COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC-13307

JAMES LYONS, RAYLA CAMPBELL, EVELYN CURLEY,
RAYMOND XIE, & ROBERT MAY,
Plaintiffs,

v.

SECRETARY OF STATE WILLIAM F. GALVIN,
Defendant.

ON RESERVATION & REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF AMICUS CURIAE COMMON CAUSE MASSACHUSETTS & THE LEAGUE OF WOMEN VOTERS OF MASSACHUSETTS IN SUPPORT OF APPELLEE

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INTRODUCTION

In 2014, the Commonwealth joined the vast majority of its sister states in adopting a period of early voting, allowing qualified voters to cast an in-person ballot during an 11-day period before election day—first only for state elections, and recently expanded to include primaries.[1] G.L. c. 54, § 25B, inserted by St. 2014, c. 111, § 12; amended by St. 2022, c. 92, § 10.

Six years later, in the midst of the COVID-19 pandemic, the Legislature permitted all qualified voters to request and cast a mail ballot, regardless of a particularized excuse to do so, for the 2020 and 2021 elections. See St. 2020, c. 115, § 6(a); c. 255; St. 2021, c. 5, §§ 4-7; St. 2021, c. 29, §§ 51-54. By legislation signed by Governor Charles D. Baker on June 22, 2022, the Legislature codified no-excuse mail voting, allowing qualified voters to request and cast a mail ballot in all statewide primaries and general elections. St. 2022, c. 92.[2]

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[1] Forty-five states plus the District of Columbia offer early in-person voting. National Conference of State Legislatures, "Early In-Person Voting" (May. 23, 2022).

[2] Thirty-four states plus the District of Columbia allow for no-excuse mail voting, including eight states which automatically mail ballots to all qualified voters (a step far beyond what is proposed in the VOTES Act). National Conference of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options" (Mar. 15, 2022).

This lawsuit followed. It asserts that all Massachusetts voters must cast their ballots in-person on election day, unless they fall into a narrow class of individuals mentioned in Article 105 of the Articles of Amendment to the Massachusetts Constitution; and that the Legislature has no power to provide otherwise. Of course, under the state Constitution, legislative power is plenary. Mass. Const. Pt. II, c.1, §1, art. 4. And limits on that power must be express. Petitioners claim to have identified two such limitations; but their argument as to each cannot withstand scrutiny.

First, they assert without evidence that permitting qualified voters to cast ballots early or by mail necessarily yields fraud, which, in their view, contravenes guarantee of free and equal election set forth in Article 9 of the Massachusetts Declaration of Rights. That argument—that as-yet-unidentified "fraud" dilutes the votes of qualified voters who appear in person on election day—has been leveled throughout the country in recent years, and it has failed everywhere it has been asserted. This brief collects and briefly canvasses those decisions.

Second, Petitioners' claim that the 1917-1918 Constitutional Convention's decision to expressly authorize absentee voting for certain voters reflected an unexpressed intent to limit absentee voting to only those voters. Yet, a review of the constitutional history reveals a very different

picture. Preceding that Convention, the Legislature had authorized absentee voting (with soldiers in mind). Then-existing constitutional language called into question whether such voting would be permissible for certain state offices. Originally, state Senators and the Governor were elected via town meeting; and legacy constitutional language continued to refer to elections as "meetings"—which, the Convention delegates were informed by the Secretary and the Attorney General, could give rise to an argument that voting for those offices must occur in person. To address that issue, and clearly establish a foundation for absentee voting, the Convention recommended the adoption of Article 45 of the Articles of Amendment (which, as amended, is now Article 105). This practice (i.e., the express grant of legislative authority to address a potential ambiguity in existing constitutional language) has been common in the state's history.

More importantly, in the intervening years, the state Constitution has been amended and is now quite clear: statewide officers and legislators are now elected in biennial elections, not at meetings. Mass. Const. Articles of Amend. arts. 64, 82. The issue that Article 45 was intended to remedy— that "meetings" could be construed to require in-person presence—has long been relegated to the dustbin of history. There it should be joined by Petitioners' lawsuit following this Court's hearing on July 6.

INTEREST OF AMICUS[3]

Common Cause Massachusetts is a non-partisan, nonprofit organization[4] that advocates for clean, fair and inclusive elections, to better ensure that government is accountable to the people it serves. It has been helping build a better democracy in the Commonwealth since 1970, and is a leading authority in the Commonwealth on conducting modern, accurate, and secure elections.

League of Women Voters of Massachusetts (LWVM) is a non-partisan, nonprofit organization[5] that, for more than a century, has empowered and educated voters and encouraged citizen participation in government decision-making. LWVMA advocates for an open governmental

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[3] Pursuant to Mass. R. App. P. 17, amici state that: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; no person, other than amicus or its counsel, contributed money that was intended to fund preparing or submitting this brief; and none of the amici nor their counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

[4] Pursuant to SJC Rule 1:21, Common Cause Massachusetts states that it is the Massachusetts chapter of Common Cause, a non-stock nonprofit organization constituted under the laws of the District of Columbia, in which no publicly-held corporation has an ownership interest.

[5] LWVMA states that it is the Massachusetts chapter of the League of Women Voters of the United States, a non-stock nonprofit organization, in which no publicly-held corporation has an ownership interest.

system that is representative, accountable, and responsive; and that protects individual liberties established by the Constitution. In the Commonwealth, LWVMA presses these principles while working to register, inform and engage voters.

ISSUES PRESENTED

Whether in-person early voting, established by the Legislature in 2014, and mail voting, codified by the Legislature in the 2022 VOTES Act, are consistent with the Massachusetts Constitution, including: Article 4 of the Declaration of Rights, which provides for the people's right of self-governance; Article 9 of the Declaration of Rights, which guarantees free and equal elections; Part II, c. 1, § 1, art. 4, which sets forth the Legislature's plenary authority; Article 3 of the Articles of Amendment, which expressly guarantees the right to vote; and Article 105 of the Articles of Amendment which expressly recognizes the Legislature's power to provide for absentee voting for certain classes of individuals.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case of Defendant Secretary William Francis Galvin (the "Secretary").

STATEMENT OF THE FACTS

Amici adopt the Secretary's Statement of Facts, and underscore the following points.

Massachusetts has been a late adopter of common types of voting. In 2014, the bipartisan Presidential Commission on Election Administration—led by Robert Bauer, counsel to President Obama, and Ben Ginsburg, counsel to former Presidential candidate Mitt Romney—recommended that: "In order to limit congestion on [e]lection [d]ay and to respond for greater opportunities to vote beyond the traditional [e]lection [d]ay polling place, states that have not already done so should expand alternative ways of voting, such as mail balloting and in-person early voting." *See* Presidential Commission on Election Administration, "The American Voting: Report and Recommendations of the Presidential Commission on Election Administration" (Jan. 2014) at 3.

