COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

ROBERT HERRMANN, ET AL. Plaintiffs, v. ATTORNEY GENERAL AND SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	Civil Action No. SJ-2022-409

DAVID C. BAXTER, ET AL. Plaintiffs, v. ATTORNEY GENERAL AND SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	Civil Action No. SJ-2022-410

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION FOR RESERVATION AND REPORT

INTRODUCTION

Plaintiffs' Complaints seek declarations (a) that the Attorney General erred in declining to certify Plaintiffs' initiative petition on grounds that the petition was "[i]nconsistent with the [r]ights of [f]ree speech," Baxter Compl. Ex. B, and (b) that Plaintiffs are not required to deliver to the Secretary of the Commonwealth the "remainder of the required signatures," as that phrase is used in Amend. art. 48, Part II, section 3 ("art. 48") until the first Wednesday of December 2023. Docket Entry ("D.E.") #1, at 24–25.

In response, the Attorney General has filed a Motion to Dismiss Plaintiffs' Complaints on the ground that they will be moot as of December 5, 2022, because the Plaintiffs do not plan to deliver more than 80,000 signatures by that date. D.E. #3 (the "Motion"), and a memorandum in support thereof, D.E. #4, the ("Memorandum").

This Court traditionally reserves and reports challenges to the Attorney General's grant or denial of certification of an initiative petition to the full Court. *See, e.g.*, *Gray* v. *Attorney Gen.*, 474 Mass. 638, 639, n. 4 (2016) ("[T]he single justice reserved and reported the case for consideration by the full court"); *Carney* v. *Attorney Gen.*, 447 Mass. 218, 220 (2006) ("The single justice reserved and reported the case to the full court on the complaint, the statement of agreed facts, and other documents."); *Paisner* v. *Attorney Gen.*, 390 Mass. 593, 595 (1983) ("The case comes to the full court by way of reservation and report without decision by a single justice of this court, and on a statement of agreed facts."). While this Court could rule on the Motion, there are at least two reasons it should reserve and report both issues raised by the Complaints without decision.

First, the issue in this case is not one the full Supreme Judicial Court has decided. If this Court were to decide that issue, the losing party would likely

appeal to the full bench. It would, therefore, be more efficient for this Court to reserve and report both issues to the full bench at the same time.

Second, to be able to collect signatures according to the calendar they have chosen, Plaintiffs need a decision on whether the Attorney General erred in declining to certify their petition by September 6, 2023. If the two substantive issues of this matter are ruled upon separately but consecutively, they may not be resolved before Plaintiffs must begin collecting signatures.

For these reasons, Plaintiffs ask this Court to reserve and report both questions to the full bench. If this Court instead decides to rule on the Attorney General's Motion rather than reserve and report the two issues, the Court should deny the Motion for the reasons explained below.

FACTS

Plaintiffs advance an initiative petition limiting contributions to independent political action committees that they intend to have introduced into the General Court in January 2024. Baxter Compl. ¶ ¶ 5, 34, Herrmann Compl. ¶¶ 10, 60.

Recognizing that such a petition might raise constitutional questions, Baxter Compl. ¶ ¶ 22, 27–28, 36; Herrmann Compl. ¶ ¶ 24, 30, 68–69, they submitted their petition to the Attorney General in June 2022, well in advance of the constitutional deadline. Baxter Compl. ¶ 20; Herrmann Compl. ¶ 22, referencing initiative petition 22-01, "Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs" (the "Petition").

Plaintiffs' purpose in submitting early was to assure that any constitutional questions about their petition might be resolved in time to allow them to gather signatures on a properly certified petition. Baxter Compl. ¶ 36; Hermann Compl.

¶¶ 68–69. Without that certification, Plaintiffs would face a significant and unnecessary extra burden to secure petition signatures. Baxter Compl. ¶ ¶ 32, 37, 41(B); Herrmann Compl. ¶¶ 55, 71, 78, 85.

