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September 1, 2021

Shiva Ayyadurai
69 Snake Hill Drive
Belmont, MA 02478

Re: Initiative Petition No. 21-30, Initiative Petition for a Law to Implement Election Transparency Voting in Elections

Dear Mr. Ayyadurai:

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 "contain only subjects … which are related or which are mutually dependent," as required by Article 48, The Init., Pt. 2, § 3.[1]

Description of Petition

The 41-section petition would make a variety of changes to existing laws relating to elections. Among other things, it would: (1) prohibit the use of voting machines and electronic voting systems; (2) require the use of certain inks, paper, and/or other security tools in the creation of ballots; (3) make city election days (but not town election days or statewide election

[1] The petition contains a number of drafting errors that would render implementation of post-amendment statutory sections difficult if not impossible. Some of these errors have been previously brought to your attention. In light of our other conclusions concerning this petition, detailed herein, we do not reach the question whether these errors are so significant as to render the petition not in proper form for submission to the voters. If you choose to re-file in the future, we recommend carefully reviewing the text of your petition and its proposed effect on existing law.

days) state holidays; (4) require local election workers to scan ballot images and upload them to a publicly accessible internet-based platform "in real time" and require the posting of election results on the same platform; (5) require votes to be counted at local precincts and accommodations to be made for public participation and observation of that process; (6) repeal statutory requirements for the annual examination and approval of voting equipment, including ballot boxes, by the Secretary of State; (7) repeal the statutory requirement that the Secretary of State prepare and provide ballots for election of state offices and local election officials to prepare and provide ballots for election of local offices; (8) eliminate the requirement that the State Secretary provide for use in polling places instructions to voters, copies of laws setting penalties for violating election laws, and ballot specimens; and (9) repeal statutory post-election procedures local election officials must follow in precincts that do not use voting machines or electronic voting systems (in addition to the precincts that do). We reserve for discussion below more specific description of certain parts of the petition that relate to the reasons we are unable to certify it.

The Proposed Law is Inconsistent with the Freedom of Elections

The proposed law would prohibit the use of voting machines and electronic voting systems. Because this prohibition would be inconsistent with the freedom of elections, the measure is excluded from the initiative process by operation of Art. 48. See Amend. Art. 48, The Init., Pt. II, § 2, ¶ 3 ("No proposition inconsistent with … freedom of elections" shall be the subject of an initiative petition.).

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.

A Note About Ballot Secrecy

The Massachusetts Constitution enshrines the concept of the secret ballot. See Mass. Const. Articles of Amendment, Art. XXXVIII ("Voting machines or other mechanical devices for voting may be used at all elections under such regulations as may be prescribed by law:

provided, however, that the right of secret voting shall be preserved."); Art. LXI ("The general court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved."). While these provisions have not been squarely interpreted by the Supreme Judicial Court, the Court would likely consider ballot secrecy an integral part of the "freedom of elections" guaranteed by Art. 9 of the Declaration of Rights. See McCavitt v. Registrars of Voters of Brockton, 385 Mass. 833, 849 (1982) ("[B]allot secrecy safeguards society's interest in the integrity of elections.").

The proposed law would require completed ballots to be scanned and uploaded to a publicly accessible internet platform. The Attorney General may take official notice of the existing statutory requirement that, in the event of a challenge to a voter's eligibility to vote, local election officials record the challenged voter's name on that voter's ballot. See G.L. c. 54, § 85 (local election officials must record challenged voter's name and address on the voter's ballot, along with the name of the challenger and the basis for the challenge); see also Yankee Atomic Elec. Co., 402 Mass. at 759, n.7 (governing the Attorney General's authority to notice facts in reviewing initiative petitions under Art. 48). Because the proposed law would not amend the requirement that a challenged voter's name be recorded on that voter's completed ballot, the law would require public internet posting of at least some ballots showing voters' names alongside their votes. See Initiative Petition No. 21-30, Section 25 (directing the Secretary of State to require by regulation that completed ballots be scanned and uploaded in "real-time" to a "publicly accessible server" for unrestricted viewing by the public). The Court would likely conclude that, to the extent it would vitiate ballot secrecy, the proposed law is inconsistent with the freedom of elections.

In light of our conclusion on the adaptive-technology question discussed above, we do not make a determination on whether this petition would be excluded from the initiative petition process due to its effect on ballot secrecy. Rather, we are highlighting the issue for your consideration in the event you refile your petition in the future.

The Measure Does Not Meet the Relatedness Requirement.

