Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-12979

HELEN BRADY
Petitioner/Appellant

v.

WILLIAM FRANCIS GALVIN, in his Official Capacity as Secretary of the Commonwealth of Massachusetts, the STATE BALLOT LAW COMMISSION, the MASSACHUSETTS DEMOCRATIC PARTY, and LEON ARTHUR BRATHWAITE, II
Respondents/Appellees

On Appeal From A Decision Of The State Ballot Law Commission And On Reservation And Report From The Single Justice Of The Supreme Judicial Court For Suffolk County

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APPELLANT'S BRIEF FOR HELEN BRADY

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"The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

Reynolds v. Sims, 377 U.S. 533, 555 (1964)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the State Ballot Law Commission committed an error of law when it found that the electronic signature gathering process Helen Brady used did not follow the *Goldstein* standard when voters could download and view the nomination form image, electronically apply their signature to the form by signing in a box, return the form and signature in native document format, and a PDF was printed and filed with the clerk's offices?

2. Whether the Commission committed an error of law when it found that the electronic signature gathering process did not comply with the Secretary of State's advisory when all form signatures were signed in person, in real time, and affixed to the forms filed with the clerk's offices.

3. Whether the Commission committed an error of law when it found the electronic signature gathering process invalid because it "took away" control of the voters' signature to a secure database which only used the information to prepare nomination forms?

4. Whether the Commission's decision, which found that Helen Brady's signature gathering process violated the *Goldstein* case, constitutes a violation of

the equal protection clause in the Fourteenth Amendment when the Commission knew that 39 other Democratic, Republican and Independent candidates used the exact same signature gathering process and denied Republican candidate Brady, and only Brady, access to the ballot?

5. Whether the Court should exercise its inherent powers, and modify the *Goldstein* standard, if necessary, to place Brady on the ballot when she has shown the necessary voter support and substantial measure of compliance with the *Goldstein* standard?

STATEMENT OF THE CASE

2020 is an election year in Massachusetts for certain federal and state offices. Due to the global pandemic and resulting emergency orders restricting gatherings and limiting access to public places, three candidates for federal and state elective offices challenged the statutory number of required signatures and signature gathering process to the extent the statutes required original or "wet" signatures. *Goldstein v. Secretary of the Commonwealth*, 484 Mass. 516 (2020).

Recognizing that the right to run for elective office and the related right to vote are fundamental rights under Article 9 of the Declaration of Rights, the Court agreed with the plaintiffs, held the statute unconstitutional as applied during the pandemic, and fashioned remedies to address the constitutional violations. 484 Mass. at 526-532. These remedies included reducing by 50% the number of

required signatures to be placed on the ballot, and allowing electronic, rather than in person, signature gathering. *Goldstein*, 484 Mass. at 526-532. The Court fashioned the emergency remedy to allow voters to download the image of the nomination papers and either apply an electronic signature (with a computer mouse or stylus) or print out a hard copy and apply a "wet signature" by hand. *Id.*

Helen Brady is a Republican candidate seeking access to the ballot for the 9th Congressional District. She decided to use a website designed by a small company, VenueXMedia, to gather nomination signatures electronically. Appendix at pp. 173-174 ("App., p. ___"). Brady printed the forms with the voters' electronic signatures affixed to them, each form having one signature, and submitted the forms to the cities and towns for certification. App., p. 173. The clerks and registrars certified 1066 names, more than enough for her to be placed on the ballot according to the *Goldstein* decision. App., p. 175.

Because many of the clerk's offices were not open and out of other concerns with the signature-gathering process, Brady and three other candidates filed a petition on May 5, 2020 with the Single Justice of the Supreme Judicial Court for Suffolk County seeking additional post-*Goldstein* relief. App., p. 3. That petition asked the Court to find that the candidates exhibited the necessary amount of community support to be placed on the ballot and asked the Court to exercise

continued oversight of the standards applied by the Secretary to approve the electronic signatures gathered during the nominating process. App. pp. 18-20.

Brady timely filed the 1066 certified names and nomination papers with the Secretary of State's Office on June 2, 2020. App., p. 173. On June 5, 2020, Leon Arthur Brathwaite, III, Vice Chair of the Massachusetts Democratic State Committee, filed objections to the clerk's certification of signatures with the State Ballot Law Commission ("Commission").[1] App., p. 101. Referring to the statutory signature gathering requirements in several places, the objection asked the Commission to find that the technology "did not comply with the statutory requirement that nomination papers be obtained 'in person.'" App., p. 101. The objection also challenged whether the electronic signatures were consistent with the Supreme Judicial Court's order in *Goldstein* and with the Secretary of State's subsequently issued advisory. App., p. 119. The objection also alleged that certain signatures were illegible; proper addresses had not been included; and the clerks failed to insert check marks on five of the forms, among other signature specific objections. App., p. 101.

The Commission held a hearing on June 16, 2020, heard arguments, received testimony from one witness, Brian Fitzgibbons, and received 8 exhibits.

[1] The objection was amended to reflect the objector to be Leon Arthur Brathwaite, II.

