COMMONWEALTH OF MASSACHUSETTS
THE SUPREME JUDICIAL COURT

SUFFOLK, ss. **Docket No. SJC-13307**

JAMES LYONS, et. al.
Petitioner-Appellant
v.
WILLIAM GALVIN, as Secretary of the Commonwealth
Respondent-Appellee

Jewish Alliance for Law and Social Action's (JALSA) Amicus Curiae Memorandum Supporting the Secretary of the Commonwealth and Upholding the Constitutionality of the VOTES ACT

Pursuant to Mass. R.A.P. 17, the amicus curiae, **Jewish Alliance for Law and Social Action's (JALSA),** hereby files the following memorandum of law in support of upholding the constitutionality of the VOTES Act (St. 2022, c.92).

JALSA emphasizes two key points: (1) There is a proud and extensive history of expanding and protecting a broad availability of the fundamental right to vote in Massachusetts and (2) The exercise of that right was not ideally equitable as possible and has come under grave attack recently on a national level and the Massachusetts Legislature has acted to safeguard that right here in the Commonwealth. With these two key points in mind, the petitioner's challenges to the VOTES Act should fail, regardless of whether rational basis review or strict judicial scrutiny applies.

1. Statement of Interest of Amicus Curiae and Declaration Pursuant to Mass. R.A.P. 17(c)(5)

JALSA is a membership based non-profit organization in Boston. JALSA is devoted to engaging the community in promoting civil rights, civil liberties, and achieving and attaining social, economic, environmental justice.

JALSA has advanced these ends through litigation, including by appearing in this Court as amicus curiae. See e.g. Deweese-Boyd v. Gordon College, 487 Mass. 31 (2021); Chelsea Collaborative v. Secretary of the Commonwealth, 480 Mass. 27 (2018) (With Common Cause and others.)

Safeguarding the fundamental right to vote under the Massachusetts Constitution and the Massachusetts Declaration of Rights is an issue of paramount importance and concern to JALSA and its mission to ensure to that all have the equitable ability to participate in American democracy. Accordingly, JALSA urges that this Court affirm that the VOTES Act is constitutional.

Pursuant to Mass. R.A.P. 17(c)(5), JALSA hereby affirms, declares and certifies that no party or party's counsel authored this brief in whole or in part or contributed money towards submitting the brief. JALSA further declares and certifies that no person or entity, other than the amicus, their members, or counsel, contributed money to fund preparing this brief. JALSA also declares and certifies that no individual preparing or submitting this brief has represented any party in similar proceedings.

2. Since colonial times, the law of Massachusetts has safeguarded the right to vote, has broadly functioned to expand the franchise to all citizens in the Commonwealth, and this Court has recognized the primacy of the Legislature to implement that right.

The petitioners have offered a selective and incomplete interpretation of the history of the fundamental constitutional right to vote in the Commonwealth. More to the point, the history and tradition of voting rights has always been to expand and foster inclusion of every citizen eligible to vote in the Commonwealth.

The COVID-19 pandemic revealed that the Legislature's mechanisms to implement that fundamental right were, at best, not accomplishing their purpose, or worse, creaking and failing under the strain of a tandem crisis of the pandemic and democratic dilution.

This backdrop of an evolving inclusive right in turn should inform whatever standard of review this Court applies, whether its rational basis or strict scrutiny to the VOTES Act. Against this historical and societal backdrop, this Court should affirm that the VOTES Act is constitutional.

Since colonial times, the law of Massachusetts has guaranteed a right to vote. Article 67 of the 1641 Body of Liberties provided:

"It is the constant libertie of the free men of this plantation to choose yearly at the Court of Election out of the freemen all the General officers of this Jurisdiction. If they please to dischardge them at the day of Election by way of vote. They may do it without shewing cause. But if at any other generall Court, we

hould it due justice, that the reasons thereof be alleadged and proved. By Generall officers we meane, our Governor, Deputy Governor, Assistants, Treasurer, Generall of our warres. And our Admirall at Sea, and such as are or hereafter may be of the like generall nature."

