COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court.

FOR THE COMMONWEALTH OF MASSACHUSETTS.

No. 08677.
SUFFOLK COUNTY.

KELLY BATES, RON BELL, DEREK BOK, BRIAN CORR, MARC D. DRAISEN, RICHARD ELRICK, ROBERT A. FEUER, KATHLEEN E. GRADY, ARNOLD S. HIATT, FRANK N. JONES, SUMNER Z. KAPLAN, GIOVANNA NEGRETTI, GALEN NELSON, WILLIAM O'CONNELL, GIBRAN X. RIVERA, DAVID C. ROBBINS, ALICE C. SWIFT, JOHN W. SEARS, JOHN J. TEMPLETON, NANCY TURNER, ERNEST WINSOR, SARAH CANNON HOLDEN, JAMES O'KEEFE, DOUGLAS PETERSEN, EVAN SLAVITT, STEPHEN SPAIN, JILL STEIN, WARREN TOLMAN, COMMON CAUSE MASSACHUSETTS, MASSACHUSETTS VOTERS FOR CLEAN ELECTIONS, MASSACHUSETTS REPUBLICAN STATE COMMITTEE, AND MASSACHUSETTS GREEN PARTY,
PLAINTIFFS-APPELLANTS,

v.

MICHAEL J. SULLIVAN, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE OFFICE OF CAMPAIGN AND POLITICAL FINANCE, AND WILLIAM FRANCIS GALVIN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANTS-APPELLEES.

ON A RESERVATION AND REPORT.

BRIEF AND APPENDIX FOR THE PLAINTIFFS-APPELLANTS.

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STATEMENT OF THE ISSUES

I. Whether the Defendant-Appellees are in violation of Article 48 of the Amendments to the Massachusetts Constitution and the Massachusetts Clean Elections Law.

II. Whether the Plaintiffs-Appellants are entitled to a declaratory judgment stating that the Defendant-Appellees are in violation of Article 48 of the Amendments to the Massachusetts Constitution and the Massachusetts Clean Elections Law.

III. Whether the Plaintiffs-Appellants are entitled to permanent injunctive relief ordering Defendant-Appellee Michael J. Sullivan, in his official capacity as the Director of the Office of Campaign and Political Finance, to implement fully the Massachusetts Clean Elections Law and to make available all necessary funds to all qualified candidates.

IV. Whether, in the alternative, the Plaintiffs-Appellants are entitled to permanent injunctive relief enjoining Defendant-Appellee William Francis Galvin, in his official capacity as the Secretary of the Commonwealth, from holding elections for state office in violation of Article 48 of the Amendments to the Massachusetts Constitution and the Massachusetts Clean Elections Law.

STATEMENT OF THE CASE

This case is before the full Court on a reservation and report. The Plaintiffs-Appellants ("Appellants") seek declaratory relief and permanent injunctive relief, enjoining Defendants-Appellees ("Appellees") from conducting elections in violation of the Massachusetts Clean Elections Law, M.G.L. c.

55A, § 1 *et seq.*, and Article 48 of the Amendments to the Massachusetts Constitution. The Clean Elections Law, passed overwhelmingly by Massachusetts voters in November 1998, mandates that candidates for state office who collect a specified number of qualifying contributions and who submit to voluntary contribution and spending limits shall be entitled to public campaign financing. M.G.L. c. 55A, § 1 *et seq.* However, no funds have been made available for participating candidates. The Appellants therefore request that this Court declare that the Appellees are conducting elections in violation of the Clean Elections Law and of Article 48. The Appellants further request that this Court order the Appellee Director of the Office of Campaign and Political Finance ("OCPF Director") to implement fully the Clean Elections Law and to make available all necessary funds to all qualified candidates. In the alternative, the Appellants request that this Court enjoin the Appellee Secretary of the Commonwealth from holding state elections in 2002 unless and until the Clean Elections Law is fully implemented and all qualified candidates are able to receive the public funds to which they are entitled under the law.

The Appellants filed their complaint on October 4, 2001, before the Single Justice of the Supreme Judicial Court for Suffolk County, in accordance with M.G.L. c. 214, § 1.[1] Simultaneous with the filing of their complaint, Appellants filed a motion for preliminary injunction, ordering the Appellee OCPF Director to implement fully the Massachusetts Clean Elections Law and to make available to any and all candidates who qualify for public campaign financing the full amounts to which they are entitled.

On October 24, 2001, Justice Martha B. Sosman, sitting as the Single Justice for Suffolk County, heard argument on the Appellants' motion. On October 25, 2001, Justice Sosman issued a ruling denying the Appellants' motion for a preliminary injunction and granting the Appellants' motion to reserve and report this case to the full Court on an expedited schedule. In her ruling, Justice Sosman found that the Appellants' "claimed irreparable harm certainly exists, and is indeed compelling, but it is not a harm that an injunction from a single justice can prevent or even reduce." *Bates v. Sullivan*, "Memorandum of

[1] A corrected complaint was filed on October 10, 2001. (A. 11-25).

Decision and Order on Plaintiffs' Motion for Preliminary Injunction," 2. In denying the motion on the grounds that, as a single justice, she could not remedy the irreparable harm, Justice Sosman did not reach the issue of Appellants' likelihood of success on the merits. *Id.* at 1, n.1.