On September 7, 2022, the Attorney General denied certification of Plaintiffs' petition.[1] Baxter Compl. ¶ 24; Herrmann Compl. ¶ 26. Plaintiffs filed their Complaints challenging the Attorney General's denial of certification on October 24, 2022. D.E. #1. The Attorney General has now moved to dismiss those Complaints on grounds that they will become moot on December 5, 2022, because Plaintiffs will not have collected signatures by that date. D.E. ##3–4.

ARGUMENT

The issue presented by the Attorney General's Motion is the application of the timing rules for an Initiative Petition under art. 48 of the Massachusetts Constitution. Plaintiffs have alleged, Baxter Compl. ¶ ¶ 5, 34; Herrmann Complaint ¶¶ 10, 60, and the Attorney General has acknowledged, Memorandum at 2, that Plaintiffs intend their petition to be introduced into the General Court in January 2024. According to Section 3 of art. 48, that means that Plaintiffs must present their petition to the Attorney General "*not later than* the first Wednesday of the August before the assembling of the General Court" — August 2, 2023. Amend. art. 48, II, § 3 (emphasis added).

Article 48 sets a deadline by which a petition must be submitted to the Attorney General. It does not require petitioners who submit an early petition to also submit that petition to the next General Court. The Attorney General's

[1] Because petitions appearing on the 2022 ballot had to be filed with the Attorney General before the first Wednesday in August 2021, Plaintiffs' petition filed in June 2022 could not appear on the ballot until November 2024. The petition therefore is in error when it states that the proposed law would be effective in January 2024. Plaintiffs represent they will submit a perfecting amendment to the Attorney General in accordance with Art. 48, Pt. V, section 2, as amended by art. LXXXI, to correct the error and make their proposed law effective in January 2025.

argument otherwise is contrary to the text of Article 48 and to the Convention's purpose in enacting it. Though the Attorney General has adopted a practice of agreeing to an injunction to evade the clear text of Article 48, no sufficient legal predicate for such an injunction could be satisfied here. *See, infra,* I(C).

This Court should therefore reject the Attorney General's effort to graft a new limitation into the text of art. 48. Such a rule is neither required by the language of the constitution nor consistent with the Convention's purpose.

I. Plaintiffs' Petitions Will Not be Moot on December 5, 2022.

The Attorney General's argument that Plaintiffs' Complaints will become moot on December 5, 2022, unless they collect more than 80,000 signatures by that date, is wrong. Because Plaintiffs intend their petition to be introduced to the General Court in 2024, Plaintiffs may not begin to collect signatures until September 2023, and need not submit those signatures to the Secretary until December 6, 2023.

A. Plaintiffs Have Initiated a Petition for the Secretary to Present to the General Court in January 2024.

Under the Massachusetts Constitution, it is the petitioners — not the Attorney General — who determine the General Court into which their petition is to be introduced. As alleged in the Complaints, Plaintiffs intend the petition to be introduced in the General Court in January 2024. Baxter Compl. ¶ ¶ 5, 34; Herrmann Compl. ¶¶ 10, 60. That fact must be taken as true for purposes of this Motion. *Calixto* v. *Coughlin*, 481 Mass. 157, 158 (2018) (in reviewing allowance of motion to dismiss, well-pleaded facts alleged in complaint accepted as true).

Plaintiffs' choice of the General Court then determines the calendar of deadlines for their petition. The first sentence of Section 3 sets the deadline for filing initiative petitions with the Attorney General:

> "[The] petition shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-general **not later than the first Wednesday of the August before the assembling of the General Court** into which it is to be introduced . . . ." Massachusetts Constitution 48, Init., Pt. 2, § 3 (emphasis added).

As Plaintiffs intend the January 2024 session to be "the General Court into which [the petition] is to be introduced," the deadline for submitting their petition to the Attorney General is August 2, 2023.

Section 3 then provides that "**if [the Attorney General] shall certify** [it], **it may then be filed** with the secretary of the commonwealth." Massachusetts Constitution 48, Init., Pt. 2, § 3 (Emphasis added). The order of operation is clear from the text: the petition is to be filed with the secretary *after* it is certified.