App., p. 104. On June 26, 2020, the Commission issued its decision, finding that the electronic signature gathering process did not comply with the *Goldstein* decision nor with the Secretary of State's advisory.[2] App., pp. 97-117. The Commission first found that the submitted nomination papers were not the original native image that the voters viewed their electronic signatures applied to, nor was it the native document made available for the voter to print out. App., pp. 113-115. The Commission also found that the process did not comply with the Secretary's Advisory because voters signed in a field separate from the signature line shown on the nomination form. App., pp. 115-116. The Commission found that this process did not allow the voters to place their signature on the signature line screen image "in person" and "in real time." App., p. 115. Finally, the Commission found that the ability to store the electronic signatures violates public policy, it gleaned from the *Goldstein* decision and the Secretary's advisory. App., pp. 116-117.

Brady timely filed an action in the Superior Court seeking judicial review of the decision, as well as declaratory relief under G.L. c. 231A and under 42 U.S.C. §1983. App., p. 76. Brady requested that the Single Justice consolidate that action with the pending single justice petition, and the Single Justice issued a reservation

[2] The Commission did not sustain any of the hotly-contested technical objections alleging deficiencies with particular signatures (e.g. illegible, improper address, fraud, etc.).

and report on July 2, 2020, reporting the action to the full Court for hearing. App., p. 121.

STATEMENT OF FACTS

Helen Brady is a Republican candidate for United States Congress from the 9th Congressional District. Appendix Statement of Fact, p. 173, ¶2 ("App. SF., p. ____, ¶____"). To qualify for the ballot as a candidate for Representative in Congress, the Respondent was required to submit at least 1,000 certified signatures to the Secretary of the Commonwealth by June 2, 2020. App. SF., p. 173, ¶3. The statutory number of 2,000 set forth in § 44 of chapter 53 of the General Laws was reduced pursuant to *Goldstein v. Secretary*, 484 Mass. 516 (2020).

For the task of collecting signatures for nomination papers, Brady engaged the services of Brian Fitzgibbons, owner of VenueXMedia, which employed three people, to provide a website to sign the Respondent's nomination papers. App. SF., p. 174, ¶6. Mr. Fitzgibbons, a former U.S. Marine captain who served in Iraq, had written an article that appeared in the Commonwealth magazine on March 23, 2020, describing how campaigns needed to adjust to the pandemic to allow nomination paper signatures to be gathered electronically. App. SF., p. 175, ¶1. With the help of several of his employees, Mr. Fitzgibbons had begun to create a web page for candidates to use, that allowed voters to access a site and sign their names electronically to nomination papers. App. SF., p. 175, ¶1.

While the *Goldstein* case was being decided, one of the *Goldstein* lawyers contacted Mr. Fitzgibbons and asked if he could fashion a website to achieve the results stated in his article. App. SF., p. 175, ¶2. Mr. Fitzgibbons continued to work on the application, and once the decision entered, he made some adjustments to conform to the expressed standards, in discussions with attorneys for the parties in Goldstein, and the site and process was ready for use. App. SF., p. 175, ¶2.

Brady contracted with VenueXMedia to use the website developed by the company for which the campaign paid $300. App. SF., p. 175, ¶3. The general website created was www.nominationpapers.com, and any candidate who contracted with VenueXMedia could embed the VenueX product on their own website or Mr. Fitzgibbons would create a personal page for the candidates. App. SF., p. 174, ¶7. Mr. Fitzgibbons created a page for Brady (www.nominationpapers.com/HelenBrady) whereby a voter[3] could electronically sign Brady's nomination papers using a stylus, finger or mouse. App. SF., p. 174, ¶8.

Candidates such as Brady could provide voters access to the website through a link in a number of ways, including Facebook and by sending the link by email or text. App. SF., p. 176, ¶6. When voters accessed the site, they saw both sides of

[3] The Commission recognized that not all signers of nomination papers are registered "voters." For purposes of this discussion there is no need to make a distinction, the Commission referenced all signers as "voters."

the nomination paper at the same time with the candidate's information entered in advance. App. SF., p. 176, ¶7. Once the voters accessed the website, the nomination form was downloaded onto the voter's computer to view. App. SF., p. 176, ¶7.

The nomination forms allowed voters to clearly see where their signatures would be placed on the form because the form had a green colored block located on the first signature line with the typed words "sign here." App. SF., p. 176, ¶4. When voters selected or clicked on the sign here button, the program dropped them down to a 400 by 600 pixel area blank box to sign their name. App. SF., p. 176, ¶5. The blank box was separate from the nomination form, but the nomination form remained visible to the voters while the voter signed in the box. App. SF., p. 176, ¶10. By applying their signature or making a mark inside the blank box, the voter created pixels on a screen that VenueXMedia's application turned into a PNG image for storage. App. SF., p. 176, ¶11.

Once the voter entered the required information inside the blank box and elsewhere, the voter could then click the submit button located at the bottom of the page. App. SF., p. 176, ¶12. If the voter did not enter any information or make any check mark inside the blank box, the voter could not successfully click the submit button located at the bottom of the page. App. SF., p. 177, ¶12. After the voter clicked submit, he or she could view an image of the nomination paper that he or

she signed because the voter was automatically emailed a copy of the signed nomination paper as a receipt. App. SF., p. 177, ¶13. That image would also show, immediately next to the electronic signature, the date and time it was signed, along with the street address typed into the address. App. SF., p. 177, ¶14.

When sufficient signatures were obtained electronically, Brady printed the nomination forms with the input data provided by the voters and stored in the Voters' Input Files but sorted by Town. App. SF., p. 178, ¶25. The forms submitted for certification electronically applied the saved data from the Voter's Input Files onto the nomination paper viewed by the voter at the time the nomination was made, with Brady's information already included, as at the time the nomination was submitted. App. SF., p. 178, ¶26.