Article 70 of the Body of Liberties likewise provided: "All Freemen called to give any advise, vote, verdict, or sentence in any Court, Counsell, or Civill Assembly, shall have full freedome to doe it according to their true Judgements and Consciences, So it be done orderly and inofensively for the manner." See also Commonwealth v. Anthes, 5 Gray (71 Mass.) 185, 276 (1855) (describing this provision qua jury trials.)

Put less anachronistically, Articles 67 and 70 of the Body of Liberties permitted the male church members of Massachusetts who were at least 21 years of age (i.e., the Freemen) to vote, including in accordance with their conscience and run for office. John Witte, Jr. A New Magna Carta for the Early Common Law: An 800th Anniversary Essay, 30 J. L. & Religion 428, 440 (2015).

The Province Charter of 1691 likewise provided for a right to vote. But, unlike the Body of Liberties, the Charter "opened the franchise to anyone who owned a qualifying amount of property, rather than restricting the vote to members of the Congregational church." L. Friedman and L. Thody, The History of the Massachusetts Constitution, (Oxford Press 2011), at 7.

The Massachusetts Constitution of 1780 likewise expressly guaranteed the right to vote. Taking inspiration from sister states, John Adams authored Article 9 of the Declaration of Rights, which guarantees: "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." See also Opinion of the Justices, 413 Mass. 1201, 1211-1213 (1992) (detailing this history and how the guarantee rejected Adams' use of the phrases "male inhabitants" and "sufficient qualifications.")

More recently, this Court recognized that although Article 9 provides explicit protection of the right to vote, other provisions of the Declaration of Rights provide further implicit protection for the fundamental right to vote. See Chelsea Collaborative v. Secretary of the Commonwealth, 480 Mass. 27, 32-33 (2018).

In 1821, forty years after the ratification of Article 9, a constitutional convention ratified Article 3 of the Amendments, establishing that every male citizen in the Commonwealth who was: (1) aged 21 or older; (2) not a pauper; (3) paid the requisite tax, and (4) resided in the Commonwealth for at least one year had a right to vote. See Boyd v. Board of Registrars of Voters of Belchertown, 368 Mass. 631, 634 (1975) (Discussing these original qualifications on the right to vote); Opinion of the Justices, 28 Mass. (11 Pick.) 538, 539 (1832) (Similar, discussing the language of Article 3 as it was ratified in 1821.)

Since 1821, Article 3 has gone through a battery of amendments that mark "the history of the extension of suffrage in the Commonwealth." Friedman and Brody, at 161. The following table (cf. Friedman and Brody, 161, unless otherwise noted) in turn provides a useful illustration of how the right to vote in Massachusetts has expanded.

Constitutional Amendment	**Ratification Date**	**Who Received The Right To Vote/What Barrier to Voting Disappeared?**
Art. 28	1881	Veterans could vote if not a pauper, and if a pauper, would not have to pay a poll tax.
Art. 32	1891	Taxpaying requirement stricken.
Art. 39	1911	Permitting the use of voting machines and expressly providing for a secret ballot. Friedman and Brody, at 177.
Art. 45	1918	Providing absentee voting for the first time, later expanded by Art. 76 to include physical disability and Art. 105 (religious beliefs forbidding voting on a certain day) See Friedman and Brody, 180-181 (discussing this history.)
Art. 68	1924	Women could vote, the word "male" was stricken, per the ratification of the 19th Amendment of the Federal Constitution. See also Art. 69, §1 (Forbidding disqualification from public office on account of sex.); Opinion of the Justices, 240 Mass. 601 (1922).

Constitutional Amendment	Ratification Date	Who Received The Right To Vote/What Barrier to Voting Disappeared?
Art. 93	1970	One year residency requirement stricken.
Art. 94	1970	Voting age reduced from age 21 to age 19.
Art. 95	1972	"Pauper" struck from Article 3 of the Amendments.
Art. 100	1974	Consistent with the 26th Amendment of the Federal Constitution, the voting age in the Commonwealth also went down to Age 18.

Article 3 does exclude those under guardianship from voting. But this Court construed the exclusion narrowly, refusing to equate guardianships to those committed to state institutions. Boyd, 368 Mass. at 634-637.

