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

MAURA HEALEY
Attorney General

Robert E. Toone (BBO #663249)
Anne Sterman (BBO #650426)
Adam Hornstine (BBO #666296)
Assistant Attorneys General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2178
email: Robert.Toone@mass.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Miscellaneous

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

graduated income tax. *Opinion of the Justices*, 383 Mass. 940, 941-42 (1981). The Legislative Amendment would change this rule by establishing an additional 4% tax on annual taxable income exceeding $1 million.

The Attorney General has summarized the Legislative Amendment's main features as follows:

> 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.

The first sentence of the summary captures the primary change that the voters will be asked to approve: the establishment of "an additional 4% state income tax on that portion of annual taxable income in excess of $1 million." Closely following the language of the measure, this sentence accurately sets forth how the Legislative Amendment would change Massachusetts law.

The second sentence of the summary informs voters that, in future years, 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." Again, this sentence

tracks the language of the Legislative Amendment. The summary does not include the measure's explanatory language that the purpose of the annual adjustment is "[t]o ensure that this additional tax continues to apply only to the commonwealth's highest income residents," because that explanation is unnecessary for a "fair" and "concise" summary of the measure.

The third sentence of the summary informs voters that revenues from the additional 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." This sentence reflects the objective stated at the start of the Legislative Amendment. The summary makes this point third, not first, because the establishment of an additional tax logically precedes the purposes for which the resulting revenue shall be used. The third sentence omits the measure's qualifiers "quality," "affordable," "all," and "only" because they are unnecessary for a "fair" and "concise" summary. Finally, the third sentence includes the phrase "subject to appropriation by the state Legislature" because this Court has ruled that the phrase is (i) not inaccurate where "it tracks the basic language of the measure" and (ii) not misleading "since it apprises the voters both that the expenditure of monies for the state purposes would

be contingent on ('subject to') an action of the Legislature, and exactly what that action is ('appropriation')." *AIM*, 413 Mass. at 12. *See* Section I.B.2, *infra*.

The last sentence of the summary states that the Legislative Amendment "would apply to tax years beginning on or after January 1, 2023." That sentence also closely tracks the Legislative Amendment's language, and the effective date is a main feature of the measure that voters should be aware of.

The Attorney General's summary is thus a fair, concise, and neutral summary of the principal elements of the Legislative Amendment. Shorter than the Legislative Amendment (which is itself brief), it summarizes each of its main features in a concise and neutral manner. It avoids unnecessary legal analysis or interpretation, and leaves arguments for and against the measure to the appropriate parts of the Information for Voters guide, as well as the public debate that will take place in upcoming months.

2. This Court has twice rejected the same challenge to the summary made by plaintiffs here.

Plaintiffs have essentially only one complaint about the Attorney General's summary, and this Court has rejected it twice before in *AIM* and *Gilligan*. Plaintiffs contend that the summary for the Legislative Amendment is unfair "because it misleadingly suggests that the new tax revenues only can lead to new spending on education and transportation, and not new spending in other areas

through the redeployment of funds historically spent on education and transportation." JA 113. They criticize the summary for not explaining to voters that the Legislature retains "ultimate discretion" over how to spend revenue raised as a result of the measure, JA 84, or that the revenue might be spent on "other purposes," JA 112; *see also* Pl. Br. 31-33 (arguing that summary should explain that "the Amendment's putative requirement that the specific funds raised by the new tax be spent on education and transportation is functionally meaningless, because the Legislature can just move money around").

This Court rejected a virtually identical argument in *AIM*. That case considered a challenge to the summary for an initiative petition that imposed an excise on certain hazardous materials and used that funding to clean up hazardous waste dumpsites. 413 Mass. at 2-4. The summary stated that the excise revenue "would be used, subject to legislative appropriation, to assess and clean up sites that have been or may be contaminated by oil or hazardous materials, and to carry out and enforce the excise." *Id.* at 4. Just as plaintiffs argue here, the plaintiffs in *AIM* argued that the summary did not "fairly inform the voters that, in the Legislature's discretion, the monies could be spent for other purposes." *Id.* at 12. This Court held that the summary's inclusion of the phrase "subject to legislative appropriation" adequately "apprise[d] the voters both that the expenditure of

monies for the stated purposes would be contingent on ('subject to') an action of the Legislature, and exactly what that action is ('appropriation')." *Id.* The use of the phrase was "not inaccurate" because it "track[ed] the basic language of the measure," and it was proper for the summary not to "state that the monies could be spent for other purposes" since the petition itself did not say that. *Id.* "To require the Attorney General to state that the monies could be spent for other purposes would, in essence, require him to state a legal interpretation of the measure," the Court concluded. "Nothing in art. 48 requires the summary to include legal analysis or an interpretation." *Id.*

Similarly, in *Gilligan* the plaintiffs challenged the summary for an initiative petition that imposed an excise on tobacco products and provided that the resulting revenue would be credited to a Health Protection Fund and "'expended, subject to appropriation, to supplement existing levels of funding for' a variety of programs related to health and tobacco." 413 Mass. at 15. Just like plaintiffs here, the plaintiffs in *Gilligan* argued that "the Attorney General's summary is not fair because it does not alert the voters of 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." *Id.* at 19. Following *AIM*, the Court held that the summary properly covered the "main features" of the measure, and "the

inclusion in the summary of the phrase 'subject to appropriation by the state Legislature' accurately and fairly inform[ed] voters of the precise contingency involved." *Id.* at 19-20. The Court noted that "the full text of the measure would be made available to all voters," and while in the "partisan arguments for and against the measure" the plaintiffs could "attempt to persuade the voters that the measure should be defeated because the expenditure of the monies in the Health Protection Fund would be subject to appropriation by the Legislature," Article 48 did not require the Attorney General "to advocate the plaintiffs' position" through the summary. *Id.* at 20.

AIM and *Gilligan* defeat plaintiffs' challenge here. As in this case, *AIM* and *Gilligan* each involved a measure to raise revenue through a new excise or tax and a statement of purpose as to how that revenue should be expended. Like the summary in this case, the summaries in *AIM* and *Gilligan* stated that expenditures of the revenue would be subject to appropriation by the Legislature – thus informing voters that "the expenditure of monies for the stated purposes would be contingent on … an action of the Legislature" and that action would be an "appropriation." *AIM*, 413 Mass. at 12; *accord Gilligan*, 413 Mass. at 19-20. And in each case, this Court approved the Attorney General's decision to track the language of the measure and exclude extraneous warnings that the Legislature

might spend the revenue for some other purpose. *AIM*, 413 Mass. at 12; *Gilligan*, 413 Mass. at 19-20.