The last sentence of Section 3 then addresses *when*, after certification, a petition may be filed with the Secretary of the Commonwealth. It provides that:

> "All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth **not earlier than the first Wednesday of the September before the assembling of the General Court** into which they are to be introduced, and the remainder of the required signatures shall be filed not later than the first Wednesday of the following December." *Id.* (Emphasis added).

Given Plaintiffs' intent, that date is September 6, 2023, and the date the remainder of the required signatures would be due is December 6, 2023.

Plaintiffs have complied with the first of these deadlines: They submitted their petition to the Attorney General in June 2022 — *before* August 2, 2023. Plaintiffs are now prosecuting this appeal so that they may comply with the second of these deadlines by filing their certified petition to the Secretary on or after September 6, 2023 and commencing the three-month period to gather sufficient signatures to submit to the Secretary by December 6, 2023, so that their Initiative might be transmitted to the General Court in January 2024.

Notably, Section 3 does not specify how early a petition might be submitted. It sets a deadline for submissions; it does not erect a window for submissions.

In her Motion to Dismiss, the Attorney General now asks this Court to recognize a new requirement in Section 3, one that is neither in the text of that article nor in the purpose of the Convention in crafting that article. According to the Attorney General,

> "Article 48 contemplates a process by which initiative petition **proponents must collect signatures immediately after the Attorney General's certification decision is handed down** as a means of demonstrating popular support for a proposed law – not a drawn out, three-year-long process of signature collection." Memorandum at 2 (Emphasis added.)

This is plainly not the procedure that Article 48 describes. Article 48 does not direct that signatures must be collected "immediately after the Attorney General's certification decision is handed down." Memorandum at 2. To the contrary, it directs that a petition must be presented to the Secretary (so that the Secretary may provide signature "blanks") *only after* the petition has been certified. *See* Massachusetts Constitution 48, Init., Pt. 2, § 3. Only then may the process of gathering signatures begin. *See id.*

It is true that, for petitions filed in an odd-numbered year before an election in which a petition may appear on the ballot, signatures must be collected during that three-month period of the same odd-numbered year. Because state elections always and only occur in even-numbered years, petitions submitted to the AG in odd-numbered years will always need to be introduced at the next legislative session (at the beginning of the following year) in order that the initiative may appear on the ballot at the next state election.

However, for petitions submitted in even-numbered years, as in this case, the process need not be so condensed. Pursuant to the clear language of art. 48, the

petition can appear on the ballot at the next state election either by being introduced in the next legislative session (at the start of the odd-numbered year) or the one thereafter (at the start of the next even-numbered year).

With respect to petitions submitted to the Attorney General in an even-numbered year, under the clear terms of Article 48, the legislative session in which the petition is to be introduced is determined by when the petitioners file the petition with the Secretary of the Commonwealth. If they file the petition (and the first ten voter signatures) with the Secretary between the first Wednesday of September and the first Wednesday of December of that same odd-numbered year in which they submitted the petition to the Attorney General, then under Article 48, they must file the rest of the signatures by the first Wednesday of December of that same year, and the legislative session into which the petition is to be introduced is necessarily the session starting the following January (i.e., at the start of the ensuing odd-numbered year).

If the petitioners opt not to submit the petition with the Secretary before the first Wednesday of the December after their submission to the Attorney General—by choice or because, as in this case, the petitioners must first pursue an appeal to obtain a court order requiring the Attorney General to certify the petition—then (unless the petitioners abandon the petition) under the express terms of Article 48, in order for the initiative appear on the ballot at the next state election, the petition and first ten signatures must be filed with the Secretary of the Commonwealth between the first Wednesday of the following September and the first Wednesday of the following December (i.e., during the ensuing odd-numbered year), the rest of the signatures must be submitted to the Secretary by that first Wednesday in December, and the legislative session in which the petition is to be introduced is necessarily the session commencing the next January (i.e, at the beginning of the next even-numbered year after the initial submission to the Attorney General).

