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September 1, 2021

Steve Tougas  
78A Gilbert Street  
Quincy, MA 02169

Re: Initiative Petition No. 21-10, Initiative Petition for a Law Implementing Hand-Counted Plain-Paper Ballots

Dear Mr. Tougas:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August this year. I regret that we are unable to certify that the proposed law complies with Article 48. Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed law.

Below, we describe the proposed law and then explain why we cannot certify it due to the operation of Article 48, The Init., Pt. 2, § 2, ¶ 3, which excludes initiative petitions that are "inconsistent with ... freedom of elections." We also explain why we are unable to certify the petition because it does not "propose a law" in proper form for submission to the people, as required by Article 48, The Init., Pt. 2, § 3. Finally, although not dispositive on the question of certification, we offer some thoughts on the requirements for original signatures and voter registration certificates that might be helpful should you choose to file another petition in the future.

### Description of Petition

The petition consists of two sections providing that, "[a]ll voting in any public election in the Commonwealth shall be by hand-counted hand-cast plain-paper ballots whose election totals are publicly verifiable." In between these two sections is a Recommended Implementation section, containing suggestions for, among other things, outfitting and staffing polling places, conducting and video-broadcasting vote counting and vote tabulation, and the creation, retention, and destruction of ballots and other election-related materials. The petition also contains a



section entitled “Other Details,” which discusses how excess public funds might be redirected, how the proposed law should be harmonized with federal statutory and constitutional provisions, and how the proposed law should be enforced.

*The Proposed Law is Inconsistent with the Freedom of Elections*

This measure would require all public elections in the Commonwealth to be administered using only paper ballots that are cast and counted by hand. By necessary implication, it would prohibit the use of any ballots that are not paper, are not cast by hand, or are counted by any method other than by hand. As such, the measure would ban all voting machines and electronic voting systems, which permit the casting and counting of ballots by machine. In this regard, the measure is inconsistent with the freedom of elections and is therefore excluded from the initiative petition process. See Article 48, The Init., Pt. 2, § 2, ¶ 3.

Freedom of elections is guaranteed by Article 9 of the Massachusetts Constitution’s Declaration of Rights, which provides: “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.” In Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 248 (1946), the Court concluded that the concept of freedom of elections encompasses equality in voting: “In some States the idea of equality is expressly coupled with that of freedom. Other provisions of our own Constitution have been held to require equality in the right to vote. Moore v. Election Comm’rs of Cambridge, 309 Mass. 303, 313, 320, 321 [1941].” “[T]he primary, if not the exclusive, purpose of [art. 9] is to guarantee equality among all . . . [qualified] voters.” Opinion of the Justices, 368 Mass. 819, 821 (1975) (citing and quoting Moore).

Application of the article 9 standard requires examination of whether a law “impairs the freedom of a voter to express his choice as to men or measures.” Bowe, 320 Mass. at 249; see Opinion of the Justices, 375 Mass. 795, 810 (1978). This freedom is tempered by the Legislature’s authority “to regulate elections in order to prevent bribery, fraud and corruption to the end that the people’s right to vote may be protected.” First Nat. Bank of Boston v. Attorney General, 362 Mass. 570, 587 (1972). “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” Storer v. Brown, 415 U.S. 724, 730 (1974); Goldstein v. Sec’y of Commonwealth, 484 Mass. 516, 524 (2020) (noting that, as “with many fundamental rights, the court has sustained statutes which reasonably regulate elections and access to a place on the ballot”) (citation and internal quotation omitted). And courts have recognized that regulations to achieve the “necessary objectives” of fairness, honesty, and order will “inevitably affect[] - at least to some degree - the individual’s right to vote.” Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

To evaluate whether a law “impairs the freedom of a voter to express his choice as to men or measures,” Bowe, 320 Mass. at 249, Massachusetts courts apply a “sliding scale approach,” to “weigh the character and magnitude of the burden the State’s rule imposes on the plaintiffs’



rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." Libertarian Ass'n of Mass. v. Sec'y of the Commonwealth, 462 Mass. 538, 560 (2012) ("LAM") (quotations, citations, and alterations omitted); Chelsea Collaborative v. Sec'y of the Commonwealth, 480 Mass. 27, 35 (2018) ("In general, this 'sliding scale' analytical framework [discussed in LAM] is appropriate for cases that involve voting rights under the Massachusetts Constitution").