Plaintiffs do not even mention *Gilligan* in their brief. *See* Pl. Br. 4. And their attempt to distinguish *AIM* because it "mentions no evidence that the voters were especially interested in how the new excise tax would be spent," Pl. Br. 46, falls flat. The adequacy of a summary does not turn on a showing of "voter interest" in a particular issue; rather, the summary need only give voters "a fair and intelligent conception of the outlines of the measure." *Abdow*, 468 Mass. at 505 (quoting *Sears*, 327 Mass. at 324). In any event, the opponents of the measures in *AIM* and *Gilligan* attacked the summaries that same way – *i.e.*, the new revenue might be spent on other purposes – and in each case this Court rebuffed that argument and approved the summaries because they informed voters that expenditures would be subject to appropriation.

Plaintiffs' attempt to avoid the holding of *AIM* because "statutory earmarks are inherently always subject to superseding legislation," Pl. Br. 46, also misses the mark. Any provision, statutory or constitutional, that makes its statement of a spending purpose "subject to appropriation" preserves the Legislature's discretion to make appropriations in the future. *See Weiner v. Attorney General*, 484 Mass. 687, 696 (2020) (citing *Gilligan*, 413 Mass. at 17). In this case, while the Attorney

General's summary properly identifies the Legislative Amendment as a "proposed constitutional amendment," there is no basis for plaintiffs' claim that the summary "misleadingly suggests to voters that the Constitution will force the Legislature to use its increased revenues only on education and transportation." Pl. Br. 46. Rather, the summary simply follows this Court's instruction that the phrase "subject to appropriation by the state Legislature" informs voters that the Legislature will retain its appropriation authority, and that no further interpretation based on speculation about future events is required. Plaintiffs offer no reason to treat summaries for proposed laws and constitutional amendments differently, and, in fact, Article 48 makes clear that the same standard applies regardless of the underlying measure. *See* Art. 48, Gen. Prov., pt. III, as amended by Art. 74, § 4 ("A fair, concise summary, as determined by the attorney general, … of each proposed amendment to the constitution, and each law submitted to the people, shall be printed on the ballot …").

3. Plaintiffs' proposed addition to the summary would violate the requirements of Article 48.

Plaintiffs' argument for modifying the summary also fails because the language they seek to add would violate the "basic legal principles used to evaluate whether a summary is 'fair' for art. 48 purposes." *Hensley*, 474 Mass. at 660. Plaintiffs contend that the summary should be amended by adding, after stating the

general purposes for which the revenue would be used subject to appropriation, the following sentence:

> The Legislature could, however, choose to reduce funding on education and transportation from other sources and replace it with the new surtax revenue because the proposed amendment does not require otherwise.

JA 113. According to plaintiffs, this new language seeks to explain to "the average voter" a "subtlety of the state budget" that, because "money is fungible," "the Legislature would retain ultimate discretion over spending choices." JA 112-13. While plaintiffs are free to offer their views about the Legislature's spending authority and possible consequences of the Legislative Amendment in their advocacy against the measure, their new language does not belong in the summary.

First, it is unnecessary. As this Court has held, the phrase "subject to appropriation by the state Legislature" informs voters that the expenditure of revenue resulting from the Legislative Amendment will be contingent on how the Legislature exercises its appropriation authority. *See* Section I.B.2, *supra*.

Second, plaintiffs' proposed summary would undermine the goal of "conciseness," *Bowe*, 320 Mass. at 243, by adding a fourth sentence and additional thirty-one words about a "subtlety of the state budget," not a main feature of the Legislative Amendment. Indeed, their amended summary would be nearly as long as the measure itself, which would defeat the purpose of Article 48's summary

requirement. *See Sears*, 327 Mass. at 324 (Article 48 requires "an abridgment, abstract, compendium, or epitome," not a litany of every detail about how a measure would be implemented or operate).

Third, rather than "track[] the basic language of the measure," *AIM*, 413 Mass. at 12, plaintiffs' proposed summary would introduce new words and ideas not present in the Legislative Amendment, including the power of the Legislature to "choose to reduce funding," "other sources," and "new surtax revenue." These undefined terms and concepts could confuse voters, who might not know, for example, what "other sources" means in this context, or what "surtax revenue" is, or how that term differs from the "additional 4% state income tax" referred to earlier in the summary. Voters who turn to the actual language of the Legislative Amendment could become even more confused, since none of those terms are set forth there. *See AIM*, 413 Mass. at 11-12 (rejecting argument that summary should explain that class of material subject to excise might change if referenced federal law changed because inclusion of such matters "might actually tend to 'confuse rather than clarify'") (citation omitted).

Fourth, plaintiffs' proposal violates the principle that a summary need not "state a legal interpretation of the measure" or "include legal analysis." *AIM*, 413 Mass. at 12. The proposal speculates about what the Legislature "could …

choose" to do, and sets forth a particular scenario about future legislative action. Such speculation and interpretative analysis do not belong in a summary. Plaintiffs contend that voters must be warned that "the Legislature has the discretion to increase spending on whatever it wants," Pl. Br. 8, but analysis of a measure's perceived flaws or possible impact is not the proper role of a summary. *Hensley*, 474 Mass. at 660.

Fifth, plaintiffs' proposed addition is argumentative and one-sided. *See Sears*, 327 Mass. at 324. Its use of "however" signals that an argument is coming,[1] and its overall structure makes clear that its purpose is to refute a particular understanding of the Legislative Amendment "because the proposed amendment does not require otherwise." Such argument is neither fair nor neutral.

4. Survey results and argument in an earlier case have no bearing on the adequacy of the summary.

Lastly, this Court should reject plaintiffs' attempt to invalidate the Attorney General's summary based on partisan survey data or out-of-context statements from prior litigation. Extraneous materials have no bearing on the performance of the Attorney General's duties under Article 48. As this Court has held, "the

[1] While plaintiffs contend that it is "frivolous" to characterize their requested language as argumentative, Pl. Br. 43, they tellingly omit the term "however" whenever they recite that language in their brief. *Compare* Pl. Br. 23, 43, 48, *with* JA 113 (Am. Compl. ¶ 131).

Attorney General is not to become involved with holding extensive hearings to determine the full factual impact" of a measure. *Bogertman v. Attorney General*, 474 Mass. 607, 619 (2016) (citation omitted). Rather, "the factual examination required of the Attorney General is limited to matters implicit in the language of the petition and to matters of which the Attorney General may properly take official notice." *Id.* (citation omitted).

