comm'rs, 257 Mass. 332 (1926) (analyzing irregularities in ballots with pasters).

States.[34] See Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 1886 (2018) (Mansky).

In addition to establishing early voting periods, the VOTES act also makes explicit that § 65 applies whenever polls are open during early voting. G. L. c. 54, § 65, fifth par. The plaintiffs allege that in doing so the act creates an unconstitutional restriction on free speech.[35] Specifically, according to the plaintiffs, banning attempts to influence voters for the extended periods of time provided by early voting effectively ends "all free speech activities, for weeks at a time" around town halls, a problem "[e]specially for

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[34] These laws are many and varied, and a number appear to have a longer reach than § 65. California forbids electioneering in the presence of those voting by mail. Cal. Elec. Code § 18371. Louisiana bans electioneering at nursing homes for seven days before any voting. La. Rev. Stat. Ann. § 18:1334. South Carolina recently enacted a law that establishes a 500-foot electioneering-free zone around polling places for an early voting period of two weeks. S.C. Code Ann. § 7-25-180.

[35] The plaintiffs' appellate brief also attempts to expand the scope of their First Amendment challenge to include long-standing formal regulations issued by the Secretary and a 2020 guidance document. See 950 Code Mass. Regs. §§ 52.03(22)(d), 54.04(22)(d) (2011); Secretary of the Commonwealth, Election Advisory #20-12: Regarding Electioneering, the 150-foot Rule, and Maintaining Order in the Polling Place (Oct. 30, 2020). "Pleadings must stand or fall on their own." Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985). We decline to address claims not articulated in the plaintiffs' complaint, which was directed solely at the VOTES act and its application of § 65 to early voting periods. See Mass. R. Civ. P. 8, 365 Mass. 749 (1974).

municipalities with populations under 5,000."

In Burson v. Freeman, 504 U.S. 191 (1992), the seminal case on the constitutionality of electioneering prohibitions, the United States Supreme Court upheld Tennessee's "campaign-free zone" of one hundred feet around polling places, notwithstanding that the law was "a facially content-based restriction on political speech in a public forum," and thus subject to "exacting scrutiny." Id. at 193-194, 198, 211. The Court acknowledged that each State "indisputably has a compelling interest in preserving the integrity of its election process," id. at 199, quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989), and in "protecting the right of its citizens to vote freely," Burson, supra at 198. Then, probing the necessity of the electioneering prohibitions, the Court undertook an extensive historical review of voting procedures in the United States. Id. at 200-206. That survey revealed that in elections from colonial times through the late Nineteenth Century, voters at the polls were regularly beset with attempts at bribery and intimidation. See id. at 200-202. "In short," the Court summarized, "these early elections 'were not a very pleasant spectacle for those who believed in democratic government.'" Id. at 202, quoting E. Evans, A History of the Australian Ballot System in the United States 10 (1917).

The remedy came in the form of the "Australian system" of elections, which entailed both official ballots and private polls. Burson, 504 U.S. at 202-205. Massachusetts was the first State in the country to adopt the system. Ludington, Present Status of Ballot Laws in the United States, 3 Am. Pol. Sci. Rev. 252, 252 n.1 (1909). As a contemporary noted, the Commonwealth quickly reaped the rewards of its reform:

> "Quiet, order, and cleanliness reign in and about the polling-places. I have visited precincts where, under the old system, coats were torn off the backs of voters, where ballots of one kind have been snatched from voters' hands and others put in their places, with threats against using any but the substituted ballots; and under the new system all was orderly and peaceable."

Burson, supra at 204 n.8, quoting 2 Annals of the American Academy of Political and Social Science 738 (1892). In light of the "persistent" problems that predated voting reform and the "widespread and time-tested consensus" that anti-electioneering laws were their antidote, the Court concluded that "some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." Burson, supra at 206.

But how much restriction is necessary? To survive, the Court determined, an anti-electioneering restriction may not "significantly impinge on constitutionally protected rights."[36]

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[36] This modified burden is applicable "only when the First

Id. at 209, quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986). The Court concluded that Tennessee's buffer zone inflicted no such significant impingement and was thus "on the constitutional side of the line." Burson, supra at 210-211. In doing so, the Court recognized that the State was provided some latitude to determine the extent of the restriction; the difference between buffer zones of twenty-five and one hundred feet was simply not one "of constitutional dimension" (quotation and citation omitted). Id. at 210.