Brady obtained and timely submitted 1,066 certified signatures to the Secretary of the Commonwealth. App. SF., p. 173, ¶4. All the signatures contained on the Respondent's nomination papers submitted to the Secretary were "electronic signatures" obtained using the process described below. No so-called "wet" signatures were submitted. App. SF., p. 173, ¶5.

VenueXMedia's voter input database has numerous indicia of reliability. For example, the VenueXMedia application adds a sequential document number to each nomination as it is made along with a unique Submission ID to each nomination record in the database. App. SF., p. 177, ¶17. One of the exhibits

showed Brady's Voters' Input Files sorted by sequential document number while another showed the Voters' Input Files sorted by last name and first name. App. SF., p. 178, ¶18.[4]

The Process met the letter and spirit of the *Goldstein* standard.

Mr. Fitzgibbons testified, without any contrary testimony or evidence that:

- This process allowed voters to download images of the nomination papers onto their computers. App. SF., p. 178, ¶21.
- This process allowed voters to print a hard copy of the downloaded images and return the printed forms to the candidate. App. SF, p. 178, ¶22.
- This process allowed voters to return their nomination papers in electronic form by transmitting the native document back to the campaign. App. SF., p. 178, ¶23.
- This process allowed voters, when they signed the box, to sign in real time and in person. App. SF., p. 178, ¶24.

Mr. Fitzgibbons explored the possibility of creating an alternative process so that a voter could apply a signature directly onto the nomination form line, but those processes were multi-step, and would have required back and forth emails

[4] Exhibits 7 and 7A are different sorts of the Voters' Input Files previously filed by Petitioner Brady in the Single Justice Session on May 7, 2020.

that placed a heavy burden on voters to complete the process. App. SF., p. 177, ¶15. Many candidates who used VenueXMedia's process explored using such other signature gathering methods, including Docusign. App. SF., p. 177, ¶16. However, only a third of the voters who began using other signature gathering methods completed those methods. App. SF., p. 117, ¶16. Several of the 39 candidates VenueXMedia helped initially tried other computer applications that did not work well for voters. Consequently, they came to VenueXMedia. App. SF., p. 177, ¶27.

Of the 39 other candidates who used VenueXMedia's website process, approximately 40 percent were Democratic candidates, 60 percent were Republican candidates, with a few independent candidates. (AR Vol. XV pp. 104-105).

No other challenges were made to Brady's signature gathering process. Despite hearing that dozens of other candidates used the same system, the Commission made no findings and conducted no investigation with respect to any other campaign's use of this same process. App. SF. p. 179, ¶28.

Despite the Commission's concerns over signature control, Mr. Fitzgibbons testified that no one made any edits to any of the information. App., p. 179, ¶29. No one except Mr. Fitzgibbons had access to the secure, stored information. App., p. 179, ¶29.

ARGUMENT

I. THE COURT SHOULD REVIEW THIS DECISION DE NOVO, WITHOUT AFFORDING THE DECISION ANY DEFERENCE AND VACATE THE DECISION, PROVIDING BRADY ACCESS TO THE BALLOT.

The Court should review the Commission's decision de novo, without affording its findings or legal interpretations any deference at all. There are several reasons for this conclusion.

First, courts review administrative decisions for errors of law de novo, and the Commission's decision is based on a faulty interpretation of this Court's decision in *Goldstein v. Secretary of the Commonwealth*. The Court may revise or revoke a decision of the Commission if it is in violation of constitutional provisions or based on errors of law. *Camara v. Attorney General*, 458 Mass. 756 (2011); *Duggan v. Board of Registration in Nursing*, 456 Mass. 666, 673 (2010).

Second, the decision infringes upon the fundamental constitutional rights afforded under Article 9 of the Declaration of Rights of over 1000 voters and Brady, and "courts have a continuing interest as the 'ultimate protectors of constitutional rights.'" *Lyons v. Labor Relations Comm'n*, 397 Mass. 498, 502 (1986), quoting *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 1076 n. 20, 89 L.Ed.2d 232 (1986). The Court's role in protecting the "'fundamental' and 'intertwine[d]' rights of candidates to gain access to the ballot and of voters to cast their ballots as they see fit," *Goldstein*, 484 Mass. at 524,

eliminates any deference to which a Commission decision (if it were within an area of the Commission's expertise) might otherwise be entitled. To avoid a constitutional deprivation, the Court must give an expansive reading to its *Goldstein* standard to allow the signature gathering process used to be valid. Otherwise, application of the standard, as interpreted by the Commission, violates Brady's rights protected under the Fourteenth Amendment to the United States Constitution and Article 9 of the Declaration of Rights.