Nevertheless, plaintiffs contend that this Court should modify the summary (and, by implication, overrule its holdings in *AIM* and *Gilligan*) based on the results of a "multi-mode live survey" conducted at plaintiffs' direction by a firm that describes itself as "the #1 Republican private pollster." JA 278-79, 290; *see* Pl. Br. 41-42. This Court has never before considered such extraneous information in its deferential review of the Attorney General's summaries under Article 48, and there is no reason to start now. Moreover, the Attorney General has no familiarity with plaintiffs' survey, and its reliability and relevance to this case are dubious.[2] It

[2] For example, Question 3 of the survey reports that, after being presented with the Attorney General's 2018 summary, a substantial majority (65%) of respondents did not believe or were unsure that the Legislative Amendment would "require spending on education and transportation to increase by the amount of the new taxes," JA 283-84 – a result that undercuts plaintiffs' claim that the summary "suggest[s] to voters that new revenues raised by [the measure] only can be used to fund new spending on education and transportation," JA 83. Plaintiffs emphasize a subsequent question, Question 9, which was phrased in a leading and suggestive

(footnote continued)

would be inappropriate for the Attorney General to have considered this one-sided survey when drafting a summary, and the Court should defer to her judgment in declining to do so.

Plaintiffs also cite various out-of-context statements made by Assistant Attorneys General in the *Anderson* litigation from 2018. Significantly, the plaintiffs in that case – led by the same named plaintiff and represented by the same counsel – did not challenge the Attorney General's summary for the initiative petition at issue, even though, as plaintiffs acknowledge, Pl. Br. 22-23, that summary was very similar to the one they are challenging here. Instead, the cited statements arose in the context of the plaintiffs' claim that the initiative petition violated Article 48's prohibition against imposing "specific appropriation[s]" by initiative petition. *See Anderson*, 479 Mass. at 785 (citing Art. 48, Init., pt. II, § 2). This Court did not rule on that issue in *Anderson*, *see id.* at 798 n.9, and, because

---

manner: "*If you were told* that a YES VOTE would amend the state Constitution to impose an additional tax 'to be used, subject to appropriation by the state Legislature, on education and transportation,' *but then found out* that the Legislature could simply replace current education and transportation funding dollars with the new tax dollars – resulting in no increase in education or transportation funding – *would you feel misled*?" JA 285-86 (emphasis added). The question presumed an inconsistency between the first and second statements, then prompted respondents to acquiesce to a specific subjective response about that presumption.

"the 'excluded matters' provision of art. 48 has no application to" legislative amendments, *Opinion of the Justices*, 386 Mass. 1201, 1213-14 (1982), it is not an issue here.

None of the cited statements bear on the fairness of the Attorney General's summary for the Legislative Amendment. The Attorney General's brief in *Anderson* explained that, under this Court's precedent, the inclusion of the phrase "subject to appropriation" in a measure means that the Legislature would maintain its power and discretion to make specific appropriations. This Court has repeatedly recognized this principle in its cases applying Article 48's "appropriation" exclusion for initiative petitions and amendments. *See* Br. of the Appellees at 10-18, *Anderson v Attorney General*, No. SJC-12422 (Mass.), 2018 WL 557688, at *10-18 (Jan. 12, 2018) (discussing *AIM*, 413 Mass. at 6-9; *Gilligan*, 413 Mass. at 16-19; *Mazzone*, 432 Mass. at 522-24). The brief further explained that, even if the measure were interpreted to restrict the spending discretion of the Legislature, that limitation would still not amount to a "specific appropriation" in violation of Article 48 because the measure's general identification of policy areas to receive revenue would ensure that a "wide array of spending choices" remained open to the Legislature. *Id.* at 22-26. It also observed that, as this Court has explained in other cases, the Legislature has authority to shift money from fund to

fund to meet obligations, provided that it appropriates at least as much for enumerated purposes as dedicated revenue sources yield. *Id.* at 27 (discussing *New England Div. of Am. Cancer Soc'y v. Comm'r of Admin.*, 437 Mass. 172, 181 (2002); *Mitchell v. Sec'y of Admin.*, 413 Mass. 330, 333-34 (1992)).

This anodyne discussion of appropriation authority from 2018 provides no basis to overturn the Attorney General's summary now. While conceding that "it is technically accurate that the *specific* dollars raised by the Amendment must be spent on education and transportation," Pl. Br. 35, plaintiffs contend that the Amendment "sets up a shell game," JA 84, or allows a "bait-and-switch," Pl Br. 45, because the Legislature would maintain its discretion on how to spend fungible tax revenues. But the summary already informs voters that expenditures of the revenue generated by the Legislative Amendment for its stated purposes will be contingent on the Legislature's appropriation authority, and this Court has held that summaries need not include warnings that the Legislature might spend the revenue on some other purpose. *See* Section I.B.2, *supra*. Nor has the Court ever required the Attorney General to include speculation about a particular action opponents think the Legislature might take (*e.g.*, reducing "funding on education and transportation from other sources" and replacing it with "the new surtax revenue"),

much less an assessment of that scenario's legality (*e.g.*, "the proposed amendment does not require otherwise").

Any speculation about what the Legislature might do if the Legislative Amendment is passed – and what interested parties and the courts might do in response – is inherently uncertain. Indeed, the intervenors contend that the Legislative Amendment would restrict the spending discretion of the Legislature, requiring all additional revenue to be spent on education and transportation. *See* JA 359-60. If the "shell game" scenario imagined by plaintiffs were to actually occur, the intervenors or other interested parties could seek to enforce their interpretation of the Legislative Amendment through the courts. Neither intervenors nor plaintiffs are entitled to ask this Court to take sides on that hypothetical scenario now – before the measure has been voted on, any new revenue collected or spent, or any lawsuit filed. *See Duane v. Quincy*, 350 Mass. 59, 61 (1966) ("Parties are not entitled to decisions upon abstract propositions of law unrelated to some live controversy.") (citation omitted); *Abdow*, 468 Mass. at 508 ("[T]he proper time for deciding definitively whether the measure has the desired legal effect will come if and when the measure is passed."). And it would be equally improper for the Attorney General to assume the adjudicatory role of

the courts by deciding this hypothetical question of law and incorporating it into her summary.

The prudent approach to Article 48 summaries is the one long taken by the Attorney General and approved by this Court: a summary should identify the principal elements of a measure in a fair, concise, and neutral manner while avoiding unnecessary legal analysis and interpretation. Plaintiffs, intervenors, and other interested parties are free to advance their competing views in their public advocacy, including the 150-word arguments that will be appear in the Information for Voters guide. But those legal interpretations and arguments do not belong in the summary.

II. THE ATTORNEY GENERAL AND SECRETARY PREPARED FAIR AND NEUTRAL "YES" AND "NO" STATEMENTS.

Plaintiffs similarly ask this Court to amend the one-sentence "yes" and "no" statements. No such amendment is warranted, especially given the deferential standard of review of these statements.