As the plaintiffs concede, the essential interests at stake and the necessity of regulation are the same here as in Burson. The Commonwealth's compelling interest in securing free and fair elections is identical, as is the necessity of anti-electioneering restrictions to safeguard against the proven perils of election fraud and voter intimidation. These protections are no less vital when voting on a Saturday instead of a Tuesday.

The buffer zone here is also similarly geographically limited. The area in which § 65 operates remains modest. One hundred and fifty feet may be traversed in seconds. See Burson, 504 U.S. at 210 ("The State of Tennessee has decided that these last [fifteen] seconds before its citizens enter the polling

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Amendment right threatens to interfere with the act of voting itself." Burson, 504 U.S. at 208-209 & n.11.

place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice"). Beyond the 150 feet, the restrictions on campaigning do not apply.

The plaintiffs allege that the VOTES act nevertheless significantly impinges on First Amendment rights by expanding the temporal reach of § 65's anti-electioneering proscription to early voting periods. In Frank v. Buchanan, 550 F. Supp. 3d 1230 (D. Wyo. 2021), the United States District Court for the District of Wyoming upheld a buffer zone of one hundred feet that applied during early absentee voting periods stretching ninety days. Id. at 1239 ("Burson did not premise its holding on a factual scenario where a regulation is only effective for two days a year"). Several other courts have upheld the constitutionality of anti-electioneering restrictions during early voting periods, even if the issue of their duration was not placed front and center.[37] See, e.g., Citizens for Police

[37] We note that the anti-electioneering restriction considered by the Supreme Court in Mansky applied during "election days and for [forty-six] days before at absentee voting locations." Reply Brief of Petitioners at 1, Mansky, No. 16-1435 (U.S. Feb. 19, 2017). Nonetheless, we do not rely on that aspect of Mansky, because it appears to have played no part in the Court's decision, and because the challenged Minnesota law applied only in a nonpublic forum, engendering a different standard of review. See Mansky, 138 S. Ct. at 1886-1888, 1891 (holding States may permissibly prohibit certain apparel inside polling places, but finding prohibitions in Minnesota statute at issue too "indeterminate" to be enforceable).

Accountability Political Comm. v. Browning, 572 F.3d 1213, 1215 (11th Cir. 2009), cert. denied, 559 U.S. 1086 (2010) (upholding Florida's buffer zone of one hundred feet around polling places and early voting sites); Schirmer v. Edwards, 2 F.3d 117, 118 & n.2 (5th Cir. 1993), cert. denied sub. nom. Recall '92 v. Edwards, 511 U.S. 1017 (1994), and abrogated by State v. Schirmer, 646 So. 2d 890 (La. 1994) (upholding Louisiana's 600-foot buffer zone applied during early absentee voting periods); Clark v. Schmidt, 493 F. Supp. 3d 1018, 1021-1022, 1028-1034 (D. Kan. 2020) (upholding Kansas buffer zone enforced during twenty-day early voting period). Moreover, numerous other States have such restrictions, and the plaintiffs have not identified any that have been declared unconstitutional for applying during early voting. See, e.g., Ark. Code Ann. § 7-1-103(a)(8); Cal. Elec. Code § 18370(a); Colo. Rev. Stat. §§ 1-5-105(1), 1-13-714(1); Fla. Stat. § 102.031(4)(a)-(b); Haw. Rev. Stat. Ann. §§ 11-109(b), 11-132(a); Ind. Code § 3-14-3-16(c); Kan. Stat. Ann. § 25-2430; Ky. Rev. Stat. Ann. § 117.235(3); La. Rev. Stat. Ann. § 18:1462; Neb. Rev. Stat. § 32-1524; Nev. Rev. Stat. § 293.361(1); N.Y. Elec. Law § 8-104(1); N.C. Gen. Stat. §§ 163-166.4(e), 163-227.2; Or. Rev. Stat. § 260.695(3); S.C. Code Ann. § 7-25-180; S.D. Codified Laws § 12-18-3; Utah Code Ann. § 20A-3a-501; Vt. Stat. Ann. tit. 17, § 2508(a); Wash. Rev. Code § 29A.84.510; W. Va. Code § 3-9-9; Wis. Stat. § 12.03(2); Wyo.

