SUPREME JUDICIAL COURT
for the
COMMONWEALTH OF MASSACHUSETTS

No. SJC-08916
(Request for Advisory No. A-105)

and

No. SJC-08917
(Request for Advisory No. A-106)

IN THE MATTER OF A REQUEST FOR AN ADVISORY OPINION
FROM THE GOVERNOR

and

IN THE MATTER OF A REQUEST FOR AN ADVISORY OPINION
FROM THE PRESIDENT OF THE SENATE

BRIEF OF INTERESTED PARTY/AMICUS CURIAE
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STATEMENT OF THE QUESTIONS PRESENTED

In SJC-8916 (Request for Advisory No. A-105), the questions transmitted to the Justices from the Governor are:

1. Does adjournment by a roll call vote (137 yeas to 53 nays) of the joint session [of the two Houses] constitute final action on a proposed constitutional amendment such that the Governor's power and duty to recall the joint session under Article 48 [of the Constitution of the Commonwealth] do not attach?

2. If there has not been final action by the joint session, may the Governor, using her judgment, reasonably determine whether this controversy has reached the "limit of futility," LIMITS v. President of the Senate, 414 Mass. 31, 32 n.4 (1992), such that she may decline to recall the joint session under Article 48?

In SJC-8917 (Request for Advisory No. A-106), the questions transmitted to the Justices from the President of the Senate are:

1. Would a member of [any] joint session [that might be called by the Governor] violate Article 48 [of the Constitution of the Commonwealth] by moving to adjourn before the joint session otherwise takes action on any of the proposed [constitutional] amendments?

2. Would the President of the Senate, as presiding officer of the joint session, violate Article 48 by recognizing a motion to adjourn before the joint session otherwise takes action on any of the proposed amendments?

3. Would the joint session violate Article 48 by voting to adjourn before otherwise taking action on any of the proposed amendments?

4. If the joint session votes to adjourn before otherwise taking action on any of the proposed amendments, does Article 48 require any further action by the President of the Senate?

STATEMENT OF THE CASE

1. Prior Proceedings

On December 3, 2002, the Governor requested an advisory opinion from this Court on two questions of law. Both questions concern the joint session of the two houses of the Massachusetts Legislature, which convened on May 1, 2002 with three proposed constitutional amendments laid before it and which adjourned on July 17, 2002 pursuant to a roll call vote of 137 yeas to 53 nays.

On December 5, 2002, the President of the Senate requested an advisory opinion from this Court on four question of law. Those questions concern a joint session's adjournment rules and procedures vis-a-vis Amendment Article 48 of the Constitution of the Commonwealth as well as the role of the Senate President post-adjournment.

Also on December 5, 2002, this Court issued an Announcement inviting any interested party to file a

brief, letter or memorandum with regard to the two requests for advisory opinions.

Gay & Lesbian Advocates & Defenders (GLAD) received a copy of the Announcement and submits this brief in response.

2. Statement of Facts

For the purposes of this matter, GLAD accepts those relevant statements of fact set forth in the seven numbered paragraphs in the "Background" section of the Governor's request for an advisory opinion (with the exception of any possible characterization of facts that would suggest that there has not been final action on the proposed constitutional amendments) and in the first five introductory "Whereas" paragraphs of the President of the Senate's request for an advisory opinion.

SUMMARY OF THE ARGUMENT

The Governor's Request (Advisory No. A-105)

This Court has set forth the standards for assessing whether a request for an advisory opinion presents a solemn occasion many times, making clear that the Court will not grant such a request if it does not involve pending matters, present duties, or

serious doubts as to the power of the branch of government posing the request, or if the request involves an abstract or hypothetical question. (p. 7-10).

The Governor's first question presents no solemn occasion because, in light of the inference that the Governor is not contemplating taking any action, it lacks the requisite action in view. (p. 10-12). Further, the Governor's first question is premature. The Governor is not facing any present duty to act, as Art. 48 does not require the joint session to act by any specific time. (p. 12-15).

The Governor's second question also presents no solemn occasion because, in addition to having no action in view, this Court has already answered the issue posed by this question. The Governor has also asked an abstract legal question untied to any particular factual circumstance. (p. 16-19). In addition, given that question two presents no solemn occasion because the Court has already given guidance on the issue, there can no longer be any need for the Court to answer question one. (p. 19).

The matter at issue before this Court does not present any specific circumstances that would support

relaxing the requirement of a solemn occasion. Given the lack of weighty matters presented and the existing guidance on the issues raised, the Court should refuse the Governor's request to ignore the lack of solemn occasion. (p. 20-21).

If the Court finds, however, that there is solemn occasion to answer the Governor's requests, the Court should answer question one in the affirmative because the Legislature has taken final action on the proposed amendments within the meaning of Art. 48. The roll call vote to adjourn met the constitutional requirements for final action. (p. 21-22). Further, this Court has made clear that legislative actions other than a direct vote on the substance of a petition may constitute final action. (p. 22-25). The Legislature understood its vote on adjournment to be final action, thereby foreclosing additional action on the proposed amendments. (p. 25-27).

Moreover, as might be argued, the Legislature's actions cannot be construed as nonetheless allowing the proposed amendments to proceed to the next General Court. (p. 27). The Debates on Art. 48 make clear that the Legislature must affirmatively vote to approve an amendment before it may proceed. (p. 27-

31). In addition, any case law regarding the effect of a lack of an affirmative legislative action on a statutory initiative is inapposite to a proposed initiative constitutional amendment. (p. 31-32).

Again assuming a solemn occasion, the Court should also answer the Governor's second question in the affirmative because the Governor may decline to recall the joint session if she reasonably believes that to do so would be futile. The law does not require a futile act, even where the requirement at issue states that a party shall or must engage in a particular action. (p. 32-35). This principle applies to the Governor, given that this Court has recognized that the standoff between the Legislature and the Governor can reach the point of futility. As a result, if the Governor reasonably believes that recalling the joint session would be futile, she need not engage in such a useless act. (p. 35-36).

