
COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

SUFFOLK COUNTY

No. SJC-10021

COMMITTEE FOR HEALTH CARE FOR MASSACHUSETTS, ET AL.,
Plaintiffs-Appellants,

v.

SECRETARY OF THE COMMONWEALTH,
Defendant-Appellee.

ON RESERVATION AND REPORT FROM THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF APPELLEE
SECRETARY OF THE COMMONWEALTH

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QUESTION PRESENTED

Whether Mass. Const. amend. art. 48 and art. 30 allow this Court, where a joint legislative session has not voted on the merits of an initiative amendment to the constitution, to rule that the amendment would have been approved had a vote been held, or to "deem" it "constructively approved," and to order the Secretary of the Commonwealth to submit the amendment to the people at the next state election.

STATEMENT OF THE CASE

Prior Proceedings

Plaintiffs filed a complaint in the county court in November 2006 and an amended complaint in June 2007, seeking mandamus and unspecified equitable relief against the Secretary. RA 1, 82. The case was reserved and reported on a statement of agreed facts in July 2007. RA 16, 83, 84.

Statement of Facts

Plaintiffs include voters who were among the signers of an initiative petition for a constitutional amendment to guarantee health care to all Massachusetts residents.¹ The proposed amendment declared:

[I]t shall be the obligation and duty of the

¹ Plaintiff Committee For Health Care lacks standing, because it is not a voter. Mazzone v. Att'y Gen'l, 432 Mass. 515, 517 n.4 (2000).

Legislature and executive officials, on behalf of the Commonwealth, to enact and implement such laws as will ensure that no Massachusetts resident lacks comprehensive, affordable and equitably financed health insurance coverage for all medically necessary preventive, acute and chronic health care and mental health care services, prescription drugs and devices.

RA 17, 34. In 2003, the petition met all requirements for transmission to the Legislature for consideration, and the Secretary so transmitted it. RA 17.

Under art. 48, such initiative amendments must be laid before a joint session of the Legislature, "and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof." Art 48, Init., pt. 4, § 2. An initiative amendment "shall be voted upon in the form in which it was introduced," unless amended by a three-fourths vote. Id. § 3.

"Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays[.]" Id. § 4. "At such joint session . . . an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court." Id. "If

in the next general court . . . an initiative amendment . . . shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election." Id. § 5.

Here, the amendment was laid before a July 14, 2004 joint session of the 2003-2004 Legislature, where it was amended (by adding a requirement that laws implementing the amendment be approved at a statewide election) and then approved as amended by a vote of 153-41. RA 18. Among those voting "Yea" were Senator Moore and Representative Walrath, who co-chaired the Joint Committee on Health Care Financing and who would later play key roles in legislative action on the amendment and related legislation. RA 18, 39-42.

Matters took a different and unexpected turn in the 2005-06 Legislature. In the fall of 2005, a separate group of voters successfully circulated an initiative petition for a detailed law entitled the "Massachusetts Quality Affordable Health Care Act," and the Secretary transmitted that petition to the Legislature. RA 18, 45-55. It was referred to the

Joint Committee on Health Care Financing. RA 19.

In April 2006, the Legislature enacted "An Act Providing Access to Affordable, Quality, Accountable Health Care," which became St. 2006, c. 58. RA 19. Chapter 58 originated in the Joint Committee on Health Care Financing, see 2005-06 H 4463, 4479, and Senator Moore and Representative Walrath co-chaired the conference committee that drafted the final version of the bill.² Senator Moore later credited the pendency of the two initiative petitions--one for the constitutional amendment broadly guaranteeing comprehensive, equitably financed health care to all residents, and the other for the detailed law actually financing and expanding specific types of health care coverage--with helping to create the political momentum for the enactment of Chapter 58. RA 19-20. In light of that enactment, the proponents of the petition proposing the detailed health care law did not file any additional signatures on the petition, as art. 48 would have required in order for that law to be submitted to the people at the 2006 election. RA 19.

In July 2006, the Legislature assembled in joint

² See <http://www.mass.gov/legis/184history/h04479.htm> (last visited Sept. 20, 2007).

session to consider, inter alia, the proposed health care amendment. RA 19. Senator Moore moved to refer the amendment for further study by a special committee made up of the members of the Joint Committee on Health Care Financing, stating his concern that the enactment of Chapter 58, and the need for time to implement it and amend it if necessary in light of experience, made it potentially unwise to freeze into the constitution the proposed guarantee of health care for all Massachusetts residents. Id. Senator Moore said:

Now the concern that a number of members have with the overall amendment . . . is that, on July 14, 2004 [the date the 2003-04 joint session approved the amendment], I don't think anyone . . . had any idea that we would in this [2005-2006] legislative session, actually enact a very comprehensive effort to reform our health insurance program

. . . I think the very existence of the amendment pending, as well as a potential ballot question on a specific legislative proposal for health care . . . helped to underscore the understanding of the need, that the people of Massachusetts wanted us to act on a comprehensive health care legislation. . . .

[Chapter 58] is now being implemented. The Connector Authority that was created under that, that provides it, is appointed, is underway; regulations are now being written for that. . . .

The question is whether we want to move forward with a change in the Constitution, a

pretty significant step, or whether we want to give this Chapter 58 of the Acts 2006 an opportunity to play itself out, to work, to continue to monitor it, to determine if we really need to make a significant change in the Constitution. So, Mr. President, I think this matter does require a lot further deliberation before we put it on the ballot, and I would move that this amendment be referred under Special Rule F to a special committee of the Convention. . . .

RA 19-20. After another senator spoke in opposition to the motion, Senator Moore withdrew it, but after an hour of debate on the merits of the amendment, Senator Moore renewed the motion. RA 21-22. Representative Mariano (another member of the conference committee on what became Chapter 58) supported the motion, arguing:

For those of us who have been involved in bringing [Chapter 58] through the conference process and seeing it come out in bill form and then being charged with trying to work and implement it, we have seen things that need to be tinkered with, that need to be fixed. My real concern is with the rigidity of a constitutional amendment you lose this ability. You no longer can deal with the problems that come up in the implementation in a swift and efficient manner. You have to go back to a constitutional change.

RA 22-23. Senator Spilka also supported referring the amendment for further study, stating: "I support what this amendment wants to do. I am in favor of this amendment, the language basically. But I feel like it's very important that we see how [Chapter 58] reform

plays out as well.” RA 24-25.

By a roll call vote of 118-76, the motion passed and the amendment was referred to the special committee. RA 25. By January 2, 2007, which was the last day of the 2005-06 Legislature and the date of a scheduled joint session, the special committee had not yet reported back on the amendment. RA 26.

A few days earlier, this Court had decided Doyle v. Sec’y of the Comm., 448 Mass. 114 (2006), clarifying that the joint session had a duty to take final action on all amendments pending before it. When the joint session met on January 2, it voted on the proposed initiative amendment to ban same-sex marriage that was at issue in Doyle. RA 26.

