COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. NO. SJC-13257

CHRISTOPHER ANDERSON, et al.,
Plaintiff-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,
Defendant-Appellants.

JOSE ENCARNACION, et al.,
Intervenors.

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

BRIEF OF THE DEFENDANTS-APPELLEES

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INTRODUCTION

In November, the voters will decide whether to amend our Constitution to impose an additional income tax on those making more than a million dollars per year, and to use that revenue, subject to appropriation by the Legislature, to fund the Commonwealth's education and transportation needs (the "Legislative Amendment"). This lawsuit is an attempt to sway the outcome of that vote by injecting speculation and a disputed interpretation of the Legislative Amendment into the summary and one-sentence "yes" and "no" statements, which are required by the Constitution and laws of the Commonwealth to be fair, concise, and neutral. Plaintiffs' proposed changes violate the requirements of Article 48 and G.L. c. 54, § 53; flout this Court's rulings in *Associated Industries of Massachusetts v. Secretary of the Commonwealth*, 413 Mass. 1 (1992) ("*AIM*"), and *Gilligan v. Attorney General*, 413 Mass. 14 (1992); and would introduce undue bias into the upcoming election. The Court should reject them.

QUESTIONS PRESENTED

1. Is the Attorney General's summary of the Legislative Amendment "fair" and "concise" as required by Article 48, where it is neutral, accurate, and covers the measure's main features while avoiding analysis and interpretation of the measure?

2. Did the Attorney General and Secretary prepare one-sentence "yes" and "no" statements for the Legislative Amendment that are not clearly false or misleading, where they identify the primary subject matter of the measure in a "fair and neutral" manner as required by G.L. c. 54, § 53?

STATEMENT OF THE CASE

This is a challenge to the summary and one-sentence "yes" and "no" statements prepared for the "Proposal for a legislative amendment to the Constitution to provide resources for education and transportation through an additional tax on incomes in excess of one million dollars," JA 119-20 (the "Legislative Amendment").

Prior Proceedings

On January 27, 2022, the plaintiffs filed a complaint in the county court seeking (i) a declaration that "the Summary" for the Legislative Amendment does not comply with the requirements of Article 48; (ii) a declaration that "the Yes statement" for the Legislative Amendment does not comply with the requirements of G.L. c. 54, § 53; (iii) an order excluding the Legislative Amendment from the ballot "unless the Attorney General has amended the Summary to clarify that [the measure] does not preclude the Legislature from reducing spending on education and transportation from other revenue sources and replacing it with the new surtax

revenue"; and (iv) an order "to amend the Yes Statement to clarify that the Amendment does not preclude the Legislature from reducing spending on education and transportation from other revenue sources and replacing it with the new surtax revenue." Joint Appendix (JA) 35. On February 1, the Attorney General and Secretary moved to dismiss the complaint as premature. JA 38. On March 3, the court (Lowy, J.) encouraged defendants "to complete the summary, ballot question title, and the one-sentence 'yes' and 'no' statements as expeditiously as possible," with the goal of reserving and reporting the case to be heard by the full Court in May. JA 76-81.

After seeking and receiving input from plaintiffs, intervenors, and other interested parties, the Attorney General prepared a summary of the Legislative Amendment on March 11. JA 343-44. On March 15, defendants announced the ballot question title and one-sentence statements for the measure. JA 349. On March 17, plaintiffs filed an Amended Complaint seeking the same relief as before while proposing additional changes to the "yes" statement. JA 82, 114-15.

On March 22, the court granted the motion to intervene of eight registered voters who support the Legislative Amendment. JA 451. The parties filed a statement of agreed facts (JA 366-446) and a motion to reserve and report (JA 447-

48), which was allowed on March 22. The case was entered in this Court that same day.

Statement of Facts

1. Procedural History of the Legislative Amendment

Amendment Article 48 of the Constitution of the Commonwealth ("Article 48") establishes the framework for proposed constitutional amendments. *Opinion of the Justices*, 438 Mass. 1201, 1203 (2002). Article 48, Init., pt. IV, § 1, provides that a proposed amendment introduced into the General Court by initiative petition "shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment." A legislative amendment must be laid before a joint session of the Legislature "not later than the second Wednesday in May." Art. 48, Init., pt. IV, § 2, as amended by Art. 81, § 2. If it receives an affirmative vote of a majority of all the members elected at two successive joint sessions, it shall be placed on the ballot at the next general election. Art. 48, Init., pt. IV, §§ 4-5.

