No. SJC-13257

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

CHRISTOPHER ANDERSON, et al.,

Plaintiffs-Appellants,

v.

MAURA HEALEY, in her official capacity as Attorney General of the Commonwealth of Massachusetts, and

WILLIAM F. GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts

Defendants-Appellees,

JOSE ENCARNACION, DEBORAH FRONTIERO, NAZIA ASHRAFUL, MEG WHEELER, JOHN M. KYRIAKIS, ZIBA CRANMER, KEITH BERNARD and KAYDA ORTIZ,

Intervenors.

On Reservation and Report from the
Supreme Judicial Court for Suffolk County

BRIEF OF AMICUS CURIAE GREATER BOSTON CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFFS-APPELLANTS

Date: April 25, 2022

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, the Greater Boston Chamber of Commerce, is an independent, non-profit business association representing more than 1,300 businesses throughout the region. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE THE GREATER BOSTON CHAMBER OF COMMERCE

The Greater Boston Chamber of Commerce ("GBCC" or "Chamber") is an independent, non-profit organization that is the convener, voice, and advocate of the Greater Boston business community. The Chamber represents more than 1,300 businesses of all sizes from virtually every industry and profession in the Greater Boston region.

The Chamber believes that the Amendment raises fundamental questions about the purpose of the Massachusetts Constitution and the durability of its principles. As a general matter, income tax rates are debated in the ordinary political process, subject to legislative adjustment and oversight on an ongoing basis. Constitutionalizing tax rates creates obstacles to future adjustments and ties the hands of government when faced with changing economic and political circumstances. The Chamber thus has serious concerns about enshrining a specific tax bracket and rate into the Commonwealth's Constitution.

For any ballot measure, and especially for a ballot measure that would amend the Commonwealth's Constitution, voters presented with such a proposal must have a clear understanding of the choice they are offered and the meaning of its terms. Official summaries and explanations of the proposed Amendment must be written clearly and fairly and reflect a neutral perspective. Because the Attorney General has failed to deliver such summaries and explanations, the Chamber urges this Court to

grant Plaintiffs' requested relief and correct the statements that will appear on the ballot on Election Day.

RULE 17(c)(5) DECLARATION OF AMICUS AND COUNSEL

Amicus Curiae and its counsel declare that:

A. No party or party's counsel authored this brief in whole or in part;

B. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;

C. No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

D. Neither amicus curiae nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

POSITION OF AMICUS CURIAE

The Chamber urges the Court to declare that the Attorney General's Summary does not comply with Article 48, order the Secretary not to place the Amendment on the ballot unless the Summary is clarified as Plaintiffs propose, and revise the proposed Yes Statement as Plaintiffs propose. In their current form, these statements will mislead Massachusetts voters about the true effect of the Amendment. The people should not have to make such an important decision based on such poor information.

If passed, the proposed Amendment would have major consequences. It would reverse the Commonwealth's historical practice of a uniform state income tax rate, a practice re-affirmed by statewide referendum five times in the last century. Pl. Br. 13 (citing JA411, 414, 416, 418, 427). Not only would this change abruptly nearly double the tax rate for affected Massachusetts residents, but it would also be extremely difficult to reverse. If the voters changed their view after ratification—even if, for example, the new tax had a negative economic impact that caused hardship in the Commonwealth—the people's representatives could no longer retire the tax by ordinary legislation. Moreover, the process of overturning it by a new constitutional amendment would take at least four years. At the very least, therefore, it is crucial that voters be fairly and accurately informed about what the Amendment does as they go to the polls.

Instead, the Attorney General has provided misleading guidance that obfuscates, rather than illuminates, the proposed Amendment. Through her Summary of the Amendment, required under Article 48 of the Amendments to the Massachusetts Constitution, and her one-sentence "Yes Statement," the Attorney General has presented the Amendment as providing new programs in popular areas which it does not in fact deliver. Voters casting their ballots are entitled to know the effect and the limits of the Amendment to deliver on its stated purpose. The Court should intervene to provide fair and neutral statements in place of these skewed advertisements.

ARGUMENT

The Attorney General's Summary and Yes Statements hold out false promises to voters that the Amendment will lead to new funding for education and transportation throughout the Commonwealth. In fact, the Amendment accomplishes no such thing. It instead entrusts the Legislature with discretion to make its preferred appropriations. These statements thus violate the requirements of the Constitution and the General Laws that they be fair, concise, and neutral.

By contrast, Plaintiffs have proposed appropriate revisions which render the Summary and Yes Statement fair and neutral. None of Defendants' or Intervenors' attacks on these revisions succeed, and the Court should order modifications to the Attorney General's statements accordingly.