The President of the Senate's Request
(Advisory No. A-106)

The questions posed by the President of the Senate do not currently present this Court with a solemn occasion, although a solemn occasion might well arise depending on the actions of the Governor. The

President of the Senate and the joint session currently have no present duty as to which they are seeking the assistance of the Court because the questions are premised on a hypothetical action of the Governor. (p. 37-39). As a result, this Court should hold these questions in abeyance until either the Governor acts or the term of the current General Court comes to an end, whichever first occurs. (p. 40-42).

Assuming the existence of a solemn occasion to answer these questions, the Court should answer that adjournment does not violate Art. 48. Art. 48 anticipates that it will co-exist with legislative rules such as adjournment, and the joint session operates according to ordinary rules governing legislative bodies. (p. 42-45). As a result, the Court should answer questions one, two, and three posed by the President of the Senate in the negative.

ARGUMENT

I. THE GOVERNOR'S REQUEST FOR AN ADVISORY OPINION (NO. A-105) ASKS TWO QUESTIONS, NEITHER OF WHICH PRESENTS A SOLEMN OCCASION.

A. The Governing Standards For Assessing A "Solemn Occasion."

This Court has had many opportunities to set forth the standards under which it assesses whether a

request for an advisory opinion constitutes a solemn occasion such that the Court will answer a question presented.

Without attempting to catalogue all of the principles the Court has developed over its history, a number are salient to the present request from the Governor (as well as the request from the President of the Senate – Request for Advisory A-106). First, the advisory opinion is to be "sparingly exercised." Answer of the Justices to the Council, 373 Mass. 867, 870 (1977). Second,

> The provision that the opinions of the Justices be required only on "solemn occasions" has been strictly construed. Not only does the Constitution define the extent of the duty of the Justices to furnish opinions, but it also limits their right to express them. The boundaries set by the Constitution are jurisdictional and cannot be crossed. The jurisdictional limitations imposed by the Constitution must be strictly observed in order to preserve the fundamental principle of the separation of the judicial from the executive and the legislative branches of government.

Answer of the Justices to the Council, 362 Mass. 914, 916-917 (1973) (Citations omitted). See also Answer of the Justices to the Senate, 406 Mass. 1220, 1224 (1989) ("It is not the less our duty, in view of the careful separation of the executive, legislative and

judicial departments of the government, to abstain from … [giving our opinion] in any case which does not fall within the constitutional clause relating thereto." (quoting Answer of the Justices, 373 Mass. 898, 901 (1977)).

Third, opinions "may be required only respecting pending matters, in order that assistance may be gained in the performance of present duties." In re Opinion of the Justices, 216 Mass. 605 (1914).

Fourth, "[i]f there is no present duty, no solemn occasion exists and the Justices are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular question." Answer of the Justices to the Acting Governor, 426 Mass. 1201, 1204 (1997).

Fifth, "having some action in view," id. at 1203, the Governor or the Legislature must entertain "serious doubts as to their power and authority to take such action" Answer of the Justices to the Council, 373 Mass. 867, 871 (1977), and "the settlement of such doubt was necessary to enable it, in the exercise of its proper functions, to act legally and intelligently upon the pending question."

In re Opinion of the Justices, 217 Mass. 607, 612 (1914).

Questions bearing on the wisdom or expediency of some action, as opposed to questions of the power and authority to act, "cannot properly be answered by the Justices." Answer of Justices, 319 Mass. 731, 734 (1946). See also Opinion of the Justices to the Governor, 385 Mass. 1201, 1203 (1982) (same).

Sixth, the Court will not answer purely abstract questions of law, see In re Opinion of the Justices, 301 Mass. 615, 617 (1938); Answer of the Justices to the Governor, 364 Mass. 838, 846-847 (1973), or hypothetical questions. See Answer of the Justices to the Acting Governor, 426 Mass. 1201, 1204-1205 (1997).

Finally, if the power of the Governor or the legislative body is clear or if the answer given in no way affects that power, there is no solemn occasion. See Answer of the Justices to the Senate, 406 Mass. 1220, 1225 (1989); Answer of the Justices to the House of Representatives, 375 Mass. 822, 824-825 (1978); Answer of Justices, 319 Mass. 731, 734-735 (1946).

B. The Governor's First Question Does Not Present A Solemn Occasion.

The Governor's first question asks:

> Does adjournment by a roll call vote (137 yeas to 53 nays) of the joint session [of the two Houses] constitute final action on a proposed constitutional amendment such that the Governor's power and duty to recall the joint session under Article 48 [of the Constitution of the Commonwealth] do not attach?

Announcement, Supreme Judicial Court of the Commonwealth, SJC-8916, December 3, 2002.

At the outset, the question arises as to whether the Governor here has, in fact, the requisite "some action in view," i.e., recalling the joint session, as opposed to no action, i.e., allow the status quo to continue. From the Governor's recitation of the factual background and also from the framing of her questions, the strong inference arises that the Governor is not contemplating the taking of any action and she certainly does not aver that she has any action in view. Therefore, there is no requisite pending matter. Contrast In re Opinion of the Justices, 301 Mass. 615, 616-617 (1938)(noting the requirement of a pending matter, the Court had reason to logically assume that the Governor had a particular action in mind); In re Opinion of the Justices, 216 Mass. 605 (1914) (same). For that reason alone, her first question does not present a solemn occasion but

rather an abstract question of law or a hypothetical question that cannot be answered.