Representative O'Day introduced the Legislative Amendment in 2019. JA 119. At a joint legislative session on June 12, 2019, a majority of the legislators voted to approve the measure. JA 161-83. At a second joint legislative session on June 9, 2021, a majority of the legislators again approved the measure. JA 205-14.

Consequently, the Secretary will include the Legislative Amendment in the Information for Voters guide being prepared this summer and will place the question on the ballot for the November 2022 biennial statewide election.

2. Substance of the Proposed Amendment

Adopted in 1915, Article 44 of the Constitution authorized a state income tax to be "levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property." Amend. Art. 44. If adopted, the Legislative Amendment would add the following text to the end of Article 44:

> To provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges and public transportation, all revenues received in accordance with this paragraph shall be expended, subject to appropriation, only for these purposes. In addition to the taxes on income otherwise authorized under this Article, there shall be an additional tax of 4 percent on that portion of annual taxable income in excess of $1,000,000 (one million dollars) reported on any return related to those taxes. To ensure that this additional tax continues to apply only to the commonwealth's highest income taxpayers, this $1,000,000 (one million dollars) income level shall be adjusted annually to reflect any increases in the cost of living by the same method used for federal income tax brackets. This paragraph shall apply to all tax years beginning on or after January 1, 2023.

JA 119-20.

3. The Attorney General's Summary

Under Article 48, the Attorney General must prepare a "fair, concise summary" of "each proposed amendment to the constitution." Art. 48, Gen. Prov., pt. III, as amended by Art. 74, § 4. That summary "shall be printed on the ballot." *Id.* The summary also appears in the Information for Voters guide published by the Secretary and circulated to all registered voters. Art. 48, Gen. Prov., Part IV; G.L. c. 54, § 53.

The Attorney General has prepared the following summary for the Legislative Amendment:

> This proposed constitutional amendment would establish an additional 4% state income tax on that portion of annual taxable income in excess of $1 million. This income level would be adjusted annually, by the same method used for federal income-tax brackets, to reflect increases in the cost of living. Revenues from this 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. The proposed amendment would apply to tax years beginning on or after January 1, 2023.

JA 343-44.

4. The Ballot Question Title and One-Sentence "Yes" and "No" Statements

For each measure to be submitted to the voters, the Attorney General and Secretary must jointly prepare a "a ballot question title" and a "fair and neutral one sentence statements describing the effect of a yes or no vote." G.L. c. 54, § 53.

The title and the one-sentence statements for each measure appear in the Information for Voters guide, and the one-sentence statements and summary are printed on the ballot. *See* Art. 48, Gen. Prov., pt. III & IV, as amended by Art. 74, § 4; G.L. c. 54, § 53.

The Attorney General and Secretary have prepared the following ballot question title for the Legislative Amendment: "Additional Tax on Income Over One Million Dollars." JA 349. The Attorney General and Secretary have prepared the following one-sentence statements for the Legislative Amendment:

> 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, subject to appropriation by the state Legislature, on education and transportation.
>
> A NO VOTE would make no change in the state Constitution relative to income tax.

JA 349.

SUMMARY OF THE ARGUMENT

The Attorney General's summary of the Legislative Amendment satisfies Article 48's standards for a "fair, concise summary." Although a summary must mention a measure's main features, details may be covered by generalizations, and legal analysis and interpretation need not be included. Plaintiffs' arguments to the contrary rely on the now-obsolete "description" requirement for Article 48 and the

decisions of courts in other states that applied different legal requirements. *See infra* pp. 17-25.

Here, the summary informs voters about the main features of the Legislative Amendment in a neutral manner while avoiding analysis and interpretation. Ignoring the deference to which the Attorney General's judgment is entitled, plaintiffs fault the summary for not warning voters that, because money is fungible, the Legislature might "shift current spending on education and transportation to some different purpose, while swapping in the new tax dollars," Pl. Br. 8. The summary, however, informs voters that, consistent with the language of the measure itself, the revenue "would be used, subject to appropriation by the state Legislature," for the stated purposes. This Court has twice ruled that this language sufficiently informs voters that expenditures are contingent on future legislative action and a summary need not also state that revenue might be used for other purposes. *See AIM*, 413 Mass. at 12; *Gilligan*, 413 Mass. at 19-20. Those rulings foreclose plaintiffs' challenge here. *See infra* pp. 25-33.