Stat. Ann. § 22-26-113.

The plaintiffs' argument also overstates the impact of the VOTES act. First, as the plaintiffs themselves point out, the existence of municipal, State, and Federal elections, as well as primaries and special elections, means that polling places were already open in the Commonwealth on multiple days every year before the act's passage. The plaintiffs do not dispute the constitutionality of enforcing G. L. c. 54, § 65, on those days, where it has applied for over a century. This suggests that the act's application of § 65 to additional voting periods is "a difference only in degree," not an "alternative in kind." Burson, 504 U.S. at 210.

Further, the main objection leveled by the plaintiffs is to the application of § 65's restrictions during early voting in smaller towns, where they would curtail political speech around the key public forum of a town hall. But in towns with under 5,000 registered voters -- over one third of the municipalities in the Commonwealth -- the act is tailored to require only four additional hours of early voting, to be held on weekends. G. L. c. 54, § 25B (b) (2)-(3). Although the act's sliding scale requires longer hours for larger municipalities -- up to two full weeks of voting in the Commonwealth's largest cities -- those are communities that provide many other public forums for

campaigning.[38] Cf. Munro, 479 U.S. at 198-199 (finding availability of alternative avenue of campaigning expression significant in concluding ballot regulation did not significantly impinge First Amendment rights).

Doubtlessly a significantly more expansive combination of time and space restriction would constitute an impermissible restraint on speech, but here we are confident that the VOTES act's application of § 65 remains "on the constitutional side of the line." Burson, 504 U.S. at 210-211. The geographic scope of the restrictions on campaigning at polling places is limited and not meaningfully different from that approved by the Supreme Court in Burson. See id. at 221. The time periods for early voting are likewise limited, particularly in municipalities where the plaintiffs have alleged a heightened risk of impingement. The fact that, outside of the circumscribed "island[s] of calm" around a polling place, Mansky, 138 S. Ct. at 1887, the tumult of campaigning can continue unabated also confirms that the impingement is not significant. The Legislature's decision that voters are entitled to peace while they undertake this most "weighty civic act," id. at 1880, when they do so during early voting as well as on an election day is

[38] Local officials also have the discretion to designate a different polling place if town or city hall is "unavailable or unsuitable." G. L. c. 54, § 25B (b) (4).

not an unconstitutional one.[39]

d. Electronic systems to aid voters with disabilities or living or serving overseas. Like the COVID-19 voting act before it, the VOTES act enhances the ability of persons with disabilities to participate in the electoral process on similar terms as other voters. See G. L. c. 54, § 25B, as appearing in St. 2022, c. 92, § 10; St. 2020, c. 115, § 6 (i). In particular, voters who wish to vote early by mail and who are unable independently to mark a paper ballot because of a disability may apply for accommodations. See G. L. c. 54, § 25B (a) (4), (5). Among other enumerated possible accommodations,[40]

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[39] The plaintiffs' complaint also lodges parallel challenges under arts. 9 and 16 of the Massachusetts Declaration of Rights. Article 9, as discussed above, guarantees "equality among all qualified voters" (citation and alterations omitted), Opinion of the Justices, 368 Mass. at 821; the plaintiffs make no argument as to how forbidding electioneering during early voting implicates this provision.

Article 16, as amended by art. 77 of the Amendments, states that "[t]he right of free speech shall not be abridged." We have historically interpreted the protections provided by this provision to be "comparable to those guaranteed by the First Amendment." 1A Auto, Inc. v. Director of the Office of Campaign & Political Fin., 480 Mass. 423, 440 (2018), cert. denied, 139 S. Ct. 2613 (2019), quoting Opinion of the Justices, 418 Mass. 1201, 1212 (1994). The plaintiffs do not argue that we should depart from that practice here, nor do they provide us with any basis for doing so. The plaintiffs' art. 9 and art. 16 claims therefore also fail.

