

COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss.

Superior Court Department  
Civil Action No. 2180-CV-00081

TERRY Y. ALLEN, et al.,

Plaintiffs,

v.

BOARD OF REGISTRARS OF  
THE TOWN OF AMHERST,

Defendant.

**PLAINTIFFS' EMERGENCY MOTION TO SET SCHEDULE FOR BRIEFING,  
HEARING AND DISPOSITION ON ITS MOTION FOR SUMMARY JUDGMENT ON  
COUNTS I AND II OF THEIR AMENDED COMPLAINT**

Pursuant to Superior Court Rule 9A(d)(1), Plaintiffs, Terry Y. Allen, et al. ("Plaintiffs"), forty registered voters in the Town of Amherst (the "Town"), move on an emergency basis for entry of an Order in the form attached hereto as Exhibit A setting a schedule for briefing, hearing, and disposition of their Motion for Summary Judgment on Counts I and II of their Amended Complaint (the "Motion"). Plaintiffs plan to file and serve their Motion on or before July 19, 2021.

This action concerns Plaintiffs' efforts to place a referendum before the Amherst voters under the Amherst Town Charter (the "Charter") seeking reversal of a measure passed by the Town Council. To avoid the costs to the Town of a special election, it is in the best interests of all concerned if any referendum is held on the date scheduled for this fall's biennial regular town election, November 2, 2021.

Under the Town's election calendar, the deadline for the Amherst Town Council to advise the Town Clerk to place a referendum on the November 2021 ballot is September 28, 2021. A true and accurate copy of that Election Calendar is attached as Exhibit B. Before being placed on the ballot, the Amherst Town Charter provides for (a) Town Council to reconsider the decision on which Plaintiffs seek a referendum at its next regularly scheduled meeting<sup>1</sup>-- probably September 13, 2021, depending on when the Court disposes of the Motion,<sup>2</sup> and (b) Town Counsel to determine whether the subject of the referendum falls within a narrow category of topics not appropriate for referendum within 21 days after the Board of Registrars of the Town of Amherst (the "Board") concludes that Plaintiffs have obtained sufficient signatures for the referendum to be placed on the ballot. See section 8.4(c) of the Town Charter, Ex. C hereto.

Accordingly, Plaintiffs request that the Court set a briefing schedule and date for hearing on their Motion with sufficient time for the Court to decide Plaintiffs' Motion by August 27, 2021, or as promptly thereafter as is convenient to the Court. (Plaintiffs may also be filing and serving a Motion for Entry of Separate, Final Judgment on Counts I and II of their Amended Complaint). That schedule will afford the Town Council and the Town Counsel the time prescribed by the Town Charter to take the above-described actions, and afford the parties sufficient time before September 28, 2021, to seek appropriate relief from this Court if Town Council affirms its earlier decision and Town Counsel decides the matter is not appropriate for a referendum.

In further support thereof, Plaintiffs state as follows:

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<sup>1</sup> See section 8.4(a) of the Town Charter, a true and accurate copy of which is attached as Exhibit C, last sentence of first paragraph.

<sup>2</sup> A copy of the Amherst Town Council Meeting Schedule is attached as Exhibit D.

## Nature of the Action and Procedural History

1. On April 5, 2021, the Amherst Town Council approved a measure approving and authorizing borrowing of funds for the expansion and renovation of the Jones Library (the “Measure”), a public library in the Town. See Board of Registrars’ Certificate dated April 22, 2021, a true and accurate copy of which is attached as Exhibit E hereto (the “Certificate”).

2. Section 8.4 of the Amherst Town Charter affords Amherst voters who disagree with a Town Council decision a “Voter Veto” procedure to challenge that decision. The procedure requires opponents of the decision to file with the Clerk of the Town Council within 14 days following the date on which the Town Council has voted finally to approve any measure, a petition on a form prepared by the Town, physically signed by a minimum of 5% of the registered voters as of the date of the most recent Town election, and addressed to the Town Council protesting against the measure or any part thereof. See section 8.4(a) of the Amherst Town Charter, Ex. C.