Plaintiffs' proposed change to the summary should also be rejected because it undermines the goal of conciseness, introduces confusing words and concepts not present in the Legislative Amendment, inserts a policy argument and disputed

interpretation of the measure, and relies on speculation about future events. Nor do plaintiffs' commissioned survey data or statements by counsel in prior litigation warrant overruling the Attorney General's judgment. Plaintiffs are free to advance their views about the Legislative Amendment and its potential impact in the political arena, but the Attorney General is not required to advocate their position through the summary. *See infra* pp. 33-42.

Plaintiffs also challenge the one-sentence "yes" and "no" statements prepared by the Attorney General and Secretary, but those materials identify the primary subject matter of the Legislative Amendment and are not misleading. By contrast, the various changes proposed by plaintiffs are speculative, argumentative, and confusing. Because plaintiffs cannot show that "it is clear" that the one-sentence statements are "false, misleading or inconsistent with the requirements" of G.L. c. 54, § 53, their request to alter these statements should be denied. *See infra* pp. 42-51.

The Court should refrain from setting a fixed timetable for the preparation of summaries, ballot question titles, and one-sentence statements for legislative amendments because such measures are infrequent and, when they do occur, are often approved by a joint session of the Legislature as late as June of an election year. In general, if the Legislature approves an amendment by March of an

election year, the summary, title, and one-sentence statement for the measure should be prepared in accordance with the deadline for all titles and one-sentence statements set forth in G.L. c. 54, § 53. In early March (or as soon as possible thereafter) the Attorney General and Secretary will circulate draft language to proponents, opponents, and others and solicit those parties' feedback and proposed edits. The Attorney General and Secretary will then finalize the summary, title, and one-sentence statements by mid-April, as required to meet the publication schedule and filing deadlines for the Massachusetts Register. Consistent with G.L. c. 54, § 53, any challenge to the materials should be brought after "the second Wednesday in May" and litigated in the county court. *See infra* pp. 51-58.

ARGUMENT

I. THE ATTORNEY GENERAL PREPARED A FAIR AND CONCISE SUMMARY OF THE LEGISLATIVE AMENDMENT.

Because the Attorney General's summary sets forth the main features of the Legislative Amendment in an accurate and neutral manner, it satisfies the requirements of Article 48 and should be upheld under this Court's deferential standard of review.

A. Article 48 Requires a "Fair, Concise Summary," Not an Analysis or Interpretation of the Measure.

1. The summary must be neutral and concise, not argumentative.

The basic principles for evaluating whether a summary is "fair" and "concise" are well established. *Hensley v. Attorney General*, 474 Mass. 651, 660-61 (2016) (quoting *Abdow v. Attorney General*, 468 Mass. 478, 505-06 (2014)). "It must not be partisan, colored, argumentative or in any way one-sided." *Sears v. Treasurer & Receiver General*, 327 Mass. 310, 324 (1951). "[M]ention must be made of at least the main features of the measure," but "[n]o doubt details may be omitted or in many instances covered by broad generalizations." *Id.* "Conciseness is emphasized … and conciseness and completeness are often incompatible." *Bowe v. Sec'y of the Comm.*, 320 Mass. 230, 243 (1946).

2. The summary need not include legal analysis or interpretation.

Accordingly, "[t]he Attorney General is not required to conduct a comprehensive legal analysis of the measure, including possible flaws. All the Constitution demands is a summary." *Hensley*, 474 Mass. at 660 (citation omitted); *see also AIM*, 413 Mass. at 12 ("Nothing in art. 48 requires the summary to include legal analysis or an interpretation."). This rule not only follows from the plain text of Article 48, which requires a "fair, concise summary … of each

proposed amendment to the constitution," Art. 48, Gen. Prov., pt. III, as amended by Art. 74, § 4, but also makes sense as a practical matter. The ways in which a not-yet-enacted measure may be implemented and enforced are often difficult to assess in the absence of concrete disputes, *see Mazzone v. Attorney General*, 432 Mass. 515, 532-33 (2000); *Abdow*, 468 Mass. at 506-08 & n.20; *Mass. Teachers Assoc. v. Sec'y of the Comm.*, 384 Mass. 209, 232 (1981) ("*MTA*"), and forward-looking descriptions of a measure's anticipated legal effects pose an inherent risk of mistake, *see Bowe*, 320 Mass. at 245-46. The Attorney General also could not summarize the full range of potential applications of a measure while still being "concise." *See MTA*, 384 Mass. at 228 ("The summary, if cluttered with detailed explanation and discussion, could no longer rightly be called a summary."). Nor could she easily draw lines about which particular applications to describe, and which to ignore, while still being "fair." Any attempt to insert interpretation of a measure or analysis of its possible application to future factual scenarios could result in a challenge that the Attorney General is advocating either for or against the proposed law, not summarizing it in an accurate and neutral manner.