On November 1, 2001, the Appellants and Appellees filed a "Stipulation Regarding Defendants' Response to Plaintiffs' Complaint," stating that, in light of the expedited schedule of this litigation, the Appellees need not presently respond to the Appellants' complaint. (A. 26-29). On November 2, 2001, the Appellants and Appellees filed a "Statement of Agreed Facts" with accompanying exhibits. (A. 30-125). On November 2, 2001, Justice Sosman issued a reservation and report of this case without determination to this Court. (A. 126-127).

STATEMENT OF FACTS

In November 1998, Massachusetts voters overwhelmingly approved the Clean Elections Law pursuant to the provisions of Article 48 of the Amendments to the Massachusetts Constitution.

Approximately two thirds voted for it,[2] and it passed in every legislative district in the state.[3] The law, enacted as Chapter 395 of the Acts of 1998 and codified as Chapter 55A of the General Laws, mandates public funding for qualified candidates who choose to participate.

As reflected in the "Findings and Declarations" of the Clean Elections Law, the measure was designed to improve Massachusetts' electoral process in numerous ways, including reducing the disproportionate influence of large contributors; halting the escalating costs of elections; enabling voters to hear and be heard in the political process; increasing the accountability of elected officials; encouraging more competitive elections; and freeing candidates from the rigors of fundraising, allowing more time for them to carry out official duties. St. 1998, c. 395 (b) (1)-(7).[4]

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[2] SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, MASSACHUSETTS ELECTIONS STATISTICS 1998, PUBLIC DOCUMENT 43 at 421.

[3] "1998 results by rep. district," *available at* http://www.massvoters.org.

[4] In 1998 and 2000, less than one-third of the legislative races in Massachusetts were contested and only one state had a higher proportion of uncontested legislative races. *See* GEORGE PILLSBURY & JEFF ARP,

The Clean Elections Law sets forth procedures and criteria for participating candidates for state office in Massachusetts to become eligible for public campaign funding, including signing a declaration of intent and then raising a minimum number of qualifying contributions and signed supporting forms from registered voters during a "qualifying period." M.G.L. c. 55A, §§ 1 and 4. The qualifying period for political party-affiliated candidates for statewide offices in the 2002 elections is August 1, 2001 to June 4, 2002. The qualifying period for unenrolled candidates for statewide offices in the 2002 elections is August 1, 2001 to August 27, 2002. For candidates for other offices, the qualifying period is January 1, 2002 to May 28, 2002. M.G.L. c. 55A, § 1; G.L. c. 53, § 10.

BARRIERS TO ENTRY: MONEY'S ROLE IN DISCOURAGING CANDIDATE COMPETITION IN THE 2000 MASSACHUSETTS LEGISLATIVE ELECTIONS 1-2 (Massachusetts Money and Politics Project, April 2001)(A. 80-89, Statement of Agreed Facts ("SAF"), Ex. L); GEORGE PILLSBURY & JEFF ARP, THE MONEY THRESHOLD: A SUMMARY OF CAMPAIGN SPENDING, COMPETITION AND CHOICE IN THE 1998 MASSACHUSETTS STATE ELECTIONS 9 (Massachusetts Money and Politics Project, March 1999). (A. 92-116, SAF, Ex. M). In those races that are contested, candidates with a significant financial advantage (over twenty percent) have won over nine out of ten races. PILLSBURY & ARP, BARRIERS TO ENTRY 4 (2001). (A. 82, 85). The Appellees have not stipulated to the truth of the matters asserted in these reports.

During the election cycle, all participating candidates must refuse any monetary contributions over $100, and may not accept aggregate contributions in the primaries over limits ranging from $3,300 for State Representative candidates to $322,000 for candidates for Governor, M.G.L. c. 55A, § 9.[5] The aggregate contributions permitted in the general election range from $3,200 (State Representative) to $164,600 (Governor). M.G.L. c. 55A, § 9.[6] Finally, candidates seeking public funding must also abide by expenditure limits in the primary campaign ranging from $19,500 (State Representative) to $1,944,100 (Governor), and limits in the general election campaign ranging from $12,900 (State Representative) to $1,300,100 (Governor). M.G.L. c. 55A, § 6. For the 2001-2002 election cycle, all limits apply as of March 31, 2001.

Candidates who raise sufficient qualifying contributions, abide by the contribution and spending

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[5] All contribution and spending limits, and public financing amounts, are as adjusted for inflation on February 1, 2001, pursuant to M.G.L. c. 55A, § 13. (A. 40-42, SAF, Ex. B).

[6] Participating candidates must also limit in-kind contributions from each individual or political committee. M.G.L. c. 55A, § 10.

limits, and otherwise comply with the law, must be certified by the Appellee OCPF Director and are then entitled to receive distributions from the Massachusetts Clean Elections Fund (the "Fund"). M.G.L. c. 55A, §§ 5 and 7. In addition to the base level of funds allocated to certified candidates, each candidate is also entitled to matching funds when a non-participating opponent exceeds the primary or general election expenditure limits, until the candidate's total public financing reaches twice the relevant expenditure limit. M.G.L. c. 55A, § 11.

During the 2001-2002 primary election, certified candidates are entitled to the following amounts: Governor, $1,622,100 in base funds, up to $2,266,100 matching funds, totaling up to $3,888,200 per candidate; Lieutenant Governor, $414, 200 base, up to $559,200 matching, $973,400 total; Attorney General or Treasurer, $389,300 base, up to $583,900 matching, $973,200 total; Auditor or Secretary of the Commonwealth, $129,800 base, up to $194,800 matching, $324,600 total; Governor's Councilor, $20,500 base, up to $31,300 matching, $51,800 total; State Senator, $46,500 base, up to $70,300 matching, $116,800 total; State Representative, $16,200 base, up to $22,800

matching, $39,000 total. Distribution of one half of the primary funding is due within five business days of certification, and the remainder is due to candidates with an opponent who will appear on the ballot in the primary within five business days after the end of the qualifying period. M.G.L. c. 55A, § 8.

