

**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.

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**PETITIONERS' SUPPLEMENTAL MEMORANDUM**

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Counsel for Petitioners

Dated: April 14, 2020

Petitioners Robert Goldstein, Kevin O'Connor, and Melissa Bower Smith hereby submit this Supplemental Memorandum in response to the Court's April 9, 2020, Reservation and Report Order entered in the single justice session.<sup>1</sup>

**I. This Court has the Authority to Order Electronic Signature Collection**

This Court may exercise its mandamus power to order the Secretary to implement and administer an electronic signature collection scheme in order to remedy the constitutional violation alleged by the Petition.

In the Commonwealth, a "court has the right to order [a public agency] to do what it has a legal obligation to do," and "one way in which that obligation may properly be fulfilled, is a judge . . . telling a public agency precisely how it must fulfill its legal obligation." Matter of McKnight, 406 Mass. 787, 792 (1990). While "courts normally will not direct how the public official should exercise that statutory duty," where there is "only one means by which the public officials could carry out their statutory duty" within "the financial and time frame available," this Court has previously instructed public

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<sup>1</sup> All capitalized terms not defined herein have the meaning assigned to them by the Petition.

officials on what actions to take in order to comply with the law. Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 630 (1985).

The authority to direct public agents derives from the Court's mandamus power. See G. L. c. 249, § 5 ("A civil action to obtain relief formerly available by writ of mandamus may be brought" in the supreme judicial court.). Mandamus relief is appropriate to remedy "administrative inaction and is not available where action has already been taken."<sup>2</sup> Doherty v. Retirement Bd. of Medford, 425 Mass 130, 134 (1997), quoting Reading v. Attorney Gen., 362 Mass. 266, 269 (1972).

Here, the Secretary has the administrative authority and legal obligation to implement an electronic gathering scheme, but has not done so. Section 7 of Chapter 53 of the General Laws provides that "[t]he state secretary shall promulgate regulations designed to achieve and maintain accuracy, uniformity, and security from forgery and fraud in the procedures for certifying nomination papers." Citing that authority, the Secretary has promulgated

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<sup>2</sup> Petitioners invoked this Court's general equity authority in their Petition, see Pet. 10, which has been interpreted in election law cases to be coextensive with the mandamus power, see Desjourdy v. Board of Registrars of Voters of Uxbridge, 358 Mass. 664, 670 (1971) (noting that "a bill in equity may be employed" to seek adjudication over absentee ballot disputes, and that the Court retains "traditional jurisdiction in election contests by way of mandamus").

extensive regulations governing certification protocols, see 950 Code Mass. Regs. § 55, and advises local officials on compliance with the ballot access scheme. Nothing prevents the Secretary from exercising that power to permit or require collection to be conducted electronically.

In addition to being consistent with this Court's judicial authority, electronic collection conforms to the text and purpose of the statute. The statutory requirement that registered voters "sign in person," G. L. c. 53, § 7, has never been interpreted by any Massachusetts court to preclude the electronic recording or transmission of a signature, see, e.g., Capezzuto v. State Ballot Law Comm'n, 407 Mass. 949, 955 (1990) (holding that a "signer [must] actually see the applicable text" to render a valid signature, but not imposing additional requirements).

The statutory language referring to signatures made "in person" has never been interpreted to require that a signature be provided while in the presence of a candidate, campaign worker, or town official, and the Secretary and local election officials routinely accept nomination papers accompanied by signatures which have been sent through the mail.

Further, this Court has previously rejected interpretations of ballot requirements advanced by the

Secretary that are overly technical and not in keeping with the spirit of the law. See Robinson v. State Ballot Law Comm'n, 432 Mass. 145, 152 (2000) (finding that "the Secretary's position does not further the purpose of the statute," and holding that "[t]here is no public purpose served by construing this statute to prevent access to the ballot because of this type of photocopying problem").

## **II. Other States Have Swiftly Implemented Electronic Signature Collection in Response to COVID-19**

Petitioners seek a finding from this Court that the Minimum Signatures Law<sup>3</sup> imposes an unconstitutional burden, and cannot be enforced as currently codified in light of the COVID-19 emergency. As relief, Petitioners seek a determination that the signature requirements and deadline are unenforceable. Alternatively, Petitioners ask this Court to exercise its equity and mandamus powers to compel state officials to craft a reasonable solution that protects public health while easing the severe burden currently imposed on candidates seeking ballot access.

Electronic signature collection has been quickly introduced in other states as a response to the COVID-19 emergency. On April 2, 2020, Florida's Secretary of State

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<sup>3</sup> Petitioners incorporate by reference the various statutes cited by the Parties in Part I of the Parties' Statement of Agreed Facts into the definition of the Minimum Signatures Law.

issued an emergency rule changing the regulatory term "ink signature" to the phrase "image of voter's original signature that can be utilized by the Supervisor of Elections to compare and verify the signature of the voter on record." Fla. Admin. Code Ann. r. 1SER20-2 (2020). On March 19, 2020, New Jersey's Governor ordered that signatures would be collected electronically, via "an online form created by the Secretary of State." Exec. Order No. 105, Office of the Gov., N.J. (Mar. 19, 2020). And states like Arizona have long relied on fully electronic signature collection to verify the identities of signatories to nomination papers. See Ariz. Rev. Stat. §16-315(e).

Massachusetts commentators have suggested that the Secretary could engage a vendor and use a variety of off-the-shelf products to migrate to electronic collection.<sup>4</sup> To the extent the Secretary needs a reasonable amount of additional time to accomplish that task, this Court should grant an extension of the deadlines.

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<sup>4</sup> See, e.g., Fitzgibbons, Electronic signature gathering is the answer, Commonwealth Magazine (Mar. 23, 2020), <https://commonwealthmagazine.org/health/2-takes-on-how-to-protect-our-health-and-democracy/>.

Respectfully submitted,

/s/ Robert Jones

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Counsel for Petitioners

Dated: April 14, 2020

**CERTIFICATE OF SERVICE**

I, Robert Jones, a member of the Bar of this Court, hereby certify that on this day, April 14, 2020, the foregoing Petition and accompanying documents were electronically served on counsel to the Secretary of Commonwealth by emails sent to Assistant Attorney General Anne Sterman and Assistant Attorney General Elizabeth Kaplan.

/s/ Robert Jones

Robert G. Jones