After doing so, the joint session turned to the health care amendment, which was still in the special committee. Id. The proceedings (shorn of plaintiffs’ unsupported assertions and characterizations³) were as follows. Senator Tolman moved to discharge the

³ Plaintiffs’ account (Br. at 6-7) includes matters that have no support in the record, including that “most of the press corps had left the building,” that “the leadership . . . exerted pressure on the members to keep the health care amendment in committee,” and that the Senate President “decreed” that discharging the matter from committee required a two-thirds vote. The basis for the Senate President’s ruling is set forth in the next footnote.

amendment from the special committee. RA 27. By rule, debate was limited to 15 minutes, and the motion required a two-thirds vote.⁴ RA 27. Senator Moore opposed the motion, reiterating his concerns about freezing particular requirements for health care reform into the constitution while Chapter 58 was in the early stages of implementation:

The plan that has been enacted by the Legislature is just being implemented. . . . [I]n the sessions that are going on around this Constitutional Convention . . . we are in fact adopting some further corrective changes to the legislation.⁵ I expect over the next couple of years we will still have to make some further tinkering. So I think that until we get it to where we feel comfortable that it could be made more permanent in the Constitution rather than in statute, it would be premature to adopt this as a constitutional amendment.

RA 27. Senator Moore also cited uncertainties regarding federal approval of the state changes,

⁴ The 15-minute debate limit resulted from Joint Session Rule J (RA 66) and House Rule 64 (available at <http://www.mass.gov/legis/ht02007.pdf>). The two-thirds vote requirement resulted from the fact that neither the Joint Session Rules, nor the House Rules that otherwise govern (see Joint Session Rule J), expressly provide for a vote to discharge a measure from a special committee of the joint session. Thus the usual requirements of a two-thirds vote to suspend the rules applied. See Joint Session Rule L (RA 66); House Rule 84. The point is moot in any event, as not even a majority voted to discharge the measure. See infra.

⁵ Chapter 58 was amended in late 2006 and early 2007. St. 2006, c. 324; id. c. 450; St. 2007, c. 1.

federal financial assistance, and the state's financial condition. Id.

So we have a lot of questions that are still pending before we carve an amendment basically in stone and lock it in, in a way that makes it very difficult for the Commonwealth to function on anything else. My concern is that because the language is there it will present many opportunities for litigation because someone doesn't get a certain type of care or level of care that they think is important and they will then go before the courts and spend a lot of money on litigation that ought to be spent on health care itself and perhaps on other matters.

RA 27-28. Representative Walrath also opposed the motion to discharge, arguing:

There's certainly concern about whether or not this constitutional amendment is ready to be adopted. . . . The amendment [] is quite broad. It is worded such that I am sure that the actual interpretation of some of those words, if it were adopted, would be determined by the Court.⁶ If a change would be needed, and heaven knows the complexity of health care almost guarantees that we're going to have to have some changes, if it were a constitutional amendment, that would take four years before any legislative change could take place, at a minimum. With a statute we can certainly have changes much . . . earlier than that.

⁶ The sponsors worded the amendment to guarantee "comprehensive, affordable and equitably financed health insurance coverage" for all Massachusetts residents, RA 34, and they presumably intended the amendment to be enforceable, at a minimum, in a manner similar to the Education Clause. See Hancock v. Comm'r of Educ., 443 Mass. 428 (2005); McDuffy v. Sec'y of Educ., 415 Mass. 545 (1993).

RA 28.

In response, numerous supporters of the amendment emphasized that the immediate question before the joint session was not the merits of the amendment, but merely whether it should be discharged from the special committee so that a debate on the merits could be held. Senator Jehlen rose to "remind the members that this is a procedural vote . . . to get it out of committee . . . to allow us to do the constitutional duty, that the Supreme Judicial Court has asked us to perform, to take a vote on the amendment by a call of the yeas and nays." RA 28. Senator Montigny asked for a "two thirds [vote] . . . to move it out of committee to have an appropriate debate." Id. Senator Tolman noted this Court's Doyle decision and the just-completed vote on the same-sex marriage amendment, and then stated:

Now we're not asking you to vote on the actual health care amendment. That will come next. What I'm asking you to do is to vote to discharge the bill out of committee. That is what I'm asking you to do. . . . I ask . . . for your vote -- just to discharge this bill and then we'll take the merits of the amendment.

RA 29.

With this understanding, the joint session voted 92 Yeas to 101 Nays against discharging the health care

amendment from the special committee. RA 29. The joint session then adjourned. Id. Accordingly, the clerk of the joint session made no certification to the Secretary regarding any 2005-06 joint session approval of the amendment, id., as art. 48 would require if the amendment had received final 25% approval, and as art. 48 requires before the Secretary may lawfully submit a proposed amendment to the people.

SUMMARY OF ARGUMENT

The plaintiffs' desire for relief is understandable, but ordering the Secretary to place the health care amendment on the 2008 ballot would violate art. 48's requirement that an initiative amendment receive the "affirmative votes" of 25% of the members of two successive Legislatures before being submitted to the people. It would also violate art. 30's prohibition on the Court exercising legislative powers, by requiring the Court to make the legislative determination that the amendment has sufficient legislative support to appear on the ballot. The drafters' failure to anticipate the issue of joint session inaction has been termed "the most serious flaw" in art. 48, but it is not one this Court can "fix." (pp. 15-18.)

The 2005-06 Legislature did not "affirmatively approve" the amendment. This Court cannot infer such approval from procedural votes. A legislator might well have voted not to send the amendment to a committee, or voted to discharge it from the committee, precisely so that the legislator would have the opportunity to vote "Nay" on the merits. The Court cannot re-define after the fact the nature of these actions by a co-equal branch. To do so would not only violate art. 30 but also invite future cases in which the Court would be asked to rule, based on affidavits from legislators, that an amendment had sufficient support to warrant a judicial order placing it on the ballot, even though the amendment had never been voted upon or even debated in any joint session. The constitutional amendment process does not permit such short-cuts. (pp. 18-30.)

Nor does art. 48 allow the Court to "deem" that an initiative amendment has been "constructively approved." The changes in successive drafts of what became art. 48, and the debates in the 1917-78 Constitutional Convention that drafted it, make clear that, although the drafters intended the joint session to vote, they never would have approved a mechanism

under which an initiative amendment could be submitted to the people without an affirmative 25% vote in two successive Legislatures. (pp. 30-36.)

Previous decisions of this Court confirm that an initiative amendment may not move forward absent a 25% affirmative vote. Those decisions were issued in the context of non-votes by the first Legislature to have an amendment placed before it, but the decisions are equally applicable when the second Legislature does not vote. Article 48 requires affirmative votes in two Legislatures, and art. 30 prohibits this Court from effectively conducting such votes using extrinsic evidence or deeming such votes to have been constructively held. (pp. 36-38.)

Plaintiffs' suggestion that the Court should find "constructive approval" in order to "sanction" the Legislature should also be rejected. The Court has previously rejected, on art. 30 grounds, a similar suggestion that it issue relief against the Secretary in order to 'pressure' the Legislature. Such relief would create a serious risk of a confrontation with the Legislature--here, confrontation with a future Legislature if the amendment is ordered onto the ballot, approved under a cloud as to its legitimacy,

and then gives rise to a lawsuit, patterned after the Education Clause cases (McDuffy and Hancock), asserting that the Legislature has not done its duty to enact satisfactory universal health care laws. (pp. 38-41.)

Where the constitution "deems" inaction by one branch or official to constitute approval of or acquiescence in a decision by another branch or official, the constitution says so clearly. It does so in at least four separate places. No such language appears in art. 48, and none should be read into it, particularly where a "deeming" mechanism appeared in an early draft of art. 48 but was deleted. (pp. 41-45).

No judicial remedy is available in this situation. As this Court, the Supreme Court, and the commentators relied on by plaintiffs have all recognized, not every right--not even every constitutional right--carries with it a judicial remedy. This does not render constitutional provisions meaningless. They remain as yardsticks that the people may use in exercising their political remedies. (pp. 45-46.)

