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One Bromfield Street
Third Floor
Boston, Massachusetts 02108

Phone (617) 368-9100
Fax (617) 368-9101
Email nvri@nvri.org
Web www.nvri.org

February 8, 2002

Susan Mellen
Clerk
Supreme Judicial Court
1412 New Courthouse
Boston, Massachusetts 02108

RE: *Bates v. Director of the Office of Campaign and Political Finance*,
No. SJC-08677

SENT BY FAX AND HAND-DELIVERED

Dear Ms. Mellen:

At oral argument on February 7, 2002, Justices of the Court suggested as a remedy the issuance of monetary judgments to certified participating candidates in the Massachusetts Clean Elections system. This letter is submitted under Rule 16(l) of the Massachusetts Rules of Civil Procedure to address the question of sovereign immunity which the Defendant-Appellants have raised in connection with this remedy and to explain the attached proposed order for monetary judgment and other relief.

For the proposition that sovereign immunity may arise “by necessary implication” from a statute, Plaintiff-Appellants cite the following cases: *Bain v. City of Springfield*, 424 Mass. 758, 763 (1997); *Woodbridge v. Worcester State Hosp.*, 384 Mass. 38, 43 (1981). As an instance where this Court has implied a waiver of sovereign immunity, *see Bain*, 424 Mass. at 763 (sovereign immunity waived where statute imposed duties on Commonwealth and political subdivisions and provided for monetary damages). These rulings apply in this instance because the Massachusetts Clean Election Law explicitly imposes a duty upon the Commonwealth and its political subdivisions to provide funding to certified candidates, and explicitly grants certified candidates an entitlement to funding.

For the proposition that this Court should abrogate sovereign immunity where individual rights are violated by governmental actors in the course of non-discretionary activities, Plaintiff-Appellants cite *Whitney v. City of Worcester*, 373 Mass. 208, 216-217 (1977). Plaintiff-Appellants cite this same case for the proposition that, where the failure to waive sovereign immunity would cause a constitutional violation, the Court need not await legislative action. *Id.* at 210 (“[L]egislative action

on the subject of sovereign immunity is almost sure to follow any action on our part, and the nature of the process is such that *barring any possible constitutional infirmities*, the Legislature will have the final word.”) (emphasis added). For additional support of the proposition that the Court may abrogate sovereign immunity in the absence of a statutory waiver, the Plaintiff-Appellants cite *Morash & Sons v. Commonwealth*, 363 Mass. 612, 614-615 (1973) (Commonwealth not immune from liability for private nuisance) (“Since sovereign immunity is a judicially created common law concept, we reject the assumption...that the consent of the Commonwealth to suit may be derived only from the Legislature.”) (internal citations omitted).

For the proposition that sovereign immunity may be waived in actions directly under the Massachusetts Declaration of Rights, Plaintiff-Appellants cite *Layne v. Superintendent, Massachusetts Correctional Institution*, 406 Mass. 156, 160 (1989) (permitting claim for money damages directly under the Declaration of Rights) (“[A] State may not violate a person’s constitutional rights and then fairly assert that no redress can be had because the state has not provided a statutory means of enforcing those rights.”); *Moore v. McMannus*, 1998 WL 77904 (Mass. Super. 1998) (permitting a record to be developed in suit for money damages directly under the Declaration of Rights).

In support of their contention that the Legislature has, by its actions, created a future entitlement in participating candidates who raise a sufficient number of qualifying contributions to be certified, Plaintiff-Appellants reference the following: St. 1999, ch. 127 (allocating \$10 million to the Clean Elections Fund in the 1999 budget); St. 2000, ch. 159 (setting aside an additional \$10 million in the FY 2000 budget, delaying the start date for the beginning of the election cycle under the Clean Elections Law, and doubling the stipend legislators receive for office supplies and district expenses); “State pols move to hike their own earnings,” *Boston Herald*, March 30, 2000 (increase in stipend enacted in order to compensate for expenditure limits in the Clean Elections Law); St. 2001, ch. 177 (leaving allocated money in Clean Elections Fund despite fiscal shortfall).

In support of their contention that the actions of the Office of Campaign and Political Finance (OCPF) have created a future entitlement in participating candidates who raise a sufficient number of qualifying contributions to be certified, Plaintiff-Appellants reference the following: 970 CMR 5.00 *et seq.* (Clean Elections Regulations promulgated at various times by the OCPF); the OCPF’s creation of forms for participating candidates, such as the CE-1 Declaration of Intent, CE-2 Qualifying Contribution for individual contributor, CE-2L Qualifying Contribution for Multiple Contributors, and CE-3 Application for Certification; the OCPF’s adjustment of the voluntary spending limits to keep pace with inflation as required by section 13 of chapter 55A, *see* <http://www.state.ma.us/ocpf/celimits.pdf>; March 2001 notice sent by OCPF to all candidate committees advising candidates how to participate; the OCPF’s acceptance of Declarations of Intent from the candidate-plaintiffs and others; and the OCPF’s certification, at this date, of two candidates.