Third, while cases refer to giving "due weight to the experience, technical competence, and specialized knowledge of the agency as well as to the discretionary authority conferred upon it," this situation does not call for deference where, as here, the administrative agency has no experience, technical competence and specialized knowledge in the area being adjudicated. *See, e.g., Ten Local Citizen Group v. New England Wind, LLC* 457 Mass. 222 (2010). Until the pandemic quickly forced the Court to alter the legal landscape, all signatures on nominating papers had to be original, so-called "wet" signatures. The Commission has no experience or expertise with respect to computer programming, website applications, or means and methods to gather electronic signatures. Where there is

no such skill or experience within the agency, there is no reason for judicial deference to its decision. [5]

Thus, the Commission's decision is not entitled to any deference when it interpreted this Court's decision and applied it to a unique electronic signature gathering process and technical computer lexicon. These issues are truly *sui generis*: they are not contained nor defined within the Commission's enabling legislation, nor are they found in any of the agency's regulations. The Commission did not participate in drafting this standard; it has never before applied nor interpreted this standard; the standard has not been the subject of prior regulation or review; thus, it is decidedly not within the Commission's "'experience, technical competence, and specialized knowledge.'" *Doe v. Sex Offender Registry Board*, 470 Mass. 102, 110 (2014); *Amherst-Pelham Regional School District Committee v. Department of Education*, 376 Mass. 480, 492 (1978)(agency interpretation should be given weight to construction of regulatory statute when the statute allows agency to fill in the scheme; the agency helped draft the statute; and the interpretation has been consistently applied).

[5] While deference to an administrative agency may be an extension of the deference afforded the legislative branch as a result of the separation of powers inherent in our form of Government, no such argument is available here. The requirements concerning electronic signatures that are at issue were not the result of legislative action, but rather a judicial decision.

II. THE COMMISSION'S DECISION CONTAINS ERRORS OF LAW AND IS UNCONSTITUTIONAL.

A. The Decision Misinterprets The *Goldstein* Standard and Should Be Vacated.

The process Brady used to collect nomination signatures maximized public safety while minimizing the burden on voters to support a candidate of their choice. The signature gathering method Brady used met the letter and spirit of the *Goldstein* case, and the Commission's decision should be vacated.

Brady, a Republican candidate for Congress, obtained more than 1000 certified signatures of registered voters through an electronic signature gathering process that allowed voters to access a website, and after viewing exact duplicates of the ballot nomination forms issued by the Secretary of State, inserted their names, addresses and signatures into fields inputted into a database. Voters' signatures, names, and addresses were placed onto the printed, hard copy forms filed with the local clerks' offices. Even though 39 other candidates used the exact same signature gathering process, the Commission singled out only Helen Brady as being non-compliant with the Court's instruction in *Goldstein v. Secretary of the Commonwealth*.

1. This process met the *Goldstein* standard.

The Commission did not properly apply the Court's *Goldstein* decision and invented requirements that the Court did not impose. For example, it found the

system invalid because the nomination "receipt," which allowed voters to immediately view their signature on the nomination form, was not identical to the filed forms. App., p. 164. The Commission also determined that the nomination form submitted to the clerks had to be the actual "native image" that the voter viewed "their electronically applied [] signature to" on his or her computer. App., pp. 164-165. These and the other concerns do not appear in the *Goldstein* case, and it was error to deny Brady ballot access on these bases.

The Court in *Goldstein* allowed a somewhat modest but critical exception to the in-person signature requirement: candidates could gather signatures using electronic means, based on the following generalized parameters:

> candidates seeking to be on the ballot for the September 1 primary election [are] allowed to scan and post or otherwise distribute their nomination papers online. Voters may then download the image of the nomination papers and either apply an electronic signature with a computer mouse or stylus, or print out a hard copy and sign it by hand. The signed nomination paper can then be returned to the candidate, or a person working on the candidate's behalf, either in electronic form (by transmitting the "native" electronic document or a scanned paper document) or in paper form (by hand or mail). The candidates will still have to submit the nomination papers to local election officials in hard copy paper format, but the proposed process will alleviate the need for, and the risk associated with, obtaining "wet" signatures.

484 Mass. at 531-532 (emphasis added). The Court did not allow a broader array of electronic signature gathering due to time constraints, potential logistical, legal, and "cybersecurity related concerns" and because local and state governments were already operating under severe constraints with little staffing. 484 Mass. at 531.

As identified by the concurrence, most of those concerns focused on the apparent problems associated with the local clerks' offices ability to handle electronic submissions, resulting in the requirement for hard copies being submitted to clerk's offices. 484 Mass. at 535.

The process developed by VenueXMedia and used by Brady (and 39 other candidates) met this standard. It is undisputed that each voter could access the site through a link, allowing him or her to download the nomination form image to view on their computer or device. App. SF., p. 176, ¶¶6, 7. In addition, the forms clearly showed where the voter's signature belonged, as indicated by the "SIGN HERE" button's location. App. SF., p. 176, ¶8. Voters clicked on the button, which directed them to a 400 by 600 pixel box just below the "SIGN HERE" button in which they applied their signature with a mouse, stylus or finger. App. SF., p. 176, ¶¶8, 9. Only after the voter entered his or her signature and all of the other identifying data could the voter click the submit button to have their information and signature stored in a secure database in electronic, native format – here, in the form of PNG data. App. SF., p. 176, ¶11. Alternatively, voters could elect to print and sign their names to hard copies to mail back to the campaign, although none chose to do so for the Brady campaign. App. SF., p. 178, ¶22.

The Commission first seized upon the fact that the voters received a signed nomination "receipt" showing a date and time stamp next to their signature, which

was not the form filed with the clerk's offices. This is error because neither the *Goldstein* case nor the Advisory contain any such prohibition. This merely allowed the voters to see their signatures before submission to the clerks for certification. It provides more certainty and security – not less.