Assuming for the sake of argument alone that the Governor has the act of recalling the joint session in view, the next question that arises is whether the Governor could be facing any present duty to act regardless of how one might characterize the current status of the joint session and the three proposed constitutional amendments that were presented to the joint session.

It is undisputed that there is no solemn occasion when a request is premature. See Answer of the Justices to the Acting Governor, 426 Mass. 1201, 1204 (1997). Moreover, in the particular context of joint sessions and initiative amendments, this Court has addressed the question of prematurity where the proponents of an amendment had brought an action for mandamus. See LIMITS v. President of the Senate, 414 Mass. 31 (1992).

In LIMITS, the joint session of the Legislature had convened on several occasions, including December 16, 1992 and December 21, 1992, and adjourned on December 21, 1992 "without taking final action on the initiative amendment." 414 Mass. at 33. When this

Court issued its ruling on December 23, 1992, with only a modest number of days remaining in the legislative session, it said:

> Article 48 does not require final action by any specified time. The time within which the joint session must act continues until January 5, 1993, when the term of the current General Court will end. The joint session has not yet failed to comply with the direction of art. 48 that it take final action. The joint session has not failed to perform a duty that could justify issuing an order to act. In circumstances in which a person or entity has not yet failed to perform a duty, an action in the nature of mandamus is premature.

414 Mass. at 34 (Citations omitted).

The clear teaching of LIMITS is that it is currently premature to make a determination as to whether the joint session has failed to comply with Article 48 in the present case where the critical factual predicates regarding dates and the then current action of the joint session, i.e., adjournment, are identical. As a result, any recall action by the Governor is premature and, therefore, she is under no present duty that would create a solemn occasion requiring this Court to answer question one.

Two subsidiary questions do remain concerning LIMITS. First, that case involved a mandamus action

seeking an order from the court to require some action of the legislature. The current matter involves questions from the Governor as to actions she might take vis a vis the legislature. However, this distinction cannot change the result because the analysis of the pertinent issue, prematurity, is the same; and it is prematurity which governs the result.

Second, in LIMITS, the Court left open the question whether the joint session's "adjournment without taking final action on the initiative amendment might lead us to conclude that, as a practical matter, this action is no longer premature." 414 Mass. at 35.

Assuming for the sake of argument alone that the present joint session also adjourned without taking final action (but see Section II, below), the Court in LIMITS was solely addressing whether a mandamus action might no longer be premature under such circumstances. Such a question is simply not relevant here where the issue is strictly whether a solemn occasion exists.

In that regard, the result may well be that a Governor simply cannot get an answer from this Court as to when he or she might call a joint session on the basis that the joint session was failing to take final

action. However, that result is consistent with the Court's recognition that Article 48 gives no role to the courts but rather leaves the matter to the Legislature and the Governor and, ultimately, to the people by way of the ballot box if the purpose of Article 48 is frustrated. 414 Mass. at 35; see also Alexander G. Gray, Jr. & Thomas R. Kiley, The Initiative and Referendum in Massachusetts, 26 New Eng. L. R. 27, 96-97 (1991) (discussing In re Opinion of the Justices, 291 Mass. 578 (1935), and Opinion of the Justices, 334 Mass. 745 (1956), to the effect that there is "no deadline or due date established by Article 48" and, therefore, "no means of requiring the Joint Session to take any particular action"). The alternative is that the Court acts and gets drawn in, politically, as a player in the constitutional amendment process.

For these reasons, and for an additional reason set forth below in the discussion of the second question from the Governor, the Governor's question one does not present a solemn occasion and, therefore, the Court should respectfully decline to answer question one.

C. The Governor's Second Question Does Not Present A Solemn Occasion.

The Governor's second question asks:

> If there has not been final action by the joint session, may the Governor, using her judgment, reasonably determine whether this controversy has reached the "limit of futility," LIMITS v. President of the Senate, 414 Mass. 31, 32 n.4 (1992), such that she may decline to recall the joint session under Article 48?

Announcement, Supreme Judicial Court of the Commonwealth, SJC-8916, December 3, 2002.

Initially, as noted in Section I.B., above, it seems clear from the Governor's submission to the Court that she has no "action in view." Therefore, for the same reason as noted with respect to question one, there is no solemn occasion to address question two.

Second, the Governor is asking in question two whether, assuming no final action by the joint session to date, she may decline to recall the joint session if she reasonably determines in her judgment that a recall would be futile.

This Court should decline to answer this question for the simple reason that in actual litigation (and in other advisory opinions) this Court has "spoken to [the issue] raised by the question posed." In re

Answer of the Justices to the House of Representatives, 375 Mass. 790, 794 (1978). See also Answer of the Justices to the House of Representatives, 413 Mass. 1219, 1225 (1992); LIMITS, supra at 34 n.5 (quoting from Opinion of the Justices, 334 Mass. 745, 758-759 (1956)).

Specifically, this Court has held that the legislature may be prorogued without final action by a joint session where the Governor "has become reasonably convinced that it will be impossible to secure [final action by the joint session]" because the Constitution does not require going to the "limits of futility." Opinion of the Justices, 334 Mass. 745, 758-759 (1956). See also LIMITS, supra at 34 n.5 (quoting from Opinion of the Justices, 334 Mass. 745, 758-759 (1956).

In effect, the Governor has simply asked whether she has the power to follow the law as set down by this Court. Such a question does not present a solemn occasion. See Answer of the Justices to the Senate, 406 Mass. 1220, 1225 (1989); Answer of the Justices to the House of Representatives, 375 Mass. 822, 824-825 (1978).