At the time, 23 states had in-person early voting; 45 states, plus the District of Columbia, provide for it now.[6] In 2014, Massachusetts joined its sister states by adopting early voting, and it was first implemented by the Secretary of the Commonwealth and municipal clerks in 2016. *See* St. 2014, c. 111, § 10 (codifying G.L. c. 54, § 25B). It immediately proved popular with the Commonwealth's voters, more than 20% of whom have cast an early

[6] United States Election Assistance Commission, "2012 Election Administration and Voting Survey" at 13 (2013); National Conference of State Legislatures, "Early In-Person Voting" (May 23, 2022).

ballot in the three state elections since then.[7] Peer-reviewed election literature indicates that early voting increases turnout, particularly among women and independent voters, resulting in a "de-polarizing effect" on the electorate. E. Kaplan & J. Yuan, "Early Voting Laws, Voter Turnout, and Partisan Vote Composition: Evidence from Ohio, " 12 *American Economic Journal: Applied Economics* 32, 54-56 (2020).

Today, 34 states permit all registered voters to request and cast a mail ballot.[8] These states run the gamut from those considered quite conservative (Idaho, Nebraska, Utah, and Wyoming); to those considered quite liberal (California, New Jersey, Oregon, and Washington); and they include many in between (Arizona, Georgia, Florida, Michigan, North Carolina, Ohio, Pennsylvania, and Wisconsin). In 2020, Massachusetts joined these states, albeit only for elections during the COVID-19 pandemic. St. 2020, c. 115, § 6(a); c. 255; St. 2021, c. 5, §§ 4-7; St. 2021, c. 29, §§ 51-54. The VOTES Act

[7] Secretary of the Commonwealth, "2016 Early Voting Statistics"; Secretary of the Commonwealth, "2018 Early Voting Statistics"; Secretary of the Commonwealth, "2020 Early Voting Statistics."

[8] National Conference of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options" (Mar. 15, 2022).

extends mail voting to all future state elections. G.L. c. 54, § 25B, as amended by St. 2022, c. 92, § 10.[9]

In recent years, more voters have cast ballots before election day than ever before. In 2016, nearly 40% of voters nationwide did so.[10] In 2020, just under 70% did (though that number was inflated by the pandemic); and Massachusetts voting practices were consistent with nationwide trends, as 64% of voters here participated early or by mail.[11]

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[9] Data following the 2020 election indicates that, while the availability of mail voting may have been correlated with increased turnout, "no-excuse absentee voting did not meaningfully change the composition of the electorate during the 2020 election." Jesse Yoder, et al., "How Did Absentee Voting Affect the 2020 U.S. Election," 7 *Science Advances* 52 (2021).

[10] United States Election Assistance Commission, "The Election Administration and Voting Survey: 2016 Comprehensive Report" (2017).

[11] United States Election Assistance Commission, "The Election Administration and Voting Survey: 2020 Comprehensive Report" (2021); Secretary of the Commonwealth, "2020 Early Voting & Vote By Mail Statistics" (2021).

In past years, such participation was uncontroversial. Not so in 2020.[12] Nor, sadly, in the years that have followed.[13]

SUMMARY OF THE ARGUMENT

The Massachusetts Legislature has determined that the Commonwealth is best served by an accessible democracy that facilitates participation by qualified voters. To that end, in 2014, the Legislature established an early voting process, whereby qualified voters may cast a ballot in the 11 days before an election (excluding Sunday). G.L. c. 54, § 25B

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[12] The nation's two foremost nonpartisan election academics have written that:

> The 2020 U.S. election was both a miracle and a tragedy. It was a miracle in that election administrators, facing unprecedented challenges from a pandemic, were able to pull off a safe, secure and professional election in which a record number of Americans turned out to vote. It was also a tragedy, though, because, despite these heroic efforts, lies about vote fraud and the performance of the system have cemented a perception among tens of millions of Americans that the election was 'rigged.'

N. Persily & C. Stewart, "The Miracle and Tragedy of the 2020 Election," 32 *Journal of Democracy* 159 (Apr. 2021).

[13] After the 2020 election was certified in the Commonwealth, certain candidates challenged the counting of early and mail ballots; their suit was rejected as untimely. *See Moran v. Commonwealth*, 100 Mass. App. Ct. 1133 (2022) (Rule 23.0). Neither Court materially addressed the substantive constitutional claims, which now, in substantial part, are reasserted in this action.

(codified by St. 2014, c. 111, § 10). During the COVID-19 pandemic, the Legislature also extended temporarily the opportunity to vote by mail to all qualified voters, regardless whether they had an excuse to do so. St. 2020, c. 115. This year, the Legislature codified no-excuse mail voting in St. 2022, c. 92, entitled "An Act Fostering Voter Opportunity, Trust, Equity and Security" (the "VOTES Act").

Petitioners challenge whether early voting and no-excuse mail voting comport with the Commonwealth's Constitution, and also level a number of arguments against other provisions of the VOTES Act. On each issue, amici and supports the arguments submitted by the Secretary. We submit this brief to address the state constitutional challenge to early and mail voting.

As we understand it, the argument has two components. First, it is an assertion that early and mail voting somehow contravenes the guarantee of free elections set forth in Article 9 of the Massachusetts Declaration of Rights. The centerpiece of Petitioners' argument is a theory of vote dilution, i.e., that early and mail voting creates fraud, which in turn "dilutes" the votes of qualified voters who appear on election day to cast ballots in person. That argument has been leveled numerous times in recent years; it has failed everywhere it has been brought. Article 9's guarantee of free elections to the

people of the Commonwealth bolsters, rather than prohibits, efforts to make the franchise more accessible.

Second, Petitioners assert that the state Constitution prohibits the Legislature from affording qualified Massachusetts voters the choice whether to cast a ballot early or by mail. No such express limitation exists in the constitutional text; and this Court has found that legislative action to expand access to the franchise furthers, rather than defeats, the constitutional guarantee of free and fair elections. *See* Mass. Const. Pt. I, art. 9. Indeed, the Court has recognized the Legislature's "broad powers to deal with elections." *Opinion of the Justices*, 359 Mass. 775, 777 (1971).

Essentially, Petitioners' argument is one of negative implication. Article 105 of the Articles of Amendment provides that the Legislature "shall have the power" to provide for absentee voting for certain enumerated qualified voters. They argue that grant of power excludes all other legislative authority in the area. Arguments of negative implication, however, fall short in the context of the Constitution's grant of plenary power to the Legislature.

Moreover, the history of Article 105—initially adopted in 1917 as Article 45, recommended to the people by the 1917-18 Constitutional Convention—reveals that the constitutional text was intended to foreclose an argument that language then-existing in the state Constitution required in-

person voting. Specifically, at the founding of the Commonwealth, voting for Governor and state Senate occurred at town meetings; and, in 1917, several material provisions of the state Constitution continued to refer to "meetings." The Delegates to the 1917-18 Convention were advised by the Attorney General that such references—specifically in the limited context of gubernatorial and state senate elections—could be read to require in person voting, such that an express grant of legislative authority to provide for absentee voting would be wise. The Delegates and the people (when presented with Article 45) agreed. In the years that have followed, subsequent amendments have clarified that, in Massachusetts, voting occurs at "elections," not at "meetings." Accordingly, any need for an express grant of legislative authority to permit early or mail voting has been obviated.