Importantly, "the summary [is] not the only source of voter information." *MTA*, 384 Mass. at 236. Rather, the voters will receive "full information about the proposal" when the Secretary sends them copies of the full text of the proposed

measure, 150-word arguments drafted by supporters and opponents of the measure, and any legislative committee reports favoring or opposing it. *Id.* at 228 & n.16 (citation omitted). Thus, while opponents of a measure "certainly can attempt to persuade the voters that the measure should be defeated," the Attorney General is not required to "advocate" their "position" in the summary. *Gilligan*, 413 Mass. at 20.

3. The Attorney General's judgment as to what constitutes a "fair, concise summary" is entitled to deference and must be upheld unless it is "significantly misleading and likely to have a major impact on voters."

Although plaintiffs do not mention it, the Attorney General's judgment about what constitutes a fair and concise summary is entitled to deference. *Hensley*, 474 Mass. at 661 ("The exercise of discretion by the Attorney General, a constitutional officer with an assigned constitutional duty, should be given weight in any judicial analysis of the fairness and adequacy of a summary.") (citation omitted). Accordingly, this Court will not substitute its judgment for the Attorney General's when the question is "a matter of degree." *MTA*, 384 Mass. at 230 (citation omitted); *see also First v. Attorney General*, 437 Mass. 1025, 1026 (2002) (rescript); *Ash v. Attorney General*, 418 Mass. 344, 349 (1994).

The Court will not even invalidate a summary containing an "error" unless "in the context of the entire proposal, it is significantly misleading and likely to

have a major impact on voters." *First*, 437 Mass. at 1026; *see also MTA*, 384 Mass. at 233-36 (summary was fair despite omissions and "clear error" that affected municipalities); *Hensley*, 474 Mass. at 664 (declining to invalidate summary that did not explain that "marijuana products" included edibles, because risk that voters might not understand term was not "so substantial … as to render the summary constitutionally inadequate").

4. Plaintiffs misstate the holding in *Sears* and improperly rely on the "description" requirement that was repealed in 1944 and inapposite rulings from other states.

Plaintiffs incorrectly contend that *Sears* requires the Attorney General to include all "material" information about a measure's future operation that "a voter would have a natural interest in knowing." *See* Pl. Br. 25, 29, 36-37, 39. *Sears* held only that a summary must mention "the main features of the measure." 327 Mass. at 324. In that case, all of the matters omitted from the summary which the Court found voters would be "interest[ed] in knowing" were "the subject of express provisions in the measure itself." *Id.* at 325. *Sears* does not require that a summary analyze or interpret how a measure might operate in practice, and this Court has repeatedly held that analysis or interpretation need not be included. *See* Section I.A.2, *supra*.

Plaintiffs' reliance on *Opinion of the Justices*, 271 Mass. 582 (1930), is similarly unavailing because that case applied the since-eliminated "description" requirement for Article 48 summaries, not the "fair, concise summary" requirement that applies today. *See* Pl. Br. 27-28, 35, 36. Article 48 was amended in 1944 to eliminate the "description" requirement. *Hensley*, 474 Mass. at 661 (citing *Sears*, 327 Mass. at 324). Plaintiffs argue that the amended version of Article 48 somehow "preserv[ed] … this Court's precedent that a description 'ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy,'" Pl. Br. 28 (quoting *Opinion of the Justices*, 271 Mass. at 589), but this Court has never cited that standard in any of its rulings applying the "fair, concise summary" requirement. To the contrary, this Court explained in *Sears* that Article 48 was amended to eliminate the "description" requirement because it "had been interpreted as implying a very substantial degree of detail and had resulted in very long and cumbersome statements of details of proposed laws" – and the case the Court cited for that now-obsolete requirement in turn held that the 1930 *Opinion of the Justices* stated the "constitutional requirements to which a 'description' must conform." *See* 327 Mass. at 324 (citing *Opinion of the Justices*, 309 Mass. 631, 642 (1941) (citing *Opinion of the Justices*, 271 Mass. at 588-89)); *see also Bowe*, 320 Mass. at 241-43 (discussing "free from any misleading

tendency" standard for "descriptions" from 1930 *Opinion of the Justices* and explaining that "intention" of 1944 amendment "was to relax the requirements which had been found implicit in the word description").

