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September 4, 2019

Patrick Galvin
32 Ranelegh Road
Brighton, MA 02135

Re: Initiative Petition No. 19-12, Initiative Petition for a Law Relative to Primary Elections

Dear Mr. Galvin:

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 art. 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed law.

Below, we summarize the proposed law and then explain why Article 48, the Init., Pt. 2, § 3, which requires that a proposed law "contain[] only subjects ... which are related or which are mutually dependent," precludes its certification. As explained below, though all provisions of the proposed law relate to primary elections, the two major changes to such elections that the law would effectuate are so distinct -- in terms of both policy and operation -- that the petition cannot reasonably be viewed as "contain[ing] a single common purpose and express[ing] a unified public policy." *Anderson v. Att'y Gen.*, 479 Mass. 780, 791 (2018).

Sections 1 through 8 of Petition No. 19-12 all pertain to replacing the current system of party primaries with an open "voter nomination" primary, under which all candidates from all parties would appear on a single primary ballot and voters could choose any candidate. The top two vote-getters, regardless of party affiliation, would advance to the general election. Sections 1 and 2 of the proposed law would define this form of primary and set forth the offices for which it would be used. Sections 3, 4, and 5 pertain to the preparation and provision of ballots. Section 6 governs voting lists and election administration, while Sections 7 and 8 would repeal existing provisions relating to party enrollment that would be unnecessary under a voter-nomination primary system. If the proposed law consisted only of Sections 1 through 8, it would likely not



run afoul of Article 48's relatedness requirement.

Sections 9 and 10 of the proposed law, however, would amend the current law relating to early voting by expanding its application to primaries in state (Section 9) and local (Section 10) elections. Section 9 sets forth detailed procedures for the implementation of early voting in statewide elections and contemporaneous municipal elections, while Section 10 provides for local adoption of early voting in municipal elections occurring separately from statewide elections.¹

While both the expansion of early voting to primaries and adoption of a voter-nominated primary system pertain to primary elections, the two sets of amendments represent two distinct policy shifts that, under recent SJC precedent, cannot be considered part of a "unified" statement of public policy. One might argue that the petition advances the "common purpose of expanding and enhancing voter rights." While this description is not inaccurate, it is similar in scope to the abstract, high-level "common purposes" that the SJC has found impermissibly broad, such as "making government more accountable to the people," *Opinion of the Justices*, 422 Mass. 1212, 1220-21 (1996); "promoting more humane treatment of dogs," *Gray v. Attorney Gen.*, 474 Mass. 638, 647 (2016) (citing *Carney v. Attorney Gen.*, 447 Mass. 218, 224, 231 (2006)); "elementary and secondary education," *id.* at 649; and "strengthen[ing] the Massachusetts economy and set[ting] a foundation for inclusive growth," *Anderson v. Attorney Gen.*, 479 Mass. 780, 795 (2018). As the SJC has explained, "[i]t is not enough that the provisions in an initiative petition all 'relate' to some same broad topic at some conceivable level of abstraction." *Carney I*, 447 Mass. at 230.

In contrast, judicially approved "common purposes" have been more specific, such as "restricting the benefits and incidents of marriage to opposite sex couples," *Albano v. Attorney Gen.*, 437 Mass. 156, 161 (2002); "expanding the scope of the Commonwealth's drug treatment programs and ... 'fairly' funding those programs," *Mazzone v. Attorney Gen.*, 432 Mass. 515, 529 (2000); "a detailed plan to legalize marijuana (with limits) for adult use," *Hensley v. Attorney Gen.*, 474 Mass. 651, 658 (2016); and "establish[ing] and enforc[ing] nurse-to-patient ratios in facilities in the Commonwealth," *Oberlies v. Attorney Gen.*, 479 Mass. 823, 830 (2018). A description of this petition that would be equivalent in scope to these purposes would be inaccurate because it would exclude one or the other of the major changes the petition proposes.

This petition likewise fails to meet the "mutually dependent" criterion of the relatedness test. There is no doubt that one could adopt "top two" primaries without expanding early voting to include primaries, and vice versa. *See Anderson*, 479 Mass. at 794 ("Because the provisions here can 'exist independently,' they are not 'mutually dependent[.]'" (citations omitted); *see also Gray*, 474 Mass. at 648 (where operation of one provision of proposed law would be unaffected by operation of the other, the two are not "mutually dependent"). The SJC has made clear that the relatedness requirement as set out in the text of Article 48 must be satisfied in all

¹ Sections 11 and 12 are effective-date and severability provisions that do not factor into our relatedness analysis.

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cases. *See Anderson*, 479 Mass. at 793-94 (“To construe the phrase ‘or which are mutually dependent’ as eliminating the requirement of relatedness would be to vitiate the purpose of protecting the voters from misuse of the petitioning process for which it was enacted.”).

Anderson described *Gray* as holding that “it would be unfair to place voters in the untenable position of casting a single vote on two dissimilar subjects, which each happened broadly to pertain to aspects of educational reform.” 479 Mass. at 797. If it appeared on the ballot, this petition would do the same thing by asking voters to “cast a single vote on two dissimilar subjects, which each happen[] broadly to pertain to aspects of” primary elections.

For this reason, we are unable to certify that Petition No. 19-12 contains only subjects “which are related or which are mutually dependent,” as required by Article 48, the Initiative, Part 2, Section 3.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Juliana deHaan Rice', with a long horizontal flourish extending to the right.

Juliana deHaan Rice
General Counsel
617-963-2583

cc: William Francis Galvin, Secretary of the Commonwealth