Plaintiffs' procedure is perfectly consistent with the plain language and purpose of art. 48 for at least three reasons.

First, the language of Section 3 plainly confirms that petitioners have the right to seek the certification decision of the Attorney General well in advance of their gathering signatures. While Section 3 specifies how *late* a submission might be made to the Attorney General, it does not specify how *early* it can be made. Had the drafters of Section 3 intended a closed period during which a petition might be submitted to the Attorney General, they could have done so. Indeed, language elsewhere in art. 48 demonstrates that they knew precisely how: Section 3 established a closed period during which signatures might be gathered, at most spanning three months. *See id.* There is no closed period described in Section 3 for submitting petitions to the Attorney General.

Second, the Convention's purpose in preclearing petitions through the Attorney General was precisely to make it easier to frame an appropriate petition, and to give petitioners and the public confidence in the suitability of the proposed initiative before petitioners undertook the burden of gathering signatures. *See, e.g.*, *Debates in the Massachusetts Constitutional Convention* 1917–1918, 727 (Mr. Parker of Lancaster), 730 (Mr. Walker of Brookline), *available at* https://perma.cc/DD5D-A39R. By filing their petition with the Attorney General well in advance of the deadline, Plaintiffs can accomplish these goals: If the Petition was denied, they would have adequate time to appeal; if it was granted, they could rally support for the effort to gather signatures one year later.[2]

[2] This potential political gain is structurally like the gain they would have achieved had they chosen to introduce their petition into the General Court in 2023 and the petition then certified. In that case, they would have an extra year to campaign to ratify their petition. In this case, they have extra time to organize a petition movement.

Finally, Plaintiffs' procedure secures to them the same benefit that is received by petitioners whose petition is certified: The opportunity to collect signatures without a legal cloud hanging over the petition. That was the objective of the Convention in establishing preclearance. This Court should read art. 48 consistently with that purpose.

B. Article 48 does not require that signatures be collected until the December before the Secretary presents the petition to the General Court.

The language of art. 48 notwithstanding, the Attorney General argues that Plaintiffs' Complaints will be moot on December 5, 2022, because

> "art. 48 contemplates a process by which initiative petition proponents must collect signatures immediately after the Attorney General's certification decision is handed down as a means of demonstrating popular support for a proposed law – not a drawn out, three-year-long process of signature collection." Memorandum at 2.

There is no basis in the text of art. 48, or in the purpose of the Convention in crafting art. 48, for this argument.

First, Plaintiffs do *not* seek "a drawn out, three-year-long process of signature collection." To the contrary, Plaintiffs fully acknowledge that the Constitution limits the time during which signatures may be gathered to at most three months. According to the text of art. 48, those three months begin once a certified petition is filed with the Secretary. In this case, given Plaintiffs' intent, Plaintiffs' certified petition must be filed with the Secretary in September 2023. Signatures would then have to be gathered and certified by the first Wednesday in December 2023. Plaintiffs' Complaints are designed to assure that their petition is certified by that September date.

Second, absent an injunction, the language of Section 3 does not permit Plaintiffs to gather signatures before their petition is certified. Section 3 directs that it is only after a petition is certified that it "may **then** be filed with the secretary of the commonwealth." Massachusetts Constitution 48, Init., Pt. 2, § 3 (emphasis added). It does not say that the petition may be submitted to the secretary before the Attorney General certifies it. Neither does it authorize the Secretary to provide petitioners "blanks for the use of subsequent signers" before the Attorney General certifies it. Everything in the process beyond the initial submission to the Attorney General is determined by the Attorney General's certification: If she certifies, the process moves forward; if she does not, it does not.

This is precisely why Plaintiffs submitted their petition to the Attorney General as early as they did. Plaintiffs anticipated the possibility that, despite the detailed legal memoranda they submitted to the Attorney General explaining why the petition satisfies Article 48's requirements, the Attorney General might nonetheless wrongly decline to certify it. They filed their petition in time to have the Supreme Judicial Court resolve the constitutional question that would arise should the Attorney General fail to certify their petition. Assuming Plaintiffs prevail on the merits before the Supreme Judicial Court, then, as Plaintiffs have represented, Baxter Compl. ¶ 41(B)(1), Herrmann Compl. ¶ 78, they would gather signatures to present the petition to the General Court in January 2024.

