

No. SJC-13257

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COMMONWEALTH OF MASSACHUSETTS  
*Supreme Judicial Court*

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CHRISTOPHER ANDERSON, *et al.*,  
*Plaintiffs-Appellants,*

v.

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

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

*Defendants-Appellees,*

*and*

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

*Intervenors.*

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

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**BRIEF OF AMICUS CURIAE THE BEACON HILL INSTITUTE FOR  
PUBLIC POLICY RESEARCH IN SUPPORT OF APPELLANTS**

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Michael Williams (BBO# 634062)  
Lawson & Weitzen, LLP  
88 Black Falcon Ave., Suite 345  
Boston, MA 02210  
Telephone: (617) 439-4990  
mwilliams@lawson-weitzen.com

Dated: April 25, 2022

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to S.J.C. Rule 1:21(b)(i), amicus curiae, The Beacon Hill Institute for Public Policy Research (BHI) states that it is a 26 U.S.C. § 501(c)(3) nonprofit, research organization, incorporated in Massachusetts in 2016 and headquartered in Medway, Massachusetts. BHI is governed by a self-perpetuating Board of Trustees, the members of which serve solely in their personal capacities. BHI does not issue stock or any other form of securities and does not have any parent corporation.

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## **INTEREST OF AMICUS CURIAE**

Amicus curiae The Beacon Hill Institute for Public Policy Research (“BHI”) is a nonprofit, public interest research organizations incorporated in Massachusetts in 2016 and headquartered in Medway, BHI is a donor-supported organization that conducts contract research with the goal of promoting balanced economic growth, sound tax policy and regulation in Massachusetts and across the United States.

BHI’s interest in this case stems from its foundational concern that anything that purports to be law and to regulate property or economic activity should be validly enacted. As BHI explains in this brief, there exist compelling reasons to conclude that the text of the proposed constitutional amendment is far too ambiguous in its reference to earmarking funds for education and transportation.

BHI strongly believes that the summary and yes statement proposed by the Attorney General would fail to accurately inform voters of the true nature of the changes to the Constitution that their vote would enact, and therefore urge this Honorable Court to correct that error by ruling that the summary and yes statement is misleading and therefore may not be put before the electorate for a vote in 2022.

BHI believes its views may be of assistance to the Court in this case and has therefore responded to the Court’s request for amicus briefing.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

When the voters of the Commonwealth are confronted with the option of amending the Constitution in November, will they understand the impact of their vote -- that is the question before this Court. In deciding whether to amend the Constitution by adopting a graduated income tax, voters must not be expected to decipher a misleading summary and yes statement to discern the true impact of the proposed constitutional amendment before casting their votes.

Under current law, the state imposes a flat rate of 5 percent on all income. The amendment would impose a surtax of 4% on taxable income over \$1 million.<sup>1</sup> If approved, the amendment would go into effect on January 1, 2023. The amendment states that, upon its adoption, all revenue received “shall be expended, subject to appropriation,” only on “quality public education and affordable public colleges and universities” and on “the repair and maintenance of roads, bridges, and public transportation.” The Attorney General’s summary and yes statement largely repeats that formulation. The following brief argues that the amendment’s promise to spend revenue raised by the surtax only on education and transportation is misleading.

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<sup>1</sup> “Massachusetts Income Tax for Education and Transportation Amendment (2022)”, Ballotpedia, [https://ballotpedia.org/Massachusetts\\_Income\\_Tax\\_for\\_Education\\_and\\_Transportation\\_Amendment\\_\(2022\)](https://ballotpedia.org/Massachusetts_Income_Tax_for_Education_and_Transportation_Amendment_(2022)) (Accessed March 29, 2022).

The commitment to use revenue from a specific source for a specific purpose is known as “earmarking.” In this instance, the ballot measure earmarks the revenue it yields for the two designated purposes—education and transportation. The question is what that means in terms of total state spending on those purposes. Without the amendment, BHI projects that the state will spend about \$14.2 billion on education and transportation in 2023.<sup>2</sup> The state expects the tax to yield \$1.9 billion in new revenue.<sup>3</sup> If the measure were to have the ostensibly promised effect, spending on the two targeted items would rise to \$16.1 billion.