Plaintiffs' reliance on rulings from other states that have nothing to do with Article 48 and which this Court has never cited in an Article 48 case further underscores the weakness of their position. *See* Pl. Br. 37-39. Plaintiffs incorrectly claim that those courts applied "functionally identical standards for summaries of initiative petitions" as that set forth under Article 48. Pl. Br. 37. In fact, the standards applied in those cases are far from "functionally identical" to those adopted by this Court. For example, they cite *Florida Department of State v. Slough*, 992 So. 2d 142 (Fla. 2008), for the proposition that "technically accurate summaries are misleading if they omit information about a measure's practical consequences that would be important to voters." Pl. Br. 37. However, whereas Article 48 requires a "fair, concise summary" of each proposed measure, Florida law requires the ballot summary to be "an *explanatory statement*, not exceeding 75 words in length, *of the chief purpose of the measure*." *Slough*, 992 So. 2d at 146 (quoting Fla. Stat. § 101.161(1)) (emphasis added); *see also Askew v. Firestone*, 421 So. 2d 151, 153 (Fla. 1982). Further, because the summary in Florida is prepared by the sponsors of a measure, and the Secretary of State reviews the

summary only to verify that it complies with the word limit, *see* Fla. Stat. § 101.161(1), (2), the Florida court's criticism of "advantageous but misleading 'wordsmithing'" is irrelevant to the Attorney General's exercise of her constitutional duties in Massachusetts. *See* 992 So. 2d at 149.

Similarly, plaintiffs cite *Fairness & Accountability in Insurance Reform v. Greene*, 886 P.2d 1338, 1346-49 (Ariz. 1994), Pl. Br. 38-39, but fail to acknowledge that Arizona law requires a legislative council to prepare not a summary but rather an "analysis of the provisions of each ballot proposal of a measure or proposed amendment," including a description of "the meaning of the measure, the changes it makes, and its effect if adopted," 886 P.2d at 1346-47 (discussing Ariz. Rev. Stat. § 19-124(C)). Plaintiffs also cite *City and County of Honolulu v. State*, 431 P.3d 1228 (Haw. 2018), but mistakenly assert that the case involved "the summary of a proposed constitutional amendment," Pl. Br. 38, rather than the "yes/no" ballot question prepared by the Hawaiian legislature, *see* 431 P.3d at 1233. Unlike Article 48, the applicable Hawaiian statute requires the ballot question to make the "language *and meaning* of a constitutional amendment … clear." *Id.* at 1239 (quoting Haw. Rev. Stat. § 11-118.5) (emphasis in original).

Unlike the out-of-state cases they cite, Article 48 does not require the Attorney General to "explain" the "chief purpose of the measure"; conduct an

"analysis" of a measure's provisions; describe "the meaning of the measure" or "its effect if adopted"; or make "the meaning" of a measure "clear." To the contrary, this Court has repeatedly held that under Article 48 a summary need not include analysis or interpretation at all. *See* Section I.A.2, *supra*. That holding is fatal to plaintiffs' claim here.

B. The Attorney General's Summary Satisfies the Requirements of Article 48.

1. The summary fairly and concisely informs voters about the main features of the Legislative Amendment.

Because the Attorney General's summary of the Legislative Amendment is fair, concise, neutral, and will give the voters "a fair and intelligent conception of the outlines of the measure," *Abdow*, 468 Mass. at 505 (quoting *Sears*, 327 Mass. at 324), it should be upheld under the Court's deferential standard of review.

The Legislative Amendment would effect a "one-section, four-sentence" change to the Constitution. *Anderson v. Attorney General*, 479 Mass. 780, 804 (2018) (Budd, J., dissenting) (describing similar initiative amendment at issue in 2018). As this Court explained in *Anderson*, 479 Mass. at 782-83, Article 44 of the Constitution authorizes the Legislature to impose and levy a state income tax at a "uniform rate throughout the commonwealth upon incomes derived from the same class of property." Accordingly, the Legislature may not currently impose a