Given that it is clear that the Governor need not act if she is reasonably convinced that a recall would be futile, the only element undetermined in the present case is whether the current situation can be determined to be futile. That question does not require an answer by the Court, however. First, the Governor has not asked the Court to resolve this factual issue. Second, this factual issue is not a question of power or authority and therefore does not create a solemn occasion. Third, the Governor indicates that she has already resolved this question. In the Background section of her submission to the Court, the Governor states, after setting forth the factual basis for the statement: "Accordingly where, as here, the Governor reasonably believes that it may be impossible to secure further action by the joint session …." (Emphasis added). Governor's Submission, dated December 3, 2002, Background, p. 3, ¶6.

Third, beyond the fact that the Governor has asked a question that this Court has previously addressed, the Governor has also asked simply an abstract legal question untied to any particular factual circumstance. As noted in Section I.A.,

above, such questions do not present a solemn occasion.

Finally, once it is determined: (1) that the existing state of the law clearly enunciates the Governor's power to choose not to recall the joint session if she determines that a recall would be futile and (2) that, therefore, question two does not present a solemn occasion, it follows logically that the Court should, for this additional reason, decline to answer question one. This is so because the Governor can only conceivably have to act if there has been no final action by the joint session. (If there has been final action, it is clear that the Governor has not role to play whatsoever.) Once it is clear that the Governor already has guidance in the law on question two, she has no present need for an answer to question one.

For these reasons, the Governor's question two does not present a solemn occasion and, therefore, the Court should respectfully decline to answer question two.

D. The Present Matter Does Not Present Particular Circumstances That Justify Relaxing The "Solemn Occasion" Requirement.

Anticipating a "solemn occasion" problem, the Governor's submission asks this Court to "rely on their ability in unusual and important circumstances to opine on the Governor's constitutional powers and duties" should the Court "question whether a solemn occasion exists." (Governor's Submission, dated December 3, 2002, Background, pp. 3-4, ¶7).

In support, the Governor cites four cases over the span of 50 years (id.) in which this Court has relaxed its solemn occasion inquiry because of "particular circumstances" while always expressly noting that the action was "not to be regarded as establishing a practice." Opinion of the Justices to the Council, 374 Mass. 864, 866-867 (1978) (concerning whether the powers of the Council had been usurped by the Governor); Opinion of the Justices to the Governor, 363 Mass. 889, 898-899 (1973) (concerning questions of continuing importance regarding the Commonwealth's obligations to pay rents); Opinion of the Justices, 330 Mass. 713, 727 (1953) (regarding the construction of the Mass. Turnpike and noting the extensive enterprise and the importance of the

statute); In re: Opinion of the Justices, 269 Mass. 611, 618-619 (1929) (regarding important tax laws involving corporate excise).

For the reasons previously discussed, the present request for an advisory opinion raises no comparably weighty matters such that the Court should relax its "solemn occasion" standards. Indeed, the existing case law from this Court provides ample guidance to the Governor in the present circumstances. The Court should refuse the Governor's request to ignore the lack of a solemn occasion.

II. THE COURT SHOULD ANSWER "YES" TO THE GOVERNOR'S QUESTION ONE BECAUSE THE JOINT SESSION OF THE LEGISLATURE HAS TAKEN FINAL ACTION WITHIN THE MEANING OF ARTICLE 48.

A. The Roll Call Vote on Adjournment by the Joint Session Constituted Final Action.

In voting to adjourn the joint session, the Legislature took final action on the proposed constitutional amendments before them. Their vote met the constitutional requirements for final action and was clearly understood to be final action.

1. The Vote on Adjournment Met the Requirements for Final Action.

Part 4, § 4 of Article 48 of the Amendments to the Constitution [hereinafter "Art. 48"] sets forth

the only constitutional requirement for final legislative action on proposed constitutional amendments: "Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays, which shall be entered upon the journals of the two houses[.]"

The joint session's vote on adjournment on July 17, 2002 was precisely this type of roll call vote of the yeas and nays. See House, No. 4840, at http://www.state.ma.us/legis/history/h04840.htm. The votes were recorded on the records of both houses. See Uncorrected Proof of the Journal of the Senate, at http://www.state.ma.us/legis/journal/sj071702.htm; Journal of the House, Wednesday, July 17, 2002, at http://www.state.ma.us/legis/journal/hj071702.htm. Thus, this vote has met the only requirement explicitly set forth in Art. 48 for final action.

This Court has also provided insight into the meaning of "final action" under Art. 48. In Hilsinger v. Sec'y of the Commonwealth, 388 Mass. 1 (1983), this Court made clear that the final action requirement may be met by legislative actions other than a direct vote on the substance of a proposed initiative. In Hilsinger, the joint session had amended an initiative

constitutional amendment by striking out all nine sections of the proposal and replacing it with twenty-one new sections. By a vote of 172 to 9, the legislature voted to refer the amended version to the next joint session. The Court ruled that this vote constituted final action on the amendment as originally proposed. The Court explained,

> [T]he General Court's 1980 agreement, by considerably more than three-fourths of its members, to refer the … amendment to the next joint session, was an expression of its disapproval of House No. 6252 as originally submitted. Not having received approval by one-fourth of the members of the 1980 constitutional convention, as required by art. 48, the Initiative, IV, § 4, House No. 6252 became a nullity for the purposes of the next constitutional convention.

388 Mass. at 5. The Court noted that this vote constituted final action despite not having met the requirements of Pt. 4, § 4 of Art. 48 that final action be taken by a vote of yeas and nays due to the fact that the amendment was made pursuant to Pt. 4, § 3, which does not require a call for yeas and nays unless specifically asked for. 388 Mass. at 5, n.3.

In addition, in Opinion of the Justices, 291 Mass. 578, 583 (1935), this Court stated, "'Final legislative action' in this connection means such action according to established legislative procedure

modified by the constitutional requirements of article 48 of the Amendments." A motion for adjournment is a prime example of established legislative procedure. See Rules 55, 64, 65 of the House of Representatives for the year 2001-2002 at http://www.state.ma.us/legis/bills/house/ht02002.htm; Rules 46, 52, 53 of the Senate as adopted on Feb. 14, 2002 at http://www.state.ma.us/legis/senrules.htm.