A. G.L. c. 54, § 53 Provides for Limited Review of the One-Sentence Statements.

Under G.L. c. 54, § 53, any 50 registered voters may challenge the title and one-sentence "yes" and "no" statements by filing an action within 20 days after their publication in the Massachusetts Register. Because the Secretary has not yet

published the one-sentence statements in the Massachusetts Register, plaintiffs' challenge is premature. Defendants discuss the timing issues associated with challenges to summaries, titles, and one-sentence statements for legislative amendments in Section III, *infra*.

Assuming that the Court will nevertheless review plaintiffs' challenge, the standard is clear: "The court may issue an order requiring amendment by the attorney general and the state secretary only if it is clear that the title [or] one-sentence statement … in question is false, misleading or inconsistent with the requirements of this section." G.L. c. 54, § 53. The "requirements of this section" are that the one-sentence statements be "fair and neutral." *Id.*

Through this language, the Legislature made clear that courts are not to make a *de novo* determination of what would constitute a fair and neutral one-sentence statement. Just as with the summary that the Attorney General must prepare, "an element of discretion is involved" in determining "what to include, what to exclude, and what language to use." *See MTA*, 384 Mass. at 230. And, as with the summary, "the joint effort of the Attorney General and Secretary in crafting the … statements is entitled to some deference," particularly given the challenge of "drafting a single sentence that fairly and neutrally describes the consequences of a 'yes' or 'no' vote regarding" a ballot measure. *Hensley*, 474

Mass. at 668. The Legislature intended that this Court would not substitute its judgment for the Attorney General and Secretary, but rather order an amendment only if the language chosen by those officers is plainly defective. That is not the case here.

The one-sentence "yes" and "no" statements are not intended to provide substantial amounts of information about the content of the measure being voted upon. That is the function of the Attorney General's summary and of the Secretary's Information for Voters guide. Rather, the one-sentence statements are intended to help avoid voter confusion that could otherwise result from a crowded ballot or when a measure repeals another law.[3]

[3] Specifically, the one-sentence statements identify the subject matter of the question, which is critical on those rare occasions when the summaries themselves cannot fit onto voting equipment because of their number and length. G.L. c. 54, § 42A was amended to require that the "yes" and "no" statements appear on the ballot, St. 1996, c. 389, § 1, after the 1994 state election in which summaries for nine questions were given to voters on separate handouts and voters reported not knowing which questions dealt with which of the nine subject matters. The one-sentence statements also serve to alleviate confusion when voting on measures that would repeal other laws. In those cases, the Attorney General's summary typically focuses on the subject of the law being repealed, and the "yes" and "no" statements remind voters that they are actually voting on whether to repeal what they have just finished reading about in the summary.

B. The One-Sentence Statements Here Are Not Clearly False or Misleading.

There is nothing misleading (let alone clearly misleading) about the one-sentence statements prepared by the Attorney General and Secretary 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. These statements are fair and neutral, and they will be presented to voters (in both the Information for Voters guide and on the ballot) alongside the Attorney General's summary, which informs voters about the main features of the Legislative Amendment. *See* Art. 48, Gen. Prov., pt. III & IV, as amended by Art. 74, § 4; G.L. c. 54, § 53.

Plaintiffs claim that the "yes" statement is "misleading, not fair and neutral," because "the average voter would understand this Yes Statement to mean that the [Legislative Amendment] allows the new tax revenues to fund increased spending on public education and transportation, and not increased spending in other areas." JA 114; *see also* Pl. Br. 31-33. This argument fails for several reasons.

First, there is no requirement that one-sentence statements expressly capture every feature of a measure. As discussed, the "yes" and "no" statements are not intended to serve as a "summary of the summary." Rather, they are intended to help avoid voter confusion that might otherwise result, for example, from a crowded ballot. To attempt to describe a measure's numerous features in a single sentence could lead voters to draw erroneous negative implications about the measure, or skip reading the summary altogether in the erroneous belief that the one-sentence statements are an adequate substitute. *See Arroyo v. Attorney General*, SJ-2002-0210, Memorandum of Decision at 2-3 (Spina, J.) ("The one-sentence statement could not possibly describe every effect of the prepared measure without being unreadable, or without itself being misleading as to the importance of the concise summary proposed by the Attorney General.").

Second, the one-sentence statements prepared by the Attorney General and Secretary identify, in a fair, neutral, and concise manner, the primary subject matter of the proposed measure. Specifically, the one-sentence "yes" statement accurately reflects that (i) the Legislative Amendment would amend the state Constitution; (ii) the Legislative Amendment would impose an additional 4% tax on that portion of incomes over one million dollars; and (iii) the additional tax would be used, subject to appropriation by the state Legislature, on education and

transportation. As previously discussed, *see* Section I.B.1, *supra*, these are the key policy changes that voters will be asked to approve.

Third, plaintiffs' argument that the "yes" statement fails to explain that "the new tax revenues" might lead to "increased spending in other areas" ignores the significance of the phrase "subject to appropriation by the state Legislature." As this Court has held, that phrase informs voters that "the expenditure of monies for the stated purposes would be contingent on … an action of the Legislature" and that action will be an "appropriation." *AIM*, 413 Mass. at 12; *accord Gilligan*, 413 Mass. at 19-20. The phrase included in the "yes" statement is the same as that in the Attorney General's summary, which itself "tracks the basic language of the measure." *AIM*, 413 Mass. at 12. Its inclusion defeats any claim that the statement "does not fairly inform the voters that, in the Legislature's discretion, the monies could be spent for other purposes." *Id.*; *accord Gilligan*, 413 Mass. at 20.

Fourth, plaintiffs' proposed addition to the "yes" statement is not only unnecessary but also misleading, unfair, and confusing. Plaintiffs argue that the "yes" statement should instead read:

> 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*, though 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 amendment does not require otherwise*.

JA 114-15 (emphasis added). Plaintiffs' amendment would thus add another 31 highly argumentative words to the existing 37-word "yes" statement. It would make the statement more difficult to parse by adding (i) a "though" clause that suggests tension with the preceding statement, and (ii) a "because" clause that sets forth an interpretation of "the proposed amendment" in support of that "though" clause. And whereas the "yes" and "no" statements prepared by the Attorney General and Secretary seek to dispel confusion by succinctly informing voters what each vote would do, plaintiffs' version would create confusion by appending a hypothetical scenario about what "the Legislature could choose to" do and a legal interpretation about what "the proposed amendment does not require."