The Commission next misinterpreted the terms "native" and "electronic document" as a basis to deny Brady her Article 9 rights. When voters entered their signature, name, and other information into the voter inputted database, all data was submitted and stored in its native form, until it was used to create the pdf that was printed out and given to the registrars. What *Goldstein* required was that the signed nomination paper be returned to "the candidate, *or a person working on the candidate's behalf*, … in electronic form (by transmitting the "native" electronic document)." 484 Mass. at 531. That was done. Black's Law Dictionary (11th Ed. 2019) defines the term "electronic document", as "any electronic media content, other than a computer program or system file, intended to be used in an electronic or printed form." The signatures and other data provided by the voter clearly fall within this definition, and they were provided to VenueXMedia in their native, electronic format. The *Goldstein* case does not require more.

The Commission was simply wrong in determining that the nomination papers were not printouts of the native electronic documents that were transmitted by the voter to VenueXMedia.

To the extent there is any ambiguity in the standard, the Court can and should construe the standard broadly to avoid disenfranchising voters in the 9th District and infringing upon Brady's Article 9 rights.[6] The Court had to fashion an emergency remedy to allow voters to obtain signatures in a new and unforeseen environment. In so doing, the Court devised a judicial remedy in lieu of a legislative standard for the campaigns to address legislative inaction. Nevertheless, providing this standard a broad interpretation comports with the doctrine that "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988)(Courts should construe statutes to avoid raising serious constitutional problems.)

Given the paucity of judicial definitions of these disputed terms, Mr. Fitzgibbons and Ms. Brady reasonably understood the process to be *Goldstein* compliant. App. SF., p. 178, ¶¶21-24. Moreover, this process <u>better</u> evidences voters' intent than the old way of signing a "wet" signature to a form in a ten

[6] That the standard may be subject to different interpretations is not unexpected when the Court had only nine days to consider and decide the issues, in the absence of any evidentiary hearings or expert testimony on the meaning of these terms.

second encounter at the town dump. Here, the voter has to log onto a website, type their name and address, sign in the space provided and hit submit. The five minutes or so this must take unequivocally demonstrates candidate support.

In addition, the evidence was also clear that the website developer explored alternative means to implement the electronic signature gathering process. However, other processes were multi-step processes, involving back and forth communications that placed too heavy a burden on the voters. App. SF., p. 177, ¶15. Only a third of the voters who used other methods completed the multi-step process. App. SF., p. 177, ¶16. Thus, it is clear that this process maximized safety, minimized voter burden and allowed the voter's intent to be demonstrated in a safe and effective environment.

2. The Commission erred in determining that the signature gathering process violated the Secretary's Advisory.

The Commission also erroneously determined that a "voter signing a box independent from the signature line on the image of the nomination paper is not consistent with the Secretary's Advisory." App., p. 165. To reach this conclusion, the Commission relied on the Advisory's statement that a "voter can sign by … using a computer mouse or stylus applied to the signature line of the nomination paper screen image to sign their actual signature in person and in real time…." App., p. 165. The Commission's determination that the process did not comply with the Advisory is also an error of law. Nothing in the Advisory prevented the

use of a signature box that was clearly tied to the signature line of the nomination papers.

The Advisory's intent is that the person actually apply their signature, not a computerized image of their signature (i.e. Docusign), to the form. Here, the voters clearly created their signature in real time and in person. To access the signature box, the voter clicked the "SIGN HERE" button located on the signature line of the nomination paper. App. SF., p. 176, ¶8. Each voter (unless disabled and directing someone else to do so) used a mouse, stylus or finger to create their signature. App. SF., p. 174, ¶9. The voter's intent was unquestionably to have his or her signature applied to the signature line on the nomination form. App. SF., p. 176, ¶¶4-8. A voter could not possibly have misunderstood what they were doing when they applied their signature in real time and in person to the box for placement on the signature line on the nomination paper.

When the voter subsequently hit submit, the data that constituted the voter's signature was transmitted to VenueXMedia along with all the other data that constituted the images that the voter saw on their screen. The signature was not changed in any way. App. SF., p. 179, ¶29. When the pdfs were created that constituted the voter nomination papers emailed to the campaign and subsequently submitted to the registrars, the voters' signatures were placed on the signature

lines. App. SF., p. 178, ¶¶25-26. The Commission's determination that the process violated the Advisory erred as a matter of law.

Instructively, in a recent and highly persuasive case concerning electronic signatures for ballot initiatives, *Dennis v. Galvin*, SJ-2020-278 (Apr. 29, 2020), the Secretary agreed to the entry of a Judgment that *allowed for the use of a signature box*. See Addendum. The Commission's interpretation of the Advisory must, then, be rejected as being inconsistent with the Secretary's own actions.

The Advisory and the language the Commission relied on concerning the signature line could not alter the *Goldstein* criteria concerning the collection of electronic signatures. *See, e.g., Goldberg v. Board of Health of Granby*, 444 Mass. 627, 633 (2005) (where the legislature has spoken with certainty on a topic no deference is given to an agency interpretation). Even if the Secretary had intended to alter or expand the *Goldstein* criteria rather than simply providing "clear guidance," the Secretary's Advisory would be entitled to no deference. There was no notice or comment period, and in the absence of notice-and-comment interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97, 135 S. Ct. 1199, 1204, 191 L. Ed. 2d 186 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995)); *see also Massachusetts Gen. Hosp. v. Rate Setting Comm'n*, 371 Mass. 705, 707, 359

N.E.2d 41, 44 (1977) (holding that notice and hearing are not required for a particular agency promulgation is cushioned by the consequence that it does not have the binding force attributable to regulation); *see also United States v. Mead Corp.*, 533 U.S. 218, 230, 121 S. Ct. 2164, 2173, 150 L. Ed. 2d 292 (2001) (even before *Perez* the overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication).