The effect of adjournment on pending matters differs depending on the nature of the session to be adjourned. When adjournment ends the regular session of a legislative body, pending matters are carried over and given priority on the next day's agenda. See Rule 46 of the House of Representatives; Rule 35 of the Senate. In Opinion of the Justices, 334 Mass. 745, 754 (1956), however, this Court noted that "the joint session is not, or at least has not been, an assembly having regular sessions." As a result, the effect of adjournment on pending matters before the joint session is to put an end to it.

> When the adjournment closes a session in an assembly which does not meet as often as quarterly, or when the assembly is an elective body, and this session ends the term of a portion of the members, the adjournment puts an end to all business unfinished at the close of the session.

Art. III. Privileged Motions, in Robert's Rules of Order, http://www.constitution.org/rror/rror-03.htm#17. Because the vote on adjournment ended all action on the proposed amendments, therefore, it should be deemed final action for purposes of Art. 48.

Just as the Court recognized the vote at issue in Hilsinger as final action because it clearly demonstrated the Legislature's disapproval of the proposed amendment, so, too, should the actions of the joint session in July, 2002 be deemed final action. The vote on adjournment was a decisive message from the Legislature that they did not want to take further action on the measures before them. Further, unlike the vote in Hilsinger, the vote to adjourn met the requirement that final action be taken by a call of the yeas and nays.

2. The Legislature Understood the Vote on Adjournment to Be Final Action.

As the Governor recognized in her request to this Court for an opinion of the Justices, legislative leaders understood the vote on adjournment to be final action. See Letter from Governor Jane Swift to the Honorable Justices of the Supreme Judicial Court of 12/3/02, at 2 (quoting statements from the Senate

President’s Office: “‘the vote to adjourn the constitutional convention indefinitely was final’”; Senator Harriette L. Chandler: “‘I think the Legislature voted and it’s pretty clear what the vote was. … It wasn’t even close.’”; and Senator Mark Montigny: “‘This is a debate we have had, and I think the issue is over for this session.’”) (internal citations omitted). Even Legislators that voted against adjournment recognized that the vote foreclosed further action on the proposed amendments. See, e.g., Yvonne Abraham, Gay Marriage Ban Thwarted, Legislators Kill Ballot Question, Boston Globe, July 18, 2002, at A1 (statement of Senator David P. Magani, who voted against adjournment, acknowledging that adjournment prevented further action).

In light of this understanding and the fact that the vote on adjournment conformed to the constitutional requirements, adjournment by a roll call vote of the joint session constituted final action on the proposed constitutional amendments such that the Governor’s duty to recall the joint session under Pt. 4, § 2 of Article 48 of the Amendments to the Constitution does not attach. For these reasons,

the Court should answer “yes” to the Governor’s question one.

B. The Vote on Adjournment Prevents the Proposed Amendments from Proceeding to the Next General Court.

It might be argued that the joint session’s decision not to vote on the substance of the proposed amendments nonetheless allows the amendment to proceed to the next session of the Legislature.[1] This cannot be the case. Because the Legislature did not affirmatively approve the proposed amendments, the final action of the joint session cannot be “deemed” approval such that the amendments may be transmitted to the next legislative session. The vote on adjournment cannot be construed as a legislative approval of the initiative amendments before them.

1. The Debates on Art. 48 Demonstrate that the Legislature Must Vote to Approve an Initiative Before It May Proceed.

The Debates on Art. 48 make clear that amendments must be affirmatively voted on by the Legislature in order to move on to the next General Court. When the

[1] This argument was raised in the Revised Brief of the Plaintiff-Appellant and at oral argument in Pawlick v. Birmingham, No. SJC-08879 (docketed, Oct. 22, 2002). GLAD fully anticipates that the argument will be raised again in the context of these requests for an opinion of the Justices.

Committee on the Initiative and Referendum reported the "Resolution to Provide for Establishing the Initiative and Referendum" to the Committee of the Whole, the Resolution allowed that if "the General Court into which [a proposed amendment] is introduced shall fail to agree to such amendment in the manner provided in the ninth article of amendment to the Constitution, 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[.]" 2 Debates in the Massachusetts Constitutional Convention, 1917-1918 3. The Committee on the Whole retained this language when it reported the resolution to the Constitutional Convention, but it also added a provision allowing for a legislative check making clear that unless there is a vote to adopt the petition in both legislative sessions, the initiative will not be submitted to the people. See id. at 675 ("[U]nless at least one-third of the members of the House present and voting and one-quarter of the members of the Senate present and voting in both of the annual sessions aforesaid vote to adopt the initiative petition for a constitutional amendment, it shall not be submitted to the people").

The Debates in the Constitutional Convention reflect a concern that the provision deeming an amendment to have been approved without an affirmative vote would allow prejudicial or oppressive amendments to pass without a sufficient legislative check. The members of the Committee on the Initiative and Referendum who dissented from the recommendation that the Resolution, which included the "deeming" provision, be adopted, stated that changes to the solemn compact to protect the rights of individuals and minorities should be made only after deliberate action of the legislature. Recognizing "that majorities maybe unjust, unwise and uninformed," id. at 7, they stated:

> The measure now presented by the majority of this committee provides for a fundamental and revolutionary change in altering this solemn compact between all the people and every individual citizen, in that by it a majority of the voters who may at any time vote upon a particular amendment, are permitted, in spite of the protest and the adverse action of the representatives assembled in the General Court of all the people in the Commonwealth, to compel a change in the solemn compact or Constitution which determines the rights and liberties of all. … An organized minority may change the compact by which all have agreed to be bound, may impose new and different obligations upon all, may take away from them rights which are cherished and have been preserved to them by solemn covenant.