It is not the function of the one-sentence statements to make one-sided arguments. Because it is speculative, argumentative, and purports to state an interpretation of what the Legislative Amendment "requires," none of the language proposed by plaintiff belongs in the summary. *See* Section I.B.3, *supra*. It would be even less appropriate to include this language in the "yes" statement. Rather than help voters identify the subject matter of this measure, plaintiffs' amendment would compound voter confusion by introducing an extraneous interpretation of the measure and speculation about what the Legislative might "choose" to do if it

were approved. The resulting incoherence and overall lack of readability of plaintiffs' amended "yes" statement could in fact discourage voters from voting on the measure at all – a result which would hinder the underlying goals of Article 48.

Nor are plaintiffs' alternative changes any better. One option is to rewrite the "yes" statement as follows:

> 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*.

JA 115 (emphasis added); Pl. Br. 24. This reformulation uncouples the "subject to appropriation" phrase from the verb "used," leaving its meaning less clear. It also inexplicably adds a second "state" to modify "education and transportation" and unhelpfully refers to the new tax being "used" for "spending." Even worse, this alternative creates a conundrum that few voters will be able to understand: how a new tax could "be used for, but not necessarily to increase" spending. Because we have the benefit of plaintiffs' briefing, we know that they intend this locution to refer to their interpretation of what the Legislative Amendment would require if a particular factual scenario were to arise in the future. But such speculation and interpretation are wholly inappropriate for one-sentence statements, and they are particularly unwarranted here given the high risk of voter confusion.

Lastly, plaintiffs contend that the Court could order the removal from the "yes" statement "its misleading reference to education and transportation spending." JA 114; *see also* Pl. Br. 24. The phrase "to be used, subject to appropriation by the state Legislature, on education and transportation" is not misleading, however, but rather consistent with language this Court has approved to describe the similar measures at issue in *AIM* and *Gilligan*. It is not surprising that plaintiffs, as opponents of the Legislative Amendment, might want voters at the ballot box to focus on just the measure's taxation element, but that artificial focus would not advance the purpose of G.L. c. 54, § 53, which is to allow voters to readily identify the subject matter of the question. The "yes" statement prepared by the Attorney General and Secretary identifies, in a fair, neutral, and concise manner, the primary subject matter of the Legislative Amendment – including the fact that the additional tax would be used, subject to appropriation by the state Legislature, on education and transportation. Plaintiffs justify their proposed omission on the ground that "[s]ome discussion of the Amendment's spending component still will appear in the Summary," JA 114, but it is precisely such a discrepancy in how the summary and the "yes" statement refer to the Legislative Amendment that would cause voter confusion.

Because plaintiffs cannot show that "it is clear" that the one-sentence statements prepared by the Attorney General and Secretary are "false, misleading or inconsistent with the requirements" of G.L. c. 54, § 53, and because each of their proposed alternatives would increase voter confusion, their request for amendment should be denied.

III. SUMMARIES, BALLOT QUESTION TITLES, AND ONE-SENTENCE STATEMENTS FOR LEGISLATIVE AMENDMENTS SHOULD BE PREPARED ON A SCHEDULE CONSISTENT WITH G.L. C. 54, § 53.

The county court directed the parties to address in their briefs to the full Court what "an appropriate timetable for the preparation of summaries, titles, and the one-sentence 'yes' and 'no' statements in legislative amendment cases like this" could be. *See* JA 356, 452. Defendants submit that if a legislative amendment receives a second vote of approval by a joint session of the Legislature 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. If a legislative amendment is finally approved later in an election year, defendants should prepare those materials as soon as possible, with any litigation to follow in the county court.

Legislative amendments have been infrequent in recent years. No legislative amendment has appeared on the ballot since 2000. *See* JA 384-86. Moreover,

unlike the schedule for initiative petitions fixed by the Constitution, the timing for legislative amendments depends upon the Legislature's scheduling of its constitutional conventions.[4] For example, the Legislature approved the last two legislative amendments to reach the ballot on June 28, 2000, mere weeks before the July deadline for inclusion in the Information for Voters guide. *See* G.L. c. 54, § 53. Prior legislative constitutional amendments appearing on the ballot passed the second vote of the Legislature on varying schedules, often not long before the July deadline.[5] For these reasons, the preparation of materials involving legislative amendments is less amenable to a fixed timetable.

---

[4] For a proposed amendment to appear on the ballot, the Constitution requires only that the Legislature put the measure before a joint session "not later than the second Wednesday in May." Art. 48, Init., pt. IV, § 2, as amended by Art. 81, § 2. Otherwise, Article 48 proscribes no final date by which legislative action must take place, except in an unusual scenario which "the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending." *See id.*

[5] In the last 50 years, ten biennial statewide elections have included legislative amendments. In nine of those ten elections, one or more of the legislative amendments appearing on the ballot was not approved for the second time by the Legislature until after March of that election year. The dates upon which the Legislature approved legislative amendments appearing on the ballot are recorded in the Information for Voters guides prepared by the Secretary. The guides for 2000 through 2020 are available at https://www.sec.state.ma.us/ele/eleifv/infoforvoters.htm. Guides for earlier election years are maintained by the Secretary's office and available upon request.

Legislative amendments are also unique in that, unlike initiative petitions and initiative amendments, they do not require certification by the Attorney General and are not subject to the "excluded matters" provision of Article 48. *See* Art. 48, Init., pt. II, § 2. Accordingly, there is no mechanism to exclude a legislative amendment from the ballot. *Opinion of the Justices*, 386 Mass. at 1213-14.[6]

For good reason, there is also no constitutional or statutory deadline for publication of a summary for a legislative amendment. Unlike initiative petitions and initiative amendments, legislative amendments do not require gathering voter signatures. When voters are asked to sign a petition in support of a citizen-proposed law, they are furnished with a copy of the Attorney General's summary of that proposed law. That is why the summary for initiative petitions is prepared months in advance, so that it can be printed on the forms used for signature gathering. *See* Art. 48, Init., pt. II, § 3, as amended by Art. 74, § 1. By contrast, voters will not rely on the summary for a legislative amendment until they cast

[6] While plaintiffs in this case refer to the Court "excluding" or "barring" the Legislative Amendment from the ballot, *see, e.g.*, Pl. Br. 6; JA 85, 116, they do not identify any authority that would support such an extreme action. In fact, Article 48 states that a legislative amendment "shall" be placed on the ballot if approved in the required manner. *See* Art. 48, Init., pt. IV, §§ 4-5.

their votes. Efficiency thus suggests that, where possible, the summaries for legislative amendments should be prepared in tandem with title and one-sentence statements, so that, as occurred here, comprehensive views may be solicited and received from proponents and opponents of the measure and other interested parties, and so that any legal challenge to those materials may be brought "in the same case at the same time." *See Hensley*, 474 Mass. at 671.