Similarly, only two amendments to Article 3 have bucked this trend by limiting the availability of the right to vote. Article 40, adopted in 1912, disenfranchised those "temporarily or permanently disqualified by law because of corrupt practices in respect to elections."

In 2002, Article 120 disenfranchised those incarcerated in a correctional facility due to a felony conviction, derogating two contrary decisions of this Court recognizing such a right. Compare Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930, 932-938 (1983); Dane v. Board of Registrars of Voters of Concord, 374 Mass. 152, 161 (1978). See also Herbert Wilkins, The Massachusetts

Constitution: The Last Thirty Years, 44 Suffolk L. Rev. 331, 345, n.92 (2011). ("Wilkins") (Describing Article 120 as " a petty, but politically popular, tampering with the Declaration of Rights [that] was unnecessary.")

In sum, nearly four hundred years of history elucidates this principle: with only two aberrations, the fundamental right to vote and the availability of the franchise has consistently expanded to ensure as broad participation as possible in elections by the people of the Commonwealth.

Article 9 of the Declarations of Rights established an ideal to aspire to that all inhabitants would have a right to vote. Article 3 of the Amendments in turn implemented and broadened Article 9's guarantee. Eligible voters have expanded from "Freemen" (i.e., church going adult males) to all adults, regardless of their gender, (cf. G.L. c.4, §7, Clause Fifty-First, defining age 18 as the "age of majority") and makes the franchise available regardless of a (lack of) wealth, physical status, mental status. One of the exclusionary aberrations was a "petty" and "unnecessary…tampering with the Declaration of Rights." Wilkins, *supra.*

Additional amendments have facilitated the historic expansion of the right to vote. Article 39 guarantees a secret ballot and machine ballot. Article 45, as repeatedly amended, has opened up and expanded access to the absentee ballot to ensure that neither disability nor religion pose a barrier to voting.

The Legislature has broadly implemented the fundamental right to vote. See G.L. c. 50-57 (governing elections.) This Court has consistently endorsed the Legislature's broad and plenary authority in this realm-and has applied pro-democratic principles to interpret those laws.

Indeed, this Court observed long ago: "The purpose of [the] election laws is to ascertain the popular will not to thwart it. The object of election laws is to secure the rights of duly qualified voters and not to defeat them." Blackmer v. Hildreth, 188 Mass. 29, 31 (1902). See also Swift v. Registrars of Voters of Quincy, 281 Mass. 271, 277 (1932) ("Election laws are framed to afford opportunity for the orderly expression by duly qualified voters of their preferences among candidates for office, not to frustrate such expression.")

More recently, this Court reaffirmed that the Legislature may "regulate elections in order to prevent bribery, fraud, and corruption to that end that the people's right to vote may be protected…But such regulation must be narrowly drawn to meet the precise evil sought to be curbed." Commonwealth v. Lucas, 472 Mass. 387, 397 (2015) (Cleaned up.) (Involving a successful freedom of speech challenge to a statute punishing false statements about candidates done to affect their candidacy.)

But contrast Chelsea Collaborative, 480 Mass. at 33-34, and cases cited. (Noting the Legislature's broad authority in this realm and that the level of judicial

scrutiny to an election statute can vary depending on how a statute affects the right to vote and that rational basis review applies to one that "merely" regulates elections and noting "the significant role for the Legislature.")

3. By 2022, access to the ballot had become inequitable and that inequity became aggravated by the combination of the COVID-19 pandemic and a national political climate that questioned the very concept and integrity of a democratic process-and the VOTES act exists to actively, restore, foster and enhance voter equity.

Despite this history, strains to voting and equity and election access have been brimming. By 2018, there were nearly 2.5 million unenrolled voters in Massachusetts and it had become painfully clear that there were ways the Legislature could enhance to the Massachusetts ballot. Katelyn Manning, Voting Right Issues Are Not a Thing of the Past: Voter Registrations, 53 New Eng. L. Rev. 279, 290 (2021) ("Manning.").

In person registration was inaccessible at the RMV as it occurred during typical working hours. Id. Internet registration was inaccessible to the underprivileged. Id. And individuals who frequently moved, such as people of color, young people, or lower income people, often had improper registrations. Id.