Id. at 8.

The desire to balance allowing the people to circumvent the legislature through the initiative process with ensuring thorough scrutiny and preventing propositions lacking merit led to the adoption of an amendment proposed by Augustus Loring, which deleted the language about deeming and replaced it with much of the language that was ultimately adopted. See id. at 678 (introduction of amendment); 692 (adoption of amendment). The amendment set forth the requirement that an initiative amendment shall receive in two consecutive terms of the General Court "the affirmative votes of at least one-quarter of all the members elected" in order to be submitted to the people. Id. at 678.

Mr. Loring, in introducing the amendment, stated that the requirement of approval of one-quarter of the Legislature would

> not only give information to the voters but it will have this effect: It will cut off the freak proposition, the proposition that is without merit and is introduced rashly and without proper consideration. Such a proposition would be turned down by even one-quarter of the members of the Legislature.

Id. at 680. Thus, by adopting this amendment, the framers of Art. 48 specifically required that the Legislature affirmatively act on a proposed amendment before it can proceed through the additional requirements to appear on the ballot.

2. Case Law on Statutory Initiatives Is Inapposite.

As this Court noted in League of Women Voters of Mass. v. Sec'y of the Commonwealth, 425 Mass. 424, 431-32 (1997), cases such as Citizens for a Competitive Mass. v. Sec'y of the Commonwealth, 413 Mass. 25 (1992), regarding the impact of legislative inaction on a statutory initiative petition are inapposite to the situation presented by this request. As the Court stated, "Article 48's provisions concerning an initiative proposal for a statutory change and an initiative proposal for constitutional change differ significantly with respect to legislative inaction." 425 Mass. at 431.

In the context of a statutory initiative, art. 48 provides a mechanism for the Secretary of the Commonwealth to place the petition on the ballot at the next election upon failure of the Legislature to approve a petition. See Art. 48, Pt. 5, § 1. In the

context of an initiative amendment, however, a petition may not be submitted to the people unless and until it receives approval in two consecutive General Courts. See Art. 48, Pt. 4, §§ 4, 5. As a result, without the affirmative approval of the joint session, the proposed amendments may not proceed to the next General Court.

III. THIS COURT SHOULD ANSWER "YES" TO THE GOVERNOR'S QUESTION TWO BECAUSE THE GOVERNOR MAY DECLINE TO RECALL THE JOINT SESSION IF SHE REASONABLY BELIEVES THAT A RECALL WOULD BE FUTILE.

Assuming, arguendo, that the Legislature has not taken final action, the Governor may nonetheless demur to recall the joint session if she reasonably believes that to do so would be futile. Although Art. 48, pt. 4, § 2 states that until final action has been taken, "the governor shall call such joint session or continuance thereof," if to do so would be pointless, the Governor need not engage in a futile act.

A. The Law Does Not Require A Useless Act.

That the law does not require vain or futile actions is a long established maxim. In Hobart v. Hilliard, 28 Mass. 143, 147 (1831), this Court held that no averment of notice to a defendant was necessary as to a recovery of judgment in a former

suit because the defendant was the counsel of record in the former suit. "Notice, therefore, to him would be a useless ceremony, which the law never requires."

This principle has been invoked in a wide variety of contexts. See, e.g., Stock v. Mass. Hosp. Sch., 392 Mass. 205, 212-13 (1984) (futility exception to rule that resorting to administrative process is a prerequisite to invoking court's jurisdiction); Anderson v. Phoenix Inv. Counsel of Boston, Inc., 387 Mass. 444, 455 (1982) (because attempt to conform to new statute of limitations would have been futile, plaintiffs not barred from challenging its application to them because they waited thirty days after passage of the statute to press their claim. "[W]e would not require a plaintiff to engage in a futile activity in order to preserve his rights."); Pupecki v. James Madison Corporation, 376 Mass. 212, 218 (1978) (shareholder must demand that corporation itself bring suit before shareholder can bring derivative suit unless such demand would be futile); Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 107 (1977) (plaintiff excused from complying with notice and grievance requirements of employment contract if defendant would not have complied with obligations if it had received

timely notice. "The law does not require useless acts."); Beach & Clarridge Co. v. Amer. Steam Gauge & Valve Mfg. Co., 208 Mass. 121, 132 (1911) (party may be excused from complying with condition precedent in contract if performance of the condition would be futile. "The law requires no vain or idle performance.").

Even when the law states that a party shall or must engage in a particular action, if such action would be futile or useless, this Court has made clear that the party may be excused from the requirement. In Commonwealth v. Angiulo, 415 Mass. 502 (1993), this Court ruled that a Defendant's failure to demand a list of jurors did not prevent reversal of conviction on the basis that his right of access to the names and addresses of jurors under G.L. c. 277, § 66 had been denied. As the dissent noted, 415 Mass. at 533, "[t]he statute expressly provides that the defendant or his counsel must first demand the list from the clerk before he is entitled to receive it." Despite this clear statutory requirement, however, the Court ruled that because the trial judge had ordered jurors' names withheld, it was therefore "futile--and indeed highly improper--for the defendant to request a list

of prospective jurors from the clerk. The law traditionally does not require litigants to make a futile demand in order to preserve their rights." 415 Mass. at 526, n.20.

This principle also applies to the Governor. Despite the requirements of Art. 48, pt. 4, § 2 that "the governor shall call such joint session or continuance thereof," if the Governor has become reasonably convinced that recalling the joint session would not result in any action being taken on the proposed amendments, she is not required to call them back into session. She need not engage in a futile act.