Courts calibrate this sliding scale by looking first to how burdensome a law is on the exercise of the right to vote. "Recognizing that [Article 9 of] the Massachusetts Declaration of Rights may be more protective of voting rights than the Federal Constitution," this Supreme Judicial Court will apply strict scrutiny to any voting requirement that "significantly interfere[s]" with the fundamental right to vote. See Goldstein, 484 Mass. at 524. At the other end of the scale, where a law does not "significantly interfere with the right to vote but merely regulate[s] and affect[s] the exercise of that right to a lesser degree," courts will examine the law under "rational basis review to assure [its] reasonableness." Chelsea Collaborative, 480 Mass. at 34. Some regulations on the right to vote, however, will fall somewhere "between these two extremes." Chelsea Collaborative, 480 Mass. at 48-49 (Gants, C.J., concurring opinion) (citing Obama for Am. v. Husted, 697 F.3d 423, 429 (6th Cir. 2012)). In these circumstances, courts apply "a more flexible standard," under which "the rigorousness of our inquiry... depends upon the extent to which a challenged regulation burdens" voters' rights. Id. (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

In analyzing an initiative petition for constitutional adequacy, the Attorney General may consider facts that would be subject to judicial notice or agency notice by the Attorney General. Yankee Atomic Elec. Co. v. Sec'y of the Commonwealth, 402 Mass. 750 (1988). Facts subject to judicial notice are those that are "indisputably true" or are "[m]atters of common knowledge or observation within the community." See id. at 759, n.7 (citations omitted). Consistent with this standard, the Attorney General may officially notice the regulations of the Secretary of the Commonwealth concerning procedures for voting by persons with disabilities, see 950 C.M.R. 51.00, and voter information on the Secretary's official public website, which states that the AutoMARK Voter Assist Terminal is available in every Massachusetts polling place and early voting location for use by individuals requiring adaptive equipment to enable them to vote independently. A video presentation linked to the site shows that the AutoMARK may be used to mark ballots through a touch screen or other interface, such as audio, foot pedal, or puff-sip mechanism. Though paper ballots are used with the AutoMARK, it cannot be said that votes recorded on such ballots are cast "by hand": votes may be cast by touchscreen, voice, foot, or mouth. Thus, the law proposed by this petition would prohibit the use of the AutoMARK or other machine with similar functionality.

Without the use of the AutoMARK or a similar machine, some voters with disabilities would no longer be able to vote independently and privately. As such, the proposed law would "impair[] the freedom of a voter [with disabilities] to express his choice as to men or measures." Bowe, 320 Mass. at 249. The equal access to voting that has been established for voters with disabilities through the widespread use of the AutoMARK machine in Massachusetts would be



withdrawn. The “character and magnitude of the [resulting] burden” on voters with disabilities would be weighty. LAM, 462 Mass. at 560. Though the measure would not change existing law allowing voters with disabilities to receive voting assistance from others, see G.L. c. 54, § 79, it would remove the independence and privacy of the voting process that voters not requiring assistance would continue to enjoy without adaptive technology. As such, the proposed law would undermine “the primary, if not the exclusive, purpose of [art. 9, which] is to guarantee equality among all . . . [qualified] voters.” Opinion of the Justices, 368 Mass. at 821 (citations omitted).

Given the severity of the burden that elimination of technology-assisted voter terminals would impose on voters with disabilities, a court would almost certainly employ strict scrutiny in evaluating the constitutional validity of the proposed law. See Goldstein, 484 Mass. at 524 (court will apply strict scrutiny to any voting requirement that “significantly interfere[s]” with the fundamental right to vote). The court would consider the governmental interests served by the imposition of the burden and the extent to which those interests necessitate the burden. See LAM, 462 Mass. at 560.

No officially noticeable facts have been brought to the attention of the Attorney General suggesting that use of the AutoMARK by voters with disabilities increases the risk of bribery, fraud, or corruption in voting or undermines the Commonwealth’s valid interest in promoting honesty, fairness, and order in the administration of its elections. See Anderson, 460 U.S. at 788; Storer, 415 U.S. at 730; Goldstein, 484 Mass. at 524; First Nat. Bank of Boston, 362 Mass. at 587. Even if officially noticeable facts demonstrated such a risk, it has not been established that methods less restrictive than wholesale elimination of adaptive voting technology could not be employed to remediate that risk. Because we cannot determine that the proposed law’s prohibition of the AutoMARK is necessitated by a compelling governmental interest, we must conclude that the petition is inconsistent with the freedom of elections.