The Attorney General argues that "petitioners might well choose to file petitions … as part of pre-filing research and political strategy for a subsequent year's petition." Memorandum at 15. Yet this function precisely is what the Attorney General provides when it rules on a petition in even-numbered year. If a petition is approved in an even-numbered year, petitioners have no obligation to seek signatures that year. Instead, they are free to submit the same petition in the following year, and if unchanged, can count on the Attorney General's approval

again. Plaintiffs seek nothing more, save the opportunity to correct an erroneous ruling by the Attorney General well in advance of the obligation to present their petition to the Secretary.

Third, *Lockhart* v. *Attorney General* is not to the contrary. 390 Mass. 780 (1984). In that case, the petitioners had filed their petition in the year before it would be introduced into the General Court. *Id.* By choosing that compressed timeframe, the *Lockhart* petitioners accepted the risk that they would need to gather signatures without a certified petition if they were to meet the deadline of art. 48. Their subsequent failure to gather signatures rendered their complaint moot, because nothing this Court could have done could have qualified their petition to be submitted in time to be presented to the General Court. *See id.* at 784.

This case is fundamentally different. Here, Plaintiffs have filed their petition eighteen months before it would be submitted to the General Court in January 2024, and seventeen months before the deadline for submitting signatures on a petition to be submitted that General Court. Therefore, a favorable decision by this Court, reversing the refusal of the Attorney General to certify Plaintiffs' petition, would enable plaintiffs to present a certified petition to the Secretary in September 2023. That fact means this case will not be moot on December 5, 2022.

C. There Is No Proper Basis to Deviate from the Plain Language of Art. 48 for any Petition Submitted, but Not Certified, in an Even-Numbered Year and Intended to be Submitted to the General Court in the Year of the Next State Election.

Plaintiffs acknowledge that in cases in which the Attorney General has denied certification of a proposed petition, the Attorney General has adopted a practice of agreeing to — and insisting upon — an injunction to require petitioners to collect signatures before the matter is heard by this Court. In light of *Lockhart*, that practice may be defended on pragmatic grounds — but *only* when a petition is

submitted in the year before it is intended to be presented to the General Court. And while this Court has not addressed the question of the proper standard to be applied when seeking an injunction to deviate from the plain language of art. 48, at the very least, some party must be able to assert a compelling interest to ignore the plain text of the Constitution. In this case, however, there could be no compelling interest — for either party, for the general public, or for this Court — sufficient to justify deviating from the plain language of Section 3.

First, Plaintiffs would have (a) no reason — and certainly (b) no compelling reason — to evade the restriction of Section 3.

(a) Plaintiffs would have *no reason* to gather signatures early because obviously, the burden of gathering signatures for an uncertified petition is much greater than the burden for a certified petition. Plaintiffs intend to rely upon volunteers to gather signatures. Baxter Compl. ¶ 41(B)(1); Herrmann Compl. ¶ 79. Those volunteers would rightly be skeptical about devoting their time to a rejected-as-allegedly-unconstitutional petition as opposed to giving their time to other community efforts more likely to succeed. Similarly, even citizens who might otherwise be inclined to sign the petition may be reluctant to do so in the face of an Attorney General ruling that it is unconstitutional. Further, even if Plaintiffs could raise funds (notwithstanding the exact same problem that would effectively curtail volunteer recruitment—skepticism about donating money in support of a rejected-as-allegedly-unconstitutional petition) to hire paid-signature gatherers instead of volunteers, the cost of collecting signatures during an even-numbered year would be significantly greater than during an odd-numbered year. Baxter Compl. ¶ 41(B)(4).[3]

[3] The Baxter Plaintiffs have submitted evidence regarding paid signature gathering. The Herrmann Plaintiffs have not alleged any capacity to hire paid signature gatherers or evidence

(b) Plaintiffs could have *no compelling reason* to seek an injunction to evade the plain language of Section 3: If this Court reverses the decision of the Attorney General and orders certification, Plaintiffs could then comply with the deadlines of art. 48; if it does not, there would be no reason to collect signatures. Unlike the Attorney General, who offered to stipulate to an injunction crafted specifically to *evade* the language of Section 3, Plaintiffs seek to *comply* with those requirements.