B. This Court Has Applied The Principle Of Futility To Article 48.

This Court has recognized that the situation may arise whereby the Governor's action in calling back the joint session would be useless. In Opinion of the Justices, 334 Mass. 745, 758-59 (1956), this Court acknowledged that while the framers of Art. 48 expected all officers to perform their required duties, "We do not believe it was intended that an unseemly controversy should be carried on between the Governor and the General Court to the limits of

futility." Given that the Governor retains the general power to prorogue the Legislature under Mass. Const. Pt. II, c. 2, § 1, art. 5, when the Governor "has become reasonably convinced that it will be impossible to secure [action by the joint session], he may exercise his powers of prorogation, even though final action on all proposed amendments has not been taken." 334 Mass. at 759.

The Court reinforced this notion in <u>LIMITS v. President of the Senate</u>, 414 Mass. 31 (1992). Acknowledging that the Governor's calling of a joint session is the only remedy for the Legislature's inaction, the Court invoked the language of the <u>Opinion of the Justices</u>, again stating that the Governor need not engage in a futile act if convinced of the impossibility of securing action by the joint session. 414 Mass. at 34, n.5.

These cases are quite clear. If the Governor is reasonably convinced that recalling the joint session would be futile, she may exercise her powers of prorogation, even if final action on the proposed amendments has not been taken. This Court should therefore answer yes to the governor's question two.

IV. THE PRESIDENT OF THE SENATE'S REQUEST FOR AN ADVISORY OPINION (NO. A-106) ASKS FOUR QUESTIONS NONE OF WHICH CURRENTLY PRESENTS A SOLEMN OCCASION; HOWEVER, A SOLEMN OCCASION MIGHT WELL ARISE DEPENDING ON THE ACTIONS OF THE GOVERNOR.

In setting forth the pertinent factual background to the request for an advisory opinion, the President of the Senate recounts the history to date of the 2002 joint sessions of the Senate and the House of Representatives. Specifically, the request details that the joint session met on three occasions, May 1, 2002, June 19, 2002 and July 17, 2002. (Request, "Whereas" Paragraphs 3-4). At the last session on July 17, 2002, the joint session "voted finally to adjourn by a recorded rollcall vote of 137-53." (Id., "Whereas" Paragraph 4).

In sum, the joint session of the 2001-2002 General Court has been formally and finally concluded insofar as any actions of the legislature are concerned. All that remains is the possibility that the Governor might call a joint session of the legislature before the dissolution of the current General Court on December 31, 2002. It is that possibility that constitutes an essential premise of each of the four questions presented by the President of the Senate.

A. None Of The Questions Propounded By The President Of The Senate Currently Presents A Solemn Occasion.

The President of the Senate has asked the following questions:

1. Would a member of [any] joint session [that might be called by the Governor] violate Article 48 [of the Constitution of the Commonwealth] by moving to adjourn before the joint session otherwise takes action on any of the proposed [constitutional] amendments?

2. Would the President of the Senate, as presiding officer of the joint session, violate Article 48 by recognizing a motion to adjourn before the joint session otherwise takes action on any of the proposed amendments?

3. Would the joint session violate Article 48 by voting to adjourn before otherwise taking action on any of the proposed amendments?

4. If the joint session votes to adjourn before otherwise taking action on any of the proposed amendments, does Article 48 require any further action by the President of the Senate?

As noted in Section I.A., above, opinions "may be required only respecting pending matters, in order that assistance may be gained in the performance of present duties." In re Opinion of the Justices, 216 Mass. 605 (1914). If there is no present duty, no solemn occasion exists and the Justices are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular question." Answer of the Justices to the

Acting Governor, 426 Mass. 1201, 1204 (1997). Without "having some action in view," a request is premature. Id. at 1203-1204. Moreover, "without an actual, specific factual context," questions become abstract and hypothetical and fail to present a solemn occasion. Id. at 1204-1205.

At the present moment, "there is no duty presently confronting the [President of the Senate or the joint session] as to the performance of which it is in doubt." Opinion of the Justices, 349 Mass. 802, 803 (1965). Moreover, the President of the Senate could not -- and, indeed, has not -- asked for the Court's view with respect to the adjournment motion and vote previously taken by the 2002 joint session in July 2002. Id. (Court would not give its views "with respect to an action which has already been taken").

As a result, with each of the questions being expressly premised on a hypothetical – "if the Acting Governor does call such a joint session" (Request, "Whereas" Paragraph 6) – there is currently no solemn occasion presented.

B. A Solemn Occasion Might Well Arise Depending Upon The Actions Of The Governor, And, Therefore, This Court Should Hold These Questions In Abeyance Until Either The Governor Acts Or The Current General Court Is Dissolved.

As noted in the preceding section, there is currently no solemn occasion that would allow this Court to answer the questions propounded by the President of the Senate. At the same time, it remains a possibility that the Governor might act to recall the legislature into joint session before the current General Court is dissolved. Should that possibility become a reality, a solemn occasion might well arise at least with respect to questions one, two and three.[2]

[2] It appears unlikely that Question four, which asks a broad, open-ended question as to "any further actions [required] by the President of the Senate" following a vote to adjourn, could even then present a solemn occasion because it presents an abstract question of law. Answer of the Justices to the Acting Governor, 426 Mass. 1201, 1204-1205 (1997).

Even assuming for the sake of argument alone, however, that Question four presents a solemn occasion in some circumstance, this Court should advise that Art. 48 requires no further action by the President of the Senate following a vote to adjourn the joint session. As set forth by the Constitution, the singular role of the President of the Senate is to preside at the joint session. Amend. Art. 81, § 1. By definition, once the joint session is formally adjourned under the operative rules of the joint session, there can be no further role for the President of the Senate under Art. 48.

Assuming a recall of the joint session by the Governor, the Senate President as presiding officer of the joint session has duties and responsibilities in connection with the power and authority of that particular office. Questions one, two and three all raise the issue as to whether there is a conflict between the rules governing joint sessions – which clearly encompass a motion to adjourn (Request, "Whereas" Paragraph 6) – and Article 48 of the Constitution.