I. The Attorney General's Summary of the Amendment and Yes Statement Are Unfair and Misleading.

Article 48 requires the Attorney General to supply a "fair, concise summary" of any proposed amendment, to be printed on the ballot. This summary "must not be partisan, colored, argumentative, or in any way one-sided, and it must be complete enough to serve its purpose of giving the voter ... a fair and intelligent conception of the main outlines of the measure." *Sears v. Treasurer and Receiver General*, 327 Mass. 310, 324 (1951). This includes a "fair comprehension of what the law will be if the measure is adopted." *Id.* at 326. A summary fails this test when it omits "material provisions" which a "voter would have a natural interest in knowing." *Id.* at 325.

Under an earlier version of Article 48, this Court held that the Attorney General's description of the proposal "ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy." *Opinion of the Justices*, 271 Mass. 582, 589 (1930). Since that ruling, the Commonwealth has amended Article 48 to require a less "cumbersome" description, requiring only a "fair, concise summary" instead of a lengthier "description." *Sears*, 327 Mass. at 324. But while the level of detail demanded of the Attorney General has changed since 1930, the level of candor has not. The Attorney General is still bound to deliver voters a summary "free from any misleading tendency." *Opinion of the Justices*, 271 Mass. At 589. Along with this summary, the Attorney General and Secretary of the

Commonwealth must also supply "fair and neutral 1-sentence statements describing the effect of a yes or no vote." G.L. c. 54, §53. These Yes and No statements cannot be "false, misleading or inconsistent with the requirements of this section." *Id.*

Here, the Attorney General's Summary and Yes Statement are neither "fair" nor "neutral." Instead, they mischaracterize the Amendment by adopting misleading language about its effect. The Summary advertises that revenue from the proposed tax "would be used, subject to appropriation by the state Legislature, for public education, public colleges and universities; and for the repair and maintenance of roads, bridges, and public transportation." JA343-44. The Yes Statement echoes this pitch, saying the additional tax will be "used, subject to appropriation by the state Legislature, on education and transportation." JA349.

Both these statements convey to the average reader that the Amendment will result in increased funding for two popular objectives, education and transportation. But the Amendment does no such thing. Money is fungible, and under the Amendment the Legislature retains unfettered discretion to decide, in every state budget, whether the new tax revenues should increase funding for education and transportation, or simply free up other money to be appropriated elsewhere.

In short, the Summary and Yes Statement attempt to persuade voters to support the Amendment—the kind of graduated tax the electorate has rejected in the past—with unsupportable promises of new and increased education and

transportation spending. But the Amendment will not fund either education or transportation on its own. Only the Legislature can do so with its own appropriations power, and nothing in the Amendment imposes any constraints to ensure this funding "would" or "will" increase or be dedicated to those programs.

It is no answer, as Defendant and Intervenors argue, that the Summary and Yes Statement simply track language in the Amendment itself. *E.g.*, Att'y Gen. Br. 26; Int. Br. 28. If that language is misleading or incomplete (and for the same reasons, it is), then the Attorney General cannot simply use it as a convenient excuse to parrot the misleading language in her own statements. Indeed, this would defeat the entire purpose of the Summary and Yes Statements, which are intended to convey additional and clarifying information about the proposals. Nor can the fact that some Amendment language is even *more* one-sided help the Summary or the Yes Statement. *E.g.*, Att'y Gen. Br. 27. The Attorney General's language must be "fair" and "neutral" in its own right, not simply less biased than other pro-Amendment advocacy.

Lastly, the phrase "subject to appropriation by the state Legislature" does not make the Summary or the Yes Statement any less misleading. This insertion does not naturally suggest that the Legislature retains power to *frustrate* the Amendment's stated objective of "provid[ing] the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of

roads, bridges and public transportation." JA119-20. Rather they suggest to the ordinary reader that the new revenue will go to education and transportation and that the Legislature decides *which* particular projects and programs will receive funding, and how much. A substantial number of voters are unlikely to comprehend that this clause grants the Legislature a license to appropriate *zero* new funding, or even cut funding, in these areas after the Amendment's passage. Neither Defendants nor Intervenors deny this legislative discretion, but they adamantly deny that it should be mentioned anywhere on the ballot.