Second, the Commonwealth could have no compelling reason to require Plaintiffs to collect signatures two years before their petition could appear on the ballot. The Attorney General suggests that this would prevent staleness. Memorandum at 2. This has the argument exactly backwards. Staleness is avoided by assuring that the signatures are gathered just before the initiative would be presented to the General Court. By requiring Plaintiffs to gather signatures in the fall 2022 for an election to be held in November 2024, the Attorney General increases, rather than reduces, the risk of stale initiatives.

Third, the public could have no compelling interest in determining whether to lend their signature to a petition that has not yet been certified — at least when there is ample time to resolve the question of certification before the need to gather signatures. For petitions filed the year before they are to be presented to the General Court, the balance of interests would be different, because otherwise the public would forgo the opportunity to have the issue on the next ballot. Here, however, by filing eighteen months before submission to the General Court, the Court has ample opportunity to resolve the issue and determine the constitutionality of the proposed petition *before* it is put before the public for signatures.

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regarding the costs of such. Although both sets of plaintiffs are submitting this brief jointly in the interest of judicial efficiency, assertions regarding the costs of paid signature gathering are asserted solely by the Baxter Plaintiffs.

Fourth, at least for a petition involving an "excluded" matter, an injunction would not serve the Convention's apparent purpose in requiring the preclearance of petitions. Under the Attorney General's preferred procedure, after declining certification, petitioners could seek to gather signatures for all manner of nativist, demagogic, or similar petitions plainly excluded by the text of Article 48, yet by their very circulation, repugnant to the public interest; they could then obtain an injunction allowing the collection of signatures and instructing the Secretary of State to provide blanks; and they could then travel about the state, canvassing voters and obtaining their signatures on official petition signature forms, bearing the Secretary's seal, for the most loathsome and repellent policies imaginable, all while the litigation was pending. This possibility defies the plain purpose in requiring preclearance and in excluding certain matters from the petition process.

Finally, this Court could have no legitimate interest in requiring that signatures be gathered while an appeal is pending. The Attorney General provides statistics about the number of petitions submitted since 1999, and the relatively few that are appealed following the Attorney General's refusal to certify. Memorandum at 14. The implication of the Attorney General's argument is that if the Court agreed with Plaintiffs, the number of appeals to this Court would increase. These statistics are plainly not relevant to this case, as they all are from petitions intended to be introduced at the General Court in the following year. Plaintiffs have acknowledged that in such a case, there would be a compelling reason to gather signatures during an appeal. In this case, Plaintiffs have not submitted a petition to be introduced into the General Court next year; instead, they intend their petition to be introduced in January 2024. The Attorney General has offered no statistics about petitions similarly situated to Plaintiffs'. Plaintiffs are unaware of any.

Yet even assuming there were comparable cases, the Attorney General's argument is quite extraordinary: In fine, the Attorney General is arguing that

Plaintiffs should bear a wholly unnecessary extra burden in gathering signatures, solely to reduce the number of appeals to this Court.

By "extra burden," Plaintiffs mean a burden beyond the ordinary burden in gathering signatures that other petitioners must bear. In the ordinary case, every petition must gather signatures. In the ordinary case, that process is supported by a certification by the Attorney General that if the drive is successful, the petition will be presented to the General Court. In cases in which certification has been denied, however, the burden of gathering signatures is obviously significantly greater. Again, Plaintiffs intend to rely upon volunteers to gather signatures. But to make the point clear, assume *dubitante* that they intended to rely exclusively upon paid signature gatherers.[4] As the Baxter Plaintiffs' expert has testified, the cost of gathering signatures during an even-numbered year would be twice the cost during the odd-numbered year immediately preceding an election — almost $1 million. *See* D.E. #1, Ex. D, at 3. That extra cost is the "extra burden" of forcing Plaintiffs to gather signatures during the pendency of an appeal.

