THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

September 6, 2023

John A. Griffin
2 Repton Place #2206
Watertown, MA 02472

Re: Initiative Petition No. 23-04, An Act To Establish a Nonpartisan Top Five Election System

Dear Mr. Griffin:

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 Article 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 Initiative, II, § 3, which requires that the Attorney General certify that each petition "is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections," and "contains only subjects . . . which are related or which are mutually dependent."

Description of Petition

This proposed law would change the method of determining the candidates that will appear on the general election ballot for certain elected offices by replacing party primaries with a "top-five preliminary." Any person could become a candidate at a top-five preliminary, even if they are not affiliated with any political party, although political parties could nominate candidates to appear as that party's endorsed candidate on the top-five preliminary ballot. Candidates could request that their affiliation with a political party, or non-affiliation with any political party, be placed after their name on the top-five preliminary ballot. The top-five preliminary ballot would include a disclaimer that a candidate's political party designation does not imply that the candidate is nominated or endorsed by that party, and that a candidate

endorsed by a political party would be identified on the ballot as that party's endorsed candidate. Any voter could vote for any candidate on the top-five preliminary ballot. The up-to-five candidates who received the greatest number of votes at the top-five preliminary would advance to the general election.

This proposed law would also change the way votes are cast and counted for general elections by implementing a system called "instant runoff using ranked-choice voting" whereby voters would have the option to rank candidates in order of preference and votes are counted in a series of rounds. In the first round, each voter's first-ranked candidate would be counted. If more than 50 percent of voters ranked one candidate first, that candidate would be elected and counting would end. If no candidate received more than 50 percent of the voters' number one ranking, the candidate who received the fewest number one rankings would be eliminated, and the remaining candidates would proceed to the next round. In the next round, for any voter who selected an eliminated candidate as their first-ranked candidate, their next-ranked candidate would be counted. These rounds would continue until only two candidates remained. The petition would create a "central tabulation facility" at which the counting for the second and all subsequent rounds of voting tabulation would occur. The proposed law would direct the Secretary to promulgate implementing regulations.

The top-five preliminary and instant runoff using ranked-choice voting would apply to the elections for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Councillor, Attorney General, Secretary of State, Treasurer and Receiver-General, Auditor, and for state legislators.

This proposed law includes a severability provision and would apply to all elections and primaries on or after August 1, 2025.

The Measure is Substantially Similar to Initiative Petition 19-10

The proposed law does not meet the requirement of Article 48 that the "measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified or submission or submitted to the people at either of the two preceding biennial state elections." Art. 48, The Initiative, II, § 3. The "instant runoff using ranked-choice voting" portion of this measure is substantially the same as a measure that was submitted to the people at the 2020 biennial state election.

Article 48 requires that the Attorney General certify that "a measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections." Art. 48, The Initiative, II, § 3. "Substantially the same" means "essentially the same" or "with little or no substantive difference." *Bogertman v. Att'y Gen.*, 474 Mass. 607, 621 (2016). The purpose of this requirement is to prevent "the constant forcing of . . . questions which have been rejected." *Id.* at 620.

In 2019, we certified Initiative Petition No. 19-10, which proposed a ranked-choice

voting system for casting and counting ballots for most state primary and general elections. This initiative petition was put to the voters in the 2020 biennial state election as Question 2, and it was defeated by 8 percentage points.[1] The instant runoff using ranked-choice voting portion of this measure overlaps nearly completely with the ranked-choice voting system rejected in 2020.

This measure has several provisions that are copied directly from Question 2. These nearly identical provisions would amend the same provisions of the General Laws and add the same new provisions to the General Laws as Question 2. *Cf. Bogertman*, 474 Mass. at 621 (proposed measure was not "substantially the same" where no "actual overlap" in provisions of General Laws two measures sought to amend).

For example:

- Both measures would amend § 2 of G.L. c. 50 to provide that the determination of the person receiving the highest number of votes for ranked-choice voting elections shall be governed by the new sections 2A and 2B added by the measure. Compare 19-10 § 2 *with* 23-04 § 3.

- Both measures would amend § 1 of G.L. c. 50 to add the same new terms applicable to ranked-choice voting: "instant runoff using ranked-choice voting" / "ranked choice voting," "active preference," "batch elimination," "concluded ballot," "continuing ballot," "continuing candidate," "highest continuing ranking," "last-place candidate," "overvote," "ranking," "round," and "skipped ranking." *Compare* 19-10 §§ 1, 3 *with* 23-04 §§ 1, 4.

- Both measures would amend G.L. c. 50 by adding the same new § 2B after § 2A that describes in detail the ranked-choice voting procedure. *Compare* 19-10 § 4 *with* 23-04 § 5.

- Both measures would amend G.L. c. 54 to insert after § 105A a new § 105B that includes the same detailed description of how the Secretary of State should establish a central tabulation facility for tabulating votes and how ballots should be delivered to the central tabulation facility. *Compare* 19-10 § 10 *with* 23-04 § 45.