Article 30 constrains judicial remedies when the Legislature declines to act, as this Court has recognized in numerous prior decisions asserting violations of constitutional rights. Often some remedy

against an executive official is available, but not where the remedy would trench on legislative powers. (pp. 46-51.)

Neither art. 11 of the Declaration of Rights nor this Court's "general equitable powers" authorize a remedy that would violate arts. 30 and 48. (pp. 51-54.) That the drafters did not fully anticipate how the joint session mechanism might operate does not empower this Court to make a discretionary decision reserved to the Legislature. Nor can the Court effectively add language to fill the perceived gap in art. 48. An actual amendment to art. 48 to facilitate the operation of the initiative process is not unthinkable--the Legislature and people have approved such an amendment in the past--and would be a far more legitimate remedy than what plaintiffs seek here. (pp. 54-57.)

ARGUMENT

I. Ordering the Secretary to Submit to the People a Proposed Constitutional Amendment that Has Not Been Approved by Two Successive Legislatures Would Violate Article 48 and Article 30.

The plaintiffs' frustration is understandable, but their requested relief--an order that the Secretary place the health care amendment on the 2008 ballot--

would violate art. 48's requirement that an initiative amendment receive the "affirmative votes" of at least 25% of the members of two successive Legislatures, each meeting in joint session, before being submitted to the people. Art. 48, Init., pt. 4, §§ 4, 5 (emphasis added). It would also violate art. 30's prohibition on the Court exercising legislative powers.

The 'one-fourth vote' requirement applicable to initiative amendments was intended as a 'legislative minority check' on initiative amendments to the Constitution. Its purpose is to ensure that initiative amendments submitted to the people for approval have at least a reasonable amount of public support, as reflected by the favorable votes of at least one fourth of the legislators elected to the General Court.

Opinion of the Justices, 386 Mass. 1201, 1212 (1982) (emphasis added). A "proposed initiative amendment cannot be submitted to the people unless it has received the specified vote of a joint session of two successive General Courts." Opinion of the Justices, 291 Mass. 578, 586-87 (1935).

To be sure, the drafters "did not intend a simple majority of the joint session to have the power effectively to block progress of an initiative [amendment]." Doyle, 448 Mass. at 118 (emphasis added). But neither did the drafters intend that an

initiative amendment be submitted to the people if it was "unable to command the approval of a one-fourth minority of two successive General Courts[.]" Id. at 118 n.6. In short, the drafters did not fully foresee or provide for the problem of joint session inaction. Commentators have termed this "the most serious flaw in the entire initiative and referendum procedure."⁷

The drafters would never have approved a system under which a proposed amendment could be submitted to the people without actual debates and sufficient votes on the merits in two successive Legislatures. See Part I.B.1 infra. Because the health care amendment did not receive the affirmative votes of 25% of the members of the 2005-06 joint session, art. 48 prohibits the Secretary from submitting it to the people in 2008. And art. 30 prohibits the Court from making the

⁷ Alexander G. Gray, Jr. & Thomas R. Kiley, The Initiative and Referendum in Massachusetts, 26 New Eng. L. Rev. 27, 95 (1991). See id. at 95-98 (discussing history of problem and predicting that unless 25% approval requirement "is brought into harmony with the notion of majority rule under parliamentary law, there will never be a successful effort to amend the constitution by initiative petition"). This may overstate the case; an initiative amendment for a graduated income tax was approved by two Legislatures and appeared on the ballot (but defeated) in 1994, and a proposed amendment to ban same-sex marriage received votes on the merits in two Legislatures in 2007, but was defeated at the second vote.

determination that the amendment has sufficient legislative support to be put on the ballot. Ordering the Secretary to do so would violate both art. 48 and art. 30.

The proponents of the health care amendment may "have cause for discouragement," because there is no recognized, appropriate judicial remedy available for joint session inaction. See League of Women Voters of Mass. v. Sec'y of the Comm., 425 Mass. 424, 431-32 (1997) (citing LIMITS v. President of the Senate, 414 Mass. 31 (1992)). Their remedy is political. Id. at 432; see Doyle, 448 Mass. at 121.

A. The 2005-06 Joint Session Did Not Affirmatively Approve the Amendment.

As a matter of undisputed fact, the 2005-06 joint session did not approve the amendment by the "affirmative votes of at least one fourth of all [its] members." There is no basis for this Court nevertheless to rule "as a matter of law" that the requisite number supported the amendment, as plaintiffs suggest. Br. at 41.

First, plaintiffs' point that the preceding (2003-04) Legislature's joint session approved the amendment is irrelevant. Intervening circumstances, principally

the enactment of Chapter 58 (stimulated in part by plaintiffs' petition and another initiative petition for a health care law), and the recognized need to continue to amend and improve it, obviously changed the minds of many legislators. Constitutional amendments require action by two successive Legislatures precisely to protect against hasty decisions--to allow sufficient time to develop and consider alternative solutions before taking action that is so difficult and time-consuming to undo.

Plaintiffs also err in equating a legislator's vote not to refer the amendment to the committee, or a vote to discharge the amendment from committee, with a vote in favor of the merits of the amendment. Br. at 41. A legislator might well have voted against referral to, or supported discharge from, the committee precisely so that the legislator could then do his or her constitutional duty by taking a vote on the merits, fully intending to vote "Nay." Legislators have reportedly taken this approach in the past,⁸ and many

⁸ Such was the case with the 2002 proposed initiative amendment to ban same-sex marriage. See Yvonne Abraham, [Gay Marriage Ban Thwarted--Legislators Kill Ballot Question](#), Boston Globe, July 18, 2002, at A1 (quoting Sen. Magnani as saying he voted against adjournment of 2002 joint session because he thought
(continued...)

may have done so at the January 2, 2007 joint session held shortly after this Court in Doyle clarified legislators' duty to vote.

That the vote on sending the measure for further study in July 2006 cannot be treated as a vote on the merits is clear enough. After a colloquy about what might occur if the committee did not report back before the November 2006 election, one amendment supporter stated that "a vote for the study is a vote against the ballot question," but the Senate President clarified that "any action that is taken up until the end of this calendar year will allow it to be on the ballot in the next election cycle. So I think the statement . . . that it's dead if we take this vote [to send the matter for further study], is not accurate." RA 24 ¶ 21.⁹

⁸(...continued)

"Protection of Marriage" amendment should be debated on merits, but that he would have voted against the amendment had it come to the floor; stating that five of seven senators who voted against adjournment were also opposed to amendment on merits). See Massachusetts Citizens for Marriage v. Sec'y of the Comm., 440 Mass. 1033 (2003) (rescript) (discussing 2002 joint session's action).

⁹ Plaintiffs note (Br. at 5 n.5) the Senate President's statement that if the committee did not report back, what would happen to the amendment would depend on the Secretary. In context, the Senate President was not suggesting that the Secretary had any discretion in the matter, but rather was clarifying
(continued...)

As for the January 2007 vote on discharging the measure from committee, amendment supporters expressly emphasized that that vote was not a vote on the merits, but merely a procedural vote that would allow a debate and vote on the merits to occur, as called for in Doyle. RA 28-29; see, e.g., id. ¶ 41 (Sen. Tolman, after alluding to Doyle and just-completed vote on same-sex marriage amendment, stated "we're not asking you to vote on the actual health care amendment. That will come next. What I'm asking you to do is to vote to discharge the bill out of committee"). Plaintiffs now ask this Court to re-define, after the fact, what the joint session was voting on--to convert into a final vote on the merits what advocates of a "Yea" vote expressly portrayed as a purely procedural question. The art. 30 problem is self-evident.