Contrary to plaintiffs' position, Pl. Br. 49-50, it would be improper to require that summaries for legislative amendments and ballot question titles and one-sentence statements for all measures be prepared so far in advance that they can be litigated at the same time as certification challenges to initiative petitions and initiative amendments. First, that approach has no basis in the schedule already expressly set by the Legislature for challenges to ballot question titles and one-sentence statements under G.L. c. 54, § 53. Under that law, the Secretary must publish those materials in the Massachusetts Register "by the second Wednesday in May."[7] That statute further provides that any 50 registered voters may challenge

[7] The Register's publication schedule and filing deadlines effectively require the Attorney General and Secretary to prepare the materials several weeks in advance. For example, this year the second Wednesday in May is May 11, 2022. Consistent with the Register's 2022 Publication Schedule (https://www.sec.state.ma.us/spr/sprpdf/maregsch.pdf), these materials appear in

(footnote continued)

the title and one-sentence statements by filing an action "within 20 days after" their publication in the Register. G.L. c. 54, § 53. While the Court in *Hensley* asked the Legislature to amend G.L. c. 54, § 53 "so that statutory actions challenging titles and statements can be brought earlier in the initiative process," *see* 474 Mass. at 672, the Legislature has not done so.

Second, as discussed, some legislative amendments are not approved for a second time by a joint session of the Legislature until as late as May or June of an election year. Unfortunately, for legislative amendments approved so late, some form of "mad scramble" to prepare summaries, ballot question titles, and one-sentence statements, as well as to litigate any challenges to those materials, may be unavoidable. *See Hensley*, 474 Mass. at 671. In that case, defendants would suggest that those materials be prepared as soon as possible, with any litigation to follow in the county court.

Third, while challenges to the Attorney General's certification decisions often warrant consideration by the full Court because they raise important questions about what matters will appear on the ballot as a result of "the people's prerogative to initiate and adopt laws," *Abdow*, 468 Mass. at 487 (citation omitted),

---

Register Number 1469, which will be published on April 29, 2022 with a filing deadline of April 15, 2022.

challenges to summaries, ballot question titles, and one-sentence statements often reflect (as here) attempts by interested parties to sway voters by changing the materials they read at the ballot. Such challenges can usually be handled by the Single Justice in a more efficient and streamlined process, with any appeal therefrom decided on the papers. Any litigation concerning legislative amendments will necessarily involve only summaries, ballot question titles, or one-sentence statements, and not whether the measure will appear on the ballot. It is unnecessary for most such litigation to be referred and reported to the full Court. Indeed, G.L. c. 54, § 53 provides that litigation over titles and one-sentence statements shall be handled by "the supreme judicial court for Suffolk county," and that court has resolved the majority of such challenges to date, *see Hensley*, 474 Mass. at 668 & n.27.

In most cases, the county court will also be best suited to decide any challenge to a summary for a legislative amendment. In general, the legal questions presented in challenges to summaries and one-sentence statements are less complex than certification challenges, and most will not require consideration by the full Court. Although the summary and one-sentence statements serve different purposes, they are both intended simply to describe the subject matter of the measure in a fair, neutral, and concise manner, *see* Sections I.A.1 & II.A,

supra, and courts apply a deferential standard in reviewing them both, *see* Sections I.A.3 & II.A, *supra*. By contrast, certification decisions are reviewed *de novo*. *Mazzone*, 432 Mass. at 520. Any timetable proposed by the Court should reflect that most challenges to a legislative amendment's summaries, ballot question titles, and one-sentence statements will be properly decided by the county court.

For these reasons, the Attorney General and Secretary suggest that this Court should not set an alternative schedule of deadlines for challenges to legislative amendments different from the one already set by the Legislature. Accordingly, in early March of each election year (or as soon as possible after the Legislature's second vote), the Attorney General and Secretary will circulate to proponents, opponents, and others draft language on the summary, title, and one-sentence statements for any legislative amendment and solicit those parties' feedback. This approach is consistent with the longstanding practice of the Attorney General's Office to seek and receive input from interested parties on various aspects of Article 48 certification and review. This process advances the objectives of Article 48 by allowing interested parties to identify concerns and advocate for particular changes before the various items that appear in the Information for Voters guide and on the ballot are finalized. It also enhances judicial efficiency by identifying and seeking to resolve potential areas of disagreement outside of the courts.

Following the interactive process, the Attorney General and Secretary will (where possible) finalize the summary, title, and one-sentence statements for any such legislative amendment no later than mid-April, as required to publish in the Massachusetts Register no later than "the second Wednesday in May." Consistent with G.L. c. 54, § 53, any legal challenge to those materials must then be brought within 20 days of publication in the Register. At that point, the litigation may proceed in the county court as contemplated by G.L. c. 54, § 53, on an expedited briefing schedule if necessary, with any ruling to be issued by the second week of July so that the materials can be sent to the printer for inclusion in the Information for Voters guide.

CONCLUSION

For the foregoing reasons, the Court should: (i) conclude that the Attorney General properly summarized the Legislative Amendment and that the Attorney General and Secretary's one-sentence statements meet statutory requirements; and (ii) remand the case to the county court for dismissal of the complaint.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Robert E. Toone
Robert E. Toone (BBO #663249)
Anne Sterman (BBO #650426)
Adam Hornstine (BBO #666296)
Assistant Attorneys General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2178
Robert.Toone@mass.gov

Date: April 19, 2022

CERTIFICATE OF COMPLIANCE

I, Robert E. Toone, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,886 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word.

/s/ Robert E. Toone
Robert E. Toone
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2022, I caused this brief to be served by email on counsel for plaintiffs and intervenors:

Kevin P. Martin/ kmartin@goodwinlaw.com
Jordan Bock/ jbock@goodwinlaw.com
Jenna Welsh/ jwelsh@goodwinlaw.com
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
Counsel for Plaintiffs-Appellants

Thomas O. Bean, Esq.
Verrill Dana, LLP
One Federal Street
Boston, MA 02110
(617) 309-2600
tbean@verrill-law.com
Counsel for Intervenor-Defendants-Appellees

/s/ Robert E. Toone
Robert E. Toone
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
Robert.Toone@mass.gov
(617) 963-2178

ADDENDUM

AMENDMENT ARTICLE 48: INITIATIVE AND REFERENDUM

(as amended by amend. arts. 67, 74, 81, 108; Referendum provisions omitted for brevity)

I. DEFINITION

Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection.

THE INITIATIVE.

II. INITIATIVE PETITIONS.

Section 1. Contents

An initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure, which is proposed by the petition.