The Defendant-Appellees, in their letter to this Court dated February 7, 2002, now concede that “[i]t would be within the Court’s power to abrogate sovereign immunity to execution upon the Commonwealth’s property, whether real or personal (citing *Bromfield v. Treasurer & Receiver General*, 390 Mass. 665, 670 (1983) (emphasis in original omitted). “Personal property includes money...” *Black’s Law Dictionary*, Fifth Ed., at 1096. *See also Lipsitt v. Walmsley*, 289 Mass. 43 (1935) (writ of attachment authorizes seizure of defendant’s personal property, including money, to satisfy any judgment plaintiff may recover). It follows that the Massachusetts Clean Elections Fund

and all other funds of the Commonwealth constitute personal property of the Commonwealth and may be levied for execution.

There is no need to grant the Legislature time to waive sovereign immunity as to the claims in this case before doing so judicially, particularly given the urgency of this matter. While the Court in *Morash* warned the Legislature that it would abrogate sovereign immunity for tort claims unless the Legislature enacted a comprehensive framework, this did not prevent the Court from abrogating immediately sovereign immunity to grant relief as to the claims raised by the plaintiffs in that case. *Morash*, 363 Mass. at 614. The Plaintiff-Appellants note that if the *Morash* plaintiffs had been forced to wait for a legislative abrogation, they would not have received relief until five years after the *Morash* decision, when the Legislature enacted the Massachusetts Tort Claims Act. *See* St. 1978, c. 512, s. 15.

Plaintiff-Appellants respectfully submit, for the Court's consideration, the attached proposed order for monetary judgment and other relief. This proposed order is designed to ensure that candidates certified as participating in the Massachusetts Clean Elections system do not suffer any unreasonable delay in the satisfaction of any monetary judgments. The proposed order defines delay as any point beyond the end of the time periods set forth in the Massachusetts Clean Elections Law, M.G.L. c. 55A §8, for the distribution of funds to certified candidates.

If the Massachusetts Clean Elections Law is to be fully implemented, as mandated by Article 48, it is critical that certified participating candidates know they will receive the funds to which they are entitled under the law in accordance with the law's time provisions. Such assurance will provide certified candidates with the necessary certainty to carry out their campaigns. It will also encourage candidate participation in the system, as the voters intended when they created this law at the ballot box. This assurance must apply to all points within the 2002 election cycle at which certified candidates become entitled to public funds, including matching funds triggered by the expenditures of non-participating candidates. *See* M.G.L. c. 55A, §§ 8 and 11 (detailing time periods for distribution of Clean Election funds and eligibility for matching funds). To the extent it is necessary to achieve this remedy, Plaintiff-Appellants are prepared to amend their complaint as a class action and to file a motion for class certification. The attached proposed order would grant leave to the Plaintiff-Appellants to amend their complaint accordingly and to file such motion.

Plaintiff-Appellants also attach to this letter the following documents:

1. The Defendant-Appellee Director of OCPF's letter, dated November 30, 2001, to Plaintiff-Appellant Warren Tolman, informing Mr. Tolman that the Defendant had, on that day, certified him as a participating candidate in the Massachusetts Clean Elections system;
2. The Defendant-Appellee Director of OCPF's letter, dated November 30, 2001, to the Comptroller, informing him that Mr. Tolman had become a certified candidate; and
3. The payment voucher issued by the Defendant-Appellee Director of OCPF to the Office of the Comptroller in the amount of \$811,050 to be processed against the Massachusetts Clean Elections Fund and to be distributed to Mr. Tolman.

Plaintiff-Appellants continue to assert that the remedy of deeming all necessary funds to have been appropriated as matter of law will provide the most effective and immediate relief. If, however, this Court finds that this remedy is not available, Plaintiff-Appellants embrace the monetary judgment remedy with the appropriate assurances of immediate relief for all current and future certified candidates in the 2002 election cycle.

Sincerely,

John C. Bonifaz
Co-counsel for the Plaintiff-Appellants

cc: Peter Sacks, Esq.
Plaintiff-Appellants' co-counsel

Encl.

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

CIVIL ACTION
No. SJC-08677

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

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

ON A RESERVATION AND REPORT

Order for Monetary Judgment and Other Relief

After hearing and consideration of the merits of this case and
the submissions regarding appropriate relief,

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED that

1. Under art. 48 of the amendments to the Massachusetts
Constitution, the Legislature was obligated to appropriate the funds
necessary to implement the Massachusetts Clean Elections Law, M.G.L.
c. 55A, for the current election cycle, because it did not repeal
the Clean Elections Law prior to August 1, 2001.