Moreover, the Justices have recognized the need to defer to the joint session's characterization of procedural votes on proposed initiative amendments.

Opinion of the Justices, 291 Mass. at 582-84; see also

⁹(...continued)
that if the committee did not report back and the joint session did not take action in time for the measure to go on the November 2006 ballot, the measure, if approved by the 2006 joint session after that time, could be placed on the next (i.e., 2008) ballot by the Secretary. RA 9.

Opinion of the Justices, 334 Mass. 745, 753-56 (1956) (same, for legislative amendment). In those Opinions the Justices concluded that, after an amendment had been approved by the requisite vote, the making of a motion for reconsideration meant that the initial vote approving the amendment was not "final action," and that "adverse disposition must be made of that motion [for reconsideration] before the earlier vote would stand as the final action of the joint session."

Opinion of the Justices, 291 Mass. at 584; see Opinion of the Justices, 334 Mass. at 756. Moreover, a vote in favor of reconsidering the initial approval could not be treated as an "unfavorable vote," for purposes of art. 48's requirement that "an unfavorable vote at any stage prior to final action shall be verified by call of the yeas and nays[.]" Opinion of the Justices, 291 Mass. at 584; see art. 48, Init., pt. 4, § 4.

Reconsideration was not a vote "antagonistic to the merits of the amendment," but merely a vote in favor of "further reflection," and so no roll-call vote was required. Opinion of the Justices, 291 Mass. at 584.

In light of these Opinions, neither the July 2006 vote to commit the health care amendment to the committee, nor the January 2007 vote not to discharge

it from that committee, can be considered "final action" on the amendment, let alone an "affirmative vote[]" on the merits of the amendment. Even if a vote against discharge from committee, unlike a vote to reconsider, might be viewed as "antagonistic to the merits of the amendment," the converse does not follow; a vote in favor of discharge does not automatically equate to support on the merits. It could as easily be a vote to allow a merits vote to occur as required by art. 48 so that the legislator could vote "Nay."

While in the circumstances some legislators' procedural votes might suggest how they would ultimately have voted on the merits had a vote been held, the fact is that such an "affirmative vote" never occurred here. This Court cannot simply assume based on procedural votes that any particular legislator or number of legislators would have voted in favor of the amendment on the merits.¹⁰ The Court cannot give a

¹⁰ The hazards of such an assumption are further illustrated by the January 2, 2007 votes on the amendment to ban same-sex marriage. The amendment was initially approved by a vote of 61 Yeas to 132 Nays, yet a subsequent motion to reconsider prevailed by a vote of 117 Yeas to 75 Nays. See Senate Journal, Jan. 2, 2007 (available at <http://www.mass.gov/legis/journal/sj010207.htm>) (last visited Sept. 30, 2007). A vote against reconsideration obviously cannot be equated to a vote in favor of the action sought to be

(continued...)

vote in favor of discharging the measure from committee a different, and far more constitutionally significant, effect than is dictated by the procedural nature of the vote and by the statements of legislators who themselves voted in favor of discharge.

For similar reasons, plaintiffs err in asking the Court to infer, from the fact that several of the amendment's opponents spoke against discharge from committee, that they knew or believed they would lose a vote on the merits. Br. at 41. What particular legislators on either side might have thought the result of such a vote would be provides no basis for this Court to dispense with the actual "affirmative vote" that art. 48 requires.¹¹

If the Court does so here, then if a similar case arises in the future, the Court will undoubtedly be

¹⁰ (...continued)
reconsidered; it is highly unlikely that the additional 14 legislators who voted against reconsideration had suddenly changed their minds about same-sex marriage.

¹¹ The fact that the Senate President exclaimed "Good Girl!" when one Senator who had previously voiced her support for the amendment in principle ultimately voted against discharge (RA 24-25, 29) suggests, if anything, that the Senate President did not know in advance what the results of the vote on discharge would be, let alone the results of any vote on the merits that might occur. The larger point is that judicial relief cannot be based on speculation about the results of a hypothetical legislative vote.

presented with affidavits from legislators stating how they and other legislators would have voted had a vote on the merits been held -- even if there had been no joint session debate on the merits, which debate, as intended by art. 48's drafters, would have informed and might have altered those legislators' votes. Moreover, such affidavits could as easily be presented in relation to the first Legislature to consider an amendment as to the second. Despite plaintiffs' effort to sidestep that issue and minimize the implications of their argument (Br. at 45 n.18), there is no principled basis in art. 48 for distinguishing between inaction by the two Legislatures. If the Court is willing to determine how a vote in the second Legislature "would have turned out," it is hard to see how the Court could refuse to do the same in the event of inaction by the first Legislature.

Accordingly, for the Court to count hypothetical votes here would raise the specter of a constitutional amendment being submitted to the people for approval despite no debate or vote on the merits having occurred in either joint session, based on post hoc affidavits of legislators saying that they and a sufficient number of others would have voted "Yea" in both Legislatures

if such debates and votes had been held. That is no way to amend a constitution, and it would ultimately weaken the political process.¹²

Moreover, the prospect of this Court essentially holding legislative roll-call votes because the Legislature would not do so is, from an art. 30 standpoint, awkward and unsettling to say the least. One branch's failure to perform its art. 48 duty does not justify another branch crossing art. 30 lines to provide a "remedy." The 2005-06 Legislature did not vote on the amendment, but plaintiffs overstate the case in insisting that the Legislature was "overreaching," "def[ying] its boundaries," "doing more than the constitution allows," and violating art. 30. (Br. at 11, 15, 17, 26-27). Such rhetoric is a diversion aimed at creating the impression that the Legislature must be 'put back in its place'; it distracts from the fact that plaintiffs are attempting to draw this Court out of its own place, into the legislative sphere, to make a discretionary decision

¹² Cf. Hancock, 443 Mass. at 472-73 (Cowan, J. joined by Sosman, J., concurring) ("The more this court interferes in policymaking . . . debates, the more we allow the Legislature to avoid difficult questions, and the more our citizens get accustomed to turning to the courts for solutions rather than to their elected officials.").

that the Legislature was constitutionally required to make but did not. That would violate art. 30.

The requirement for affirmative 25% legislative approval is what distinguishes this case from McCarthy v. Briscoe, 429 U.S. 1317 (1976) (Powell, Circuit Justice), relied on by plaintiffs. Br. at 42-44. That decision invalidated a state statute that barred independent candidates for president from obtaining ballot access. In ordering a remedy, Justice Powell recognized the need to respect the state's legitimate interest in limiting ballot access to candidates with a reasonable amount of voter support--but in the absence of any existing statutory mechanism for presidential candidates to demonstrate such support, Justice Powell found it appropriate to look to the available evidence to determine that Eugene McCarthy had the requisite level of support. 429 U.S. at 1322-23. Here, in contrast, there is a valid, constitutionally prescribed mechanism for determining whether an initiative amendment has sufficient legislative support to justify placing the amendment on the ballot. This Court cannot substitute another mechanism, particularly one that requires the Court to perform a task constitutionally assigned to the Legislature.