However, that will be true only if the \$1.9 billion in new revenue is not offset by diverting existing revenue to other purposes. The state could apply every dollar raised by the new tax to education and transportation (broadly defined) and divert money already spent on those programs to other uses, with no net increase—or perhaps even a net decrease—in total current spending on the two promised uses. Indeed, the state could divert every dollar currently spent on education and transportation to other purposes and remain within the letter of the amendment if it

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<sup>2</sup> United State Census Bureau, State & Local Government Finance Historical Datasets and Tables, <https://www.census.gov/programs-surveys/gov-finances.html>, (Accessed March 29, 2022).

<sup>3</sup> Nik DeCosta-Klipa, “The Massachusetts Millionaire’s Tax is Back, and It’s a Little Different This Time,” (May 5, 2021), Boston.com, <https://www.boston.com/news/politics/2021/05/05/massachusetts-millionaires-tax-ballot-question-2022/>.



spent the \$1.9 billion, as promised, on education and transportation. This is owed to the “fungibility” of money. A dollar of earmarked revenue is no different from other revenue already being spent on the targeted programs. For the amendment to yield an increase of \$1.9 billion in new spending on education and transportation, it would have had to guarantee that its adoption would not reduce revenues currently allocated to those purposes, but it does not include such a guarantee. Therefore, the “earmark” is misleading.

In fact, it is impossible to guarantee that revenue earmarked for a particular program will increase spending on that program by the amount of the earmarked revenue. This is important insofar as voters might support the amendment on the expectation that adoption of the amendment guarantees another \$1.9 billion in education and transportation spending. If that is the basis of popular support, the earmark is a false promise.

The change in spending, if any, depends in part on the underlying motives of the government. One point of view is that earmarking permits the government to impose taxes as user fees to finance its expenditures. The gasoline tax and its use for highway financing is an example of this idea. Under this interpretation, there is no intention to deceive voters however the earmark affects spending for the two purposes.

A competing point of view suggests that the government aims to raise as much tax revenue as possible, subject to its accountability to voters. This view is called the Leviathan hypothesis, after the dictator in Thomas Hobbes' treatise on government. Earmarks thus become a way to soften voter opposition to tax increases. Politicians promise to use the new revenue generated by a tax increase in some fashion that appeals to voters and then use the new revenue to divert existing revenue to other purposes. The legislature could take \$1.9 billion in revenue currently used to pay for education and transportation and apply that revenue to, say, environmental purposes, simply replacing the diverted revenue with revenue yielded by the surtax. This is what the Leviathan hypothesis predicts.

The user fee view is reflected in Article 78 of the Massachusetts Constitution, under which:

No revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicle on public highways, or to fuels used for propelling such vehicles, shall be expended for other than cost of administration of laws providing for such revenue, making of refunds and adjustments in relation thereto, payment of highway obligations, or cost of construction, reconstruction, maintenance and repair of public highways and bridges, and mass transportation lines and of the enforcement of state traffic laws, and for other mass transportation purposes; and such revenue shall be expended by the commonwealth or its counties, cities and towns for said highway and mass transportation purposes only and in such manner as the general court may direct; provided, that this amendment shall not apply to revenue from any excise tax imposed in lieu of local property taxes for the privilege of registering such vehicles.

According to the federal publication Highway Statistics, Massachusetts user fees subject to Article 78 account for 43.7 percent of Massachusetts highway revenues.<sup>4</sup> On the other hand, Massachusetts education spending is financed almost entirely from general revenues collected at the state and local levels. Therefore, there is virtually no opportunity to impose a tax earmarked for education as a user fee.