During the 2001-2002 general election, certified candidates are entitled to the following amounts: Governor, $1,135,500 base, up to $1,464,700 matching, $2,600,200 total; Lieutenant Governor, $275,800 base, up to $373,000 matching, $648,800 total; Attorney General or Treasurer, $259,500 base, up to $389,300 matching, $648,800 total; Auditor or Secretary of the Commonwealth, $86,500 base, up to $129,700 matching, $216,200 total; Governor's Councilor, $14,100 base, up to $20,700 matching, $34,800 total; State Senator, $31,400 base, up to $46,600 matching, $78,000 total; State Representative, $9,700 base, up to $16,100 matching, $25,800 total.

Despite the clear mandate of the Clean Elections Law, no money has been appropriated for disbursement from the Fund.[7] Nevertheless, candidates who wish to

[7] At present, there is approximately $23 million which has been set aside for the Clean Elections Fund but

remain eligible for financing must abide by the Clean Election Law's contribution and spending limits, and must expend the time and resources necessary to gather qualifying contributions.[8] At the same time, the candidates' non-participating opponents are free to accept individual contributions up to $500 per calendar year, or $1000 for the 2001-2002 cycle. M.G.L. c. 55, § 7A.

The candidate Appellants include Warren Tolman, who is seeking the Democratic Party nomination for Governor; Jill Stein, who is seeking the Green Party nomination for Governor; Sarah Cannon Holden, who is seeking the Democratic nomination for Lieutenant Governor; Evan Slavitt, who is seeking the Republican nomination for Attorney General; James O'Keefe, who is seeking the Green Party nomination for Treasurer;

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not appropriated for disbursement. This includes $10 million authorized by the legislature in the general appropriations act for fiscal year 2000, 1999 Mass. Acts 127, line 0920-0302; another $10 million authorized by the legislature in fiscal year 2001, 2000 Mass. Acts 159, § 361; money received through a check-off on state tax returns, pursuant to G.L. c. 62, § 6C, and G.L. c. 10, § 42; fines and penalties paid into the fund pursuant to G.L. c. 55A; and interest.

[8] Statewide candidates were permitted to gather qualifying contributions as of August 1, 2001, while for other candidates the qualifying period does not begin until January 1, 2002. G.L. c. 55A, § 1.

Stephen Spain, who is seeking the Democratic nomination for State Senate in the Third Middlesex District; and Douglas Petersen, who is seeking the Democratic nomination for State Representative in the Eighth Essex district.

The candidate Appellants running for statewide office are in the process of qualifying for public financing. (A. 43-66, Statement of Agreed Facts, ("SAF"), Ex. C-H). In doing so, they continue to limit their spending and forgo contributions over $100, as the law requires, while non-participating candidates may spend unlimited amounts and are free to accept larger contributions, up to $500 per individual contributor each calendar year. *Id.*

While no candidate Appellant has yet filed an application for certification under M.G.L. c. 55A, § 5, one Appellant, gubernatorial candidate Warren Tolman, is close to doing so, having gathered more than 5,200 qualifying contributions from Massachusetts voters. (A. 47-49, SAF, Ex. D). Upon receipt of such an application, the Appellee OCPF Director must, within a seven-business-day period, either issue a certification or a denial of certification. M.G.L. c. 55A, § 5(e). If the candidate is certified for

public financing, the Appellee OCPF Director must distribute funds to that candidate within five business days after certification. M.G.L. c. 55A, § 8(a)(1).

The lack of public funding jeopardizes the ability of the candidate Appellants and others seeking public financing to run an effective campaign for office. (A. 43-75, SAF, Ex. C-J). Absent judicial relief, the lack of funding has caused and will continue to cause some candidates to opt out of Clean Elections participation and to seek large private contributions, contrary to their desires. Other candidates, unable or unwilling to seek large private contributions, will withdraw from the elections entirely, and still other potential candidates considering a run from office will be deterred from the endeavor by the Commonwealth's failure to guarantee the funding promised by the new law. (A. 43-78, SAF, Ex. C-K).

The voter Appellants supported enactment of the Clean Elections Law, and wish to support publicly funded candidates for elected office. These Appellants include four who were among the first ten signers of the petition to place the law on the

ballot: Brian Corr, Marc D. Draisen, Arnold S. Hiatt, and John W. Sears. The other voter Appellants are Kelly Bates, Ron Bell, Derek Bok, Richard Elrick, Robert A. Feuer, Kathleen E. Grady, Frank N. Jones, Sumner Z. Kaplan, Giovanna Negretti, Galen Nelson, William O' Connell, Gibran X. Rivera, David C. Robbins, Alice Swift, John J. Templeton, Nancy Turner, and Ernest Winsor. As the failure to implement the Clean Elections Law deters candidates from seeking office, the range of choices available to voters in the 2002 elections will be irrevocably narrowed, and competitiveness of races across the state will be reduced.[9]

The organizational Appellants worked actively to place the Clean Elections Law on the ballot and to secure its passage. Massachusetts Voters for Clean Elections ("Mass Voters") is a nonpartisan, nonprofit citizen effort to reduce the influence of private money in the electoral process and encourage greater competition in statewide and legislative elections. It was the principal proponent of the ballot initiative, and had over 6,000 volunteers working to

[9] *See* PILLSBURY & ARP, THE MONEY THRESHOLD; PILLSBURY & ARP, BARRIERS TO ENTRY, *supra* at n.4.

enact the law by gathering signatures and conducting public education. Common Cause Massachusetts is an affiliate of a thirty-year-old nonprofit, nonpartisan citizen's lobbying organization promoting open, honest, and accountable government. With over 10,000 members, Common Cause Massachusetts was a major proponent of the Clean Elections Law; its members worked to secure the law's passage by gathering signatures and through public advocacy.