Section 2. Excluded matters

No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the eighteenth amendment of the constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

Section 3. Mode of Originating

Such petition shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-general not later than the first Wednesday of the August before the assembling of the general court into which it is to be introduced, and if he shall certify that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a fair, concise summary, as determined by the attorney-general, of the proposed measure as such summary will appear on the ballot together with the names and residences of the first ten signers. All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth not earlier than the first Wednesday of the September before the assembling of the general court into which they are to be introduced, and the remainder of the required signatures shall be filed not later than the first Wednesday of the following December.

Section 4. Transmission to the General Court

If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall, upon the assembling of the general court, transmit it to the clerk of the house of representatives, and the proposed measure shall then be deemed to be introduced and pending.

III. LEGISLATIVE ACTION. GENERAL PROVISIONS.

Section 1. Reference to Committee

If a measure is introduced into the general court by initiative petition, it shall be referred to a committee thereof, and the petitioners and all parties in interest shall be heard, and the measure shall be considered and reported upon to the general court with the committee's recommendations, and the reasons therefor, in writing. Majority and minority reports shall be signed by the members of said committee.

Section 2. Legislative Substitutes

The general court may, by resolution passed by yea and nay vote, either by the two houses separately, or in the case of a constitutional amendment by a majority of those voting thereon in joint session in each of two years as hereinafter provided, submit to the people a substitute for any measure introduced by initiative petition, such substitute to be designated on the ballot as the legislative substitute for such an initiative measure and to be grouped with it as an alternative therefor.

IV. LEGISLATIVE ACTION ON PROPOSED CONSTITUTIONAL AMENDMENTS.

Section 1. Definition

A proposal for amendment to the constitution 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.

Section 2. Joint Session

If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election, or if in case of a proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in May, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

Section 3. Amendment of Proposed Amendments

A proposal for an amendment to the constitution introduced by initiative petition shall be voted upon in the form in which it was introduced, unless such amendment is amended by vote of three-fourths of the members voting thereon in joint session, which vote shall be taken by call of the yeas and nays if called for by any member.

Section 4. Legislative Action

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; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner. At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

Section 5. Submission to the People

If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a

legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.

V. LEGISLATIVE ACTION ON PROPOSED LAWS.

Section 1. Legislative Procedure

If an initiative petition for a law is introduced into the general court, signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election, a vote shall be taken by yeas and nays in both houses before the first Wednesday of May upon the enactment of such law in the form in which it stands in such petition. If the general court fails to enact such law before the first Wednesday of May, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following June nor later than the first Wednesday of the following July, a number of signatures of qualified voters equal in number to not less than one half of one per cent of the entire vote cast for governor at the preceding biennial state election, in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of May aforesaid, then the secretary of the commonwealth shall submit such proposed law to the people at the next state election. If it shall be approved by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such law, it shall become law, and shall take effect in thirty days after such state election or at such time after such election as may be provided in such law.

Section 2. Amendment by Petitioners

If the general court fails to pass a proposed law before the first Wednesday of May, a majority of the first ten signers of the initiative petition therefor shall have the right, subject to certification by the attorney-general filed as hereinafter provided, to amend the measure which is the subject of such petition. An amendment so made shall not invalidate any signature attached to the petition. If the measure so amended, signed by a majority of the first ten signers, is filed with the secretary of the commonwealth before the first Wednesday of the following June, together with a certificate signed by the attorney-general to the effect that the amendment made by such proposers is in his opinion perfecting in its nature and does not materially change the substance of the measure, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following June nor later than the first Wednesday of the following July, a number of signatures of qualified voters equal in number to not less than one half of one per cent of the entire vote cast for governor at the preceding biennial state election in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of May aforesaid, then the secretary of the commonwealth shall submit the measure to the people in its amended form.

VI. CONFLICTING AND ALTERNATIVE MEASURES.

If in any judicial proceeding, provisions of constitutional amendments or of laws approved by the people at the same election are held to be in conflict, then the provisions contained in the measure that received the largest number of affirmative votes at such election shall govern.

A constitutional amendment approved at any election shall govern any law approved at the same election.

The general court, by resolution passed as hereinbefore set forth, may provide for grouping and designating upon the ballot as conflicting measures or as alternative measures, only one of which is to be adopted, any two or more proposed constitutional amendments or laws which have been or may be passed or qualified for submission to the people at any one election: provided, that a proposed constitutional amendment and a proposed law shall not be so grouped, and that the ballot shall afford an opportunity to the voter to vote for each of the measures or for only one of the measures, as may be provided in said resolution, or against each of the measures so grouped as conflicting or as alternative. In case more than one of the measures so grouped shall receive the vote required for its approval as herein provided, only that one for which the largest affirmative vote was cast shall be deemed to be approved.

[Provisions governing Referendum omitted]

GENERAL PROVISIONS.

I. IDENTIFICATION AND CERTIFICATION OF SIGNATURES.

Provision shall be made by law for the proper identification and certification of signatures to the petitions hereinbefore referred to, and for penalties for signing any such petition, or refusing to sign it, for money or other valuable consideration, and for the forgery of signatures thereto. Pending the passage of such legislation all provisions of law relating to the identification and certification of signatures to petitions for the nomination of candidates for state offices or to penalties for the forgery of such signatures shall apply to the signatures to the petitions herein referred to. The general court may provide by law that no co-partnership or corporation shall undertake for hire or reward to circulate petitions, may require individuals who circulate petitions for hire or reward to be licensed, and may make other reasonable regulations to prevent abuses arising from the circulation of petitions for hire or reward.

II. LIMITATION ON SIGNATURES.

Not more than one-fourth of the certified signatures on any petition shall be those of registered voters of any one county.

III. FORM OF BALLOT.

A fair, concise summary, as determined by the attorney general, subject to such provision as may be made by law, of each proposed amendment to the constitution, and each law submitted to the people, shall be printed on the ballot, and the secretary of the commonwealth shall give each question a number and cause such question, except as otherwise authorized herein, to be printed on the ballot in the following form:

In the case of an amendment to the constitution: Do you approve of the adoption of an amendment to the constitution summarized below, (here state, in distinctive type, whether

approved or disapproved by the general court, and by what vote thereon)?

YES____
NO_____

(Set forth summary here)

In the case of a law: Do you approve of a law summarized below, (here state, in distinctive type, whether approved or disapproved by the general court, and by what vote thereon)?

YES____
NO_____

(Set forth summary here)

IV. INFORMATION FOR VOTERS.

The secretary of the commonwealth shall cause to be printed and sent to each person eligible to vote in the commonwealth or to each residence of one or more persons eligible to vote in the commonwealth the full text of every measure to be submitted to the people, together with a copy of the legislative committee's majority reports, if there be such, with the names of the majority and minority members thereon, a statement of the votes of the general court on the measure, and a fair, concise summary of the measure as such summary will appear on the ballot; and shall, in such manner as may be provided by law, cause to be prepared and sent other information and arguments for and against the measure.

