

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

Suffolk, ss.

No. 2020-12931

ROBERT GOLDSTEIN, KEVIN O'CONNOR, MELISSA BOWER SMITH,
on behalf of themselves and others similarly situated,

PETITIONERS,

V.

WILLIAM FRANCIS GALVIN, in his Official Capacity as
Secretary of the Commonwealth of Massachusetts,

RESPONDENT.

PETITIONERS' REPLY MEMORANDUM

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Dated: April 15, 2020

Petitioners Robert Goldstein, Kevin O'Connor, and Melissa Bower Smith hereby submit this Reply Memorandum in response to the Secretary's Brief filed April 14, 2020 (the "Secretary's Brief" or "Sec'y Br. ").¹

Petitioners agree with the Secretary that "most or all in-person signature gathering is now impossible due to social distancing mandates." SPAF ¶ 38. Petitioners agree that "application of the signature requirements in the context of the current public health crisis imposes a greater than usual burden on petitioners, triggering heightened scrutiny." Sec'y Br. at 30-31. And Petitioners agree that, in the absence of timely and effective legislative action, "in these extraordinary circumstances, this Court has the power to grant equitable relief . . . to protect the constitutional rights of the Petitioners (and those similarly situated)." Id. at 32.

Petitioners part ways with the Secretary as to the nature of the relief this Court should order. This Court may not be equipped to adequately answer the "substantial question" posed by the Secretary: "what number of signatures is appropriately required under the current

¹ All capitalized terms not defined herein have the meaning assigned to them by the Petition or the Secretary's Brief.

circumstances?" Sec'y Br. at 41-42. Answering that question would require the Court to engage in policy judgments formed on the basis of necessarily incomplete knowledge about the virus's full impact, and resolve tensions between democratic participation rights and public health. Courts are not typically in the position of exercising judgment in such circumstances.

For that reason, Petitioners maintain that the simplest and fairest remedy would be to simply deem the signature collection requirement unenforceable for the duration of the COVID-19 emergency. While that solution is admittedly not tailored to the "substantial support" justification identified by the Secretary, see id. at 36-37, it avoids the serious "line-drawing and policy judgment" issues posed by the Secretary's proposal, id. at 31, and vindicates the fundamental participation rights threatened by the current law.

That said, Petitioners agree with the Secretary that, pursuant to its equity and mandamus powers, and in light of Legislative inaction, this Court "has the ability to fashion appropriate relief to address what it determines to be constitutional violations." Id. at 33. Should the Court engage in crafting the kind of relief the Secretary urges, the remedy it designs should have a tailored,

logically sound, and rational nexus with the constitutional injury in question. See Lewis v. Casey, 518 U.S. 343, 344 (1996); Perez v. Boston Hous. Auth., 379 Mass. 703, 730 (1980).

The Secretary's proposal to "tailor any proposed reduction in the number of required signatures to target those races where larger numbers of signatures would otherwise be required" and halve the required number of signatures for some offices but not others does not satisfy these criteria, for several reasons. Sec'y Br. at 43.

First, the assertion that elected offices that require 1,000 or more signatures ought to be set aside for special treatment because those offices require "larger numbers" reflects an arbitrary and subjective determination, which has no logical relationship to the COVID-19 emergency. Indeed, notwithstanding the Secretary's anecdotes of "creative" measures employed by some candidates to collect signatures by inviting many people to come into repeated contact with the same hard surfaces, see SPAF ¶¶ 38-39, it is far from clear that there is any number of signatures which candidates can safely gather in this environment while heeding public health measures.

Second, the proposal to reduce the requirements by 50% is similarly made out of whole cloth, and the Secretary

does not advance a rationale for this figure, other than citing a bill in the state Senate that has yet to receive a hearing or a vote.

If this Court were inclined to reduce the signature burden by a set amount, a better approach would be to reduce the signature collection burden imposed on candidates in a manner proportionate to the impact of the COVID-19 emergency on candidates' ability to collect signatures. Given the fact that candidates had approximately one-third the typical amount of time to gather signatures unimpeded by government shutdown measures,² the signature collection burden should be reduced by two thirds. Because the stay-at-home measures imposed by the government has impacted petition-gathering activities for all candidates, the proportional reduction should be across the board, allowing candidates for all offices to reach the ballot with one-third as many signatures as the statute today requires. This remedy is universal, simple, and bears a rational, logical

² Nomination papers became available on February 11. AF ¶ 2. The Governor banned gatherings of 25 or more people 33 days later, on March 15. AF ¶ 20. Petitioners are required to submit their nomination papers to the Secretary on June 2, which is 112 days from February 11. AF ¶ 1.

relationship to the constitutional harm precipitated by the COVID-19 emergency.

Yet even this relief may prove illusory to some candidates who, through no fault of their own, commenced their campaigns later in the election cycle, or who are particularly impacted by the virus, such as Petitioners O'Connor and Smith. To ensure that the Court's remedy actually addresses the constitutional injury at issue, the Court should also order two of the forms of relief endorsed by the Secretary: (i) "extending the deadline for district and county candidates (for whom the number of signatures required is lower than 1,000) to match the later deadline for candidates for federal office," Sec'y Br. at 40, and (ii) implementing the electronic signature collection scheme proposed by the Secretary, id. at 50-51. In conjunction with a two-thirds across-the-board reduction in the minimum signatures requirement, this package of relief would likely serve as a sufficient remedy, should the Court be disinclined to declare the statutory requirement unconstitutional in full.

Respectfully submitted,

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Dated: April 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2020, I filed with the Supreme Judicial Court and served this Reply Memorandum in Goldstein et al. v. Galvin, No. SJC 12931, by email and through the Court's electronic filing system, on the following:

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