The Massachusetts Republican State Committee and the Massachusetts Green Party are recognized political parties in the State of Massachusetts. Candidates are seeking the nominations of these parties for statewide offices, State Senator and State Representative. Numerous candidates from each of these parties are in the process of qualifying for public campaign financing.

SUMMARY OF THE ARGUMENT

At stake in this case is the very integrity of the ballot initiative process in Massachusetts and the Massachusetts Constitution. The voters of Massachusetts have exercised their power under Article 48 of the Amendments to the Massachusetts Constitution to overhaul the state's campaign finance system and to

open up the political process. They have done so in the face of opposition from an entrenched legislature, whose members are the chief beneficiaries of the existing campaign finance regime. The purpose of Article 48 – to preserve for the citizens a check on legislative power – could not be clearer than in this case.

By conducting elections without the full implementation of the Massachusetts Clean Elections Law, the Appellees are in violation of Article 48 of the Amendments to the Massachusetts Constitution and of the Clean Elections Law itself. When the voters of Massachusetts overwhelmingly passed the Clean Elections Law, they did not create an aspiration. They created a mandate, a mandate guaranteed by Article 48. The Appellees have a constitutional duty to carry out that mandate. *See infra* at 17-24.

The Appellants are entitled to declaratory relief stating that the Appellees are in violation of Article 48 and the Massachusetts Clean Elections Law. Such relief will help secure Appellants' rights under Article 48 and the Clean Elections Law and is consistent with the purpose of the Declaratory Judgment Act, M.G.L. c. 231A. *See infra* at 24-26.

The Appellants are further entitled to permanent injunctive relief ordering the Appellee OCPF Director to implement fully the Clean Elections Law and to make available all necessary funds to all qualified candidates. This relief is consistent with this Court's holdings in other Article 48 cases and with this Court's longstanding principle that a state agency can be ordered to carry out its constitutional obligations regardless of the lack of appropriated funds. *See infra* at 26-32.

In the alternative, the Appellants are entitled to permanent injunctive relief barring the Appellee Secretary of the Commonwealth from holding state elections in violation of Article 48 and the Massachusetts Clean Elections Law. The conduct of elections without the public campaign financing required by the Clean Elections Law renders such elections invalid, making injunctive relief necessary. Courts have long held that an electoral process which violates constitutional and statutory requirements must be enjoined. *See infra* at 33-40.

For these reasons, this Court should enter judgment granting the relief sought in Appellants' complaint.

ARGUMENT

I. The Appellees Are In Violation of Article 48 of the Amendments to the Massachusetts Constitution and the Massachusetts Clean Elections Law

Article 48 of the Massachusetts Constitution declares the right of citizens to propose and enact laws governing the Commonwealth. "Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection …." Art. 48, Initiative and Referendum Pt. 1, § 1.

To ensure that laws passed by voter initiative are given full effect, Article 48 demands that such laws be fully funded. While the legislature may amend or repeal a law approved by the people, Art. 48, Initiative and Referendum Pt. VI, if it does not do so, the legislature "shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect." Art. 48, Initiative and Referendum Pt. II, § 2.

Article 48 is central to the allocation of political power in the Commonwealth, and vests a fundamental right in the citizenry. "It was intended

to provide both a check on legislative action and a means of circumventing an unresponsive General Court. It presented to the people the direct opportunity to enact statutes regardless of legislative opposition. It projected a means by which the people could move forward on measures which they deemed necessary and desirable without the danger of their will being thwarted by legislative action." *Buckley v. Secretary of the Commonwealth*, 371 Mass. 195, 199 (1976). The "fundamental purpose" of Article 48 "is to permit the people to make law directly where the Legislature has failed or has refused to act." *Citizens for a Competitive Massachusetts v. Secretary of the Commonwealth*, 413 Mass. 25, 30-31 (1992).

Thus, Article 48 confers on the people the right to enact laws regardless of the legislature's action or inaction. The Supreme Judicial Court has defined "law" to mean "a measure with binding effect," connoting "a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject; it implies command and not entreaty." *Mazzone v. Attorney General*, 432 Mass. 515, 530 (2000) (quoting *Opinion of the Justices*, 262 Mass. 603, 605 (1928)).

Article 48 therefore requires that laws passed by initiative, and not repealed, be binding regardless of the legislature's actions. As this Court has stated: "Our interpretations have been guided by the 'firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws.'" *Citizens for a Competitive Massachusetts*, 413 Mass. at 30 (quoting *Yankee Atomic Elec. Co. v. Secretary of the Commonwealth*, 403 Mass. 203, 211 (1988)). "A constitutional amendment should be 'interpreted in the light of the conditions under which it…[was] framed, the ends which it was designed to accomplish, the benefits which it was expected to confer and the evils which it was hoped to remedy.'" *Mazzone*, 432 Mass. at 526 (quoting *Tax Comm'r v. Putnam*, 227 Mass. 522, 524 (1917)).