ARGUMENT

I. EARLY AND MAIL VOTING FURTHER, RATHER THAN CONTRAVENE, STATE CONSTITUTIONAL GUARANTEES OF FREE AND EQUAL ELECTIONS.

Though not altogether clear, it appears that Petitioners assert that early and mail voting contravene *all* of the state Constitution's election provisions, the core of which is Article 9's guarantee of free and fair elections. *E.g.*, Emergency Mot. at 6. Under a long line of this Court's cases, however, it is clear that the Legislature effectuates, rather than violates, free and fair

elections by providing greater voting access to qualified voters. *See Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930, 932-33 (1983), quoting *Kineen v. Wells*, 144 Mass. 497, 501 (1887) ("[V]oting statutes may not be interpreted so as to 'defeat or impair the right of voting, but rather must facilitate and secure the exercise of that right"); *see Kineen*, 144 Mass. at 500-01 (quoting *Capen v. Foster*, 29 Mass. 485, 494 (1832) (Shaw, C.J.) ("[W]hile it is held to be within the proper limits of legislative power to provide suitable regulations for exercising the right of suffrage in a prompt, orderly and convenient manner, the Court, speaking through Chief Justice Shaw, [has been] careful to add: 'Such a construction would afford no warrant for such an exercise of legislative power, as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself'"). *Cf. Grossman v. Secretary of the Commonwealth*, 485 Mass. 541, 548-50 (2020) (emphasizing that the Legislature's purpose in providing for mail voting in 2020 was "the expansion of the right to vote, by providing multiple voting options," which the Court found "laudable and reasonable"); *Goldstein v. Secretary of the Commonwealth*, 484 Mass. 516, 528 (2000) (noting that, absent "extraordinary circumstances . . . policy judgments" concerning election law are "best left to the Legislature").

Any claim otherwise—based on unsupported conjecture about fraud diluting the value of Petitioner's votes—is a generalized grievance of the type Courts throughout the country have rejected as not actionable. *See Wood v. Raffensperger*, 981 F.3d 1307, 1315 (11th Cir. 2020), *cert. denied* 141 S. Ct. 1379 (2021) (Alleged "[v]ote dilution in this context is a paradigmatic generalized grievance that cannot support standing"); *Bognet v. Secretary of the Commonwealth of Pa.*, 980 F.3d 336, 359 (3d Cir. 2020), cert. granted, judgment vacated on other grounds by *Bognet v. Degraffenried*, 141 S. Ct. 2508 (2021) ("Here, the [v]oter [p]laintiffs . . . have presented no instance in which an individual voter had . . . standing to claim an equal protection harm to his or her vote from the instance of an allegedly illegal vote cast by someone else in the same election").

In the 2020 cycle alone, federal courts rejected wholesale challenges to state mail voting laws on the basis of claimed vote dilution in Montana, Nevada, New Jersey and Pennsylvania. *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 376-82 (W.D. Pa. 2020) *Donald J. Trump for President, Inc. v. Way*, Docket No. 20-10753, 2020 WL 620447 (D.N.J. Oct. 22, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000-01 (D. Nev. 2020). State appellate courts were in accord. *E.g.*,

Election Integrity Project of Nevada, LLC v. Eighth Jud. Dist. Ct., 473 P.3d 1021 (Nev. 2020); *see also Favorito v. Wan*, -- S.E.2d ---, 2022 WL 2383699 (Ga. Ct. App. Jul 1, 2022) (rejecting claim that Fulton County tabulation of mail ballots resulted in vote dilution).

In short, to the extent Petitioners suggest that early and mail voting are irreconcilable with Article 9 on the basis of unsupported claims of future potential fraud, such claims have been rejected uniformly by federal and state courts in recent years.

II. BECAUSE NO PROVISION OF THE MASSACHUSETTS CONSTITUTION PROHIBITS EARLY OR MAIL VOTING, THE LEGISLATURE HAS THE AUTORITY TO PROVIDE FOR EACH MANNER OF VOTING.

As this Court has long recognized, the Massachusetts Constitution grants the Legislature broad authority to facilitate the right to vote—a right expressly guaranteed by the Constitution. Mass. Const. Pt. I, art. 9; Mass. Const. Art. Amend. art. 3. The Legislature's choices to facilitate the exercise of that right by (a) providing for early voting for all eligible voters, as of 2014, and (b) permitting all eligible voters to vote by mail during an international pandemic were permissible exercises of that authority.[14]

[14] The basis for Petitioners' contention that legislation permitting in-person early voting, in place since 2014, contravenes constitutional limitations on legislative authority is not clear; nor is the Legislature's authority to do so subject to reasonable dispute. Accordingly, the analysis

A. Legislative Authority to Facilitate Greater Access to Voting is Well-Established.

The case law developed under the Massachusetts Declaration of Rights illustrates a consistent history of both protecting citizens against restrictions on the right to vote, and rejecting challenges to legislative efforts to facilitate and encourage voting by qualified citizens. *See, e.g., Chelsea Collaborative, Inc. v. Secretary of the Commonwealth*, 480 Mass. 27, 34 (2018) (describing deference to legislative judgment in regulating elections, except where such regulation infringes upon the right to vote). As the Supreme Judicial Court put it more than a century ago, "[t]he principal question" when considering a constitutional challenge to a state election law is whether the law "is a reasonable regulation of the manner in which the right to vote shall be exercised, or whether it subverts or injuriously restrains exercise of this right." *Cole v. Tucker*, 164 Mass. 486, 488 (1885).

As this Court explained in 2020, when upholding the election day deadline for the return of mail ballots, the Legislature's decisions as to the structure of elections are within "its broad authority, as part of the State's police power, to enact reasonable laws and regulations that are, in its

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focuses on the Legislature's authority to provide for mail voting for all qualified voters.

judgment, appropriate." *Grossman v. Secretary of the Commonwealth*, 485 Mass. 541, 546 (2020) (quoting *Chelsea Collaborative*, 480 Mass. at 33).

The reason is simple. The Constitution grants broad authority to the Legislature. *See* Mass. Const. Pt. 2, c. 1, § 1, art. 4 ("full power and authority are hereby given and granted to the . . . [G]eneral [C]ourt . . . to make, ordain, and establish[] all manner of wholesome and reasonable orders, laws, statutes, and ordinances . . . ; so as the same be not repugnant or contrary to the constitution, as they shall judge to be for the good and welfare of this [C]ommonwealth, and for the government and ordering thereof"); *see, e.g., Howes Bros. Co. v. Mass. Unemployment Compensation Comm'n*, 296 Mass. 275, 284 (1936) (enforcement of a legislative enactment "can be refused only when it is in manifest excess of legislative power"). This broad authority permits the Legislature to "regulat[e] the process of elections." *Opinion of the Justices*, 375 Mass. 795, 810 (1978); *see Chelsea Collaborative*, 480 Mass. at 33. This Court has expressly so recognized. *Chelsea Collaborative*, 480 Mass. at 33 (citing Mass. Const. Pt. II, c. 1, § 1, art. 4, in describing the scope of legislative authority over elections); *see Grossman*, 485 Mass. at 546 (echoing the *Chelsea Collaborative* description of legislative authority).