The COVID-19 pandemic was another major strain. COVID-19 is a highly transmissible virus that caused a massive social upheaval, including the compelling need for physical distancing to avoid transmission. See e.g. Desrosiers v.

Governor, 486 Mass. 369, 370-375 (2020) (Detailing this upheaval and how the government of the Commonwealth responded.)

The Legislature responded by passing emergency statutes to facilitate voting despite these measures. See D.A. Randall and D.E. Franklin, Municipal Law and Practice, §38.05 (5th Ed. June 2022 Update) (citing examples.)

A deluge of (often expedited) litigation subsequently ensued in this Court surrounding the 2020 elections in the Commonwealth. See Grossman v. Secretary of the Commonwealth, 485 Mass. 541 (2020); Brady v. State Ballot Law Commission, 485 Mass. 345 (2020); Goldstein v. Secretary of the Commonwealth, 484 Mass. 516 (2020); Dennis, et. al. v. Secretary of the Commonwealth, SJC-12992 (Decided July 24, 2020); Campbell v. Secretary of the Commonwealth, SJC-12972 (Decided July 13, 2020); Christian v. Galvin, SJ-20-444 (Judgment entered June 29, 2020).

But there was a common thread from this battery of litigation. This Court worked to ensure that the right to vote was as accessible and available as possible and adhered to the principles expressed long ago. Compare Grossman (September 1 primary vote deadline had a rational basis to balance the right to vote against the orderly administration of elections) with Brady; and Goldstein (Holding that signature requirements were unconstitutional in light of the pandemic, reducing them, and holding that a candidate complied.)

Finally, there has been an insidious erosion of public confidence in the very premise of a democracy. The last President of the United States publicly but falsely suggested that "illegal voting is 'very, very common." Matthew R. Segal, Civil Rights in State Courts in the Trump Era, 12 Harv. L. & Pol'y Rev. 49, 55 (2018). Reasoning that those illegal votes diluted his election victory, the President took measures "to diminish the number of people permitted to vote", including directing the Department of Justice to support legal positions supporting voter suppression, including and especially voters of color. Id. At 55-57.

The President also publicly denied his own electoral loss in 2020 and "[incited] a riot at the [United States] Capitol in the hope of disrupting the constitutionally prescribed process for concluding the presidential election." James A. Gardner, The Illiberalization of American Election Law: A Study in Democratic Deconsolidation, 90 Fordham L. Rev. 423, 434 (2021) ("Gardner I")

The President's statements dovetail with the equally insidious and frightening tendency towards democratic backsliding, or where a faction (or "illberal" group obtains political power democratically but then seeks to remain and "[entrench] itself in power through anti-democratic means." Gardner I at 432.

Illiberalism is the antithetical contrast to liberalism , or commitments to a notion that the people of a society who can rule themselves with "fundamental political equality" under rule of law and basic rights such as freedom of speech or

others to "[effectuate]…popular self-rule." Gardner I at 436. Illiberalism also embraces "authoritarian populism", or that "true" people "lost…rightful control of the state to a corrupt minority." Gardner I at 436. Both premises also "[deny] the plurality of society's members and their interests and beliefs." Id.

See also James A. Gardner, Illiberalism and Authoritarianism in American States, 70 Am. U. L. Rev. 829, 847-849 (2021) (Contrasting liberalism and illiberalism and noting that the latter disdains the notions that citizens are equal, favors a civil society is governed by "higher laws of religious and tradition", a strong single individual leader of government, who, like the rest of government, is beyond question and works in the name of benefitting and that democracy is "unnecessary [if not] inimical to societal well-being if "it [impedes] the leader's pursuit of the good of society, properly understood.") ("Gardner II")

Worse, the questioning of the essential premise of democracy has infected voter eligibility. There have been attacks on voter eligibility that include requiring proof of citizenship, registration purges, and restricting registration drives (where minority voters are ". Gardner II, at 898-901. Similarly, efforts to suppress the vote have come to the forefront, which include identification requirements and making voting inconvenient. Id. At 901-904.

These restrictions have operated to adversely affect and dilute votes for "discrete and insular monitories." United States v. Carolene Products, 304 U.S.