In addition, because the Court, not the legislature, provided specific instructions concerning the process by which signatures may be electronically collected, there is no reason to apply deference to the Secretary's interpretation. To the extent the Advisory's additional requirements are interpreted to increase the burden on the candidate or somehow required that the signature be placed on the nomination form and then stored as a pdf, it should have no effect.

The Commission also found that the process used violated the Advisory because it concluded that the voter's signature, printed name and address were "merged" onto a "totally different nomination paper by the website operator." App., p. 166. The Commission does not acknowledge that the front and back of the nomination papers were downloaded to the voter's browser and that the "SIGN HERE" button on the downloaded version was not on the actual nomination papers signature.

Finally, the Commission's statement that printing the name onto a different form was "unbeknownst" to the voter is directly contradicted by the form itself. Submission of the signed papers is exactly what the voter intended. By signing "here," the voter knew and intended that the nomination paper that had appeared on their screen would, with the voter's signature and information added, be subsequently printed and submitted to the appropriate registrar. App. SF., p. 176, ¶¶4-10.

3. The Commission's decision that the process violates public policy is also an error of law.

The Commission concludes its decision by finding that the voter's signature is the proprietary product of the individual, and that the *Goldstein* case "allowed the voter to retain control over their signature by signing a screen image on their computer" and saving the form to their computer. The Commission believed that the process Brady used ceded control over the voters' signature, which runs contrary to the "fundamental principle" in *Goldstein* and the Advisory that voter's retain control over their signature.

This part of the decision, while perhaps based on some sort of legitimate but purely hypothetical concern, cannot withstand constitutional or legal scrutiny. Neither the *Goldstein* decision nor the Advisory stated any express concern regarding a voter's "control" over their signature. Even if the Court and Advisory subjectively shared this unexpressed concern, voters and candidates had to rely on

the four corners of the *Goldstein* opinion to try to comport with its new standards to be placed on the ballot. That is all the Court should consider. Moreover, the Commission ignores that these same concerns exist when signing original "wet" signatures to nomination forms given the advanced scanning and printing capabilities now in use. Any time a voter signs a nomination form, be it electronic or in person, they are allowing others to see and potentially copy their signature and address. It does not matter whether the unlawful copy is achieved by re-printing forms using a database or old-fashioned forgery using a scanner or pen. This concern is nothing new. However, the electronic process and voter inputted database, as shown on Exhibits 7 and 7A, provide greater forgery protection because that database will always show the exact time when the signature was prepared and submitted, along with the signer's IP address. Administrative Record, Vol. XIV, Impounded. Most forgers do not keep such exact records.

In any event, electronic signatures are a superior manifestation of a voter's intent, and hypothetical scenarios cannot prevent a candidate from exercising a fundamental right. The Commission's decision makes that egregious error, and it should be vacated.

B. The Decision also violates Brady's equal protection rights.

The Commission's decision also violates the Equal Protection clause when it prohibits only Brady from access to the ballot when other candidates, including

Democrats, Independents and Republicans who used the same signature gathering system can access the ballot. This decision treats her in a discriminatory manner, and the action is irrational and arbitrary. As a result, it violates the equal protection clause. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). The Court in *Olech* allowed a complaint to proceed when accompanied by allegations that the plaintiff suffered different treatment without a rational basis when they sought to connect to a town water supply but had to supply a longer easement than other property owners. *Id.* The Court allowed the complaint to proceed based on these allegations, noting that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." 528 U.S. 562, 564, 120 S. Ct. 1073, 1074–75.

The Court's reasoning in *Olech* has been applied to sustain equal protection claims involving voter rights. *See, e.g., Wilson v. Binrberg*, 667 F.3d 591 (5th Cir. 2012)(Plaintiff stated equal protection claim when he alleged he was treated differently from others similarly situated and denied access to democratic primary ballot because he allegedly failed to provide his address on the application form).

Here, there is no rational reason to deny Brady the right to access the ballot when 39 other candidates used the same system to collect signatures during the

pandemic but are allowed to be placed on the primary ballot while Brady is not. This decision smacks of unequal and arbitrary treatment and cannot be reasonably explained.

The Commission cannot plausibly claim that its unequal decision is rational or based on limited jurisdiction to consider only Brady's situation when its enabling legislation demonstrates otherwise. The statute provides specifically that the Commission "may investigate upon objection made in accordance with the provisions of this chapter the legality, validity, completeness and accuracy *of all nomination papers* and action required by law to give *candidates* access to a state ballot or to place an initiative or referendum on the ballot." G.L. c. 55N, §4. That is, once a single objection is made, the Commission may investigate all nomination papers to give candidates, notably plural, access to the ballot. A more limited authority would have stated that the Commission may investigate the legality, completeness and accuracy of the nomination papers of the or this candidate for whom the objection has been made. It does not say this. Moreover, the broad investigatory authority is also in its enabling legislation, which specifically authorizes the Commission to summons witnesses, administer oaths and require the

production of books, records and papers at a hearing on any matter within its jurisdiction. G.L. c. 55B, §4.[7]

For some inexplicable reason, the Commission failed to perform its authorized investigatory role and passed judgment only on Brady, denying her the fundamental right to run for office while allowing other similarly situated candidates ballot access.