The Massachusetts Clean Elections Law confers certain duties on the OCPF Director, most saliently the distribution of funds from the Clean Elections Fund. M.G.L. c. 55A, § 8(a). This provision states that the distribution of funds is "subject to appropriation." However, this language merely acknowledges that the Clean Elections Law, like any other Massachusetts law authorizing public spending,

does not, of itself, constitute an appropriation. "Appropriations are made, not in the General Laws, but through the operation of the annual budget and appropriation process described in art. 63 of the Amendments to the Constitution of the Commonwealth." *Milton v. Commonwealth*, 416 Mass. 471, 473 (1993).[10] The words "subject to appropriation" in a statute "may serve as a useful reminder, but they are supererogatory." *Id.* at 474.

The Clean Elections Law is also binding on the Secretary of the Commonwealth. As the state official ultimately charged with administration of the election laws, *Socialist Workers Party v. Davoren*, 378 F.Supp. 1245, 1248 (D.C. Mass. 1974), the Secretary must ensure that elections are carried out in compliance with the constitution and laws of the Commonwealth, including the Clean Elections Law.

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[10] Furthermore, this language was included only on the advice of the Attorney General, after a draft of the proposed law was submitted to his office for review as required by Art. 48, Init. Pt. 2, § 3. The draft was submitted to the Attorney General in advance of the statutory deadline in order to ensure that the initiative could be modified to meet the requirements for ballot certification. The insertion of such language, as required by the Attorney General, cannot by itself render ineffective Article 48's requirement that voter-enacted initiatives must be funded if not repealed.

The Appellees have argued that Article 48 applies only to the legislature. Yet, such an interpretation would render Article 48 as a merely aspirational Amendment to the Massachusetts Constitution. "The aim of all interpretation is to give effect to the dominating idea of the instrument. Statements in the Constitution and its Amendments must be given effect in consonance with the end they are designed to accomplish." *Citizens for a Competitive Massachusetts*, 413 Mass. at 30 (quoting *Town of Mt. Washington v. Cook*, 288 Mass. 67, 70 (1934)).

As stated earlier, Article 48 was designed to empower the citizenry to initiate and adopt laws at the ballot box. *Id.* *See also Buckley*, 371 Mass. at 199. This "people's process" is particularly critical in instances involving an unresponsive legislature. *Buckley*, 371 Mass. at 199. There could not be a clearer example of the importance of the ballot initiative process, as created by Article 48, than this case. Exercising their rights under Article 48, Massachusetts voters, by an overwhelming majority, have sought to restructure fundamentally and open up the state's political system in the face of opposition from members of the entrenched legislature -- the

chief beneficiaries of the existing campaign finance regime.

Article 48 established a process that creates mandates of the voters, not aspirations. The law the voters adopted via this process is, like any other, "a measure with binding effect" and enforceable against the executive agencies charged with its full implementation. *Mazzone*, 432 Mass. at 530. To suggest otherwise would run contrary to the basic purpose of the Amendment.[11]

In other cases in which the legislature has breached provisions of Article 48, this Court has ordered remedies against executive agencies. For example, when the legislature passed a substitute for a voter initiative which was not a true alternative to the initiative, as required by Art. 48, Part III, § 2, the court ordered that the legislative alternative not

[11] By the Appellees' own reasoning that Article 48 applies only to the legislature, Article 48 would impose no duty on the governor, even though a budget appropriation cannot become law without the governor's signature. It is illogical to suggest that Article 48 imposes a duty on the legislature to appropriate the necessary money to carry a law passed by initiative into effect, but does not require the governor to sign such an appropriation. If that were the case, then the language of Article 48 – "shall appropriate such money" – would have no real meaning.

be placed on the ballot. *Buckley*, 371 Mass. at 202-03. The court held that the legislature's actions constituted "the emasculation of the initiative petition" and that to give effect to what the legislature had done "would be to fly in the face of the evident intent of the distinguished members of the Constitutional Convention who prepared the way for the passage of art. 48 by the people." *Id.* *See also Citizens for a Competitive Massachusetts*, 413 Mass. at 31 (holding that failure of legislative committee to report on an initiative petition did not prohibit Secretary of the Commonwealth from placing the petition on the ballot: "We cannot endorse a result that would permit the Legislature, by failing or refusing to comply with a mandatory provision of art. 48, to frustrate the right of the people to place a proposed law on the ballot.").

Here, as in *Buckley*, the legislature's actions threaten to undermine the intent of the framers of Article 48 that the will of the people not be "thwarted by legislative action." *Buckley*, 371 Mass. at 199. The Clean Elections Law was approved by initiative after being stymied in the legislature. Before the law passed overwhelmingly on the 1998

ballot, similar proposals had been introduced in legislative sessions between 1992 and 1998, and none was ever reported favorably out of the Joint Committee on Election Laws. This is a clear example of the popular will overriding legislative recalcitrance, as anticipated by Article 48. Thus here, as in *Buckley*, executive agencies of the Commonwealth must be required to comply with Article 48 in order to protect the right and power which Article 48 vests in the citizens of Massachusetts.