V. THE VETO POWER OF THE GOVERNOR.

The veto power of the governor shall not extend to measures approved by the people.

VI. THE GENERAL COURT'S POWER OF REPEAL.

Subject to the veto power of the governor and to the right of referendum by petition as herein provided, the general court may amend or repeal a law approved by the people.

VII. AMENDMENT DECLARED TO BE SELF-EXECUTING.

This article of amendment to the constitution is self-executing, but legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions.

VIII. ARTICLES IX AND XLII OF AMENDMENTS OF THE CONSTITUTION ANNULLED.

Article IX and Article XLII of the amendments of the constitution are hereby annulled.

M.G.L.A. 54 § 53

§ 53. Mailing lists of voters; copies of measures, summaries, ballot question titles, statements and arguments to voters; public examination; petition for amendment

Effective: January 1, 2015
Currentness

<[Section impacted by 2020, 45, Secs. 1 and 1A, as amended by 2020, 92, Secs. 1 to 3, effective March 23, 2020 and 2020, 92 Secs. 15 to 17 effective June 5, 2020 relating to postponing municipal elections in order to address disruptions caused by the outbreak of COVID-19.] >

The election commissioners in the city of Boston, at least twenty-four days, and the registrars of voters in every other city or town, at least ninety days, before the biennial state election, shall cause to be sent to the state secretary mailing lists of the voters whose names appear on the latest voting lists of their respective cities and towns, prepared as required by section fifty-five of chapter fifty-one and indicating, so far as practicable, those addresses that appear to be group residential quarters, with the number of registered voters residing at each such address, and shall promptly furnish him with subsequent additions to and corrections in such lists. The secretary shall cause to be printed and sent to all residential addresses and to each voter residing in group residential quarters, with copies of the measures to which they refer, a summary prepared by the attorney general, a ballot question title prepared jointly by the attorney general and state secretary, fair and neutral 1-sentence statements describing the effect of a yes or no vote prepared jointly by the attorney general and the state secretary, a statement of not more than 100 words prepared by the secretary of administration and finance regarding the fiscal consequences of the measure for state and municipal government finances and, as provided in section 54, arguments for and against measures to be submitted to the voters under Article XLVIII of the Articles of Amendment to the Constitution. The secretary shall make available for public examination a copy of the ballot question titles, 1-sentence statements describing the effect of a yes or no vote and fiscal effect statements and shall publish them in the Massachusetts register by the second Wednesday in May. Any 50 voters may petition the supreme judicial court for Suffolk county to require that a title or

statement be amended; provided, however, that the petition shall be filed within 20 days after the publication of the title and statement. The court may issue an order requiring amendment by the attorney general and the state secretary only if it is clear that the title, 1-sentence statement or fiscal effect statement in question is false, misleading or inconsistent with the requirements of this section.

The secretary shall also cause to be printed and sent in like manner any question to be placed on the ballot at a biennial state election for the purpose of ascertaining the will of the people upon a particular subject provided that such question is received by the secretary on or before the first Wednesday of July preceding such election. Any such question shall be presented as set forth in this section for measures submitted under Article XLVIII of the Amendments to the Constitution, provided that the publication and judicial review procedures set forth herein shall be inapplicable where questions are received by the secretary on or after the first Wednesday in May. This section shall not apply to a question of public policy filed in accordance with section nineteen of chapter fifty-three.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2002-0210

FELIX ARROYO, *ET AL.*

vs.

ATTORNEY GENERAL & ANOTHER[1]

MEMORANDUM AND JUDGMENT

The petitioners have filed a petition under G. L. c. 56, § 59, in which they challenge the one-sentence statement prepared jointly by the Attorney General and the Secretary of the Commonwealth pursuant to G. L. c. 54, § 53, describing the effect of a "Yes" vote on Initiative Petition No. 01-11, titled "An Act Relative to the Teaching of English in Public Schools." The Attorney General has certified that the petition "is in proper form for submission to the people," and that it is in all respects suitable for filing, conformably with Article 48, the Initiative, Part 2, Section 3, of the Articles of Amendment to the Massachusetts Constitution, and he has prepared a fair, concise summary of the proposed measure. See G. L. c. 54, § 53.

The one-sentence statement about the effect of a "Yes" vote says:

"**A Yes Vote** would require that, with limited exceptions, all public

[1] Secretary of the Commonwealth.

school children must be taught English by being taught all subjects in English and being placed in English language classrooms."

The primary feature of the proposed measure is the replacement of the current transitional bilingual education program in public schools with a program requiring all students to be taught in English. Those who do not speak English would be placed in a sheltered English immersion program, normally not lasting more than one year, with minimal instruction in the child's native language, when necessary.

A significant but secondary feature of the proposed measure is its enforcement provisions. A parent or guardian could sue any teacher, administrator, school committee member, or other elected official for enforcement of the provisions of the proposed measure, if adopted. If the parent or guardian is successful, she may recover attorney's fees, costs, and compensatory damages. A teacher, administrator, school committee member, or other elected official found to have wilfully and repeatedly refused to implement the provisions of the proposed measure, if adopted, may be held personally liable for reasonable attorney's fees, costs, and compensatory damages; he shall not be entitled to indemnification by any public or private third party; and he shall be barred from election to any school committee or employment in any public school district for five years.

The one-sentence statement about the effect of a "Yes" vote does not mention the enforcement provisions of the proposed measure. However, the one-sentence statement was not intended to be a substitute for the concise summary, which is mailed to every registered voter. Rather, it serves as a reminder to the voter of that which is contained in the concise summary. The one-sentence statement could not possibly describe every effect of the

proposed measure without being unreadable, or without itself being misleading as to the importance of the concise summary prepared by the Attorney General. The petitioners do not challenge the content of the concise summary, which contains a fair description of the enforcement provisions of the proposed measure. It is enough that the one-sentence statement "fair[ly] and neutral]ly]" describes the primary effect of the proposed measure. G. L. c. 54, § 53.

I find that the one-sentence statement prepared by the Attorney General and the Secretary of the Commonwealth "fair[ly] and neutral]ly]" describes the primary effect of the proposed measure. I further find that it is not "clear that the one-sentence statement . . . is false, misleading or inconsistent with the requirements of" G. L. c. 54, § 53. The considerable opposition to the one-sentence statement goes beyond what the Legislature intended to be the function of that statement.

The petition is denied.

By the Court,

Francis X. Spina
Associate Justice

ENTERED: July 25, 2002