While it could perhaps be argued that no solemn occasion exists even in this future scenario because it relates solely to a matter of procedure in the legislature, see, e.g., Opinion of the Justices, 323 Mass. 764, 768 (1948), a strong argument can also be made that there is a solemn occasion. Once recalled (unwillingly) into session, the joint session presumably would continue to desire to adjourn while retaining the status quo as it currently exists. To the extent the President of the Senate has doubts as to the legality of adjournment in such circumstances, the predicate for a solemn occasion may exist.

At the same time, even assuming that a solemn occasion would arise vis-a-vis questions one, two and

three if the Governor does recall the joint session at some date in the future, this Court should refrain from answering the questions in anticipation of future eventualities. There is no basis to relax the solemn occasion requirement in these circumstances. See Section I.D., above.

Therefore, this Court should hold this matter in abeyance until the dissolution of the current General Court or the Governor acts to recall the joint session, whichever first occurs. If the General Court dissolves without any recall of the joint session by the Governor, the pending questions will not require an answer. If the Governor recalls the joint session, the Court can then invite additional briefing from interested parties as to President of the Senate's questions.

V. ASSUMING THE EXISTENCE OF A SOLEMN OCCASION, THIS COURT SHOULD ANSWER "NO" TO THE PRESIDENT OF THE SENATE'S QUESTIONS ONE, TWO AND THREE BECAUSE ADJOURNMENT OF THE JOINT SESSION DOES NOT VIOLATE ARTICLE 48 OF THE CONSTITUTION.

For the reasons set forth in Section IV, above, this Court should not currently reach the merits of the questions addressed to the Court by the President of the Senate. However, assuming for the sake of argument alone that a solemn occasion exists, this

Court should answer "No" to questions one, two and three.[3]

Questions one, two and three essentially ask a single question, i.e., would adjournment of the joint session – without otherwise taking action on pending constitutional amendments – violate Article 48?

Art. 48 requires that a proposed constitutional amendment be laid before a joint session of the two houses not later than the second Wednesday in May. See Mass. Const., Amend. Art. 81, § 1. It also anticipates that the joint session will meet and be continued from time to time until "final action" is taken on a proposed constitutional amendment. Id.

As demonstrated in Section II, above, the act of the joint session in voting to adjourn by a roll call vote of 137-53 on July 17, 2002 constituted "final action" under Article 48. As such, there can be no conflict between Article 48 and the joint session's decision to adjourn.

Even assuming for the sake of argument alone that a roll call adjournment vote does not constitute "final action" under Article 48, it does not follow,

[3] As indicated in n.2, supra, GLAD maintains that Question four fails to present a solemn occasion under any circumstances.

as a matter of law, that adjournment without a specific "yeas and nays" vote on a particular proposed constitutional amendment violates Article 48.

Most fundamentally, Article 48 expressly anticipates the possibility that the legislature may not take "final action" and, as a result, creates a remedy in the hands of the Governor. Mass. Const., Amend. Art. 81, § 1; LIMITS v. President of the Senate, 414 Mass. 31, 34 (1992). Therefore, Article 48 seems completely to anticipate its co-existence with legislative rules, including adjournment.

Second, this Court has made it clear that there are a number of scenarios consistent with Article 48 where there has been no specific "yeas and nays" vote on a particular proposed constitutional amendment. See LIMITS, supra (adjournment); Opinion of the Justices, 334 Mass. 745 (1956) (motions for reconsideration); In re Opinion of the Justices, 291 Mass. 578 (1935) (same); see also Hilsinger v. Secretary of the Commonwealth, 388 Mass. 1 (1983) (entire text of proposed amendment deleted by amendment with the substitution of different language).

Third, "[t]he joint session by necessity possesses the ordinary prerogatives of a deliberative legislative body. One of these is to adopt rules for the regulation of its conduct." <u>In re Opinion of the Justices</u>, 291 Mass. 578, 583 (1935). In that case, the Court noted that "[r]econsideration of votes is recognized practice in legislative bodies in this country." <u>Id</u>. By definition, rules of adjournment must also be a recognized practice.

In addition, Article 48 "does not prevent the joint session from adopting rules to regulate procedures touching the matters to be considered. Neither its words nor its general purpose precludes the joint session from making a rule to permit and to govern [adjournment]." <u>Id</u>.

For all of the foregoing reasons, this Court should answer "No" to questions one, two and three.

CONCLUSION

For all of the foregoing reasons, amicus curiae, Gay & Lesbian Advocates & Defenders, respectfully submits that:

As to SJC-8916 (Advisory No. A-105), this Court should:

(a) decline to answer both question one and question two for the reason that each question fails to present a solemn occasion; or, alternatively,

(b) if it finds that a solemn occasion does exist as to question one, answer "Yes" to that question; and

(c) if it finds that a solemn occasion does exist as to question two, answer "Yes" to that question.

As to SJC-8917 (Advisory No. A-106), this Court should:

(a) decline to answer question four for the reason that question four does not present a solemn occasion;

(b) decline to presently answer questions one through three for the reason that each question presently fails to present a solemn occasion;

(c) hold questions one through three in abeyance until either the Governor acts to recall the joint session of the legislature or the

current General Court is dissolved, whichever first occurs;

(d) decline to answer questions one through three as lacking a solemn occasion if the current General Court dissolves without the Governor recalling the joint session;

(e) invite additional briefing from interested parties on questions one through three if the Governor acts to recall the joint session of the legislature before the current General Court dissolves or, alternatively, if it finds that a solemn occasion does exist as to questions one through three, answer "No" to each of those questions.

Respectfully submitted
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