3. On April 20, 2021, proponents of a Voter Veto Petition timely filed with the Town Clerk’s Office 1,088 signatures to protest the Measure (the “Petition”). See Certificate, Ex. E. The 1,088 signatures were 224 more signatures than were required to meet the 864 signatures the Board determined were required to satisfy the Charter’s Voter Veto provision’s 5% threshold. Id.<sup>3</sup>

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<sup>3</sup> Accordingly, the Board bears the burden of demonstrating the valid reasons it did not certify signatures on the Petition. Four Thousand Five Hundred Sixty-Eight Registered Voters of Worcester v. City Clerk of Worcester, 392 Mass. 424, 425, 465 N.E.2d 1209, 1210 (1984) (“[t]he principles enunciated in McCarthy as to candidates for public office apply with equal force to petitions for [city or town] charter review”) citing McCarthy v. Secretary of the Commonwealth, 371 Mass. 667, 359 N.E.2d 291 (1977) (“once a candidate for public office submits in excess of the requisite signatures for inclusion on a ballot, the burden is upon the Secretary of the Commonwealth to demonstrate valid reasons for noncertification of signatures.”)

4. Just two days later, the Board issued the Certificate with respect to its decisions on certification of the 1,088 signatures on the Petition. See Ex. E, the Certificate. The Board reported that it had certified 842 signatures pursuant to 950 CMR § 55.03—thus indicating that it had refused to certify 246 signatures—and that 864 signatures were required to meet the 5% threshold. Id. The Board concluded, “[t]he petition failed to produce enough signatures of registered voters to initiate next steps in the voter veto process.” Id.

5. Because the Board certified 842 signatures, and 864 are required to meet the 5% threshold, to obtain sufficient signatures, for the Plaintiffs to prevail, the Court would need to conclude that the Board erred in failing to certify only 22 additional signatures of the 246 the Board declined to certify.

6. The percentage of signatures the Board refused to certify on Plaintiffs’ Petition submitted April 20, 2021, contrasts starkly with the percentage of signatures the Board declined to certify on the only two other petitions posted on the Town’s website, as follows:

Petition filed April 20, 2021	-	22.6% of signatures filed not certified <sup>4</sup>
Petition filed March 22, 2021	-	3.5% of signatures filed not certified <sup>5</sup>
Petition filed Dec. 20, 2016	-	4.2% of signatures reviewed not certified <sup>6</sup>

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<sup>4</sup> In certifying 842 signatures, the Board refused to certify 246 of the 1,088 signatures submitted, or 22.6%.

<sup>5</sup> A true and accurate copy of the petition submitted March 22, 2021, downloaded from the Town’s website (<https://www.amherstma.gov/DocumentCenter/View/56732/8b-PETITION-Zoning-Article-16---Temporary-Moratorium-for-180-days---Certified-Signature-Pages?bidId=>) is attached as Exhibit F.

<sup>6</sup> A true and accurate copy of the petition submitted January 30, 2017, downloaded from the Town’s website (<https://www.amherstma.gov/DocumentCenter/View/37354/STM-01302017-Petition--285-Certified-Signatures?bidId=>), is attached as Exhibit G. For reasons that are not clear from the face of this petition, the Board seems to have stopped certifying or declining to certify signatures at some point in the review process.

7. Notably, the Board refused to certify the names of more than 25 registered voters who signed the Petition but did not list their apartment numbers at the street address at which they were registered. In contrast, the Board certified the names of a total of at least 10 registered voters on the other two petitions even though those voters also failed to list their apartment numbers at the street address at which they were registered.

8. After the Board issued the Certificate, the Town provided proponents of the Petition, at proponents' request, thumb drives containing the Town's list of registered voters containing the names, addresses, and other information about registered voters (the "Voter Rolls"). It also provided to proponents, again at proponents' request, a thumb drive containing copies of the Petition signature pages showing the Board's designation as to whether a signature had been certified, as evidenced by a check mark, or not certified for reasons denominated by an "S," "N," "T" or "W." Proponents also requested voter registration cards; the Town produced approximately 475 voter registration cards.

9. On May 7, 2021, after co-counsel for the Plaintiffs filed an objection to the Board's failure to certify the requisite signatures based on the documents the Town had provided described in the preceding paragraph, counsel to the Town/Board advised that the Board did not have the authority to reopen the certification decision, and that petitioners' remedy was to seek relief in court. See Exhibit H, minutes of the Board meeting held May 7, 2021, section 4, first paragraph.

### **Procedural History of this Action**

10. On May 20, 2021, Plaintiffs commenced this action by filing a Complaint in the Supreme Judicial Court for Suffolk County (the "Single Justice Court"). They served that Complaint on the Board on May 26, 2021, and filed and served an Amended Complaint on June

4, 2021. See Docket in Single Justice Court, a true copy of which is attached as Exhibit I, docket entries (“D.E. \_\_\_”) ## 3 and 4.