As the constitutional text provides, Mass. Const. Pt. 2, c. 1, § 1, art. 4, the limit of the Legislature's authority over elections is that its exercise may not infringe on other constitutional protections. *See Capen v. Foster*, 12 Pick. 485, 494 (1832) (Shaw, C.J.); *see also Attorney Gen. v. Brissenden*, 271 Mass. 172, 177 (1930) ("every presumption is made in favor of the validity of an act of the Legislature, and . . . the courts will not refuse to enforce it unless compelled to do so by provisions of the Constitution so plain in their bearing as to prevent any other rational construction").[15] Consequently, this Court has held that the Legislature must make "suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right." *Kineen*, 144 Mass. at 501 (quoting *Capen*, 12 Pick. at 497); *see Opinion of the Justices*, 359 Mass. at

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[15] As explained in the clear and forceful prose of Judge Shaw, from nearly two centuries ago:

> [W]here the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner.

Capen, 12 Pick. at 494.

777 ("Except where the Constitution makes express provision, the Legislature has broad powers to deal with elections").

All told, the provisions of Article 9 of the Declaration of Rights and Article 3 of the Amendments—and the laws passed consistent with them over the better part of the past 100 years—elucidate a "clear policy of facilitating voting by every eligible voter." *Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930, 934 (1983); *see Kineen*, 144 Mass. at 502-03 (striking down 30-day waiting period before new citizens could vote); Mass. Const. Art. Amend. art. 3 (as amended) (gradually broadening the franchise such that every resident citizen of Massachusetts over 18 is expressly guaranteed "a right to vote" in state elections). The VOTES Act continues that policy.

For this reason—because the VOTES Act facilitates rather than restricts—voting, it is afforded deferential review, which it clears easily. *See* Mass. Const. Pt. 2, c. 1, § 1, art. 4; *Chelsea Collaborative*, 480 Mass. at 34 ("Because the right to vote is a fundamental one . . . a statute that significantly interferes with that right is subject to strict judicial scrutiny. By contrast, statutes that do not significantly interfere with the right to vote but merely regulate and affect the exercise of that right to a lesser degree are subject to rational basis review to assure their reasonableness").

B. Petitioners' Argument of Limited Legislative Authority to Permit Mail and Early Voting Cannot Be Reconciled With the History of the Provisions on Which it Relies.

Here, Petitioners assert that Article 105—initially adopted as Article 45—warrants departure from the clear principles articulated in this Court's precedent. The crux of their argument is that the 1917-18 Convention, via Article 45, "granted the Legislature the power to provide for absentee voting" and that grant of authority (as amended by Articles 76 and 105), impliedly limits the Legislature's ability to permit voting other than on election day for all classes of voters not expressly referenced in what is now Article 105. Compl. ¶ 21. The argument fails for two reasons: first, as a matter of constitutional construction; and second, in light of state constitutional history that preceded and followed Article 45.

1. The Cannon of "*Expressio Unius*" Has Limited, if Any, Application in the Context of Plenary Legislative Authority.

This Court does not lightly imply limitations on legislative authority, particularly where the alleged limitations come not from the Massachusetts Declaration of Rights but, instead, from *grants* of power to the Legislature. *See Gillespie v. City of Northampton*, 460 Mass. 148, 152-53 (2011) (where Legislature exercises its police powers, its enactments are "presumed to be constitutional and every rational presumption in favor of the statute's validity is made"); *Liebovich v. Antonellis*, 410 Mass. 568, 576 (1991) ("A

legislative enactment carries with it a presumption of constitutionality, and the challenging party must demonstrate beyond a reasonable doubt that there are no conceivable grounds which could support its validity").

The Petitioners' core claim is that because the state Constitution recognized legislative authority to provide for absentee voting in Article 45, the Constitution impliedly denies legislative authority to permit early and mail voting for other voters. This is a classic negative implication argument—otherwise known as "*expressio unius est exclusio alterius*," or the expression of one thing is the implied exclusion of another.

Although the argument may have force in certain contexts, it has no application to construction of the Constitution's grant of authority to the General Court. For example, when this Court interprets legislation establishing an administrative agency, such legislation is interpreted to grant the agency only those powers enumerated in the enabling act. *See, e.g., Universal Mach Co. v. Alcoholic Beverages Control Comm'n*, 301 Mass. 40, 45-46 (1938). In contrast, where Legislative power is concerned, the baseline is that the Constitution grants the Legislature "full power and authority" to enact all laws not "repugnant or contrary to this Constitution." *See* Mass. Const. Pt. II, c. 1, § 1, art. 4. So, an express grant of limited legislative authority must be read against the general backdrop of an express grant of

plenary legislative authority. *Cf. General Outdoor Advertising Co. v. Dep't of Pub. Works*, 289 Mass. 149 (1935) (instructing that constitutional amendments granting legislative authority are "to be interpreted as part of the Constitution of a state sovereign in all its prerogatives except those surrendered to the federal government under the Constitution of the United States of America").

That is why this Court has referred to the "maxim of negative implication" as a guide to statutory rather than constitutional construction. *See Halebian v. Berv*, 457 Mass. 620, 628 (2010). And, even when applied to statutory construction, this Court has instructed that the doctrine "requires great caution in its application," and must be disregarded "where its application would thwart the legislative intent." *Id.* (quoting 2A N.J. Singer & J.D. Shambie Singer, *Southerland Statutory Construction* § 47.25 (7th ed. 2007)); *see Bank of America, N.A. v. Rosa*, 466 Mass. 613, 619-20 (2013) ("The maxim is not a rule of law but an aid to interpretation, and it should not be applied where to do so would frustrate the general beneficial purposes of the legislation" or "lead to an illogical result").

Sixty-five years ago, the Supreme Court of New Jersey considered claims very similar to those asserted by Petitioners here. New Jersey's state constitution expressly permitted absentee voting by members of the military;

and its state legislature chose to extend absentee voting to civilians, which was challenged as beyond its authority. *See Gangemi v. Berry*, 25 N.J. 1 (1957). Explicitly rejecting application of "*expresio unius est exclusio alterius*" in this constitutional context, the court held that the state constitution did not "affirmatively prohibit civilian absentee voting" and declined to find any such prohibition "as a matter of negative interference." *Id.* at 12. Rather, the New Jersey court determined that, under its state constitutional structure, the "mode and manner of the exercise of the right of suffrage [was] left to the sound discretion of the Legislature," and the provision of additional absentee voting was well within that authority. *Id.* at 12-13. The same analysis follows here.[16]

[16] A similar issue is being litigated in Pennsylvania—which, like Massachusetts, recently provided for no-excuse mail voting in a broad bipartisan election reform bill. There, although the state's intermediate appellate court found that the legislature lacked the authority to authorize no-excuse mail voting, that decision was stayed by the Pennsylvania Supreme Court, which heard argument in the case in February 2022. *McLinko v. Commonwealth*, 270 A.3d 1243 (Pa. Comm. Ct. 2022), supersedeas reinstated, No. J-18A-2022 (Pa. March 1, 2022). Moreover, the *McLinko* decision rested on constitutional text concerning "offer[s] to vote" not present here; and a state supreme court decision that had interpreted that language to require in-person voting in the mid-19th Century. *See McLinko*, 270 A.3d at 1251 (citing Penn. Const. art. 7, § 1 and *Chase v. Miller*, 41 Pa. 403 (1862)). A decision in appeal to the Supreme Court of Pennsylvania is expected any day.