No doubt, that burden would reduce number of appeals to this Court. But this Court could have no *legitimate* interest in imposing a massive and unnecessary cost on petitioners seeking to challenge an erroneous legal determination by the Attorney General simply to reduce the number of appeals to it. If the rule specified in the text of art. 48 unduly burdens the Court, then the legislature may address that burden. But this Court has no legitimate reason to adopt a rule that blocks the ability of most ordinary citizens to challenge an Attorney General's ruling, while leaving the courts open to the wealthy or financially interested.

[4] *See supra* note 3 regarding the distinction between the Baxter Plaintiffs and the Herrmann Plaintiffs with respect to assertions regarding paid signature gatherers.

Together, these considerations mean that in the case of a petition submitted more than a year before it would be introduced into the General Court, there could be no sufficient legal basis for an injunction to evade the plain language of Article 48. More importantly, there could be no reason to adopt a practice that affords no meaningful opportunity for most petitioners to challenge an erroneous ruling by the Attorney General. By contrast, Plaintiffs offer a simple procedure that is plainly consistent with the language of art. 48, and with the purposes of the Convention, that preserves a fair opportunity to challenge an erroneous decision by the Attorney General:

- For petitioners who wish the Secretary to introduce their petition in the General Court in the year following their submission to the Attorney General, the procedure described by the Attorney General makes sense: If the Attorney General refuses certification, then the only way to challenge that refusal while still meeting the art. 48 deadline for collecting signatures is to gather signatures during an appeal.
- For petitioners who want to preserve a meaningful opportunity to challenge the Attorney General's determination, they should file their petition with the Attorney General the year before the year in which they intend to gather signatures. If the Attorney General refuses certification, then petitioners may appeal her refusal in the ordinary course. If the Attorney General certifies the petition, then petitioners would file their certified petition to the Secretary the following year. That filing would initiate the period for gathering signatures.

Nothing in the language of art. 48 compels this Court to adopt the procedure urged by the Attorney General. Neither is there any justice in a procedure designed to avoid the opportunity for effective judicial review. This Court should therefore follow the plain language of Section 3, to permit Plaintiffs the opportunity to

present their petitions to the Attorney General early enough to preserve the opportunity for meaningful review, without the extra burden of gathering signatures during the pendency of an appeal and in the face of an erroneous Attorney General ruling.

II. Filing Signatures with the Secretary is not a Precondition to this Court's Adjudicating the Merits of Plaintiffs' Challenge to the Attorney General's Denial of Certification.

The Attorney General also argues that Plaintiffs are required to submit signatures to the Secretary before this Court can consider their appeal, so as "to demonstrate that the proposed law has the level of public support to justify the Court's intervention . . ." Memorandum at 2. This argument, too, has no basis in law.

A. At least two decisions of the Supreme Judicial Court demonstrate that collection of signatures is not a precondition to the Court's deciding the merits of a petitioner's challenge to the Attorney General's denial of certification.

In at least two cases, the Supreme Judicial Court has adjudicated the merits of the Attorney General's denial of certification of a petition without petitioners submitting signatures to the Secretary before adjudication.

In *Slama* v. *Attorney General*, the first signers of a petition

> "sought an injunction from a single justice compelling the Attorney General to certify and prepare a fair and concise summary of Initiative 11/81. In addition, the plaintiffs asked the single justice to order the State Secretary to prepare blank signature forms for Initiative 11/81." 384 Mass. 620, 621 (1981).

The case was filed, argued, and decided in September and October 1981, even though plaintiffs had not collected any signatures. *Id.* The Court entered an order on the merits of petitioners' challenge on October 19, 1981 — six weeks before the deadline for collection of signatures — remanding the case to the county court

"where judgment is to be entered declaring that the initiative petition 11/81 is a specific appropriation measure and thus prohibited by Mass. Const. Art. Amend. 48, Init. Pt. 2, Section 2." *Id. Slama* demonstrates that signatures are not a prerequisite to this Court adjudicating a challenge to the Attorney General's determination.