II. The Appellants Are Entitled to Declaratory Relief

The Appellants are entitled to declaratory relief pursuant to the Declaratory Judgment Act. M.G.L. c. 231A. "The purpose of the Declaratory Judgment Act is to afford a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status, and other legal relations. The statute 'is to be liberally construed and administered.'" *Nelson v. Commissioner of Correction*, 390 Mass. 379, 388 (1983) (quoting M.G.L. c. 231A, § 9). *See also Town of Oxford v. Oxford Water Company*, 391 Mass. 581, 585 (1984).

Declaratory relief is appropriate in cases involving violations of constitutional rights. In *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545 (1993), this Court issued declaratory relief to address the denial of plaintiffs' opportunity for an adequate education, as guaranteed by Part II, C. 5, § 2, of the Massachusetts Constitution. This Court declared that those constitutional provisions

> impose[d] an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live. It shall be declared also that the constitutional duty is not being currently fulfilled by the Commonwealth…[I]t is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate.

Id. at 555-556. *See also Moe v. Secretary of Administration and Finance*, 382 Mass. 629, 660 (1980) ("declaring that the plaintiff class of Medicaid-eligible pregnant women is entitled to nondiscriminatory funding of lawful, medically necessary abortion services…").

The Appellees are conducting elections in violation of Article 48 and the Massachusetts Clean

Elections Law. This Court's issuance of a declaratory judgment, coupled with the requested permanent injunctions, will afford the Appellants "relief from uncertainty and insecurity with respect to [their] rights" under Article 48 and the Clean Elections Law. *Nelson*, 390 Mass. at 388. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

III. The Appellants Are Entitled to Permanent Injunctive Relief Against the Appellee OCPF Director

The Appellants are entitled to permanent injunctive relief ordering the Appellee OCPF Director to implement fully the Massachusetts Clean Elections Law and to make available all necessary funds to all qualified candidates. This relief is consistent with this Court's holdings in other Article 48 cases and with this Court's longstanding principle that a state agency can be ordered to carry out its constitutional obligations regardless of the lack of appropriated funds.

Agencies of the Commonwealth must comply with their constitutional duties, and may be ordered by a court to do so, even if compliance requires a

legislative appropriation. For example, this Court in *Michaud v. Sheriff of Essex County*, 390 Mass. 523, (1983), ordered improvements in county jails even while noting that the defendants (county commissioners and the Massachusetts Commissioner of Correction) "present a convincing case that access to this money [needed to comply with the court order] involves a process of legislative and executive decision making over which they have no control." *Id.* at 535. Holding that sanitary conditions in county jail facilities violated the Eighth Amendment to the U.S. Constitution and Article 26 of the Massachusetts Declaration of Rights, this Court stated: "We flatly reject the notion that an arm of the State may be allowed to violate an individual's constitutional rights because funds have not been appropriated to remedy the wrong." *Id.* at 532. *See also Blaney v. Commissioner of Correction*, 374 Mass. 337, 342 n.3, (1978) (While there was no showing that existing appropriations were inadequate, if that were the case "the unavailability of funds would not be a defense" to constitutional claims against correction officials.).

The Supreme Judicial Court has also held that the failure of the legislative and executive branches of government to fund educational programs adequately violated the Massachusetts constitution. *McDuffy*, 415 Mass. 545 (1993). The Court held that the Constitution created an enforceable duty to provide an adequate education to all children of the state, a duty which "lies squarely on the executive (magistrates) and legislative (Legislatures) branches of this commonwealth." *Id.* at 606. As stated earlier, the Court issued a declaratory judgment stating that "the constitutional duty is not being currently fulfilled by the Commonwealth," and that "it is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate." *Id.* at 621. While the Court declined the plaintiffs' request to declare the entire school-financing system unconstitutional, it provided that "the single justice may, in his or her discretion, retain jurisdiction to determine whether, within a reasonable time, appropriate legislative action has been taken." *Id.*

In *Moe*, 382 Mass. 629 (1981), where plaintiffs challenged Massachusetts' restrictions on Medicaid funding of abortions, the Court rejected the defendants' argument that "fashioning relief in this case will involve a forced appropriation, an intrusion into the legislative sphere purportedly beyond the constitutional power of this court." *Id.* at 642. After noting that the plaintiffs did not seek any forced appropriation of funds, since the legislature had already made a general appropriation of the Medicaid funds in question, the Court addressed the larger point:

> More fundamentally, we have never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review. In *Colo v. Treasurer & Receiver Gen.*, 392 N.E. 2d 1195 (1979), we rejected the argument that either the doctrine of separation of powers or the political question doctrine requires that result. "Without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have the duty, certainly since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution. 'This,' in the words of Mr. Chief Justice Marshall, 'is of the very essence of judicial duty.'" [quoting *Colo*] Clearly, the relief sought by the plaintiffs is within our power to grant.

Id.

These cases stand for the principle that the legislative power to appropriate, as enunciated in Article 63 of the Amendments to the Constitution of the Commonwealth, cannot be allowed to trump a constitutional mandate. In *Michaud*, Article 26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the U.S. Constitution required the defendants to take remedial action which necessarily involved the expenditure of money. Similarly, in *O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 514 (1972), this Court upheld a superior court judge's expenditures "to secure the full and effective administration of justice" as guaranteed by Articles 11, 29 and 30 of the Massachusetts Declaration of Rights: "It is not essential that there have been a prior appropriation to cover the expenditure." *Id.* at 511. *See also County of Barnstable v. Commonwealth*, 422 Mass. 33, 45-46 (1996) ("[I]t remains clear that proof of deficiencies in the physical plant, or in essential maintenance or security staff in a particular courthouse in one of the counties, would justify the exercise of our inherent power to ameliorate conditions in that facility.")