2. The Reference to Absentee Voting in Article 45 and Its Later Amendments Was Meant to Protect Such Voting Against Challenge, Rather Than to Limit Legislative Authority.

The roots of Article 105 lie in Article 45, which was recommended to the people by the Constitutional Convention of 1917-18. *See* Mass. Const. Art. Amendment art. 45 (adopted in 1917). A review of the history of Article 45—particularly in light of subsequent constitutional amendments—demonstrates that it in no way serves to limit legislative authority today.

i. The Constitutional Convention of 1917-18 Sought to Expand, Rather than Constrict, Democratic Participation.

The Constitutional Convention of 1917-18 is known well by this Court. In broad strokes, the amendments recommended by that Convention made Massachusetts democracy more accessible and responsive to the people — by, for example, establishing popular legislative authority through the Initiative and Referendum, and adding a formal and predictable framework to the appropriations process. Mass. Const. Art. Amend. arts. 48, 63.[17] The

[17] In language unique in the United States, the Convention also proposed, and the people ratified, a constitutional amendment permitting the Legislature to provide for *compulsory* voting. *See* Mass. Const. Art. Amend. art. 61 ("The general court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved"). In the words of Mr. Smith, of Provincetown (a principal advocate for what would become Article 61): the delegates of the Convention "do not desire nor want to leave the questions to part of the voters. They want all these questions [of ballot measures and candidates]

Convention was in the business of expanding and strengthening democracy; and not, as Petitioner's would have it, in the business of restricting the Legislature's authority to do so.

ii. The Convention Addressed Absentee Voting to Avoid the Potential Misconstruction of Legacy Constitutional Language.

Among the issues framed for the Delegates to the 1917-18 Convention was absentee voting, and particularly whether the Legislature's then-recent decision to provide for such voting could be placed on firmer constitutional footing. *See* St. 1916, c. 302. To shape the discussion, the Attorney General and Secretary of the Commonwealth authored a joint report to the Convention, explaining that certain language in the Constitution could be argued to mandate in-person voting for *certain* offices, and that the Convention should act to obviate that argument. *See* Report of the Secretary of the Commonwealth and the Attorney General Relative to the Feasibility and Desirability of Permitting Absentee Voting in the Elections of the Commonwealth, H. 1537, at 5-6 (1917) ("Report of the Secretary and AG") (included in the addendum); 2 *Bulletins for the Constitutional Convention* 1917-18 at 209-26.

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left to *all of the voters*." 3 *Debates in the 1917-1918 Constitutional Convention* 21 (1918) ("*Debates*").

Specifically, in the Commonwealth's earliest decades, state Senators and the Governor were elected by votes at town meeting—which initially took place during the traditional spring town meeting, and later evolved to special November town meetings.[18] Consequently, numerous provisions in the Commonwealth's Constitution referred to elections for those offices as "meetings," even though by 1917 such elections took place at polling places. *See* Mass. Const. Pt. 2, c. 1, § 2, art. 2, and Articles of Amendment art. 10, 15 (providing for election of state Senators); Mass. Const. Pt. 2, c. 2, § 1, art. 3, and Articles of Amendment art. 10 and 15 (proving that the "meeting for the choice of governor, lieutenant-governor, senators and representatives, shall be held on the Tuesday next after the first Monday in November"); Mass. Const. Art. Amend. art. 29 ("The general court shall have full power and authority to provide for the inhabitants of the towns of this commonwealth more than one place of public meeting within the limits of each town for the election of officers under the constitution, and to prescribe the manner of calling, holding and conducting such meetings"). According to the Secretary and the Attorney General, the term "meetings" could be used to argue that "there is an express requirement of personal

[18] *See, e.g., Hale v. Cushman*, 47 Mass. 425, 425–26 (1843).

presence in the meeting in the town or city of which the voter is an inhabitant." Report of the Secretary and AG at 7.[19]

This legacy reference to "meetings" affected only certain offices, as the Secretary and the Attorney General explained. Notably, unlike state Senators and the Governor, the Constitution provided that "[e]very member of the [H]ouse of [R]epresentatives shall be chosen by written votes." Mass. Const. Pt. II, c. 1, § 3, art. 3. Accordingly, concluded the Secretary and the Attorney General, there was no question that absentee voting for state Representatives would have been permissible without action by the Convention. Report of the Secretary and AG at 5-6. Likewise, such voting would be permitted for "officers of the federal government," as no language in the state Constitution referenced their selection at "meetings." *Id.* Still, unless the Convention acted to place absentee voting on firmer constitutional footing, a hodgepodge could result, where some absentee votes could be cast reliably for certain offices and others would be subject to post-election

[19] Likely front of mind for the Delegates was that legacy language concerning state elections and more modern election practices had caused uncertainty in the recent past. For example, in 1904, the Supreme Judicial Court held that the use of voting machines could not be reconciled with constitutional text requiring state Representatives to be elected by "written votes," *see Nichols v. Minton*, 196 Mass. 410 (1907), requiring a constitutional amendment to specifically permit the use of such machines. *See* Mass. Const. Art. Amend. art. 38.

challenge (based on the argument that they were not cast in-person at a "meeting"). *See id.* The Delegates were well aware of these issues. *E.g.*, 3 *Debates* at 12-13 (Mr. Newton, of Everett, stating "if a person was detained by his vocation away from the community, that he ought to have the right, if the Legislature saw fit to give him that right, to cast his ballot for State officers as well as for United States officers . . . .") It was the ready consensus of the Convention that action to solidify the constitutional foundation of absentee voting would be wise. L. Evans, "Massachusetts Constitutional Convention," 12 *American Poli. Sci. Review* 115, 116 (Feb. 1918) (describing "practically no opposition" within the Convention to Article 45).[20]

So, the Convention recommended the text of what would become Article 45 to the people. *See* 3 Debates at 19. And the people adopted the updated voting provisions overwhelmingly, by a vote of 231,905 to 76,709. *Id.*

[20] Mr. Evans was the technical advisor to the Convention.

iii. Subsequent Amendments Obviated the Legacy Language With Which Article 45 Was Concerned.