Legislative debates on the merits and votes on the merits are critical to the legitimacy of the amendment process. See Opinion of the Justices, 291 Mass. at 582-83. Indeed, the requirement that the Legislature take roll-call votes on proposed initiative amendments was originally inserted solely to ensure that “the people who are to vote upon the initiative constitutional amendment [will] have before them the information given them by roll-call as to the opinion of the Legislature upon that measure.” 2 Debates in the Constitutional Convention of 1917-18 at 632-33 (1918) (Mr. Quincy’s amendment and statement in support thereof); id. at 637 (amendment adopted). See also art. 48, Gen. Prov., pt. 3 (requiring that ballot itself inform voters of how Legislature voted on proposed constitutional amendment).¹³ Here, plaintiffs would have the health care amendment placed on the ballot without the people knowing where the 2005-06 Legislature stood on the measure, and after a 15-minute debate on whether the measure should be discharged from

¹³ The roll-call vote requirement was not originally intended to ascertain whether the requisite level of legislative support was present for an amendment to go on the ballot, because at that point in the 1917-18 Constitutional Convention, no legislative approval at all was required. See Part I.B.1 infra.

committee so that a debate on the merits could be held.

Plaintiffs essentially ask the Court to assume from the circumstances that constitutional actors would have exercised their constitutional voting power in a particular way, and therefore that the vote itself may be dispensed with. The Court has previously refused to do so in other contexts. For example, the Court has ruled that even where the Governor had proposed a particular appropriation bill as required by law, "the Governor's approval of the bill cannot be presumed, nor can presentment to the Governor be dispensed with as a mere formality." Alliance, AFSCME/SEIU, AFL-CIO v. Sec'y of Admin., 413 Mass. 377, 382-83 (1992). Mere passage of the bill by the Legislature alone was not enough to give the bill legal effect on the theory that the Governor was required to approve or would likely approve it. Rather, the Governor's opportunity to review the bill (and veto it or return it with suggestions for amendments) was constitutionally mandated and could not be skipped over as legally unnecessary. Id.; see also Opinion of the Justices, 375 Mass. 827, 838 (1978) (similar).

Just as the constitutionally-mandated presentment of a bill to the Governor cannot be omitted on the

assumption that, in the circumstances, the Governor would sign the bill if presented, neither can the "affirmative vote" on the merits by the members of the joint session be omitted on the assumption that, in the circumstances, there would have been sufficient votes in favor of the proposed amendment. The process of making laws and amending the constitution does not permit such short-cuts. "Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised." Attorney General v. Methuen, 236 Mass. 564, 575 (1921) (citation and internal quotation omitted).

B. Article 48 Does Not Allow for "Constructive Approval" of Constitutional Amendments.

Nor does art. 48 provide or allow for any "constructive" or "deemed" approval of proposed constitutional amendments by the joint session. Article 48 does not say, as it could have, that an amendment advances "unless disapproved" by 75% of the members of either of the two joint sessions. Article 48 does not permit any substitute for actual joint session approval, as evidenced by art. 48's express

requirement for the "affirmative votes" of at least 25% of the members of two joint sessions. Only those votes can authorize the clerk of the joint session to certify the measure to the Secretary and authorize the Secretary to submit the measure to the people. Art. 48, Init., pt. 4, §§ 4, 5. These requirements are "essential to the thing to be done" and are "limitations upon the power to be exercised" by the Secretary. See Attorney General v. Methuen, 236 Mass. at 575; cf. Opinion of the Justices, 370 Mass. 869, 877 (1976) (Secretary's "obligation and authority" to submit proposed initiative law to people did not arise unless final round of petition signatures required by art. 48 was filed with Secretary).

1. The debates on art. 48 confirm that affirmative approval is required.

The debates in the 1917-18 Convention make clear that nothing less than affirmative joint session approval suffices to authorize submission of an amendment to the people. Notably, one sort of "deemed approval" procedure was included in several early drafts of art. 48, but it was ultimately deleted in favor of the requirement for a one-fourth affirmative vote of approval in two successive Legislatures.

Specifically, the first draft of art. 48 provided that if the Legislature failed to agree to an initiative amendment, "such amendment shall nevertheless be deemed to be referred to the next General Court and shall have the same standing therein as if once agreed to"; if it was likewise not agreed to by the second Legislature, the Secretary would nevertheless be required to submit it to the people. 2 Debates at 3. In essence, although phrased as a "deemed approval" mechanism, this effectively dispensed with the need for any legislative approval or action before an initiative amendment could be submitted to the people. Not even a legislative vote of disapproval would have kept the measure from going to the ballot.

But so controversial was the "constitutional initiative,"¹⁴ and so important to its opponents (and some supporters) was the need for the Legislature to maintain some actual control over the constitutional amendment process, that the "deemed approval" mechanism

¹⁴ See, e.g., 2 Debates at 6-9 (minority report on first draft of art. 48, objecting to constitutional amendment by initiative); id. at 686 (Mr. Quincy). "[P]roviding a mechanism by which the people could directly amend the Constitution drew much more fire from the article's opponents than did the similar mechanism for the popular enactment of a statute." Mazzone v. Att'y Gen'l, 432 Mass. 515, 526 (2000).

was ultimately rejected. Before doing so, however, the Convention defeated attempts to weaken legislative control even further. For example, one supporter of the constitutional initiative thought that even requiring the measure to be placed before two successive Legislatures--whether or not either of them approved it--was too restrictive. Mr. Morrill proposed that if the first Legislature did not approve the measure, then it should go directly on the ballot without giving the second Legislature any chance to pass on the measure. 2 Debates at 637-38. But even the leading advocate of the initiative and referendum, Mr. Walker,¹⁵ recognized that this mechanism would make the whole constitutional initiative so wide-open as to jeopardize its approval by the Convention. Id. at 638. So--significantly for this case--the proposal to make consideration by one Legislature sufficient to put an amendment on the ballot was defeated. Id.

Next, the drafters added language requiring that an initiative amendment be actually approved by one-third of the House and one-quarter of the Senate in two successive Legislatures before it could be submitted to

¹⁵ E.g., Carney v. Att'y Gen'l, 447 Mass. 218, 227 (2006) (identifying Mr. Walker as such).

the people. Id. at 649-56, 675. This requirement was reconsidered and approved a second time. Id. at 656.

After further debate, the drafters agreed to the "Loring amendment," which lowered the bar somewhat by requiring the affirmative votes of 25% of two successive Legislatures, meeting in joint session, before the Secretary could submit an amendment to the people. See id. at 678-92; id. at 1053 (final version of art. 48, retaining substance of Loring amendment). Mr. Luce, an opponent of the original draft of art. 48 (see, e.g., Carney, 447 Mass. at 227), announced himself satisfied with the safeguards against imprudent initiative amendments, including that any such amendment "must receive a substantial vote in two Legislatures[.]" 2 Debates at 688.

The deletion of the "deemed approved" language, the rejection of a proposal that one Legislature's consideration suffice, and the substitution of a specific requirement of legislative support, all show that the drafters did not envision and would not have permitted any proposed amendment to go on the ballot unless it obtained the "affirmative votes" of 25% of

two successive Legislatures.¹⁶ To treat legislative inaction as substituting for such affirmative approval would bypass a critical safeguard without which the Convention likely would never have approved art. 48.

Even after the requirement of 25% affirmative legislative approval was adopted, a way around it was proposed by another supporter of a less restricted constitutional initiative process. Mr. Sullivan suggested that a constitutional amendment, if proposed by petition signed by a certain number of former legislators, be submitted to the people without any action or approval by the Legislature itself. 2 Debates at 788. Mr. Sullivan was worried that under the Loring amendment, "seventy-five votes of Senators and Representatives are necessary to get the amendment before the people." Id. at 789. While his math was slightly off,¹⁷ Mr. Sullivan's goal was clear: to

¹⁶ Cf. Town of Brookline v. Sec'y of the Comm., 417 Mass. 406, 421 n.13 (1994) (Legislature's discussion and rejection of language in proposed constitutional amendment meant that amendment as adopted did not include requirement stated in deleted language).