Further, in 2020, Question 2 asked the voters whether they wanted to "create a system of ranked choice voting in which voters would have the option to rank candidates in order of preference and votes would be counted in rounds, eliminating candidates with the lowest votes until one candidate has received a majority."[2] Unlike in *Bogertman*, where the measures overlapped "only insofar as, at the highest level of generality, they both concern slot parlors," but were "otherwise so different in scope and subject matter," here the measure would impermissibly

---

[1] https://www.sec.state.ma.us/divisions/elections/research-and-statistics/balmresults.htm#year2020

[2] https://www.sec.state.ma.us/divisions/elections/download/information-for-voters/IFV_2020-English.pdf

force the voters to reconsider the same question—whether they want to create a system of ranked-choice voting—that they already rejected at one of the two preceding biennial state elections. *See* 474 Mass. at 620, 622.

The Measure Does Not Meet the Relatedness Requirement

The proposed law also does not meet the relatedness requirement of Article 48. Under that standard, the law must contain "only subjects . . . which are related or which are mutually dependent[.]" Art. 48, The Initiative, II, § 3. One must be able to "identify a common purpose to which each subject . . . can reasonably be said to be germane," and the "general subject of [the] initiative petition" cannot be "so broad as to render the 'related subjects' limitation meaningless." *Mass. Teachers Ass'n v. Sec'y of the Comm.*, 384 Mass. 209, 219 (1981). "[R]elatedness cannot be defined so broadly that it allows the inclusion in a single petition of two or more subjects that have only a marginal relationship to one another, which might confuse or mislead the voters, or which could place them in the untenable position of casting a single vote on two or more dissimilar subjects." *Abdow v. Att'y Gen.*, 468 Mass. 479, 499 (2014). The Supreme Judicial Court poses "two questions to be considered in addressing the related subjects requirement":

> First, [d]o the similarities of an initiative petition'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. Att'y Gen., 474 Mass. 675, 680 (2016) (internal quotation marks and citations omitted).

This proposed law is not sufficiently cohesive to be voted on "yes" or "no" by the voters. Although the two central policies proposed by the initiative would change how elections are run and, at least in some sense, give voters more "choice," each of the two polices included in the measure would provide voters with more "choice" in different and distinct ways, and for different types of elections. *See Oberlies v. Att'y Gen.*, 479 Mass. 823, 837 (2018) (measure not related where although "both elements of the proposal pertain to hospitals, even this commonality is limited [because] the financial disclosure requirement would be imposed only on State-funded hospitals, while the remainder of the initiative would apply to all facilities"). One policy restructures primary elections, such that they no longer serve as a political party's vehicle to nominate a candidate, but instead serve as a preliminary election beyond which only five candidates may proceed to the general election. The other restructures general elections to provide for ranked-choice voting among the candidates on the ballot. At a "conceptual level," these proposals may be "interconnected," but the "related subjects requirement is not satisfied by a conceptual or abstract bond." *Gray v. Att'y Gen.*, 474 Mass. 638, 648 (2016).

The Supreme Judicial Court has recognized that an initiative may propose an integrated

scheme in service of a unified statement of public policy. *E.g.*, *Colpack v. Att'y Gen.*, 489 Mass. 810, 821 (2022) (petition sufficiently related where petition presented "integrated scheme" whose provisions served common purpose of expanding number of alcohol licenses while taking steps to mitigate negative effects of the expansion); *Oberlies*, 479 Mass. at 831 (petition sufficiently related where anticipated and addressed potential consequence of other provisions); *Hensley v. Att'y Gen.*, 474 Mass. 651, 658-59 (2016) (petition sufficiently related where petition laid out integrated scheme to legalize marijuana). But here, neither of the two core policy proposals in the initiative serves to implement the other. Ranked-choice voting at the general election is not dependent upon a non-partisan, top-five preliminary election. Nor is a top-five preliminary election (in which ranked-choice voting is not used to determine the up-to-five candidates that will proceed to the general election) dependent upon ranked-choice voting in the general election. In short, the proposals in the measure "exist independently" of one another and, therefore, are insufficiently related. *See Gray*, 474 Mass. at 648.

In addition, the Supreme Judicial Court has repeatedly emphasized the framers' intent—reflected in the Debates of the 1917-18 Constitutional Convention—that the relatedness requirement serves to prevent logrolling, or the hitching of one policy idea to another, in the hope that the popularity of one may result in the enactment of the other. As noted above, ranked-choice voting was separately proposed to the people in 2020 and did not pass. This proposed law would add a non-partisan top-five preliminary, possibly popularizing the measure by adding a different policy proposal. *See Anderson v. Att'y Gen.*, 479 Mass. 780, 799 (2018) (petition subjects not related where they lacked a "common purpose . . . beyond the broadest conceptual level" and included income tax proposal that "by itself, has been the subject of five prior initiative petitions"); *Abdow*, 468 Mass. at 501 (significant to relatedness that portion of proposed law in *Carney* "was identical to an initiative petition that had been submitted to, and narrowly rejected by, the voters six years earlier"); *Carney v. Att'y Gen.*, 447 Mass. 218, 232 (2006) (petition provisions did not offer voters "meaningful choice to express a uniform public policy" particularly where voters had recently rejected one of petition's policy proposals). Article 48 does not permit such "logrolling," which is the "legislative practice of including several propositions in one measure or proposed constitutional amendment so that the legislature or voters will pass all of them, even though these propositions might not have passed if they had been submitted separately." *See Carney*, 447 Mass. at 219 n.4. Consistent with Article 48, voters should not be placed in the "untenable position" of either supporting or rejecting two different policies, one of which they declined to adopt when it was submitted to them separately within the last two biennial state elections. *See Anderson*, 479 Mass. at 799-800.

For these reasons, we are unable to certify that Petition No. 23-04 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