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August 11, 2023

By Electronic Mail and Hand Delivery

The Honorable Andrea Joy Campbell
Assistant Attorney General Erin Fowler
Office of Attorney General Andrea Joy Campbell
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Attorney General Campbell and Assistant Attorney General Fowler:

On behalf of Senate President Karen E. Spilka and the Massachusetts Senate, I submit this letter concerning Initiative Petition 23-34 (the "Petition"), which proposes to amend G.L. c. 11, § 12 to expressly provide the Auditor power to audit the General Court.¹ The Petition attempts to limit the Senate's constitutional authority to make its own rules and manage its own proceedings. It also triggers serious concerns related to Article 30 of the Massachusetts Declaration of Rights and the separation of powers doctrine. The Petition should have been submitted as a constitutional amendment. As proposed, the Petition is not in the "proper form," therefore I ask that the Attorney General decline to certify it.

Article 48 of the Massachusetts Constitution requires that an initiative petition be in "proper form for submission to the people." Art. 48, The Initiative, II, § 3. The Petition attempts to fundamentally recast two constitutional principles, and thus should be in the form of a constitutional amendment, not an initiative petition proposing a statutory change. *See League of Women Voters of Mass. v. Secretary of the Commonwealth*, 425 Mass. 424, 430 (1997) (finding that constitutional provisions "may be changed only by constitutional amendment," not the statutory initiative process); *Paisner v. Attorney Gen.*, 390 Mass. 593, 600-01 (1983) (stating that the power to "vacate the constitutional authority of the Senate and House to order their own internal procedures...cannot be brought about by an initiative petition unless that petition...seeks and accomplishes a constitutional amendment to that end"). The Petition does not propose enactment of a law and therefore should not be certified under Article 48.

¹ In the coming days, the Senate will be sending a separate submission to the Attorney General's Office related to the broader question of whether the Auditor, in her official capacity, has authority under existing law to audit the General Court.

The General Court's broad authority to determine its own rules and manage its own proceedings

The Massachusetts Constitution ensures wide latitude for the Senate and House of Representatives to determine their own rules and manage their own proceedings. Specifically, the Senate is authorized to “choose its own president, appoint its own officers, and determine its own rules of proceedings.” Part II, c. 1, § 2, art. 7. The House has similar authority. *See* Part II, c. 1, § 3, art. 10 (speaking to the House’s authority to “settle the rules and orders of proceeding in their own house”).²

When analyzing the rule-making authority of each legislative chamber, the Supreme Judicial Court has observed that “laws govern conduct external to the legislative body, while rules govern internal procedures.” *Paisner*, 390 Mass. at 600 (citing *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983)). The Court has stated: “Legislative rule-making authority is a continuous power absolute and beyond the challenge of any other tribunal.” *Id.* (citing *United States v. Ballin*, 144 U.S. 1 (1892)). When the General Court has enacted “statutes relating to internal proceedings” of the General Court, “each House was essentially engaged in its rule-making function” pursuant to the Constitution. *Id.* at 601. In the Court’s words, “Such procedural statutes are not binding upon the Houses” and that each branch “under its exclusive rule-making constitutional prerogatives, is free to disregard or supersede such statutes by unicameral action.” *Id.* at 601-02.

The Massachusetts Senate strongly supports the principle of making government open and accessible to the public while ensuring the financial and operational integrity of its functions. For nearly 40 years, the Senate has adopted and maintained a rule for the Senate and a parallel rule for Senate-House joint accounts that require independent audits of all financial accounts. *See* Senate Rule 13C (“The Senate Committee on Rules shall provide for an annual fiscal year audit of all Senate financial accounts to be conducted by a certified public accountant experienced in auditing governmental entities.”); Joint Rule 34. The Senate makes completed audits available to the public on the General Court’s website.³ Adoption of these rules is a clear and unambiguous demonstration that the function of auditing legislative accounts falls within the Senate’s exclusive and absolute constitutional authority to determine its own rules of proceedings. Consistent with the Supreme Judicial Court’s opinion in *Paisner*, any **statutory** provision to the contrary would be superseded by the Senate’s adoption of those rules.

Moreover, the current Auditor has already stated an intention to use any new statutory authority to audit the General Court’s core functions, including: active and pending legislation; the process for appointing committees; the adoption and suspension of House and Senate rules; and the policies and procedures of the House and Senate. There can be no question that these

² In contrast, there is not one word in the Massachusetts Constitution related to the Auditor’s power and authority. The Auditor’s authority and power comes from legislatively-enacted statutes.

³ The Senate also makes publicly available payroll, expenditures, and other financial information, including vendors and amounts paid to them, on the Comptroller’s website (<https://www.macomptroller.org/cthr>). With respect to its functions, the Senate makes available on the General Court’s website (<https://malegislature.gov>) extensive information about the Senate and the legislative process, including information on members, bills and amendments, roll call votes from Senate sessions and Senate committees, archived video of Senate sessions and committee hearings, and journals and calendars for the Senate.

“internal proceedings” are controlled exclusively by the General Court’s rule-making function. If proponents wish to limit that rule-making function, they must seek a change to the Constitution. They cannot proceed by initiative petition. *Paisner*, 390 Mass. at 600-01.

Separation of powers

Article 30 of the Massachusetts Constitution is more explicit than the Federal Constitution in calling for the separation of powers of the three branches of government, and the Supreme Judicial Court insists on scrupulous observance of its limitations. *Opinion of the Justices to the House of Representatives*, 365 Mass. 639, 640-41 (1974). At the doctrine’s core is a mandate to prohibit interference by one branch of government with the functions of another. *Id.* at 645.

Any audit of the General Court conducted by the Auditor would constitute a prohibited interference by an executive officer into the Legislature’s constitutionally protected prerogatives. That interference would be particularly acute were the Auditor to use her new-found statutory power to audit areas within the General Court’s core functions, including: active and pending legislation; the process for appointing committees; the adoption and suspension of House and Senate rules; and the policies and procedures of the House and Senate. Article 30 strictly prohibits such interference.

Conclusion

If the proponents of the Petition seek to give the Auditor express authority to audit the General Court, they should have made their proposal in the form of a constitutional amendment. Their failure to do so has left them with an initiative petition that is not in “proper form for submission to the people.” As such, it should not be certified under Article 48.

Sincerely,



James E. DiTullio
Counsel to the Senate

Cc: Karen E. Spilka, President of the Massachusetts Senate