¹⁷ At the time of the 1917-18 Convention, the House consisted of 240 members and the Senate of 40 members, see amend. arts. 21, 22, meaning that one-fourth of the members of a joint session would have been 70 legislators, not 75. Today the number is 50.

provide a means by which no legislative action at all was required before an initiative amendment could appear on the ballot. But this proposal, too, was rejected. Id. at 789.

This history confirms that the drafters viewed affirmative approval by 25% of two successive legislators as an essential prerequisite to submission to the people. Treating the health care amendment as “constructively approved” by legislative inaction would directly contravene the drafters’ intent as reflected in the Debates.

2. Previous rulings confirm that an amendment may not move forward absent a 25% affirmative vote.

This Court has repeatedly stated, in the context of inaction by the first joint session to consider an initiative amendment, that “[a]bsent an initiative amendment’s receipt of the ‘affirmative votes of not less than one-fourth of all the members’ of a joint session of the General Court, art. 48 provides no authority for its referral to the next General Court by the Secretary or anyone else.” Massachusetts Citizens for Marriage, 440 Mass. at 1034; see Doyle, 448 Mass. at 120 (“absence of an actual affirmative vote” was fatal to request for relief against Secretary). “The

language of art. 48 does not permit, by inference or otherwise, a judicial order that the Secretary could permissibly deem the absence of a final vote on the initiative amendment to have the same effect as an affirmative vote, for purposes of submitting the amendment to the next General Court." Id. at 120-21.

The same is true here, because, as stated supra, there is no principled art. 48 basis for distinguishing between inaction by the first Legislature and inaction by the second. Thus, absent an initiative amendment's receipt of the affirmative votes of 25% of the members of a joint session of the second Legislature, "art. 48 provides no authority for its referral . . . by the Secretary or anyone else" to the voters, any more than the Secretary or anyone else could refer an amendment to the second Legislature in the absence of the requisite vote in the first. Cf. Massachusetts Citizens for Marriage, 440 Mass. at 1034; see also Opinion of the Justices, 291 Mass. at 586-87 (initiative amendment cannot be submitted to people absent sufficient votes in two Legislatures).

Notably, the Doyle plaintiffs originally sought an order that their proposed amendment, if not voted upon by the joint session, be submitted to the people by the

Secretary. Although the plaintiffs later abandoned this request, the Court noted that such relief “could not be granted in any event.” Doyle, 448 Mass. at 115 n.4; see id. at 120 (such request would be “unavailing”). The happenstance that the health care amendment was in its second Legislature, while at the time of Doyle the amendment to ban same-sex marriage was in its first, does not eliminate the art. 48 and art. 30 barriers to ordering the health care amendment onto the ballot. Article 48 requires affirmative votes in both Legislatures, and art. 30 prohibits this Court from effectively conducting such votes or deeming them to have been held and to have resulted in 25% approval.

3. Finding “constructive approval” in order to “sanction” the Legislature would violate art. 30.

Nor is “constructive approval” appropriate on plaintiffs’ alternative rationale: “as a sanction for the Legislature’s violation of Doyle.” Br. at 44. This Court faced a similar situation, and refused on art. 30 grounds a similar request for relief, in Bates v. Director of the Office of Campaign and Political Finance, 436 Mass. 144 (2002). There, as here, the Legislature had not performed an art. 48 duty to choose between two permissible alternatives. In Bates the

choice was between (1) appropriating sufficient funds to carry the "clean elections" initiative law into effect, and (2) repealing that law. The Bates plaintiffs asked the Court, inter alia, to enjoin the 2002 state elections, arguing that such an order "would be a powerful inducement to the Legislature to fund the clean elections law." Id. at 178 & n.36.

The Court refused. "The argument misperceives our role under art. 30 as a coequal branch of government owing respect and deference to the other coequal branches. It turns the rule of law into a strategy game." Id.

In Bates the request was to enjoin an election, to pressure the then-sitting Legislature to do its duty. Here, the request is to order an election, to pressure future Legislatures to do their duty. But the principles weighing against such judicial pressure tactics are the same. And in both cases, the proposed pressuring of the Legislature would risk adverse impact on the voters themselves--in Bates, by depriving them of the constitutionally-mandated opportunity to vote; here, by asking them to vote on a constitutional amendment that has not met the constitutional

requirements for being placed before them.¹⁸

Finally, for plaintiffs to promote their suggested remedy "as a deterrent to similar legislative misbehavior in the future" (Br. at 44), and then assert that this requested "sanction" somehow "does not create a potential confrontation with the legislature" (Br. at 45) is self-contradictory and mistaken. The particular 2005-06 Legislature that did not vote on the health care amendment is gone, but the Legislature as a co-equal branch remains. Judicial relief in this case would trench on its powers, and the notion that such relief would not risk a constitutional confrontation is naïve at best.

It is true that the requested order would not operate directly against the Legislature, thus avoiding any immediate questions about its enforceability. But if the order issues, and the amendment is submitted to and approved by the people, questions about the amendment's legitimacy of the amendment will remain. That could pose an especially serious problem with this particular amendment, which affirmatively requires the Legislature to enact laws to achieve the

¹⁸ The remedy the Bates Court ultimately adopted, and the reasons no analogous remedy is available here, are discussed in Part II infra.

extraordinarily difficult, expensive, and elusive goal of universal health care--when the Legislature has just enacted Chapter 58 and continues efforts to perfect it.

As this case and its numerous predecessors (such as LIMITS and Doyle) show, and as demonstrated by the Education Clause cases (McDuffy and Hancock), constitutional provisions requiring affirmative legislative action present serious enforceability problems to begin with. For the health care amendment to be voted on and possibly adopted under a cloud risks exacerbating those problems. This Court would almost certainly be asked to pass on whether a future Legislature had performed its duty under the amendment, at a time when legislative doubts about the validity of the amendment ab initio might still linger, or even simmer. Thus, the risk of inter-branch confrontation cannot be casually dismissed based on plaintiffs' short-sighted suggestion that "[t]here is nothing left for the Legislature to do." Br. at 45.

C. Where the Constitution Allows for Constructive Approval, It Expressly Says So.

Where the constitution deems inaction by one branch or official to constitute approval of or acquiescence in a particular course of action by

another branch or official, the constitution says so clearly. No such language appears in art. 48, and none should be read into it. Cf. Powers v. Sec'y of Admin., 412 Mass. 119, 124-25 (1992) (in light of explicit requirements in other parts of constitution, omission of comparable requirements from constitutional provision in question must be viewed as intentional).

For example, when the Legislature lays a bill before the Governor, he may veto it by returning it with his objections, but "in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within ten days after it shall have been presented, the same shall have the force of a law." Mass. Const. pt. 2, c. 1, § 1, art. 2. A similar provision appears in amend. art. 63, § 5 (governing appropriation bills laid before the Governor), which was drafted by the same 1917-18 Convention that drafted art. 48. The members of the Convention knew how to create such mechanisms, but, not fully appreciating the possibility of joint session inaction, they did not do so in art. 48.