This Court has dealt with similar "subject to appropriation" language before, but in different contexts that make those holdings inapposite. *See Associated Indus. of Mass. v. Sec'y of Com.* [*AIM I*], 413 Mass. 1 (1992); *Gilligan v. Att'y Gen.*, 413 Mass. 14 (1992). Both of these cases concerned new excises proposed as *statutes*, not constitutional amendments. But statutes are always subject to legislative control, meaning voters on those referenda would have expected the Legislature would retain discretion over the revenue anyway. The phrase therefore needed no explanation. *Cf. Mazzone v. Att'y Gen.*, 432 Mass. 515, 523 (2000) ("Monies directed *by operation of a general law* to a specific purpose that remain "subject to appropriation" are expressly left within the Legislature's control and are not appropriations." (emphasis added)). Here, though, ordinary readers would presume that a constitutional amendment would tie the Legislature's hands. Because that is not the case, a fair

Summary must "apprise[] the voters" of these important contingencies. *AIM I*, 413 Mass. at 12.

Moreover, there is considerable irony in the Attorney General's suggestion that the ambiguous reference to the appropriations process somehow satisfies her responsibilities under Article 48 and G.L. c. 54, §53. Even accepting her argument that the "subject to appropriations" clause could be understood to relieve the Legislature of increasing funding to any transportation or education programs, that is not enough to render it free of any "misleading" tendency. In other contexts, the Attorney General rightly recognizes that a statement may be technically "true as a literal matter, but still create[s] an over-all misleading impression through [a] failure to disclose material information." *See* Brief of Appellee Commonwealth of Massachusetts, *Commonwealth v. Exxon Mobil Corp.*, SJC-13211, 2022 WL 198509, at 15 (Jan. 13, 2022). This Court agrees. *See, e.g. Aspinall v. Philip Morris Companies, Inc*., 442 Mass. 381, 395 (2004) ("noting that a statement "may consist of a half truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information"). It is thus not enough for the Defendants to argue that *some* voters might be savvy enough to understand that the appropriations process could affect the Amendment's goals; the Attorney General's Summary or Yes Statement must provide the necessary information to ensure an ordinary voter is not misled.

Massachusetts voters have a weighty decision to make in whether to ratify the Amendment, but the Attorney General has not equipped them to make an informed decision. The Court should order revisions to the misleading Summary and Yes Statement before the Amendment can be submitted to the people.

II. Plaintiffs' Proposed Changes Render the Summary and Yes Statement Fair and Neutral

Plaintiffs propose several modifications to clarify the Summary and Yes Statement. They propose one additional sentence for the Summary: "The Legislature could choose to reduce funding on education and transportation from other sources and replace it with the new surtax revenue because the proposed constitutional amendment does not require otherwise." Pl. Br. 23 (citing JA339-40). And they propose two alternative modifications of the Yes Statement, one geared especially toward describing a "Yes" vote succinctly and neutrally, and the other toward completeness and accuracy of description: (1) "A YES VOTE would amend the state Constitution to impose an additional 4% tax on that portion of incomes over one million dollars"; or (2) "A YES VOTE would amend the state Constitution to impose an additional 4% tax on that portion of incomes over one million dollars to be used for, but not necessarily to increase, state education and transportation spending, subject to appropriation by the state Legislature." *Id.* at 24 (citing JA350-51). These changes would fix the existing defects, and the Court should adopt them.

Defendants and Intervenors object to these changes on several grounds. First, they argue that the changes stray from the Amendment's actual content into speculation about what future legislatures *might* do after it passed. Att'y Gen. Br. 35-36; Int. Br. 16-18. They next claim the changes would engage in argumentative "analysis" or "interpretation" of the Amendment, which would go beyond the proper scope of either a Summary or a Yes Statement. Att'y Gen. Br. 36, 47-48; Int. Br. 29. Finally, they argue that the changes would make the Amendment materials too "comprehensive" or lengthy, which Article 48 does not demand, and which would compromise their effectiveness in assisting voters. All of these arguments fail.

Plaintiffs' proposals do not deal in speculation, but in the actual effect the Amendment would have on the constitutional authority of the Legislature. Defendants and Intervenors seize on the language about what "the Legislature could choose" to frame this proposal as a mere theoretical exercise, but the key to the proposed sentence is what "the proposed constitutional amendment *does not require*." Put another way, the proposal explains the discretion which this constitutional amendment would vest in the legislature, so that voters are not otherwise misled into thinking that the new tax revenue will necessarily lead to increased funding for education and transportation. Even though the Amendment advertises the possibility of raising revenue to fund education and transportation, it actually entrusts the Legislature with full discretion to decide how much those

initiatives will be funded, including the discretion to appropriate *less* funding than under the current budget.