The amendment in question does not impose a user fee, however. General revenues earmarked for any kind of spending cannot be seen as a user fee since there is no link between the source of the revenue and the benefits in the form of education or highway maintenance. Therefore, the proposed Constitutional amendment cannot be seen as imposing a fee for educational and highway services. It can be seen only as a mere hope to increase spending on those services in the guise of a dedicated user fee.

## **ARGUMENT**

### **I. LITERATURE REVIEW ON EARMARKS**

Because earmarking is an essential feature of government finance, economists have attempted to show how earmarks affect spending on targeted activities.

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<sup>4</sup> Federal Highway Administration, Policy and Governmental Affairs Office of Highway Policy Information, Highway Statistics Series, <https://www.fhwa.dot.gov/policyinformation/hss/guide/index.cfm>, (Accessed March 29, 2022).

George R. Crowley and Adam J. Hoffer set out to determine how education and transportation spending responds to earmarked taxes.<sup>5</sup> The study estimates how a dollar of revenue raised by sales taxes, personal income taxes, and corporate income taxes affects education spending. The authors find that a dollar of sales tax revenue earmarked for education does not increase education spending. Instead, it offers a strong positive effect on non-education spending—which supports the Leviathan hypothesis. Corporate income tax revenue earmarked for education has a strong negative impact on education spending. On the other hand, a dollar of earmarked personal income tax revenue increases education spending by \$.56 to \$.76 per capita. The conclusion is that, under the proposed surtax, as little as half of the new revenue appropriated for education would go to education, and the rest would be diverted to other purposes.

Spending of surtax revenues on highways is harder to predict. We have noted the importance of user fees like the gasoline tax to highway financing.

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<sup>5</sup> George R. Crowley, Adam J. Hoffer, “Earmarking Tax Revenues: Leviathan's Secret Weapon?” (January 3, 2018). Excerpt from Adam J. Hoffer and Todd Nesbit, eds., *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century*, Arlington, VA: Mercatus Center at George Mason University, 2018., Mercatus Research Paper, Available at SSRN: <https://ssrn.com/abstract=3171202>.

Richard F. Dye and Therese J. McGuire examined the impact of earmarked revenues on the level and composition of state spending.<sup>6</sup> Specifically, they looked at the effect of earmarked revenues on elementary and secondary education expenditures, highway expenditures, and non-school local government expenditures. Dye and McGuire found that “an extra dollar of earmarked revenues results in either no change in expenditures or in increases in expenditures that are much smaller than a dollar.” In addition, they found that a “greater reliance” on the share of earmarked expenditures leads to no change and sometimes even lower spending.

Calvin Blackwell, John C. Crotts, Stephen W. Litvin, and Alan K. Styles examined local government spending of accommodations tax revenues in South Carolina.<sup>7</sup> The authors found that local governments engaged in illegal fiscal substitution. The classification of expenditures as “tourism related” allowed local governments to use the “accommodations tax special fund” to free up finances in the general fund for other spending. The authors found significant levels of non-

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<sup>6</sup> Richard F. Dye, Therese J. McGuire, “The Effect of Earmarked Revenues on the Level and Composition of Expenditures”, *Public Finance Quarterly* 20, no. 4 (October 1, 1992).

<https://journals.sagepub.com/doi/abs/10.1177/109114219202000410>.

<sup>7</sup> Calvin Blackwell, John C. Crotts, Stephen W. Litvin, Alan K. Styles, “Local Government Compliance with Earmarked Tax,” *Public Finance Review* 34, no. 2, (March 2006): 212-228, <https://doi.org/10.1177/1091142105284213>.

compliance with earmarks for approximately 70.1 percent of the investigated items. In South Carolina, the state legislature dictates the rules on how earmarked taxes are spent while the local governments distribute the money. Since the preferences of the two different-level governments did not coincide, taxes were not spent as intended.

Thomas P. Lauth and Mark D. Robbins studied the use of lottery proceeds for funding public education in Georgia, focusing on the state's effort to safeguard against the fungibility of lottery funds.<sup>8</sup> The authors used several measures when investigating the substitution of lottery revenues for other revenue sources: (1) gross spending in the target areas, (2) the percentage of state expenditures in the target areas, (3) the post-lottery expenditure share index excluding lottery revenue, and (4) the post-lottery expenditure share index including lottery revenue.