Further, in *Bromfield v. Treasurer and Receiver-General*, 390 Mass. 665 (1983), this Court addressed the potential need for its intervention if the Legislature did not meet its constitutional obligation under Article 10 of the Massachusetts Declaration of Rights to compensate landowners for the taking of their property in an eminent domain action. While the Court found that the plaintiff landowners had not suffered "unreasonable delay" in receiving their compensation, the Court also stated that the plaintiffs were not "relegated to standing idly by, left only to consider, as reasonable compensation, the vague hope that on some unascertainable future date their judgment will be satisfied." *Id.* at 669. While the Court held that it would not be able to compel the Treasurer to pay the judgment in the absence of appropriated funds, *Id.* at 672,[12] that did not mean

[12] In the instant case, unlike *Bromfield*, the legislature has already set aside funding, though it has not formally appropriated it. *See supra* at n.7. Further, Article 48, which establishes the essence of political power in the state as vested in its citizens -- particularly in the face of "an unresponsive General Court", *Buckley*, 371 Mass. at 199, is distinguishable from Article 10 and requires the requested injunctive relief against the Appellee OCPF Director. At the very least, however, the *Bromfield* ruling demonstrates the availability of alternative

that it would be unable to effectuate the necessary relief. The Court held that "[i]f the Legislature should fail to make an appropriation sufficient to meet the Commonwealth's obligation," it would consider taking action to satisfy the judgment, including a "levy of execution upon the Commonwealth's property." *Id.* at 670.[13]

Thus, the legislature's actions do not license the Appellee OCPF Director to violate the Appellants' constitutional rights. This Court should order the Appellants' requested permanent injunctive relief against the Appellee OCPF Director.

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injunctive relief for effectuating the necessary disbursement of funds in this case.

[13] These cases, involving constitutional mandates, are clearly distinguishable from cases in which this Court has ruled that Article 63 trumps a statutory mandate. *See Milton; Alliance, AFSCME/SEIU, AFL-CIO v. Secretary of Administration*, 413 Mass. 377 (1992); and *Massachusetts Coalition for the Homeless v. Secretary of Human Services*, 400 Mass. 806 (1987). Further, none of those statutory cases involved a law created via the ballot initiative process.

The Appellees have argued that the requested injunctive relief against the Appellee OCPF Director, in the absence of a legislative appropriation, is tantamount to asking this Court to order the Appellee OCPF Director to commit a crime. If that were the case, then this Court would have been ordering the defendants in *Michaud* to commit a crime, would have been sanctioning a crime in *O'Coins*, and would have been referring to its power to order the commitment of a crime in *Moe*.

IV. In The Alternative, The Appellants Are Entitled to Permanent Injunctive Relief Against the Secretary of the Commonwealth

In the alternative, the Appellants are entitled to permanent injunctive relief barring the Secretary of the Commonwealth from holding elections for state office in violation of Article 48 and the Massachusetts Clean Elections Law. While such a step is not taken lightly, the conduct of elections without the public campaign financing required by the Clean Elections Law renders such elections invalid, making injunctive relief a necessity.

The lack of funding has already caused at least one gubernatorial candidate to withdraw from the clean elections process and seek private funding. (A. 75-78, SAF, Ex. K). As time goes by without a remedy, more candidates will follow suit, while others who are unwilling or unable to compete for large contributions will withdraw their candidacies entirely. (A. 43-74, SAF, Ex. C-J). Still others considering a run for office will be deterred by the lack of public financing.[14]

[14] Those seeking to qualify for public funding have been required to abide by the restrictions of the law, including a $100 cap on each individual contribution, while their non-participating opponents have remained

As the failure to implement the Clean Elections Law deters candidates from seeking office, the range of choices available to voters in the 2002 elections will be irrevocably narrowed. The voters will thereby be deprived of the ability to support the candidate of their choice and to enjoy the benefits of the law, as set forth in the law's Finding and Declarations, described *supra* at 5. Perhaps more fundamentally, an election without public financing would violate the right of voters to legislate through the ballot initiative process, as provided by Article 48.

Courts have routinely refused to ratify electoral processes when the fundamental rights of voters are violated. For example, this court invalidated Suffolk County's apportionment scheme because it violated constitutional equal protection guarantees, even though the ruling would prevent the election of state legislators from Suffolk County from being held in

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free to accept contributions of $500 in 2001, and another $500 in 20002, per contributor. G.L. c. 55, § 7A. With neither the promised public financing, nor large individual contributions, the candidates will not be able to mount effective and competitive campaigns. Compounding these difficulties, the lack of funding has made it more difficult to collect qualifying contributions, because it has caused many citizens to believe that the effort to qualify will be futile.

that year unless a special statute were enacted. *Attorney General v. Suffolk County Apportionment Com'rs*, 224 Mass. 598 (1916).

The U.S. Supreme Court has noted that when an election scheme violates the constitution, plaintiffs are presumptively entitled to an injunction. "[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

Relying on this reasoning, a federal court refused to stay its order striking apportionment of the city of Boston even though its order had the effect of preventing the election of Boston city council members:

> While this Court is aware of the proximity of the upcoming elections and the likely ramifications of its July 26, 1983 order, the enormity of the constitutional defects inherent in the City's current apportionment plan dictates that this Court not allow the election to proceed on the basis of this patently illegal plan.