Another example is amend. art. 87, providing that when the Governor proposes an executive branch reorganization plan to the Legislature, "such

reorganization plan shall have the force of law upon expiration of . . . sixty calendar days . . . , unless disapproved by a majority vote of the members of either of the two branches of the general court”

Amend. art. 87, § 2. And amend. art. 91, governing determinations that the Governor is unable to discharge the powers and duties of his office, provides two separate “deeming” mechanisms to quickly and definitively resolve inter-branch disagreements over the Governor’s ability to do so.¹⁹

These mechanisms ensure that, in limited situations viewed as critically important by the drafters, inaction by one official or branch allows action by other branches or officials to take legal effect. This prevents delay and possible stalemate.

No such constructive approval or “deeming”

¹⁹ A declaration by the Governor or this Court that the Governor is unable to discharge the powers and duties of his office results in a deemed vacancy. Id. ¶¶ 1, 2. If the Governor then declares that he is able to discharge his powers and duties, “such vacancy shall be deemed to have terminated four days thereafter,” unless, within the four-day period, this Court transmits a contrary determination to the Legislature. Id. ¶ 3. In such a case, if the Legislature determines, within 21 days and by a two-thirds vote, that the Governor is unable to discharge his powers and duties, “the office of the governor shall continue to be deemed vacant; otherwise such vacancy shall be deemed to have terminated[.]” Id.

mechanism appears in art. 48. If the drafters had intended that legislative inaction be deemed a sufficient basis to refer an amendment to the next Legislature or to require the Secretary to submit it to the people, they would have said so. Instead, the drafters deleted such a mechanism, see supra, expecting that the Governor's role in calling joint sessions would be sufficient to secure joint session action. 2 Debates at 685 (Mr. Quincy). A suggestion that it might be difficult to obtain a roll-call vote was brushed aside in the belief that language requiring a roll-call would suffice. 2 Debates at 653-55 (colloquy between Mr. Carr and Mr. Dutch). The drafters gave the courts no power to deem an initiative amendment approved, or any other enforcement role with regard to joint session inaction. See Doyle, 448 Mass. at 119-20; Massachusetts Citizens for Marriage, 440 Mass. at 1033-34; LIMITS, 414 Mass. at 35. Cf. League of Women Voters, 425 Mass. at 431-32 (drafters intentionally distinguished between effect of legislative inaction on proposed laws, which would allow such laws on ballot, and effect of legislative inaction on constitutional amendments, only remedy for which was gubernatorial action). The Court should not read deleted language

back into art. 48 to provide that legislative inaction has the same effect as approval.

II. NO JUDICIAL REMEDY IS AVAILABLE HERE.

"Not every violation of a legal right gives rise to a judicial remedy." Bates, 436 Mass. at 168-69 (citing Marbury v. Madison); see Hancock, 443 Mass. at 467 (Cowan, J. concurring, joined by Sosman, J.). "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action." Colegrove v. Green, 328 U.S. 549, 55-56 (1946) (plurality opinion of Frankfurter, J.). "The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."²⁰ Id. Even the commentators cited by plaintiffs acknowledge that judicial remedies are not always available for constitutional violations.²¹

²⁰ Colegrove's particular holding that state-level apportionment disputes were nonjusticiable was overruled in Baker v. Carr, 369 U.S. 186 (1962).

²¹ For example, plaintiffs' quotations from the Fallon & Meltzer article (Br. at 17-18) elide the authors' statement that "There historically always have been, and predictably will continue to be, cases in
(continued...)

The lack of a judicial remedy does not render a constitutional provision meaningless or superfluous. The provision remains as a yardstick against which the people may measure the performance of their elected officials, who "ultimately will have to answer to the people who elected them." Doyle, 448 Mass. at 121. The remedy is not judicial but political. Doyle, id.; League of Women Voters, 425 Mass. at 432; LIMITS, 414 Mass. at 35.

**A. Article 30 Constrains Judicial Remedies
When the Legislature Declines to Act.**

The plaintiffs are correct (Br. at 2-3) that art. 48's silence as to judicial remedies does not by itself deprive courts of their usual remedial powers--e.g., the power to review the constitutionality of legislative action, by means of a case brought against an executive official charged with implementing that action. E.g., Buckley v. Sec'y of the Comm., 371 Mass. 195 (1976) (enjoining Secretary from submitting to the

²¹ (...continued)
which effective individual redress is unavailable. This is regrettable, but tolerable." Richard A. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1789 (1991). "Modern doctrines, beyond any peradventure, depart decisively from the notion that the Constitution requires effective remedies for all victims of constitutional violations." Id. at 1784.

people a "legislative substitute" for a law proposed by initiative petition, where legislative substitute did not meet art. 48 requirements). But legislative inaction poses a very different problem. Remedies for such inaction must stay within art. 30 and other constitutional bounds, are often incomplete or imperfect, and in some cases are not available at all. See Town of Milton v. Comm., 416 Mass. 471, 475-76 (1993) (judicial unwillingness to order Legislature to act is grounded in art. 30; "in most (but not all) cases," relief, if deserved, can be obtained against some other defendant) (emphasis added).

Prior decisions concerning legislative inaction illustrate the art. 30 constraints. In Bromfield v. Treasurer & Receiver Gen'l, 390 Mass. 665 (1983), the Legislature had not appropriated money to pay the constitutionally-required "just compensation" awarded in an eminent domain judgment. Plaintiff sought mandamus requiring the state Treasurer to pay the judgment without an appropriation. The Court rejected that request, noting that, under art. 30, it could not compel the Legislature to make an appropriation, and that other provisions of the constitution forbade payments from the Treasury without appropriations. Id.

at 670-72 & nn.9, 11. The state constitutional mandate to compensate owners of property taken for public use "does not mean that the appropriations procedure, which is similarly constitutionally compelled, can be ignored. Were that the case, one segment of the Constitution would achieve an unwarranted dominance over another." Id. at 671 n.10. Instead, the Bromfield Court discussed its willingness to employ other remedies, not involving invading the legislative sphere, to protect the rights of citizens whose property had been or might be taken. Id. at 670 (discussing possible order that agency reconvey property, or injunction barring further takings by agency until judgment was paid, or issuance of execution upon state property).

In Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004), legislative failure to appropriate adequate funds to compensate counsel for indigent criminal defendants caused a shortage of such counsel and consequent violations of defendants' art. 12 right to counsel. Id. at 229, 232. Those defendants sued, asking the Court to order the expenditure of additional funds, without appropriation, to protect their constitutional rights. Id. at 241.

The Court refused, noting that the power to direct the spending of state funds belonged to the Legislature, and that while art. 30 allowed the Court to order expenditures without appropriations to prevent impairment of the courts' own functions, no such impairment had been alleged. Id. at 241-42. Instead, to protect indigent defendants' right to counsel, the Court ordered that unrepresented defendants held for more than specified periods be released or have the charges against them dismissed. Id. at 246.

Here, in contrast to Bromfield and Lavallee, the remedy plaintiffs request against the Secretary invades the legislative sphere, by requiring the Court to make a discretionary choice the Legislature should have made but did not. It would give art. 48's requirement for joint session action on initiative amendments "an unwarranted dominance" over art. 48's requirement that only those amendments receiving a 25% "affirmative vote" of two successive Legislatures be submitted to the people. And, unlike in Bromfield and Lavallee, no other judicial remedy is available against a non-legislative defendant that would reverse the effects or prevent the recurrence of legislative inaction.