> Two years later, in *Paisner* v. *Attorney General*, the case came before
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> "the full court by way of reservation and report without decision by a single justice of this court, and on a statement of agreed facts. One week after the Attorney General informed the plaintiffs that he was unable to certify their petition, they commenced this action by filing their complaint in the Supreme Judicial Court for Suffolk County. At that time, they requested a preliminary injunction designed to permit them to gather signatures during the pendency of the case. The Attorney General did not oppose issuance of the requested preliminary injunction and it was entered on September 19, 1983." 390 Mass. 593, 595–96 (1983).

Paisner was argued on November 9, 1983, four weeks before the deadline for Plaintiffs to submit signatures. *Id.* at 593. That the Court held oral argument while Plaintiffs were still gathering signatures again negates the suggestion that the collection of signatures is a prerequisite to this Court's review. *Id.* at 595.

B. The Supreme Judicial Court Would Not Render an Advisory Opinion by Ruling on the Merits of Plaintiffs' Challenge to the Attorney General's Denial of Certification Before the Plaintiffs File Signatures with the Secretary

The Attorney General characterizes as "live appeal[s]" only those challenges to her rulings that come with enough signatures to qualify for the ballot. Memorandum at 14. Requiring those signatures, she suggests, would avoid this Court "deciding these constitutional questions in a vacuum," and avoid "expend[ing] judicial resources resolving hypothetical constitutional questions and issuing advisory opinions." *Id.* at 15.

But signatures don't provide context to a legal dispute. That context is fully revealed by the refusal of the Attorney General to certify a petition. The question on appeal is whether that decision was correct. This Court can decide that question without conducting a poll about the petition's popularity. No doubt the Convention could have imposed a requirement that petitions the Attorney General finds do not comply with art. 48 must nonetheless gather signatures before the judgment of the Attorney General might be challenged. It did not, and that rule is plainly inconsistent with the Convention's obvious purpose.

One example from the history of the Convention confirms this conflict. The Convention considered a fully refundable $100 deposit for a petition, proposed by Mr. Allan G. Buttrick of Lancaster. *Debates in the Massachusetts Constitutional Convention* 1917–1918, 847–53, *available at* https://perma.cc/DD5D-A39R. Even though that deposit would be refunded upon the gathering of signatures, that burden was thought improper for a "people's process." *Abdow* v. *Attorney Gen.*, 468 Mass. 478, 499 (2014). *A fortiori* for a rule that would impose an extra-burden on petitioners who sought to challenge an erroneous ruling of the Attorney General: If the *interest* on $100 for 3 months was too great, certainly imposing an additional burden that can realistically be satisfied only at a cost many times higher would be wildly excessive.

Finally, there is absolutely nothing "hypothetical," Memorandum at 7, 8, 15, about the question Plaintiffs raise, and absolutely nothing "advisory," Memorandum at 2, 13, 15, about a decision by this Court on those questions. Plaintiffs ask a very concrete legal question: Was the Attorney General correct to refuse certification of Plaintiffs' petition as "inconsistent" with the "freedom of speech"? If this Court agrees with Plaintiffs that she was incorrect, that conclusion plainly affects the legal rights of Plaintiffs substantially: It would entitle the Plaintiffs to file their petition with the Secretary and obtain petition "blanks" after September 6, 2023, so that they

might gather and file signatures by December 6, 2023. Without this Court's ruling, Plaintiffs would have no opportunity to have the Secretary present their petition presented to the General Court in January 2024. That difference plainly renders this dispute real, not hypothetical, and consequential, not advisory.

CONCLUSION

This Court should reserve and report both issues raised by the Complaints without decision. In the alternative, for the reasons given, this Court should deny the Attorney General's Motion.

Dated: November 30, 2022

Respectfully Submitted,

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