Latino Political Action Committee v. City of Boston, 568 F.Supp. 1012, (D. Mass. 1983) *stay denied*, 716 F.2d 68 (1st Cir. 1983).

An injunction against further elections is also appropriate to remedy a violation of the Voting Rights Act. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988)(opinion and order by Justice Kennedy enjoining bond referendum pending review by the full Court, where plaintiffs held likely to succeed in their claims of violations of the Voting Rights Act; "Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election.").

State courts across the country have enjoined elections where elections otherwise would be held in violation of state constitutional or statutory provisions. *See Glinski v. Lomenzo*, 209 N.E. 2d 277 (N.Y. 1965)(election of legislators enjoined for violation of state constitution); *City of Adamsville v. City of Birmingham*, 495 So.2d 642 (Ala. 1986)(city enjoined from holding referendum on annexing fire district where procedures violated state constitution); *Gibson v. Campbell*, 241 P. 21 (Wash. 1925)(enjoining recall election for violation of election statute); *Glasgow School District No. 60 v.*

Marshall, 333 S.W.2d 547 (Kan. App. 1960)(election for school district plan enjoined for statutory violation). *See also City of Grenada v. Harrelson*, 725 So.2d 770 (Miss. 1998)(circuit court had jurisdiction to enjoin city elections which violated state election laws); *State ex rel. Taft v. Franklin County Court of Common Pleas*, 692 N.E.2d 560, 562 (Ohio 1998)(refusing to enjoin referendum on tax statute, but noting that elections may be enjoined "to enforce rights or mandatory or ministerial duties as required by law."); *State ex rel. Walker v. City of Bowling Green*, 632 N.E.2d 904 (Ohio 1994)(refusing to compel city to reapportion ward boundaries, but holding that the proper remedy would be to enjoin future elections); *State v. Patten*, 69 P.2d 931 (N.M. 1937)(lower court had jurisdiction to enjoin election on municipal form of government).

By the same token, state courts have repeatedly held that elections which are held despite statutory or constitutional violations are illegal and therefore void,[15] although pre-election relief is generally the

[15] Federal courts have similarly nullified unlawful elections and/or shortened the terms of incumbents elected in violation of constitutional or statutory guarantees. *See, e.g., Smith v. Clinton*, 687 F. Supp.

preferred remedy. *Brown v. Hanson*, 17 Mass. App. Ct. 932, 933 (1983). This Court has held that a referendum establishing a new form of city government in the City of Gloucester was void because it was held in violation of state law, and ordered a new election under the former city charter. *Mayor of Gloucester v. City Clerk of Gloucester*, 327 Mass. 460 (1951). State courts have not hesitated to set aside the flawed election of officeholders and to order new elections.[16] *See McComb v. Superior Court*, 943 P.2d 878 (Ariz. 1997)(election of school board members void due to

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1310, 1317 (E.D. Ark. 1988)(three-judge court) (setting aside results of elections upon finding that multi-member district diluted minority voting strength in violation of Voting Rights Act), *aff'd mem. sub nom. Clinton v. Smith*, 488 U.S. 988 (1988); *Bell v. Southwell*, 376 F.2d 659, 664 (1967)(voiding election for justices of the peace due to racial discrimination and ordering new election); *Mann v. Davis*, 238 F. Supp. 458, 460 (E.D. Va. 1964) (three-judge court) (ordering terms of incumbents elected under malapportioned plan to be shortened although this would necessitate holding special elections to fill offices), *aff'd mem. sub nom. Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965).

[16] Those cases which explicitly address the practical consequences of delaying the election of officeholders state that incumbents should retain office until new elections are held. *See, e.g., McComb*, 943 P.2d at 887 (incumbents may continue to occupy school board offices until valid elections); *Glinski*, 209 N.E.2d 277 (enjoining election of legislators over objection that incumbent legislators, also elected under unconstitutional apportionment, would be retained).

racially discriminatory election statute); *O'Connors v. Helfgott*, 481 A.2d 388 (R.I. 1984)(school committee held to be unconstitutionally established due to malapportionment); *Kemp v. Mitchell County Democratic Committee*, 216 Ga. 276 (1960)(election for school superintendent voided due to violation of election statute; "It has long been the rule in this state that where...statutory requirements pertaining to the holding of an election are not complied with the election is void and an injunction is the proper remedy.")[17]

Thus, this Court has not only the authority, but the duty, to prevent an election from occurring in violation of the Constitution and laws of Massachusetts. "[W]hen once it becomes evident beyond a doubt that the Constitution has been infringed and that rights indisputably secured by it have been trampled, then there is no other way but to maintain the Constitution when relief is promptly sought. No consequence of adherence to the Constitution can be so

[17] In other instances, state courts have voided flawed elections on a bond issue, *State v. Kerns*, 502 P.2d 639 (Kan. 1972), a tax question, *Whittle v. Whitley*, 44 S.E.2d 241 (Ga. 1941), and a city charter amendment, *Turner v. Lewie*, 201 S.W.2d 86 (Tx. App. 1947).

evil as a failure to abide by its terms under the circumstances here disclosed." *Attorney General v. Suffolk County Apportionment Com'rs*, 224 Mass. at 609.

CONCLUSION

For the foregoing reasons, the Court should grant Appellants' request for declaratory and permanent injunctive relief.

Respectfully submitted,

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