144, 153, n.4 (1937). Registration purges "disproportionately stripped 'the poor, minorities, and the young'" from the voter rolls. Gardner II at 899-900. Registration drives are events where minority voters are nearly twice as likely as white voters. Id. At 900. A recent Florida law re-enfranchising convicted felons was enacted, affecting "one-third of adult Black males in the state"-only to require payment of outstanding fines, fees and restitution before actual voting. Id. At 901.

Similarly, voter suppression laws "have the most marked effects on the poor and members of racial and ethnic minority groups." Gardner II at 901. Identification requirements have passed despite a paucity of voter impersonation or fraud. Indeed, one law "retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans." Gardner II at 902, citing North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204, 215, 227 (4th Cir. 2016).

Similarly, up to 70% of Black voters voted early-only for eight states to pass laws that eliminated early voting hours. Gardner II at 902-903. Worse, during the pandemic, there was marked resistance to "expanding the availability of absentee voting"-with the Governor of Missouri all but daring voters who feared for their health to stay home. Id. at 903.

And still worse, there has been at least some judicial endorsement of democratic backsliding. Scholars have labeled U.S. Supreme Court's election law

jurisprudence as "incoherent…beyond incoherent…muddled…and a doctrinal quagmire." Gardner I at 430. Worse, the U.S. Supreme Court has adopted principles that diminish the feasibility of challenges to unfair election laws and to democratic backsliding. Gardner I at 453-460.

The aforementioned caselaw and scholarship distills to this: despite a proud expansive history of expanding voting rights, the exercise of the franchise in recent times is not only not as equitable as it should be, but is under constant attack. The COVID-19 pandemic not only brought out but potentially aggravated latent inequities and inequitable trends in elections. Worse, the very notion and premise of participating in a democracy by voting has become subject to challenge-potentially with judicial endorsement.

This Court in turn should assess the petitioners' challenge to the VOTES act in light of the very grim and troubling reality that voting access was inequitable before the COVID-19 pandemic and that nationally, the very premise of democracy is under attack with a very real and grave risk of voter suppression.

Here, the VOTES act enacts powerful remedial countermeasures to ensure equitable access to the ballot and avoid the majority of the substantial problems causing inequity at the ballot box and threatening democracy.

More to the point, the act permanently expands early voting and voting by mail and establishes a procedure to ensure that a voter actually gets their vote

counted. Compare Attorney General's Motion to Dismiss at 3-5. The VOTES act likewise reduces the registration deadline to 10 days before an election, when interest tends to peak. Compare Manning, at 290-291. Local election officials now must shoulder the burden of updating addresses-not individuals. Attorney General's Motion to Dismiss at 6. All of these things are likely to aid groups whose vote has come under attack or otherwise been diluted nationally and improve access to the ballot in the Commonwealth.

All of these provisions foster access to the ballot in tandem with the long history of expanding the right to vote and this Court's interpretive commitments to ensuring that every voter votes and every vote counts. There is no indication that these provisions also somehow otherwise derogate another fundamental right. Contrast Lucas.

All of these bases in turn represent rational ones if not compelling interests for the Legislature to follow and implement laws to protect the constitutional right to vote. Given this Court's historic commitment to interpreting the Massachusetts Constitution and Declaration of Rights more expansively than its federal counterpart, the petitioner's challenges must fail. Compare Wilkins, *supra.*

Conclusion

For all of the aforementioned reasons, the VOTES act fosters a historic commitment to vindicating a broad availability of the franchise and avoids the very

real erosion and latent threats to democracy stemming from the current political climate and from he COVID-19 pandemic. **Accordingly, This Court should affirm its constitutionality and reject the petitioners' challenges.**

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Joseph N. Schneiderman, hereby certify on July 5, 2022 I served one copy of this memorandum via E-Mail and via the E-File system on Michael Walsh, Esq. (walsh.lynnfield@gmail.com) and AAG's Adam Hornstine and Anne Sterman (Adam.Hornstine@mass.gov, Anne.sterman@mass.gov.)

_/s/Joseph N. Schneiderman, Esq.