The proposed law does not meet the relatedness requirement of Art. 48. Under that standard, the law must contain "only subjects . . . which are related or which are mutually dependent[.]" Art. 48, Init., pt. 2, § 3. "[O]ne [must be able to] identify a common purpose to which each subject . . . can reasonably be said to be germane," and that "general subject of [the] initiative petition [must not be] so broad as to render the 'related subjects' limitation meaningless." Massachusetts Teachers Association v. Secretary of the Commonwealth, 384 Mass. 209, 219 (1981); see also Oberlies v. Attorney General, 479 Mass. 823, 831 & n.8 (2018) (petition met relatedness requirement where common purpose of all parts was to "establish and enforce nurse-to-patient ratios" in health-care facilities); Opinion of the Justices, 422 Mass. 1212, 1220-21 (1996) (while "governmental accountability" is too broad and general a subject to satisfy relatedness requirement, "legislative accountability" would satisfy requirement, if all parts of petition related to that theme.)

The Supreme Judicial Court has synthesized its formulations of the "relatedness" test into a two-part inquiry:

> First, 'do the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on 'yes' or 'no' by the voters?';
>
> Second, does the initiative petition 'express an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy'?

Dunn v. Attorney General, 474 Mass. 675, 680-681 (2016). The same year, the Court noted that the relatedness requirement cannot be met by a "conceptual or abstract bond" between the features of a petition and that "separate public policy issues" may not permissibly be joined in a single petition. See Gray v. Attorney General, 474 Mass. 638, 648-49 (2016).

This petition advocates change in at least two areas of public policy relative to elections: (a) election administration; and (b) making some (but not all) election days state holidays. The connection between those two policy goals is not clear. Even within the broad topic of election administration, the changes the proposed law would make are not interrelated and connected to a unified statement of public policy. See Dunn, 474 Mass. at 680-681. The proposed law would: (a) eliminate pre-election examination and approval of voting equipment; (b) eliminate the obligation of the Secretary of State to provide printed materials for use in polling places and to prepare and provide ballots; (c) prohibit the use of voting machines and electronic voting systems; (d) change the requirements for the creation and certification of ballots to include various anti-fraud measures; (e) change requirements for the counting and tabulation process; (f) repeal require procedures for local election officials to follow post-election, even in precincts that do not use voting machines or electronic voting systems; and (g) require ballots and election results to be publicly posted to the internet.

Though all these provisions might be said to relate broadly to the general topic of "elections," that topic is similar in scope to the abstract, high-level "common purposes" that the Court has determined to be impermissibly broad, such as "making government more accountable to the people," Opinion of the Justices, 422 Mass. 1212, 1220-21 (1996); "promoting more humane treatment of dogs," Gray v. Attorney Gen., 474 Mass. 638, 647 (2016) (citing Carney v. Attorney Gen., 447 Mass. 218, 224, 231 (2006)); "elementary and secondary education," id. at 649; and "'strengthen[ing] the Massachusetts economy and set[ting] a foundation for inclusive growth,'" Anderson v. Attorney Gen., 479 Mass. 780, 795 (2018). As the Supreme Judicial Court has explained, "[i]t is not enough that the provisions in an initiative petition all 'relate' to some same broad topic at some conceivable level of abstraction." Carney I, 447 Mass. at 230. The relationship of all parts of the proposed law to the broad topic of "elections" does not satisfy the relatedness requirement of Art. 48.

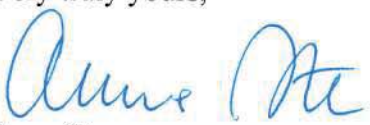
Moreover, all parts of a law proposed by initiative petition must bear a "meaningful

operational relationship" to one another so as to "permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy." Carney I, 447 Mass. at 218, 220, 231. "It is not enough that the provisions in an initiative petition all 'relate' to some same broad topic at some conceivable level of abstraction[;] [t]o clear the relatedness hurdle, the initiative petition must express an operational relatedness among its substantive parts." Id. at 230-31. The court viewed applies this requirement to bar petitions from joining "alluring" provisions to "controversial" provisions so as to confuse the average voter. Id. at 228-29.

Considering the title of the petition, it might be argued that its "common purpose" is "election transparency." Even assuming that the Court would not consider that purpose unreasonably broad – Carney I, 447 Mass. at 230 – it is not clear how the cause of improving election transparency would be furthered by requiring ballots to be printed on special banknote-level security paper with holographic images and security inks or by eliminating post-election required procedures for local election officials relative to recording the number of ballots cast and spoiled, counting ballots audibly, announcing and transmitting results, and sealing up ballots. Because the similarities of this measure's several provisions do not "dominate what each segment provides separately" to form a coherent whole for evaluation by the voters, see Dunn, 474 Mass. at 680-681, the Attorney General is unable to certify that it with the relatedness requirement of Art. 48.

For these reasons, we are unable to certify that Petition No. 21-30 meets the constitutional requirements for certification set by Amendment Article 48.

Very truly yours,



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cc: William Francis Galvin, Secretary of the Commonwealth