[40] Other possible accommodations include accessible electronic instructions, accessible electronic applications that may be signed and submitted electronically, and alternative

such voters may be granted use of an authorized accessible electronic ballot, which can be marked and submitted electronically using a system that does not collect or store personally identifying information, and use of an accessible electronic affidavit of certification, which can be signed with a hand-drawn electronic or typewritten signature. See G. L. c. 54, § 25B (a) (4). The Secretary is required under the VOTES act to promulgate regulations to implement these provisions. See G. L. c. 54, § 25B (i).

The VOTES act also will facilitate the ability of individuals voting absentee pursuant to the Federal Uniformed and Overseas Citizens Absentee Voting Act, i.e., members of the United States uniformed services and merchant marines, their family members, or qualified persons residing outside the United States, to cast their absentee ballots. See G. L. c. 54, § 91C, as appearing in St. 2022, c. 92, § 18 (effective Dec. 1, 2022); 52 U.S.C. § 20310(1), (4), (5), (7). Among other enhancements, the VOTES act will require the Secretary to approve an "electronic system" through which such voters may apply for,

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methods of signing affidavits of certification. See G. L. c. 54, § 25B (a) (4), as appearing in St. 2022, c. 92, § 10. Voters approved for accommodation by reason of a disability may also print their electronically marked ballots and return them by delivering them, in person or by a family member, to the appropriate clerk's office or secured municipal ballot drop box, or by mailing them using a postage-guaranteed envelope provided. Id.

receive, mark, verify, and cast absentee ballots and submit electronic voter affidavits.[41] See G. L. c. 54, § 91C (b), (c). Any approved electronic system shall "not store personal identifying information beyond the time necessary to confirm the identity of the voter." G. L. c. 54, § 91C (c). Once again, the Secretary is required under the act to promulgate implementing regulations, this time by a specific deadline, January 1, 2023. See G. L. c. 54, § 91C (g); St. 2022, c. 92, § 28.

Characterizing these limited voter-access enhancements as "electronic voting," the plaintiffs argue that they exceed the constitutional scope of art. 38 of the Amendments, which provides that "[v]oting 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." They further claim that the electronic processes authorized by the VOTES act cannot meet the constitutional requirements of secrecy or a written vote. The Secretary, meanwhile, maintains that the act does not provide for "electronic voting" but, rather, for an "electronic system" for "ballot conveyance." He further maintains that the enactment of these provisions represents a rational means of

[41] Absentee ballots may also be applied for and submitted by mail, facsimile, or e-mail. See G. L. c. 54, § 91C (c), (e).

meeting the Commonwealth's obligations under the Americans with Disabilities Act, 42 U.S.C §§ 12101 et seq., and the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301 et seq.

We agree with the Secretary that the provisions are a reasonable response to Federal requirements, not least because, on its face, the VOTES act enables qualified and approved voters who may otherwise require assistance or be unable to vote to cast their ballots privately and independently. We also conclude that the plaintiffs' claims, including the claim that the identity of any approved individual who submits a ballot electronically is inherently knowable, thus voiding the secrecy of that ballot, are speculative and advanced without a demonstrated understanding of how the electronic voting enhancements authorized by the VOTES act will operate.[42] For all

[42] Similarly, the plaintiffs asserted in their complaint that the VOTES act violates the Massachusetts Constitution by changing residency requirements for voting. In fact, no such change was made, and the plaintiffs were forced to withdraw that claim.

The plaintiffs also claim that the VOTES act eliminated the requirement of a police presence at each polling place on election day for purposes of preserving order, enforcing election laws, and guarding against interference with election officers' duties. In fact, the VOTES act preserves this election day requirement and only altered the designation of the entities responsible for detailing a sufficient number of police officers or constables. G. L. c. 54, § 72, as appearing in St. 2022, c. 92, § 13. It also preserves the discretion of a city

these reasons, the plaintiffs' arguments, to the extent they even rise to the level of appellate argument, fail. See Merriam, 375 Mass. at 253-254, citing Blackington, 24 Pick. at 355-356.

e. Voting by "dead people." In 2020, with the passage of the COVID-19 voting act, Massachusetts joined a handful of States[43] in expressly providing that an early or absentee ballot

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or town to maintain, at its own expense, a police presence at early voting sites. G. L. c. 54, § 25B (j), as appearing in St. 2022, c. 92, § 10. The plaintiffs appear to have recognized this, having not pressed the claim in their brief to the full court. The claim, therefore, is waived. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) (requiring appellant's brief to contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor," and providing that "[t]he appellate court need not pass upon questions or issues not argued in the brief").

