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Jesse Littlewood
Coalition for a Healthy Democracy
124 Washington St., Suite 101
Foxborough, MA 02035

Re: Initiative Petition No. 25-11, Initiative Petition for a Law to Implement All-Party State Primaries

Dear Mr. Littlewood:

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 this 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 Article 48 precludes certification. Specifically, Article 48, the Initiative, Part 2, Section 2 provides in pertinent part that "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition," including the freedom of elections. As explained below, the proposed laws are inconsistent with these rights because they would impinge on the freedom of elections, as construed by the Supreme Judicial Court.

Description of Petition

The proposed law would amend G.L. c. 50 to insert a new Section 2A which would dictate that in state primaries, the two persons receiving the highest number of votes for an office would be deemed nominated for election to such office – meaning that they would advance to the general election. Section 2A would also mandate that those two top finishers from the primary "shall be the only persons whose names shall be printed on the ballot for such office at the next proceeding state election." The petition makes changes to other election-related statutory sections to carry out the change from party primaries to a single all-party primary from which the

top two finishers would advance to the general election. Among other things, the petition would amend G.L. c. 50, § 1 to specify that a group could obtain "political party" status by receiving at least 3% of the vote at the last state primary, as opposed to the preceding biennial state election. It would also amend the candidate nomination process to reflect the change to the all-party primary system. Most significant for the Article 48 analysis is Section 17 of the proposed law, which would add the phrase "in a state primary" to two sentences of G.L. c. 54, §33E that refer to write-in candidates. The effect of those changes would be to preclude write-in candidacies in the general election.

The Petition is Inconsistent with the Freedom of Elections

Article 9 of the Massachusetts Constitution's Declaration of Rights provides (with emphasis added): "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 found the concept of freedom of elections to encompass 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 Commissioners 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).

The Article 9 standard applied by the Bowe court examines 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. at 810. This standard is nonetheless tempered by the Legislature's power "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).[1] This is because "as 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).

[1] Just as the article 9 right "to be elected," "is not absolute," but "is subject to legislation reasonably necessary to achieve legitimate public objectives," Opinion of the Justices, 375 Mass. at 811, so do the Legislature (and thus the people through the initiative process) retain the power to "reasonably regulate elections[.]" Opinion of the Justices, 368 Mass. at 821.

"The right to seek elected office, like the related right to vote, is a fundamental constitutional right in Massachusetts." Goldstein v. Sec'y of Commonwealth, 484 Mass. 516, 523 (2020). To assess whether a law is permissible under Article 9, a court will consider whether it "impairs the freedom of a voter to express his choice as to men or measures." Bowe, 320 Mass. at 249. In conducting this analysis, Massachusetts courts apply a "sliding scale approach," under which it will "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").

In calibrating this sliding scale, courts first look 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," the 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 spectrum on this 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)).

Here, the proposed law would limit write-in candidacies to the primary, guaranteeing that only two candidates would appear on the general election ballot. The petition therefore limits voters' choices, as well as candidates' ability to run for office, by rigidly constraining the number of candidates that can appear on the general election ballot to two.

In analyzing the instant petition – both to calibrate the sliding scale and to assess whether under the appropriate level of scrutiny the petitions are consistent with Article 9's protections – the Attorney General's Office is limited to considering "the facts implicit in the petition[s'] language, and facts susceptible to official notice," Yankee Atomic Elec. v. Secretary of the Commonwealth, 402 Mass. 750, 759 (1988). See id. at 759 n.7 (Attorney General may consider as part of Article 48 certification process: "Factual matters which are 'indisputably true' are subject to judicial notice; these include '[m]atters of common knowledge or observation within the community'" and "additional items of which an agency official may take notice due to the agency's established familiarity with and expertise regarding a particular subject area").

Here, we need not determine whether a court reviewing the constitutionality of this

proposed measure would determine that this limitation "significantly interferes" with the freedom of elections such that it would apply strict scrutiny review, requiring a compelling state interest, or whether a court would conduct a less exacting rational basis review, because on the record before us, we are unable to identify an interest in strictly limiting the number of general election candidates that would meet even rational basis review. No officially noticeable facts were provided to us supporting a conclusion that such a limitation is reasonably related to, let alone is necessary to, the Commonwealth's interest in preserving the integrity of its elections, or the ability of voters to meaningfully cast their vote for candidates of their choice. By contrast, other existing limitations on ballot access, such as signature requirements, have a demonstrated connection to the Commonwealth's interest in avoiding unfettered ballot access. See, e.g., Goldstein, 484 Mass. at 525 (describing how minimum signature requirements ensure that the ballot is not cluttered with frivolous candidacies without public support, thereby avoiding additional election administration costs, the potential for runoff elections, and voter confusion and/or disengagement).

For these reasons, we are unable to certify that Initiative Petition No. 25-11 meets the constitutional requirements for certification set by Amendment Article 48.

Very truly yours,

Anne Sterman
Chief, Government Bureau
617-963-2524

cc: William Francis Galvin, Secretary of the Commonwealth