In the years that followed, however, the language that concerned the 1917-18 Convention—that is, the term "meeting" to describe the selection of the Governor and state Senators at certain places in the Constitution—was obviated by later amendment. First, Article 64 provided that *all* holders of state elected office (i.e., all elected members of the Executive Branch, Senators, and Representatives) would be chosen biennially, in *elections* not at meetings. Mass. Const. Art. Amend. art. 64. In more recent years, Executive Branch officials are chosen at *elections*—not meetings—quadrennially, with legislators chosen biennially. Mass. Const. Art. Amend. art. 82. Following the ratification of Article 64 (recommended to the people in 1918, just a year after Article 45 was adopted), all future constitutional references to elections are just that — references to elections, not meetings. *See* Mass. Const. Art. Amend. arts. 74, 76, 81-82, 86, 89, 91-92, 100-01, 105. The General Laws are in accord. For decades, elections have been held at polling places; and returns have been announced by clerks, following the canvass of ballots cast (rather than by select boards following the meetings of voters). G.L. c. 54, §§ 24, 64, 105.

The concern that animated the Secretary, the Attorney General, and the Delegates therefore is a relic of the past. There is no longer any argument that the constitutional text requires in-person voting, which leaves Petitioners only with an incantation of "*expressio unius est exclusio alterius*."

3. Subsequent Amendments to Article 45 Do Not Change the Analysis.

On two subsequent occasions, the Legislature proposed, and the people adopted, revisions to Article 45 to broaden its language to encompass the physically disabled (in 1944) and those with conflicts of religious observance (in 1976). *See* Mass. Const. Art. Amend. arts. 76, 105. A review of the legislative history of each amendment—albeit one on the briefing schedule afforded by this expedited appeal—sheds no light on whether the Legislature believed such amendments were necessary, or whether they were viewed as merely prudent to forestall any challenges or questions.[21]

[21] There are numerous examples of constitutional amendments that underscore previously-existing legislative authority in particular areas. For example, Article 60 expressly recognizes the Legislature's "power to limit buildings according to their use or construction to specified districts of cities and towns." Mass. Const. Art. Amend. art. 60. But that authority was already well within the Legislature's power. *See Opinion of the Justices*, 234 Mass. 597, 601, 607–11 (1920); Martin R. Healy, *Historical Development of Massachusetts Zoning Law* § 1.3.1 (6th ed. 2017) ("Amendment Article 60 was a call for action by the legislature on the issue of zoning controls, not a prerequisite to such action").

Regardless, this Court's presumption that the Legislature is "aware of constitutional requirements," applies just as forcefully to this session of the General Court as those that convened in the lead up to Articles 76 and 105. *See, e.g., Verrochi v. Commonwealth*, 394 Mass. 633, 638 (1985); *School Committee of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 80 (1982) (collecting cases). Accordingly, this Court's interpretation of the VOTES Act must begin from a "presumed legislative intent to meet [any] applicable constitutional requirement[s]." *Verrochi*, 394 Mass. at 638. Where the Legislature acts to facilitate participation by qualified voters—and thus in furtherance of the express constitutional guarantees of the franchise and free and fair elections, *see* Mass. Const. Pt. I, art 9, and the Articles of Amendment, *see* Mass. Const. Art. Amend. art. 3 (as amended)—that presumption is controlling, absent contrary constitutional mandates which the Petitioners cannot identify.

III. PETITIONERS' REQUESTED RELIEF WOULD PLACE THIS COURT IN THE POSITION OF REWRITING STATE ELECTION LAW IN THE MONTHS BEFORE A BIENNIAL STATE ELECTION, CREATING CONFUSION AND A "SWISS CHEESE" MAIL BALLOT.

Even were Petitioners correct that Article 105 restricts legislative authority (which it decidedly does not), the practical consequence of Petitioner's argument would be a "Swiss cheese" general election mail ballot and overwhelming public confusion. Recognizing the importance of public understanding of the manner of voting in the lead up to the election, the federal courts have developed a prudential rule intended to avoid such confusion where possible. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (recognizing the risk that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," and strictly limiting such orders near in time to elections); *see also Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S.Ct. 28 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle"). Though the

Purcell principle has significant inherent limitations,[22] it has virtue here, where Petitioners raise only a generalized speculation that failure to enjoin the legislation would somehow increase fraudulent voting.

Otherwise, even if Petitioners' claims were true, the following would result. Even in 1917, the Secretary, Attorney General and the Convention recognized that there were no constitutional limitations on absentee voting for many offices, expressly including state Representative and federal office. *See* Report of the Secretary and AG at 5-8. And voting on initiatives and referenda did not yet exist, such that the anachronistic reference to "meetings" in the constitutional text could not have affected voting on those matters. So, even if the Petitioners are correct (which they are not), requirements of in-person election day voting would apply, if at all, only to elections for Governor and state Senator and not to elections for federal office, state Representative, and ballot initiatives. Moreover, under this Court's precedent, any in-person requirements would not apply to primaries *at all See Opinion of the Justices,* 359 Mass. 775, 776-77 (1971) (absentee voting in primaries is not of constitutional concern because "[t]he Massachusetts Constitution does not refer to primaries and nominations as

[22] For example, applying the principle to stay a judicial decision that would allow a qualified voter to participate in a statewide election may not be consistent with the expressly guaranteed right to vote in Article 3.

such, but concerns itself only with [state] elections"); *see also id.* at 776 (noting that the debates "during the Constitutional Convention of 1917-18 indicated that no constitutional question was involved with reference to the power of the General Court to make any provision for nominations and primaries").

As a result, under the law as Petitioners would have it, Massachusetts voters would be able to cast a mail ballot for the September primary; and then again for the November general election, except that ballot would not contain lines for Governor or state Senator. Such a mess should not—and must not—be foisted on this Court by Petitioner's effort to add an in-person voting requirement to the Massachusetts Constitution.

CONCLUSION

The laudable work of the Legislature and Governor Baker to make the franchise more accessible to the Commonwealth's qualified voters, who are guaranteed the right to vote and free and fair elections by the state Constitution, was well within the scope of Legislative authority. For the reasons set forth in this brief and those stated by the Secretary, Petitioners' claim for emergency relief should be denied, and their action should be dismissed with prejudice.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

I, M. Patrick Moore, Jr., hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 17 (amicus curiae briefs); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the proportional font Georgia at size 14 point, and contains 7,493 total non-excluded words as counted using the word count feature of Microsoft Word.

/s/ *M. Patrick Moore Jr.*
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CERTIFICATE OF SERVICE

I, M. Patrick Moore, Jr., counsel for Common Cause Massachusetts and the League of Women Voters Massachusetts, hereby certify that I have served a copy of this Brief by causing it to be delivered to all parties through the E-File system.

/s/ M. Patrick Moore Jr.
M. Patrick Moore, Jr.

DATED: July 5, 2022

Addendum

HOUSE . . . . No. 1537

Ordered printed as a 1917 House document, on motion of Mr. Knox of Somerville.

The Commonwealth of Massachusetts.

REPORT OF THE SECRETARY OF THE COMMONWEALTH AND THE ATTORNEY-GENERAL RELATIVE TO THE FEASIBILITY AND DESIRABILITY OF PERMITTING ABSENTEE VOTING IN THE ELECTIONS OF THE COMMONWEALTH.

To the Honorable Senate and the House of Representatives.