For similar reasons, the proposed changes to the Summary and Yes Statement would not veer into "legal interpretation," either. *See, e.g.*, *AIM I*, 413 Mass. at 12. Rather, the changes give only a fair explanation of the measure's words and effect—that while the Amendment advertises the possibility of more funding for popular objectives, it does not actually commit the Legislature to increase (or even hold steady) appropriations in those areas. Tellingly, neither Defendants nor Intervenors voice any disagreement with this view of the Amendment. Both agree that the Amendment would work in this way, *e.g.*, Att'y Gen. Br. 40; Int. Br. 35. They simply would rather not advertise as much. Their objections to supposed "legal interpretation" in the Summary therefore ring hollow. If no one disagrees with an explanation of the Amendment's provisions, then that explanation is neither "argumentative" nor "one-sided." Att'y Gen. Br. 36. It is simply "'fair'; that is to say, ... not ... partisan, colored, argumentative, or in any way one sided, and ... complete enough to serve its purpose of giving the voter ... a fair and intelligent conception of the main outlines of the measure." *AIM I*, 413 Mass. at 11 (quoting *Sears*, 327 Mass. at 324).

Neither of this Court's decisions in *AIM I* or *Gilligan* suggest anything different. Both those cases concerned proposed taxes which would raise revenue for

specific funds or programs already operated by the Commonwealth. *See AIM I*, 413 Mass. at 4 n.5 (concerning the Environmental Challenge Fund, "established in 1987 as a separate fund on the books of the Commonwealth"); *Gilligan*, 413 Mass. at 15 (concerning the Health Protection Fund, to be dedicated to "supplement existing levels of funding" for health- and tobacco-related programs, and other preexisting funds). The Court held that the Attorney General was not required to address the specific parameters of these funds in his Summary of the ballot initiatives. In *Gilligan*, the Court held that the Summary need not address the "the possibility that the Legislature might appropriate monies in the Health Protection Fund for purposes other than those for which the fund would be established." 413 Mass. at 19. And in *AIM I*, the Court was addressing objections that "that the [ballot] measure impermissibly would remove the Legislature's discretion in exercising its appropriative power." 413 Mass. at 7. Both cases raised potentially complex issues about the scope and structure of Commonwealth funds—issues open to "legal interpretation" which the Attorney General was not required to address in a mere summary of each initiative. This case is very different, where Plaintiffs' proposed modifications do not raise questions of "legal interpretation," as witnessed by the apparent agreement of all the parties in this case as to the correct answer.

Lastly, Plaintiffs have not proposed a "comprehensive" description of the Amendment and all its ramifications, in place of Article 48's prescribed "fair and

concise summary." *Cf.* Att'y Gen. Br. 18; *Hensley v. Att'y Gen.*, 474 Mass. 651, 660 (2016). Plaintiffs have proposed adding *only a single sentence* to the Summary. In *Hensley*, this Court confronted demands that the summary of a marijuana-related ballot initiative include fine, technical details about the specific products the proposal would regulate. *See, e.g.*, 474 Mass. at 661-62 (rejecting objection that "the summary ... does not use the words 'hashish' or 'marijuana concentrate' or otherwise make clear that the proposed act would legalize marijuana with a concentration of THC that exceeds two and one-half per cent"). Plaintiffs' extra sentence would come nowhere near toward tipping the balance from a "fair, concise summary," *id.* at 659, to the kind of "very substantial degree of detail," *id.* at 661, this Court has rejected.

Moreover, if the Court has concerns about brevity, it should adopt Plaintiffs' shorter proposed Yes Statement. This option, which neither Defendants nor Intervenors address, is the shortest statement of all, simply omitting the Attorney General's misleading advertising of transportation and education funding and including only "the main feature[] of the measure," the new tax. *Id.* at 661 (quoting *Sears*, 327 Mass. at 324).

CONCLUSION

For the foregoing reasons, the Court should declare the current Summary and Yes Statement in violation of Article 48, order the Secretary not to place the

Amendment on the ballot unless the Summary is clarified, and order the Yes Statement to be revised according to Plaintiffs' proposals.

Date: April 25, 2022

Respectfully submitted,

/s/ Patrick Strawbridge

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, undersigned counsel certifies that this brief complies with the rules of the Court pertaining to the filing of amicus briefs, including Massachusetts Rules of Appellate Procedure 17 and 20.

This brief was prepared using Microsoft Word in 14-point Times New Roman, a proportionally spaced typeface, and contains 3,226 words.

Date: April 25, 2022 /s/ Patrick Strawbridge

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, I caused this brief to be served by email on counsel for Plaintiffs, Defendants, and Intervenors:

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