11. Plaintiffs filed this case in the Single Justice Court anticipating that the parties would enter into a Statement of Agreed Facts with respect to information contained in the Town’s records concerning the Petition, that no discovery would be necessary, and that the parties would cross-move for entry of judgment on that Statement of Agreed Facts leading to expeditious resolution of this case. That Court had jurisdiction over this action under G.L. c. 56, § 59, G.L. c. 231, § 1, and G.L. c. 249, § 5.

12. Consistent with the foregoing, Plaintiffs filed a Motion for Scheduling Conference and Expedited Resolution of Case but the Board declined to assent to it. Id., D.E. 5 at 1-2.

13. In its Answer to Plaintiffs’ Amended Complaint, the Board denied numerous factual allegations, including several concerning the Town’s records. See Answer, D.E. #6.

14. The Single Justice Court entered an Order on June 22, 2021, transferring this case to this Court for entry and disposition. D.E. #7.

15. On June 22, 2021, Plaintiffs sent counsel for the Board via email a proposed Statement of Agreed Facts with exhibits containing only public records, and suggested that if the parties could agree on a Statement of Agreed Facts, they might move the Single Justice Court to reconsider its Order transferring the case. A true and accurate copy of the cover email and proposed Statement of Agreed Facts (without exhibits) is attached hereto as Exhibit J.

16. Counsel for the Board did not respond to the Plaintiffs’ proposal concerning a Statement of Agreed Facts by the date requested and, to this date, has not responded to Plaintiffs’ proposal.

## **Plaintiffs' Motion**

17. Plaintiffs' Motion will be based on a Statement of Undisputed Material Facts that relies exclusively on public documents and documents available on the Town's website, and facts that may be gleaned from the face of those documents. Those documents will include, without limitation:

- A. The Amherst Town Charter;
- B. Minutes of Meetings of the Town Council and the Board;
- C. The Petition and the Board's reasons for denial of certification of signatures as written on the face of the Petition, and as provided by the Town to the Plaintiffs;
- D. The Certificate;
- E. The Names of Streets in the Town published on the Town's website;
- F. The two petitions appearing on the Town's website referred to in paragraph 6 above and attached as Exhibits F and G;
- G. Extracts from the Town's Voter Rolls provided by the Town to the Plaintiffs, along with the cover email from the Assistant Town Clerk;
- H. The Voter Registration Cards provided by the Town to the Plaintiffs; and
- I. Documents appearing on the docket in this case including, without limitation, Plaintiffs' Amended Complaint and Defendant's Answer.

18. Based on the foregoing, Plaintiffs believe there will be no issues of material fact in dispute preventing granting of the Motion, and that the Board will not require any discovery to respond to the Motion.

19. To avoid the Board filing a motion under Rule 56(f) on the date its response to the Motion is due and delaying resolution of the Motion, the Court should order the Board to file any

Rule 56(f) motion not later July 26, 2021—one week after Plaintiffs file and serve the Motion—with Plaintiffs’ response to any Rule 56(f) motion due in or within three business days after service.

20. In their Motion, Plaintiffs intend to seek:

A. A declaration on Count I of their Amended Complaint—their count for declaratory relief—that the Court declare that the Board:

i. Breached its duty to the Plaintiffs by violating G.L. c. 53, § 7, and 950 CMR 55.00, et seq., by failing to certify at least 22 valid signatures that it declined to certify, such that Plaintiffs will have submitted 864 valid signatures on the Petition, a number of signatures the Board has determined will be equal to 5% of the voters at the last Town Election;<sup>7</sup> and

ii. Breached its duty to the Plaintiffs by violating the Town Charter in concluding that proponents of the Petition had not satisfied the 5% threshold for a Voter Veto petition by wrongfully failing to certify at least to certify at least 22 valid signatures that it declined to certify; and

B. On Count II of their Amended Complaint—their count for relief in the nature of mandamus—that the Court enter an order compelling the Board to conclude that the signature requirements of the Charter for a Voter Veto Petition have been satisfied. See McCarthy, 371 Mass. at 678–79, 359 N.E.2d at 299 (If this Court finds that “particular signatures should have been certified and, if the number so found to have been certifiable in the first

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<sup>7</sup> The precise relief in the Motion will likely seek declarations as to certain categories of signatures that and names of signatories who were not certified, that should have been certified, e.g., people who live in apartments who listed their correct street address, but were not certified because they failed to list their apartment number.



instance is sufficient to complete the total number of signatures required for nomination, it may order the Secretary of the Commonwealth to place the candidate's name on the ballot.”)