As a result, limiting its decision to only Brady, when Mr. Fitzgibbons testified that numerous other campaigns used the exact same process was a conscious choice, not derived from any limit on its authority. For these reasons, the Court should find the Commission's decision to be invalid and allow Brady access to the ballot.

The Court acted to protect fundamental rights in *Goldstein*. It fashioned a remedy to address the constitutional violation when other branches had not timely acted. Its work, though, is not yet done. Helen Brady requires additional relief to allow her to be placed on the ballot. Otherwise, her rights will be irreversibly lost by the emergency and orders not of her making. In these times, Courts must be

[7] In this respect, the Commission is analogous to the MCAD which has the authority to "receive, investigate and pass upon complaints of unlawful practice" and can hold hearings, subpoena witnesses and administer oaths. G.L. c. 151B, §3(6) and (7). No one would plausibly suggest that the MCAD is limited to only the specific complaint of discrimination and is unable, when it heard of other unlawful and discriminatory practices, to consider and act upon the specific complaint before it.

vigilant to ensure that the emergency cannot and should not be used as an opportunity to chip away at rights protected since the Bill of Rights were adopted. The Court was vigilant in *Goldstein*, but it needs to continue that vigilance here. The Court should vacate the Commission's decision and allow Brady access to the ballot.

III. THE COURT SHOULD EXERCISE ITS INHERENT POWERS TO ALLOW BRADY TO BE ON THE PRIMARY BALLOT BECAUSE BRADY HAS SHOWN THE NECESSARY LEVEL OF VOTER SUPPORT.

The remedy in *Goldstein* was fashioned pursuant to the equitable powers of the Court to ensure that candidates' constitutional rights were protected. The Court acknowledged that it was acting pursuant to those powers in the decision. ("we have little choice but to provide equitable relief pursuant to G.L. c. 241, s. 1 to protect the Constitutional rights" of the candidates). The Court retains an inherent equitable power to clarify or revisit the relief granted in *Goldstein* if necessary to protect Ms. Brady's fundamental constitutional rights, particularly in light of the obvious good faith efforts of Ms. Brady and the other 39 candidates to comply.

Moreover, in the Petition that began this particular action, Ms. Brady sought the Court's "continuing oversight … in the preparation and application of standards by the Secretary for review and approval of electronic signatures obtained by the Petitioners," and that it "Issue such other equitable and injunctive relief as the Court deems appropriate to preserve the fundamental right of

Petitioners … to seek elective office." Not only does the Court have the general equitable powers to act, it has been requested to do so.

The extraordinary relief afforded candidates in *Goldstein* will ring hollow if the Court defers to the Commission's interpretation or elevates the Secretary's Advisory to require a different signature process than what the Court outlined itself. Given all of the steps voters took to nominate Brady, (logging onto a site, typing in his or her names, addresses and phone numbers, signing with a mouse, stylus or their finger, and hitting submit), she has shown beyond a doubt that she has met the substantial level of support to allow the voters to decide this election. The Court should complete the relief and allow the political process to proceed as requested in the Single Justice Petition.

Otherwise, Brady will be another victim to this pandemic. Legal history has seen its healthy share of constitutional infringements in the name of emergencies, and the legal harm, not the public health harm, can last far longer than the emergency.

CONCLUSION

For these reasons, Brady asks that the Court exercise its authority, vacate the Commission's decision and allow her to be placed on the ballot for the September primary as the Republican candidate for the 9th Congressional District.

Respectfully submitted,

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Date: 07/09/2020

ADDENDUM

ADDENDUM
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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, ss. No. SJ-2020-278

GREGORY DAVID DENNIS, et al.,

Petitioners,

v.

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

Respondent.

JUDGMENT

This matter came before the Court on the Emergency Petition for Declaratory Relief filed by Gregory David Dennis, et al. ("Petitioners") against William Francis Galvin, in his Official Capacity as Secretary of the Commonwealth of Massachusetts (the "Secretary"), dated April 27, 2020 (the "Petition").

For good cause stated in the Petition, after notice and a hearing as appropriate under the circumstances, by agreement of all parties, and because there is a pandemic in the Commonwealth that has led to social distancing and the Governor declaring a State of Emergency, the Court hereby enters judgment in the above-captioned matter declaring as follows:

1. This Agreed Judgment applies to the following ballot initiative petitions and only with respect to the signing, collection, verification, and certification of signatures to be submitted to local election officials for certification on or before June 17, 2020 and thereafter filed with the Secretary on or before July 1, 2020, regardless of whether the pandemic, State of Emergency and/or social distancing continues through that date:

A. 19-06: Initiative Law to Enhance, Update and Protect the 2013 Motor Vehicle Right to Repair Law;

B. 19-10: Initiative Petition for a Law to Implement Ranked-Choice Voting in Elections;

C. 19-11: An Act Establishing Adequate Funding for Residents of Massachusetts Nursing Homes; and

D. 19-14: Initiative Petition for a Law Relative to the Sale of Beer and Wine by Food Stores (the foregoing, together, the "Initiative Petitions").

2. In addition to other methods of signing, collection, verification, and certification of signatures permitted by applicable law with respect to the Initiative Petitions, and notwithstanding anything in applicable law including, without limitation, 950 CMR 48.00, et seq., to the contrary, (a) proponents of the Initiative Petitions shall be permitted to distribute, collect, and deliver for filing, electronically signed ballot question petitions, as set forth in the Court's Order in Goldstein et al. v. Secretary of State, SJC No. 12931, and in this Judgment, and (b) no ballot question petition (the "Form") or signature shall be disallowed or disqualified for any act permitted hereby or by Goldstein, but all other statutory and regulatory requirements not modified by this Judgment or Goldstein shall remain in effect and applicable.