By the provisions of chapter 29 of the Resolves of 1915 the Secretary of the Commonwealth and the Attorney-General were directed to consider the feasibility and desirability of legislation to permit, under suitable safeguards and restrictions, absentee voting in the elections of the Commonwealth. They were also directed to submit to the General Court, not later than the second Wednesday in January, 1916, the draft of a proposed bill, or, if they deemed it necessary, of a constitutional amendment, permitting such absentee voting. In compliance with the provisions of said resolve the following report is respectfully submitted, together with a draft of an amendment to the Constitution (Appendix A) permitting legislation to provide for absentee voting.

Doubtless, thousands of qualified voters are deprived of the right to vote by reason of the exigencies of their vocations, and many others, at a very considerable sacrifice of time and money, go from whatever place they find themselves to the place of their legal residence for the sole purpose

of casting their votes on election day. We believe that this manifest injustice should be remedied so far as practical, so that voters absent from the city or town of their residence, but not outside the jurisdiction of the United States, should be permitted to vote, especial regard being given, however, to the prevention and detection of fraud as well as to the preservation of the purity of the ballot.

Absentee voting, or voting by proxy, as it was called in colonial days, is not an untried experiment in this Commonwealth.[1]

It is to be recalled that in the early history of the Massachusetts Bay Colony elections were conducted at a meeting of the Great and General Court, held generally in Boston, at which every freeman was entitled to cast his vote.

As early as 1635 it was ordered: —

> That the General Court, to be holden in May nexte, for election of magistrates, &c., shalbe holden att Boston, & that the townes of Ipswch, Newberry, Salem, Saugus, Waymothe, & Hingham shall have libertie to stay soe many of their ffreemen att home, for the safety of their towne, as they iudge needefull, & that the saide ffreemen that are appoyncted by the towne to stay att home shall have liberty for this Court to send their voices by proxie.[2]

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

> This Courte, takeing into serious consideration the greate danger & damage that may accrue to the state by all the freemens leaveing their plantations to come to the place of elections, have therefore ordered i , that it shalbee free & lawfull for all freemen to send their votes for elections by proxie the next Generall Courte in May, & so for hereafter, wch shalbee done in this manner: The deputies wch shalbee chosen shall cause the freemen of their townes to bee assembled, & then to take such freemens votes as please to send by proxie for every magistrate, & seale them vp, severally subscribing the magistrates name on the backside, & soe to bring them to the Courte sealed, wth an open roule of the names of the freemen that so send by proxie.[3]

[1] In these acts and the statements herein concerning them "proxy" is used in a slightly different sense from that generally understood to-day. It implied merely the transmission by another of the voter's ballot to the place of voting — not any delegation of the right to determine for what person the vote should be cast, such as is usually granted by corporate proxies at the present time.

[2] Records of Mass., Vol. I., p 166.

[3] Records of Mass., Vol. I., p. 188.

In 1647 voting in this manner was made compulsory in most cases.[1] Laws prescribing in greater detail the manner of collecting and transmitting the proxies, both in the case of direct nominations and of election of officers, were passed in 1649,[2] 1663,[3] 1679[4] and 1680.[5]

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

> The constable of each toune shall, some convenjent tjme before the day of election, giue due notice to all the freemen of that toune to meete together to giue their votes for elections, and that none shall be admitted to giue votes for any other, *vnlesse the person voteing be also present, or send his vote, sealed vp, in a note directed to the deputy or tounesmen mett together for that worke.*[6]

The following year, however, this law was repealed.[7]

The Province Charter, granted by William and Mary in 1691, required as to some elections personal presence on the part of the voter, and from that time the provisions for voting by proxy disappeared.

The subject of absentee voting was before the National House of Representatives at its last session, and the following is quoted from the remarks of Hon. John Jacob Rogers, Congressman from Massachusetts: —

> I think the question of absentee voting is a question in which every member of this House must be greatly interested, not only because it concerns very directly his own convenience and comfort, but also because of the tremendous importance that the thousands of uncast votes have or may have on the result of every election in each State of the Union.
>
> As some members of this House know, certain progressive States have already adopted legislation permitting voting by mail when any voter is necessarily away from his usual voting place on election day. I do not know just how many States in the Union there are that have such laws, but some of the members of the House may be able to extend my list of such States. Such testimony as there is upon the matter points definitely to the conviction that such a law is working well and is likely to work well wherever it has been or is being tried. There are

[1] Records of Mass., Vol. II., p. 220.
[2] Records of Mass., Vol. III., p. 177.
[3] Records of Mass., Vol. IV., pt. 2, p. 86.
[4] Records of Mass., Vol. V., p. 261.
[5] Records of Mass., Vol. V., p. 391.
[6] Records of Mass., Vol. IV., pt. 2, p. 86.
[7] Records of Mass., Vol. IV., pt. 2, p. 134.

only four States that I actually know of where this legislation is now on the statute books. These are Kansas, Nebraska, Missouri and North Dakota.

I took occasion within a few weeks to write to the Secretary of State of each of these States to get his opinion upon the working of the law in his State. Secretary of State Roach of Missouri wrote me that he believed that the central thought in the Missouri law was meritorious, although there was a distinct weakness in the details of the bill, which would undoubtedly have to be corrected at an early session of the Legislature.

What is this absentee voting and precisely what does it seek to accomplish?

The opinion is rapidly growing in the United States that there is neither justice nor excuse for the present virtual disfranchisement of hundreds of thousands of voters because their occupations oblige them to be absent from their legal residence on election day. To remedy this situation, a number of progressive States have already enacted what is known as an absentee voting law — that is, a law which permits under suitable safeguards to prevent fraud, error or delay, a voter who, for business reasons, is unable to cast his vote in the usual way to be duly and legally recorded.

Perhaps enough has already been said to indicate that such a measure is by no means a theoretical one, but that it is in use in several States to-day and is meeting the undoubted approval of those familiar with it.

It cannot be asserted that the evil sought to be remedied is a slight or a fanciful one. Hundreds of thousands of qualified citizens of the United States who desire to vote are annually unable so to do, because of their necessary absence from their homes on election day. Take the State of Massachusetts alone — probably twenty or thirty thousand qualified voters are thus virtually disfranchised at every State-wide election. I have assembled, mainly from the 1910 census of the United States, a list of occupations engaged in by Massachusetts men and likely to entail their absence from home on a given date.

This list follows: —

Fishermen and oystermen,	5,946
Lumbermen and raftsmen,	949
Locomotive engineers,	2,082
Locomotive firemen,	1,552
Conductors (steam railroad),	1,887
Convassers,	537
Brakemen,	2,944
Commercial brokers and commission men,	927
Commercial travelers,	9,474
Soldiers, sailors and marines,	2,519
Showmen,	677

Actors,	673
Sailors and deck hands,	1,707
Captains, mates, masters and pilots,	1,181
Civil service employees in District of Columbia alone,	852
Total,	33,907

There are, of course, many other occupations which may well entail absence from home on election day, some of which are —

Cranberry bog pickers,	1,129
Farm laborers (working out),	21,976
Quarry operatives,	2,192
Building contractors,	8,778
Structural ironworkers,	585
Chauffeurs,	4,428
Students (registered in higher institutions of learning all over the United States),	8,249
Total,	47,337

In addition to those enumerated in the foregoing tables there are many in other occupations whose duty or pleasure may result in absence from home on election day — Senators and members of Congress, noncivil-service government employees, travelers for pleasure, and so on.