21. Because the relief Plaintiffs seek in Counts III and IV of their Amended Complaint, alleging violations of 42 U.S.C. § 1983 and seeking reasonable attorneys’ fees and costs under 42 U.S.C. § 1988, is not essential to meet the deadlines set for the November 2, 2021 election, and because Plaintiffs anticipate taking discovery on the section 1983 count, the Motion will not address those counts.

**Justice Delayed Will Likely be Justice Denied If the Voter Veto Referendum is Not Placed on the November Ballot**

22. There are at least three reasons justice delayed will likely be justice denied if the referendum is not placed on the November ballot but is voted on at a special election after November:

A. Under the Town Charter, the Matter will be repealed only if 20% of the registered voters as of the date of the most recent Town election vote at the election upon which the voter veto question is submitted to the voters. See Ex. C, §§ 8.4(f) and (g). Having the vote on the referendum at the biennial Town election in November 2021 will increase the probability of 20% of registered voters voting; it is unlikely that 20% of voters would vote at a special election;

B. Upon information and belief, the Town is proceeding with it plans to renovate the Jones Library. Granting the relief requested by the Motion will “temporarily suspend” the Measure. See Ex. C, section 8.4(a). If this matter is not placed on the November ballot, not only will the Town incur the costs of holding a special election if Plaintiffs ultimately prevail, but Plaintiffs’ efforts may be rendered moot, or at least adversely affected, by the Town’s actions the longer this case is delayed; and

C. This case requires interpretation and application of G.L. c. 53, § 7, and the regulations promulgated with respect thereto by the Secretary of State, 950 CMR 55.00, et seq., but also implicates Plaintiffs' right to petition the government for redress of grievances, and their right to vote. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) (plurality opinion), quoted with approval in T & D Video, Inc. v. City of Revere, 423 Mass. 577, 582, 670 N.E.2d 162, 166 (1996).

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order in the form attached as Exhibit A hereto:

1. Directing the Plaintiffs to file and serve via email the Motion and supporting documents, and any Motion for Entry of Separate, Final Judgment as to Counts I and II, on or before July 19, 2021;

2. Directing the Board to file and serve via email any motion under Rule 56(f) with respect to the Motion on or before July 26, 2021, or such Rule 56(f) motion shall be deemed waived; if the Board timely files and serves a Rule 56(f) motion, Plaintiffs may file and serve via email a response to said motion in or within three business days after service;

3. Directing the Board to file and serve via email, unless an Order with respect to a Board motion under Rule 56(f) provides otherwise, any Opposition to the Motion and supporting papers, and any response to a Motion for Entry of Separate, Final Judgment, on or before August 2, 2021;

4. Authorizing the Plaintiffs to file and serve via email a Reply to the Board's Opposition to the Motion not to exceed five pages, and any Reply to a Board opposition

to a Motion for Entry of Separate Final, Judgment, not to exceed three pages, on or before August 6, 2021;

5. Scheduling a hearing on the Motion and any Motion for Entry of Separate, Final Judgment, perhaps via Zoom, at the Court’s earliest convenience after August 6, 2021; and

6. Granting the Plaintiffs such other relief as may be appropriate and just.

Respectfully submitted,

Dated: July 13, 2021

By their attorneys,

/s/ Thomas O. Bean  
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Anuj Khetarpal, BBO # 679163  
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**CERTIFICATION PURSUANT TO SUPERIOR COURT RULE 9A(d)(1)**

I, Thomas O. Bean, hereby certify that on July 12, 2021, at approximately 2:45 p.m., I left a voice-mail message for Lauren Goldberg, counsel for the Board, and sent an email to Ms. Goldberg and her colleague, Gregory Corbo, in an effort to confer with the Board and to ascertain whether the Board would assent to this Emergency Motion. I received an email response later that afternoon that said, among other things, “we will not agree to any schedule that does not provide adequate time to prepare an opposition and any motion to strike or motion to stay pursuant to Rule 56(f) that may be required.”

/s/ Thomas O. Bean  
Thomas O. Bean

**CERTIFICATE OF SERVICE**

I, Thomas O. Bean, counsel to the Plaintiffs, hereby certify that on the 13<sup>th</sup> day of July, 2021, I caused a true and accurate copy of the Plaintiffs' Motion for Scheduling Conference and Expedited Resolution of Case to be served via electronic mail upon the following counsel for the Defendant:

Lauren F. Goldberg, Esq.  
Gregg J. Corbo, Esq.  
KP LAW  
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