3. Specifically, but without limitation,

A. Proponents of the Initiative Petitions shall be allowed to post the .pdf version of both sides of the Form, as provided by the Secretary to the proponents of the Initiative Petitions, for online distribution to voters.

B. Voters may download and print a hard copy of the Form, sign it by hand, and write or type the voter's address and municipality in the spaces prescribed in 950 CMR 48.04(8) and (9). Voters may deliver signed Forms to proponents of the ballot question Initiative Petitions in paper form (by hand or mail) or by electronic image, meaning a scanned copy or photograph of the Form, sent by electronic mail or by facsimile. Signed Forms may not be submitted to local election officials electronically and must be submitted by the proponents of the Initiative Petitions consistent with the following: G.L. c. 53, § 7 and 950 CMR 48.06.

C. Voters who wish to sign the Form online shall apply an electronic signature with a computer mouse, stylus, or finger, in person directly on the Form. A typewritten name, uploaded image, or computer-generated generic signature shall not be considered a genuine signature of a voter. A voter shall be deemed to have applied their signature directly on the Form if (i) the voter can clearly identify the location on the Form where they would be affixing their signature, (ii) the voter engages in the physical act of signing their name either on the image of the Form itself or in a separate signature box that is made available by an act of the voter, such as a mouse click, (iii) the signature is affixed to the electronic version of the Form in a manner where its position on the document cannot be changed, and (iv) the signature is visible to the voter in the clearly identified location before the Form is transmitted to proponents of the Initiative Petitions. The voter's address and municipality may be written (in the manner described in the first sentence of this paragraph (C)) or typewritten in the spaces prescribed in 950 CMR 48.04(8) and (9). The voter's name

may be typewritten in the same space as the signature, as a supplement to, but not in lieu of, the voter's electronic signature. The signed Form may be delivered to the proponents of the Initiative Petitions directly as an electronic document by electronic mail, or indirectly by electronic transmission through a third-party electronic signature provider.

D. Voters shall not be required to provide any personal information to access an online version of the Form other than their name, address and municipality. If a third-party electronic signature provider requires an email address to access the Form, voters shall have the option to submit a personal email address or an email address directed to the proponents of the applicable Initiative Petition, such as in the form of optout@ballotpetition.org. Proponents of an Initiative Petition who enter into an agreement with a third-party electronic signature provider shall include provisions in such agreement that bar the provider from (i) retaining any personal information of the voter, including any image of the voter's signature, except as necessary to provide a report to the proponents of an Initiative Petition of the names and addresses of voters who signed the Form and the metadata associated with such signatures, after transmitting the signed Form to one of the proponents of the Initiative Petitions; and (ii) using the personal information for any purpose whatsoever. Proponents of the Initiative Petition who enter into an agreement with a third-party electronic signature provider shall ensure that, before being asked to sign a Form electronically, voters shall be informed what information is being collected and for what purposes it will be used, consistent with the limitations set forth in this Order. The voters shall also be informed that they need not provide a genuine email address and can instead provide a dummy address or an address in the form of optout@ballotpetitions.org.

4. A Form shall not be disqualified or disallowed for having extraneous markings under 950 CMR 48.07(2)(a) by reason of markings generated by the process of scanning the petition or of sending the Form by facsimile, or, in the case of a photograph of the signed Form, where such photograph extends beyond the margins of the Form itself, so long as the text of the Form remains legible when printed and so long as such markings or differences cannot reasonably be construed to, in any way, affect the Form's neutral form and content so as it remains free from advocacy by those for or against the proposed law. Any additional markings associated with a signature signed electronically shall be considered extraneous markings.

5. Signed Forms returned to proponents of the Initiative Petitions by electronic means shall be printed by such proponents in a manner consistent with 950 CMR 48.03 before they are delivered to the applicable municipal registrars of voters for certification. If voters return the Form with both pages printed or imaged single-sided, rather than double-sided, the proponents may copy the two single-sided pages to one double-sided page for submission to municipal registrars of voters and the Secretary, and such Form shall be deemed an "exact copy" of the Form. In doing so, the proponents of the Initiative Petitions shall retain until November 3, 2020, the original single-sided pages received from the voter or a scanned version thereof.

6. An officer of a ballot question committee for an Initiative Petition that makes a Form available for electronic signature in the manner described in paragraph 3 shall submit an affidavit to the Secretary no later than July 1, 2020, affirming that, to the best of their knowledge and belief, all signatures collected electronically were collected in compliance with paragraph 3

hereof.

7. This Court shall retain jurisdiction to resolve any disputes between one or more of the Petitioners and the Secretary arising out of or related to this Agreed Judgment.

SO ORDERED.

Dated: April 29, 2020

By the Court, (Lenk, J.)

/s/ Barbara A. Lenk
Barbara A. Lenk
Associate Justice

AGREED AS TO FORM

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in his Official Capacity as
Secretary of the Commonwealth
of Massachusetts

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, David R. Kerrigan, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 with one-inch margins and contains 10,157 total non-excluded words.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on July 9, 2020, I have made service of this Brief and Appendix upon the attorney of record for each party by the Electronic Filing System on:

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