2. On November 30, 2001, the Defendant Director of the Office of Campaign and Political Finance (OCPF) certified Plaintiff-Appellant Warren Tolman as a participating candidate in the Massachusetts Clean Elections system, in accordance with M.G.L. c. 55A, § 5. On that same day, the Defendant Director of OCPF issued a payment voucher to the Office of the Comptroller in the amount of \$811,050 to be processed against the Massachusetts Clean Elections Fund and to be distributed to Mr. Tolman within five business days after certification, in accordance with M.G.L. c. 55A, §§ 7(a)(1), 8(a)(1) and 13. To date, Mr. Tolman has not received the \$811,050 to which he has been entitled under the Massachusetts Clean Elections Law.

3. Judgment shall enter for Plaintiff-Appellant Tolman in the amount of \$811,050. The Defendant Director of OCPF is hereby ordered to satisfy immediately - by the close of business today -- this judgment. It is further ordered that this judgment be collected, in the first instance, out of the judgments and settlements account, St. 2001, c. 177, § 2, item 1599-3384.

4. If, upon collecting the funds to satisfy this judgment, the Defendant determines that said fund lacks sufficient money, the Defendant is ordered to collect such funds out of the Massachusetts Clean Elections Fund. If the Defendant determines that said fund lacks sufficient money, the Defendant is ordered to collect such funds out of the General Fund, M.G.L. c. 29, § 2. If the Defendant

determines that said fund lacks sufficient money, the Defendant is ordered to collect such funds out of the Commonwealth Stabilization Fund, M.G.L. c. 29, § 2H(1).

5. A single justice of this court shall retain jurisdiction over this case for the following purposes:

- a) The single justice shall ensure full compliance by the Defendant Director of the OCPF with this court order;
- b) If the Defendant fails to comply, the single justice shall permit Plaintiff-Appellant Warren Tolman to place immediately a levy of execution of this judgment upon property of the Commonwealth, such property including, but not limited to, the Massachusetts Clean Elections Fund, the General Fund, and the Commonwealth Stabilization Fund;
- c) The single justice shall hear all other claims for monetary judgments from certified participating candidates in the Massachusetts Clean Elections system and shall issue such monetary judgments immediately upon a participating candidate's showing of certification by the Defendant Director of OCPF. Such monetary judgments shall ensure disbursement of all funds to which a certified participating candidate becomes entitled at any

time under the provisions of the Massachusetts Clean Elections Law.

d) The Defendant Director of OCPF shall be ordered that such judgments be collected, in the first instance, out of the judgments and settlements account, St. 2001, c. 177, § 2, item 1599-3384. If, upon collecting the funds to satisfy such judgments, the Defendant determines that said fund lacks sufficient money, the Defendant shall be ordered to collect such funds out of the Massachusetts Clean Elections Fund. If the Defendant determines that said fund lacks sufficient money, the Defendant shall be ordered to collect such funds out of the General Fund, M.G.L. c. 29, § 2. If the Defendant determines that said fund lacks sufficient money, the Defendant shall be ordered to collect such funds out of the Commonwealth Stabilization Fund, M.G.L. c. 29, § 2H(1).

e) The single justice shall ensure that such judgments are satisfied without unreasonable delay. For the purposes of this order, if a monetary judgment is not satisfied by the end of the time periods set forth in the Massachusetts

Clean Elections Law, M.G.L. c. 55A, §8, for the distribution of funds, it shall constitute unreasonable delay and shall result in the levying of execution of such judgment upon property of the Commonwealth, such property including, but not limited to, the Massachusetts Clean Elections Fund, the General Fund, and the Commonwealth Stabilization Fund;

- f) The single justice shall determine which additional parties, if any, should be added as defendants;
- g) The single justice shall grant the Plaintiffs-Appellants leave to amend their complaint as a class action with an accompanying motion for class certification. Such amendment and motion shall not delay in any way the granting of monetary judgments for certified candidates and all necessary actions to ensure that such judgments are satisfied;
- h) The single justice shall hear any other claims brought by aggrieved parties regarding the implementation of the Massachusetts Clean Elections Law;

- i) The single justice shall have the authority to order the postponement of the 2002 elections for state office, with a requisite injunction on the Defendant Secretary of the Commonwealth, if it is determined that such postponement is necessary to ensure the full implementation of the Massachusetts Clean Elections Law, including, but not limited to, the timely satisfaction of all monetary judgments for all certified candidates; and
- j) The single justice has the authority to issue any other orders that may be necessary to effectuate the relief ordered in this decree.

6. Subject to the strict time constraints set forth in this decree, all executive branch officials are under the same duty to satisfy monetary judgments resulting from this decree as they are with all other monetary judgments.

An opinion of this court, including disposition of other forms of relief not discussed in this order, will follow.

By the Court,

Clerk

Dated: