



August 11, 2023

Andrea Campbell, Esq.
Attorney General
1 Ashburton Place
Boston, MA 02108

Re: Comments of the Fiscal Alliance Foundation on Initiative Petitions 23-04, 23-07, & 23-08

Dear Attorney General Campbell:

The Fiscal Alliance Foundation¹ is pleased to provide comments in response to the solicitation of the Attorney General regarding whether the proposed initiative petitions 23-04 (“An Act to Establish a Nonpartisan Top Five Election System”); 23-07 (“An Act to Increase Voter Participation, Access, and Choice in Elections”); and 23-08 (“An Act for Healthy Democracy”) (collectively, “the Petitions”) meet the criteria for certification under Article 48 of the Amendments to the Massachusetts Constitution. For the reasons below, they do not.

I. The Petitions violate the certification clause of Article 48.

The Petitions cannot be certified as a matter of law because on their face they violate the certification clause of Article 48 of the Amendments to the Massachusetts Constitution. In relevant part, that clause provides that measures must not be, “either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections.” Art. 48, The Initiative, II, § 3, as amended by art. 74. The Delegates to the Constitutional Convention adopted this provision for a specific purpose: to prevent “the constant forcing of . . . questions which have been rejected.” *Bogertman v. Attorney General*, 474 Mass. 607, 620 (2016). The phrase “substantially the same” in Article 48 means “essentially the same,” or “with little or no substantive difference.” *Id.* at 621.

An initiative petition proposing ranked choice voting appeared on the general election ballot in 2020 as Question 2.² Voters soundly rejected it by a ten-percentage point margin. Nonetheless, each of the Petitions here once again proposes adopting ranked-choice voting in all general elections for certain designated elected offices. Under the plain language of Article 48’s certification clause, ranked choice voting may not appear again on the ballot until the 2026

¹ The Fiscal Alliance Foundation is a 501(c)(3) non-partisan, non-profit organization whose mission is to increase public awareness about the public benefits to be derived from greater fiscal responsibility, transparency, and accountability in government.

² See Petition 19-10, <https://www.mass.gov/files/documents/2019/08/07/19-10.pdf>

election at the earliest. Indeed, unlike *Bogertman* where the Supreme Judicial Court correctly noted there was no overlap between the two petitions at issue there (one proposed *prohibiting* “casinos, slots parlors, and [simulcast] wagering,” while the other proposed *permitting* “a second slots parlor”), multiple sections of these Petitions are *copied directly* from the 2020 ballot question.

A brief chart identifying the identical provisions across all four petitions should suffice to illustrate the point (and note that Petition 19-10 contained only thirteen provisions in total):

Petition 19-10		Petition 23-04	Petition 23-07	Petition 23-08
Section 2	<i>is the same as</i>	Section 3	Section 10	Section 10
Section 3	<i>is the same as</i>	Section 4	Section 11	Section 11
Section 4	<i>is the same as</i>	Section 5	Section 12	Section 12
Section 8	<i>is the same as</i>	Section 39 ³	Section 50	Section 50
Section 9	<i>is the same as</i>	Section 43	Section 51	Section 51
Section 10	<i>is the same as</i>	Section 45	Section 52	Section 52
Section 11	<i>is the same as</i>	Section 46	Section 53	Section 53

In contrast to the petitions in *Bogertman*, the Petitions here do not just touch on a common general theme, but instead address the *exact same specific issue* — and frequently using the exact same text — as the defeated 2020 question.

While each of the Petitions also adds separate policy proposals beyond ranked choice voting (including establishing a non-partisan top five preliminary election, limiting foreign investor election expenditures, and easing restrictions on voter registration), such tactics cannot rescue the Petitions from Article 48’s prohibitions. The Delegates intentionally designed Article 48 to prevent “the constant forcing of . . . questions which have been rejected,” *Bogertman*, 474 Mass. at 620, and to prevent petitioners from “fram[ing] any measure he chooses . . . as trickily as he wishes” (2 Debates in the Massachusetts Constitutional Convention 1917-18, at 532). The Delegates’ intent would be frustrated if petitioners knew they could easily circumvent Article 48’s “substantially same” restriction and resurrect previously-rejected questions by simply bolting additional policy proposals onto the previously-rejected text.

Indeed, the petitioners’ decision to do so here is the paradigmatic example of “logrolling” that the Delegates sought to prevent. “Logrolling” . . . is defined as “[t]he legislative practice of including several propositions in one measure or proposed constitutional amendment so that the legislature or voters will pass all of them, *even though these propositions might not have passed if they had been submitted separately*” (emphasis added). *Carney v. Attorney General*, 447 Mass. 218, 219, n.4 (2006). Notwithstanding the Supreme Judicial Court’s repeated admonition against logrolling, the Petitions here have intentionally bundled ranked choice voting together with several other policy propositions, in a clear effort to see if the “voters will pass all of them,” even though it is empirically plain from the voters’ rejection of ranked choice voting in 2020 that this proposition *did* not pass when it was “submitted separately.”

³ This section is clearly misnumbered, as it is the second “Section 39” in the petition and comes after Section 42 on page 16.

This concern is especially heightened where — as here — the topic of the failed Question 2 is not even mentioned in the title of the new Petitions, and the substantive provisions of ranked choice voting are now scattered throughout the Petitions in a lengthy grab-bag of dissimilar policy proposals. *See Carney v. Attorney General*, 447 Mass. 218, 229 (2006) (emphasizing the concern of Delegates that the initiative process would be exploited by “burying more controversial proposals farther down.”). For all the above reasons, each of the Petitions fails to comply with the certification clause, and none are eligible to be certified.

II. The Petitions violate the related subjects requirement of Article 48.

Even if the Petitions are not barred for being repetitive under the certification clause, the Petitions still face insurmountable problems under Article 48’s relatedness requirement, and cannot be certified on that independent basis.

Article 48 limits the subjects in an initiative petition to only those “which are related or which are mutually dependent.” Mass. Const. amend. Art. 48, The Initiative, II, § 3. Subjects are unrelated for purposes of Article 48 if they do not share a sufficiently definite common purpose, if they advance separate public policy goals, or if they are not operationally related. *Oberlies v. Attorney General*, 479 Mass. 823, 830–31 (2018).

The Petitions each contain at least two (or more) of the following policy proposals, none of which are sufficiently related to one another: (1) ranked choice voting; (2) a non-partisan “top five” preliminary election, (3) restrictions on foreign investor election expenditures, and (4) easing restrictions on voter registration. Although these subjects could arguably all fall under the broad umbrella of “elections,” “[a]t some high level of abstraction, any two laws may be said to share a ‘common purpose.’” *Gray v. Attorney General*, 474 Mass. 638, 644 (2016). Instead, the Court has established that the appropriate constitutional inquiry under Article 48 is whether the subjects present a “unified statement of policy” that is “sufficiently coherent to be voted on ‘yes’ or ‘no’ by the voters,” *id.* at 645.

Here, the Petitions undoubtably do not. It is not challenging in the least to conceive of a rational voter who supports ranked choice voting, but does not want to be limited to *only* ranking five candidates a “top five” preliminary election. Similarly, it is not challenging to conceive of a rational voter who supports restrictions on foreign investors’ campaign spending, but who opposes same-day voter registration. “Unlike a legislator, the voter has no opportunity to modify, amend, or negotiate the sections of a law proposed by popular initiative. He or she cannot sever the unobjectionable from the objectionable.” *Carney v. Attorney General*, 447 Mass. 218, 230 (2006). Here, each subject of the Petitions is its own distinct policy question, and voters cannot be forced into supporting all or none of these topics.

For good measure, it is also evident that these disparate policy proposals lack either operational relatedness or mutual dependence. As in the petition rejected in *Gray*, each provision of the Petitions here could easily operate independently of the other. As is obvious, the ability to implement a ranked choice voting system is neither operationally related to, nor mutually dependent upon, whether same-day voter registration is expanded. Nor is the ability to tighten

campaign finance rules limiting foreign influence operationally related to or mutually dependent upon whether the “top five” candidates in the state auditor’s race are grouped together on the ballot. Indeed, the simple fact that ranked choice voting was put on the ballot in 2020 *on its own* demonstrates that that policy it is not mutually dependent on *any* of the other various combinations of policies to which it has been hitched in these Petitions.

These disparate policy proposals are far from “mutually dependent” provisions combined to create a comprehensive legislative scheme, which is allowable only when a petition’s purpose is not defined “so broadly that it allows the inclusion in a single petition of two or more subjects that have only a marginal relationship to one another.” *Weiner v. Attorney General*, 484 Mass. 687, 691 (2020). Presenting voters with a petition that combines “substantively distinct” policy issues, thereby yoking together disparate policy decisions into a single package that voters are only able to approve or disapprove as a whole, is to engage in “the specific misuse of the initiative process that the related subjects requirement was intended to avoid.” *Gray*, 474 Mass. at 649.

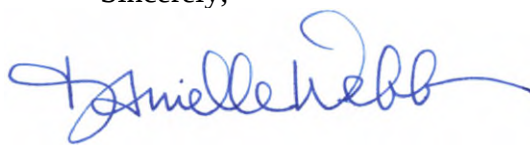
Accordingly, the provisions lack sufficient “operational relatedness” to be voted on “as a unified statement of public policy,” *id.* at 645, and would place voters in the “untenable position of casting a single vote on two or more dissimilar subjects,” *Abdow v. Attorney General*, 468 Mass. 478, 499 (2014).

* * *

That the Petitioners believe they are pursuing a salutary policy goal does not entitle them to ignore the requirements of Article 48, which “are not mere technicalities.” *Opinion of the Justices*, 422 Mass. 1212, 1219 (1996). When the people “seek to enact laws by direct popular vote they must do so in strict compliance with those provisions and conditions.” *Id.* (quoting *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310, 321 (1951)). For any or all of the above reasons, the Petitions fail Article 48’s requirements and cannot lawfully be certified.

The Fiscal Alliance Foundation appreciates the opportunity to submit these comments. Please do not hesitate to contact us if we can provide further clarity or insight on the positions we have provided.

Sincerely,



Danielle Webb
Chair, Fiscal Alliance Foundation

Cc: M. Patrick Moore, Esq. First Assistant Attorney General
John A. Griffin