The plaintiffs also claimed that the VOTES act eliminated a second mandatory list of registered voters, thereby preventing candidates and the minority party from deploying poll watchers to challenge any perceived election day irregularities and to assess the success of the campaign's efforts to increase voter turnout. In fact, the VOTES act preserves the requirement that election officers mark a voter's name on a voting list and distinctly announce the voter's name as part of early in-person voting and election-day check-in procedures. See G. L. c. 54, §§ 25B (b) (7), 67, as appearing in St. 2022, c. 92, §§ 10, 12; G. L. c. 54, § 76. As did the COVID-19 voting act, it merely left to the discretion of city and town clerks whether to use a second voting list as part of a check-out procedure before voters deposit their ballot in the ballot box. See G. L. c. 54, §§ 67, 83, as appearing in St. 2022, c. 92, §§ 12, 14; St. 2020, c. 115, § 13. Once again, the plaintiffs appear to have recognized this and did not address the claim in their brief, thereby waiving it. See Mass. R. A. P. 16 (a) (9) (A).

[43] See, e.g., Ark. Code Ann. § 7-5-416(c); Conn. Gen. Stat.

cast by an eligible voter would not be invalidated solely because the voter later died. See St. 2020, c. 115, § 7 (j) (1)-(2). As part of the VOTES act, the Legislature made these protections permanent. See G. L. c. 54, § 25B (e), as appearing in St. 2022, c. 92, § 10; G. L. c. 54, § 92 (d), inserted by St. 2022, c. 92, § 19; St. 2022, c. 92, § 22, repealing G. L. c. 54, § 100. Relying more on rhetorical flourish than reasoned analysis, the plaintiffs invoke the specter of "zombie votes" to perfunctorily claim that the VOTES act is "simply arbitrary and irrational" because it allows "dead people to vote." The law, however, does not allow dead people to vote;[44] it protects the constitutional right to vote by ensuring that ballots validly cast[45] by living registered voters

§ 9-140d; Fla. Stat. § 101.6103(8); Haw. Rev. Stat. § 15-13.5; Mont. Code Ann. § 13-13-204(6); N.D. Cent. Code § 16.1-07-12(2); Va. Code Ann. § 24.2-709(D). Other States have repealed provisions that invalidated ballots cast by absentee voters who died before election day. See, e.g., Idaho Code Ann. § 34-1009.

[44] The plaintiffs cite only to cases concerning the effect that should be given to votes cast for a deceased, disqualified, or ineligible candidate for public office, a situation that has no bearing on the status of votes cast in accordance with governing law by living registered voters.

[45] The VOTES act provides that early and absentee ballots are "cast" when deposited in the mail, returned to the appropriate election official either by hand or via a secured municipal drop box, or, where permitted, submitted electronically. See G. L. c. 54, § 25B (e), as appearing in St. 2022, c. 92, § 10; G. L. c. 54, § 92 (d), inserted by St. 2022, c. 92, § 19.

are counted. See Cepulonis, 389 Mass. at 934 (acknowledging "clear policy" in Massachusetts "of facilitating voting by every eligible voter"). Moreover, the law actually serves to avoid the arbitrary results that could occur under G. L. c. 54, § 100, which was repealed by the VOTES act, whereby the decision to count a ballot validly cast by an absentee voter who subsequently died prior to the opening of polls on election day turned on whether the election officers charged with the duty of counting happened to become "cognizant" of the voter's death.

3. Conclusion. For the foregoing reasons, on July 11, 2022, we ordered that judgment enter in the county court for the Secretary on all claims in the plaintiffs' complaint and that the plaintiffs' request to enjoin the Secretary from putting the VOTES act into effect be denied.