Finally, in Bates v. Director of OCPF, as noted

above, the Legislature had not performed its art. 48 duty to choose between two permissible alternatives: appropriating money to implement the clean elections initiative law, or else repealing that law. 436 Mass. at 146-47. The Court rejected plaintiffs' two forms of requested relief, recognizing that art. 30 did not allow the Court to enjoin the Secretary from conducting state elections as a means of pressuring the Legislature to act, and that the Court could not constitutionally order the Director of OCPF to spend money to implement the law without an appropriation. Id. at 175, 178 n. 36. Instead, the Court (and the single justice on remand) devised another remedy: entering money judgments in favor of clean elections candidates and against executive officials, and then authorizing execution on state non-monetary property as necessary to satisfy those judgments. 436 Mass. at 178-79, 187. This approach, while cumbersome, indirectly obtained money to implement the clean elections law, without, in the majority's view, either (1) requiring the Court itself to make the choice constitutionally reserved to the Legislature (between appropriation and repeal), or (2) requiring executive branch officials to act as if the Legislature had made

that choice in favor of an appropriation. Still, two Justices dissented, on the ground that the remedy, while not actually ordering the Legislature to act, "amount[ed] to a constructive appropriation" in violation of art. 30. Bates, 436 Mass. at 188 (Spina, J., joined by Cowin, J., dissenting).

Here, in contrast to what the Bates majority approved, plaintiffs openly ask the Court to order the Secretary to take action that only the Legislature (by 25% vote of two joint sessions) may authorize the Secretary to take. Whether this is characterized as the Court itself making the legislative choice in favor of the health care amendment, or as the Court deeming that choice constructively made, the requested order would violate art. 30, as well as art. 48.

B. Neither Art. 11 Nor this Court's "General Equitable Powers" Authorize the Remedy Plaintiffs Seek.

Article 11 of the Declaration of Rights²² does not require the Court to issue a remedy in disregard of arts. 30 and 48, and thus plaintiffs' reliance on art.

²² "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

11 is unavailing. Br. at 10-11, 23. Article 11 speaks of "recourse to the laws" and of obtaining justice "conformably to the laws"; it does not authorize remedies that are contrary to the laws, let alone contrary to other parts of the constitution, which of course have equal stature. Article 11 "is clearly directed toward the preservation of procedural rights and has been so construed[.]" Pinnick v. Cleary, 360 Mass. 1, 12 (1971); cf. Pl. Br. at 10-11. Plaintiffs seek not to preserve any procedure that provides a remedy for joint session inaction, but to create a new one. Finally, it may be questioned whether art. 11's reference to remedies for "injuries or wrongs that [a citizen] may receive in his person, property, or character" was intended to encompass generalized political injuries of the sort at issue here.²³

²³ In a related vein, the Debates do not support plaintiffs' portrayal of art. 48 as intended to vindicate "the rights of minority groups of voters." Br. at 33. Rather, the intent was that "if there is any great sentiment in the Commonwealth for an amendment to the Constitution, and if that sentiment has expressed itself in a petition signed by 25,000 citizens," the amendment should be considered. 2 Debates at 688 (Mr. Walker). That number (changed to the current floating formula by amend. art. 81) was viewed as a "large number," id. at 689 (Mr. Walker), indicative of broad support, not as protection for political minorities. It was largely the opponents of the constitutional initiative who concerned themselves
(continued...)

Nor does plaintiffs' invocation of this Court's "general equitable powers" justify disregarding art. 30. "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." Haverty v. Comm'r of Correction, 440 Mass. 1, 8-9 (2003) (citations and internal quotations omitted); see T.F. v. B.L., 442 Mass. 522, 533 (2004). "A [c]ourt of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law." Haverty, id. (citations and internal quotations omitted). Ordering the Secretary to submit the measure to the people when it has not received the requisite legislative approval would violate art. 30 and art. 48 and therefore is not a proper equitable remedy.

Plaintiffs correctly note that art. 30 allows a court to order executive officials to take action when those officials "fail to meet statutory or constitutional obligations." Br. at 26 (quoting Michaud v. Sheriff of Essex County, 390 Mass. 523, 534 (1983)). But here the Secretary has not failed to meet any legal obligation. Rather, his obligation, absent

²³ (...continued)
with protecting "minority rights." E.g., id. at 6-8.

25% approval by two joint sessions, is to refrain from submitting the health care amendment to the people.

C. This Court Cannot Remedy the Imperfection in Art. 48.

It is by now clear that the drafters of art. 48 failed to anticipate fully how the joint session approval mechanism might operate in practice. But nothing in art. 48's text or history suggests that the courts would have the extraordinary power to remedy legislative inaction by means of a court making the discretionary determination constitutionally reserved to the Legislature and then ordering the Secretary to act accordingly. Nothing in that text or history supports the conclusion that, if they had foreseen the problems, the drafters would have approved equating joint session inaction with affirmative approval. Indeed, all indications are that the drafters would never have agreed to dispense with such approval. See supra Part I.B.1.

This Court cannot remedy the drafters' lack of foresight. Under the "equity follows the law" principle,

we cannot infer that a void in [a] comprehensive statutory scheme . . . authorizes us to fill that void by legislating an outcome that suits us. See

Alquila v. Safety Ins. Co., 416 Mass. 494, 499 (1993) (circumstance not accounted for in statute does not permit judicial legislation). Equity is not an all-purpose judicial tool by which the "right thing to do" can be fashioned into a legal obligation possessing the legitimacy of legislative enactment.

T.F. v. B.L., 442 Mass. at 533-34 (footnote omitted).

This is also true with a void in a constitutional mechanism. "[W]e are powerless to add language to the constitutional amendment [art. 48]," even where the absence of that language makes exercise of art. 48 rights more difficult. Opinion of the Justices, 370 Mass. 869, 876 (1976). Article 48 is not perfect. But the people, having adopted it, "are bound by the provisions and conditions which they themselves have placed in it," Sears v. Treasurer & Receiver Gen'l, 327 Mass. 310, 321 (1951); it governs "until the constitution is changed by another vote of the people." Opinion of the Justices, 324 Mass. 746, 748 (1949).

Notwithstanding plaintiffs' doubts, an amendment to art. 48 to remove a barrier to an effective initiative process is not unthinkable, even though it requires "a cooperative legislature." Br. at 33. That is, even though the initiative process was intended as "a means of circumventing an unresponsive General

Court," Doyle, 448 Mass. at 118, the Legislature has previously approved amendments to art. 48 that actually facilitated the operation of the initiative process. Specifically, the Legislature proposed and adopted amend. art. 74, which eliminated the requirement that petitions carry a "description" of the proposed law (a requirement that had been strictly interpreted, resulting in the invalidation of numerous petitions as well as voter confusion), in favor of the current, more workable requirement for a "fair, concise summary." See Tobias v. Sec'y of the Comm., 419 Mass. 665, 669-71 (1995) (discussing origins of amend. art. 74); Sears, 327 Mass. at 324.

The initiative process might be thought by some to be contrary to the Legislature's institutional interests, yet the Legislature must and does ultimately respond to the people, even on art. 48 matters. See Doyle, 448 Mass. at 121. A change in art. 48 to remedy the perceived flaw in the initiative amendment process itself could be proposed and considered as a matter of principle, disconnected from any dispute about the merits of a particular substantive amendment concerning health care, same-sex marriage, or term limits. Such a change would be a far more legitimate remedy than the

one plaintiffs seek here.

CONCLUSION

For the foregoing reasons, the Court should remand the case to the county court with instructions to dismiss the complaint.

Respectfully submitted,

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.

A D D E N D U M

Mass. Const. Decl. of Rights, art. 30

Mass. Const. amend. art. 48, Init., pt. IV