After comparing the spending before and after the lottery was put into effect, they concluded that the lottery stimulated additional spending in the target areas. According to Lauth and Robbins, budget fungibility in Georgia has been constrained by the transparency of the budget and appropriations process.

William N. Evans and Ping Zhang analyzed the impact of lottery revenue on K-12 educational spending.<sup>9</sup> They showed, with high probability, that one dollar of

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<sup>8</sup> Thomas P. Lauth, Mark D. Robbins, "The Georgia Lottery and State Appropriations for Education: Substitution or Additional Funding?" *Public Budgeting & Finance* 22, no. 3, (January 2002): 89-100.

<sup>9</sup> William N. Evans and Ping Zhang, "The Impact of Earmarked Lottery Revenue

earmarked lottery funds generated more spending on K-12 schools than the spending generated from a dollar of lottery profits directed into the general fund. They found that around 50-70 percent of the earmarked lottery profits are allocated to local school districts at the state level and that 80 percent of the distributed profits are spent on public schools. However, they found that a significant fraction of the lottery revenues earmarked for K–12 education is fungible. They found, with a high probability, that a dollar of earmarked lottery revenues generates less than a dollar of spending on K–12 education.

Phuong Nguyen-Hoang evaluated the volatility of earmarked revenues and state highway expenditures in the United States.<sup>10</sup> The author found that earmarked highway revenues and highway expenditures are highly sensitive to economic downturns: A one percent decrease in earmarked revenues is associated with a .24 to .32 percent decrease in state highway expenditures. According to the author, “an increase in positive earmarked revenue deviation from trend is not associated with a rise in highway expenditures.” The author attributed this finding to the fungibility of highway funds diverted to other uses.

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on K–12 Educational Expenditures," *Education Finance and Policy* 2, no. 1, (December 2007): 40-73, <https://doi.org/10.1162/edfp.2007.2.1.40>

<sup>10</sup> Phuong Nguyen-Hoang. Volatile Earmarked Revenues and State Highway Expenditures in the United States," *Transportation* 42, no. 2, (December 2015): 237-256.

## II. THE CASE OF THE CIGARETTE TAX OF 1992

In 1992, Massachusetts passed a ballot initiative that imposed an additional excise tax of 25 cents on a pack of cigarettes.<sup>11</sup> The Act established by the passage of the ballot initiative also created the Health Protection Fund. According to Section 2T of the Act:

[T]here shall be credited to said Fund all amounts collected pursuant to section seven of chapter sixty-four C, together with any penalties, forfeitures, interest, costs of suits and fines collected in connection therewith, less all amounts refunded or abated in connection therewith, all as determined by the commissioner of revenue according to his best information and belief; any appropriation, grant, gift, or other contribution explicitly made to said Fund; and any income derived from the investment of amounts credited to said Fund.

The Health Protection Fund would then be applied to several health-related purposes. These include:

- (1) School health education programs;
- (2) Smoking prevention and cessation programs;
- (3) Support for prenatal and maternal care programs at community health centers; and
- (4) Ongoing activities related to morbidity and mortality resulting from cancer and tobacco-related illnesses.

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<sup>11</sup> Secretary of State, Commonwealth of Massachusetts, *Public Document 43, Massachusetts Election Statistics 1992*, <https://archive.org/details/massachusettssele1992mass/page/516/mode/2up?view=th eater>, (Accessed March 29, 2022).



However, in 2003, Section 2T, which maintained that the funds deriving from the tobacco tax be directed towards the Health Protection Fund, was repealed.<sup>12</sup> As a consequence, the funds have not since been used as the 1992 ballot initiative promised. The repeal of Section 2T demonstrates the ease with which an earmarked tax can be diverted from the purpose stated to the voters.