As previously stated, I do not contend that all the upward of 80,000 above specifically enumerated are deprived by the present system of voting of their right to cast the ballot; many of them undoubtedly find themselves able to vote in the ordinary way, others are not registered voters at all, and still others are under 21 years of age. Nevertheless, it would seem that 25 per cent, or about 20,000, was a very conservative estimate of those excluded from the privilege of voting. In all probability the number would far exceed this suggested minimum.

I think I need not further emphasize the inherent right and importance that these thousands of citizens should be given the privilege of the ballot. The remedy proposed is simple, inexpensive, practical and just. It seems to me clear that it should be adopted.

The feasibility of legislation to permit absentee voting in the election of State officers is dependent in the first instance upon whether or not such legislation would be constitutional.

So far as the election of officers of the Federal government is concerned there seems to be no provision in the United States Constitution preventing it, and the courts of several

States have so decided. (Opinion of the Justices, 45 N. H. 595, 596; Opinion of the Justices, 37 Vt. 665.)

During the Civil War, legislation to attain this result was enacted in many of the States. As to local officers, in each case the question involved the interpretation of the Constitution of the particular State where enacted. Such laws were held to be constitutional in Bourland *v.* Hildreth, 26 Cal. 161, and Lehman *v.* McBride, 15 Ohio St. 573.

The following courts held the acts to be unconstitutional: Opinion of the Judges, 30 Conn. 591; Opinion of the Justices, 37 Vt. 665; Opinion of the Justices, 44 N. H. 633; Morrison *v.* Springer, 15 Iowa, 304; Twichell *v.* Blodgett, 14 Mich. 127; Chase *v.* Miller, 41 Pa. St. 403; State, *ex rel.* Chandler *v.* Main, 16 Wis. 398.

The Constitutions of the three New England States mentioned more nearly resemble our own, and the decisions in those States, cited above, dwelt largely upon the fact that voting is to take place in the "freemen's meetings" or "electors' meetings" in the several towns, which meetings correspond in most respects to our own town meeting.

In the Connecticut decision it is said: —

> The convention found the "freemen's meeting" a distinct and peculiar feature in the political system of the State, as old as its history. It originated in 1639, in the compact or Constitution formed by the towns of Hartford, Windsor and Wethersfield, in a provision for the warning of a "freemen's meeting" to elect deputies (representatives) from each town to the General Court (Assembly). From that year, and after the merger of the New Haven colony under the charter of Charles, there has never been an election, by the people, of representatives or state officers, in any other manner or place. The convention adopted this feature, as they did in the main the other institutions of the state, changing its name to "electors' meeting." And then, in pursuance of one of their leading purposes, they directed, in as clear and explicit language as they could command, and specifically, and with repetition as to each of the officers, that they should be successively voted for and chosen "at," or "in," that electors' meeting. *There* the Constitution directs that the votes of the electors shall be offered and received; that is the only place contemplated or in any way alluded to in that instrument where they may be offered and received; and there only, we are satisfied, they must be offered and received, or they can have no constitutional operation in the election for which they are cast.

Looking at our own Constitution it provides as to senators: —

The senate shall be the first branch of the legislature; and the senators shall be chosen in the following manner, viz.: there shall be a meeting on the (first Monday in April,) annually, forever, of the inhabitants of each town in the several counties of this commonwealth; to be called by the selectmen, and warned in due course of law, at least seven days before the (first Monday in April,) for the purpose of electing persons to be senators and councillors; (and at such meetings every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the senators for the district of which he is an inhabitant.) And to remove all doubts concerning the meaning of the word "inhabitant" in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this state, in that town, district, or plantation where he dwelleth, or hath his home.

The selectmen of the several towns shall preside at such meetings impartially; and shall receive the votes of all the inhabitants of such towns *present* and qualified to vote for senators, . . .

As to representatives the only requirement is that they "shall be chosen by written votes."

As to Governor, the language is: —

Those persons who shall be qualified to vote for senators and representatives within the several towns of this commonwealth shall, at a meeting to be called for that purpose, on the (first Monday of April) annually, give in their votes for a governor, to the selectmen, who shall preside at such meetings; . . .

The election of the other State officers under the Constitution and its amendments now in force must be in the same manner as required in the election of governor.

It thus appears that as to senators, at least, there is an express requirement of personal presence in the meeting in the town or city of which the voter is an inhabitant, and it seems reasonably clear that the "meeting" at which the votes for governor are to be given in is the same meeting as that prescribed for the election of senators.

While, as stated above, voting by proxy was not unknown in this Commonwealth at the time of the adoption of the

Constitution, and the statement in the Connecticut opinion, quoted above, that votes had never been cast in any other manner or place, is not absolutely accurate, it is true that for nearly one hundred years prior to the adoption of the Constitution, or, rather, since the charter of William and Mary, town meetings and State elections had been conducted under the requirement of personal attendance.

The Province Charter provides for a General Court composed of Governor and Council and of such representatives "as shall be from time to time elected or deputed by the major part of the freeholders and other inhabitants of the respective towns or places, *who shall be present at such elections*." [1]

The first legislation enacted after this charter went into effect provided for a town meeting which should "by the major vote of such assembly then and there" choose the local town officers. [2]

It would seem, accordingly, that the reasoning of the opinions in the cases cited which held such laws unconstitutional would be followed in this State in most cases, although, as said by the court in Capen *v.* Foster, 12 Pick. 485, 488, 489, as to some officers in this State, notably representatives, absentee voting would be permissible.

It hardly seems advisable to have elections to Federal or State offices conducted on one basis as to some, and a different basis as to others, because of the confusion likely to result therefrom, and accordingly we have, in compliance with the said resolve, drafted a constitutional amendment, which is hereto annexed.

Regardless of one's views as to the advisability of such legislation at the present time or under ordinary conditions, it would be of great advantage to have such an amendment to the Constitution so that in case of such an emergency as confronted the voters at the time of the Civil War, and as has been met at the present time in the Dominion of Canada by legislation of this sort, the Legislature would be in position to enact fitting laws to provide for the emergency. The same equity which led our forefathers, in 1635, to permit

[1] Acts and Resolves, 1692–1714, p. 11.

[2] Province Laws, 1692, c. 28, § 4.

those voters who were required to stay in their home towns to protect themselves and the Commonwealth from hostile acts of the Indians, to send their votes by proxy, would require similar legislation to permit those who may be absent from their homes for the purpose of protecting the Commonwealth or their country to do likewise.

ALBERT P. LANGTRY,
Secretary of the Commonwealth.

HENRY C. ATTWILL,
Attorney-General.

Appendix A.

Proposed Amendment to the Constitution empowering the General Court to provide by Law for Absent Voting.

Article of Amendment.

The General Court shall have power to provide by law for voting by qualified voters of the Commonwealth who are absent from the city or town of which they are inhabitants at the time of an election, in the choice of any officer to be elected or upon any question to be voted on at that election.