*The Proposed Law is Not in Proper Form for Submission to the Voters*

The Attorney General’s duty of certification under Amend. Art. 48 requires her to determine whether “the measure and the title thereof are in proper form for submission to the people.” See Amend. Art. 48, The Init., Pt. II, § 3. An initiative petition that does not propose a law (or a constitutional amendment) is not in proper form for certification by the Attorney General. See Amend. Art. 48, The Init., Part II, § 1 (“An initiative petition shall set forth the full text of the . . . law . . . which is proposed by the petition.”); Paisner v. Attorney General, 390 Mass. 593, 598-599 (1983) (to be in proper form for submission to the voters, initiatives under Article 48 must propose either a constitutional amendment or a law). For purposes of Article 48, the Supreme Judicial Court has described a law “as including a measure with binding effect, or as importing ‘a general rule of conduct with appropriate means for its enforcement by some authority possessing sovereign power over the subject; it implies command and not entreaty.’” Mazzone v. Attorney General, 432 Mass. 515, 530-31 (2000) (citing Opinion of the Justices to the House of Representatives, 262 Mass. 604, 605 (1928)).



This petition sets forth a general policy statement that “[a]ll voting in any public election in the Commonwealth shall be by hand-counted hand-cast plain-paper ballots whose election totals are publicly verifiable.” While the first part of this sentence, standing alone, might be read as a prohibition on machine or electronic casting and counting of ballots that could be implemented without further legislation, the same is not true of the statement that election “totals” should be “publicly verifiable.” It is not apparent how compliance with that policy goal would be ensured. While the Recommended Implementation section offers some ideas for how such verifiability might be accomplished, it does not propose changes to existing law to implement a public verification process. As written, the measure consists of broad policy statements and suggestions for how those policies might be implemented. It does not propose “a general rule of conduct with appropriate means for its enforcement.” See Mazzone, 432 Mass. at 530. Thus, it is not in proper form for submission to the voters. This petition is simply a “nonbinding expression of opinion” and not a “law” that may be proposed via art. 48. See Paisner, 390 Mass. at 601.

*A Note About Original Signatures and Voter Registration Certificates*

In order to be filed with the Attorney General for certification, initiative petitions must be signed by “ten qualified voters of the commonwealth.” Amend. Art. 48, The Init., Pt. II, § 3. With respect to these signatures, Art. 48 goes on to specify that, “[p]rovision shall be made by law for the proper identification and certification of signatures to” initiative petitions. Amend. Art. 48, General Provisions, Pt. I. The Legislature has enacted G.L. c. 53, § 22A, which provides in pertinent part that, “[c]ertificates showing that each of the ten original signers is a registered voter at the stated address, signed by a majority of the registrars of voters, shall accompany an original initiative or referendum petition.” Even if this section does not mandate the filing of voter registration certificates (VRCs) with the Attorney General, we have historically relied on VRCs to establish compliance with Art. 48’s original signature requirement.

Submission of VRCs for the ten original signers of an initiative petition filed with the Attorney General on or before the first Wednesday in August conclusively demonstrates satisfaction of Art. 48’s initial signature requirements. See Compton v. State Ballot Law Comm’n, 311 Mass. 643, 651-652 (1942). The burden on petitioners of securing adequate VRCs and submitting them to the Attorney General is minimal: VRCs are statutorily required for filing certified petitions with the Secretary of State in September, see G.L. c. 53, § 22A, and the Attorney General returns original VRCs to petitioners to re-use for that purpose.

This petition was filed on the constitutional deadline of the first Wednesday in August with eleven signatures and with VRCs corresponding to four of those eleven signers. Documentation was submitted purporting to show that the seven other signers were registered voters in their localities, but that documentation did not meet the statutory requirement that VRCs be signed by a majority of the members of the applicable registrars of voters. See G.L. c. 53, § 22A.

Because of the other obstacles to certification discussed above, we do not reach the issue of whether the deficiency in your VRCs would preclude us from certifying that your petition met the initial signature requirements of Art. 48 when filed. Even if we determined that the

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documentation you supplied was sufficient to demonstrate compliance with the signature requirement, a reviewing court might disagree in the event the validity of your petition were to be challenged. We bring this concern to your attention in the event you file another petition in the future so that you can be sure to file adequate VRCs to establish beyond doubt that the initial signature requirements of Art. 48 have been met.

For the reasons discussed above, the Attorney General's Office is unable to certify that Petition No. 21-10 meets the constitutional requirements for certification set by Amendment Article 48.

Very truly yours,



Anne Sterman  
Deputy Chief, Government Bureau  
617-963-2524

cc: William Francis Galvin, Secretary of the Commonwealth