BHI compiled annual data from the Massachusetts final state budget on spending allocated for smoking prevention and cessation from FY 2012 to FY 2021.<sup>13</sup> We also collected data on annual tobacco tax revenues from the Massachusetts Department of Revenue over the same period.<sup>14</sup> We then estimated the amount of tobacco tax revenue that should have been dedicated to the Health Protection Fund under the original ballot initiative. Finally, we compared the percentage of the revenue budgeted for smoking prevention and cessation programs to the revenue that should have gone to the Health Protection Fund under Section 2T.

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<sup>12</sup> Massachusetts General Laws, Chapter 29, Section 2T, <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIII/Chapter29/Section2T>, (Accessed March 29, 2022).

<sup>13</sup> 192<sup>nd</sup> General Court of the Commonwealth of Massachusetts, “Final Budget,” <https://malegislature.gov/Budget/FinalBudget>, (Accessed March 29, 2022).

<sup>14</sup> Massachusetts Department of Revenue, Blue Book Reports, <https://www.mass.gov/lists/blue-book-reports-department-of-revenue>, (Accessed March 29, 2022).

In FY 2012, budgeted funds for smoking prevention and cessation in the Massachusetts final budget totaled \$4.15 million. BHI estimates that funds dedicated to the Health Protection Fund should have been \$32.12 million in FY 2012, as promised by the ballot initiative. Budgeted funds for smoking prevention and cessation were only 12.29 percent of estimated funds owed to the Health Protection Fund. In FY 2021, budgeted funds for smoking prevention and cessation totaled \$5.12 million, while cigarette tax revenue totaled \$315.85 million. BHI estimates that funds dedicated to the Health Protection Fund should have been \$22.50 million in FY 2021. Budgeted funds for smoking prevention and cessation came to only 22.75 percent of the funds promised by the ballot initiative. Funds allocated to smoking prevention and cessation have fallen far short of the funds pledged for that purpose.

Wendy A. Ritch and Michael E. Begay reviewed the appropriations process on the Question 1 ballot initiative, which enacted a 25 cents per pack tax.<sup>15</sup> The authors found that only 23 percent of the funds were used for tobacco education, prevention, and cessation services. Moreover, they found that earmarked funds were

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<sup>15</sup> Wendy A. Ritch and Michael E. Begay, “Smoke and mirrors: how Massachusetts diverted millions in tobacco tax revenues,” *Journal of Epidemiology and Community Health* 56, no. 7 (July 2002), [https://www.researchgate.net/publication/274102885\\_Smoke\\_and\\_mirrors\\_how\\_Massachusetts\\_diverted\\_millions\\_in\\_tobacco\\_tax\\_revenues](https://www.researchgate.net/publication/274102885_Smoke_and_mirrors_how_Massachusetts_diverted_millions_in_tobacco_tax_revenues): 522-528.

used to supplant funding for pre-existing programs, contrary to what voters were told. Ritch and Begay note “that politics did not end after Question 1 was adopted.”<sup>16</sup>

Despite the overwhelming momentum for earmarking revenues, advocates of Question 1 in 1993 failed to prevent the legislature from allocating resources to other programs, some loosely related to public health, but clearly beyond what was represented to be the scope of the ballot initiative. These include programs for law enforcement, drug abuse prevention, and programs associated with AIDS and breast cancer, none of which were specified by the initiative nor related to tobacco control. Advocates for social and health care spending also saw opportunities to link their interests to tobacco control. At the time, Senator Henri Rauschenbach was reportedly convinced by activists of a link between smoking and HIV infection.<sup>17</sup>

In the end, supporters of the initiative found they had to remind the legislature that opponents of Question 1, namely the pcco industry, attempted to warn voters that “money would not be spent for anti-smoking programs, it could be used for other things.” Nonetheless, revenue from Question 1 had hardly any association with tobacco and has been directed toward “non-tobacco related health programs such as indigent health-care, prenatal services, and hospital emergency room support.”

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<sup>16</sup> Ibid, 522.

<sup>17</sup> Ibid, 525.

Ironically, the tobacco industry made sure to drill home a point in which they failed to sway voters.<sup>18</sup>

The prerogatives of the legislature remained tantamount. “The fact that the legislature supplanted, not supplemented, General funds with Question 1 funds for non-initiative programs did not appear to concern most legislators or the directors of most recipient programs.”

Ritch and Begay note that approximately \$80 million of Question 1 funds were appropriated for non-initiative programs in the first year of its existence. Another \$60 million collected were used to “supplant General funds for pre-existing programs, which was prohibited by the language of the initiative.”<sup>19</sup>

### **CONCLUSION**

Should voters support the surtax amendment with the expectation of additional spending on transportation and education, they must be aware that the spending promised by the ballot measure may not be forthcoming. The cigarette tax in Massachusetts is an example where the state has failed to deliver on the promises made on the ballot initiative.

The earmarking of revenues from an income tax risks the potential of underfunding programs, especially during an economic downturn. Earmarking

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<sup>18</sup> Ibid, 525.

<sup>19</sup> Ibid, 522.

revenues from state income taxes through a Constitutional amendment is not the reliable path to increased spending on education and transportation that voters are being told.

For voters to have accurate information on the consequences of their vote on the amendment, they would need to be informed of the downside of designated spending from income tax funds when voting on the proposed amendment. But they are not.

For the reasons set forth above, the Court should rule that the proposed summary and yes statement for the Legislative Amendment violates the requirements of Article 48 and may not be placed on the 2022 state ballot.

Dated: April 25, 2022

Respectfully submitted,

**THE BEACON HILL INSTITUTE  
FOR PUBLIC POLICY RESEARCH**

By its attorney,

/s/ Michael Williams

Michael Williams (BBO# 634062)  
Lawson & Weitzen, LLP  
88 Black Falcon Ave., Suite 345  
Boston, MA 02210  
Telephone: (617) 439-4990  
mwilliams@lawson-weitzen.com

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 17 of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this brief complies with the rules of court that pertain to the filing of amicus briefs, including but not limited to Mass. R. App. P. 16, 17, and 20. Specifically regarding Rule 11(b)(5) and 16(k), this brief was prepared using Microsoft Word 365 and uses the font Times New Roman in size 14. Using the word count tool, there are 3,548 total non-excluded words as counted using the word count feature of Microsoft Word.

Neither the Appellants nor their counsel nor any other individual or entity, aside from BHI and its counsel, has authored this brief in whole or in part. The Fiscal Alliance Foundation has made monetary contributions to the preparation of this brief. No other entity has made any monetary contribution to the preparation or submission of this brief.

Dated: April 25, 2022

/s/ Michael Williams  
Michael Williams

**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2022, I served two copies of the within brief by any electronic means provided by the clerk and by first-class mail, postpaid, on counsel of record for the following parties:

**Counsel for Defendants-Appellees:**

Robert E. Toone  
Anne Sterman  
Adam Hornstine  
Assistant Attorneys General  
OFFICE OF THE ATTORNEY GENERAL  
One Ashburton Place  
Boston, MA 02108  
(617) 963-2048  
Robert.Toone@mass.gov  
Anne.Sterman@mass.gov  
Adam.Hornstine@mass.gov

**Counsel for Plaintiffs-Appellants:**

Kevin P. Martin (BBO #655222)  
Jordan Bock (BBO #708171)  
Jenna Welsh (BBO #707853)  
GOODWIN PROCTER LLP  
100 Northern Avenue  
Boston, MA 02210  
(617) 570-1000  
kmartin@goodwinlaw.com  
jbock@goodwinlaw.com  
jwelsh@goodwinlaw.com  
Tel.: (617) 570-1000

**Counsel for Intervenor-Defendants-Appellees:**

Thomas O. Bean  
Verrill Dana, LLP  
One Federal Street – 20th Floor  
Boston, MA 02110  
(617) 309-2600  
tbean@verrill-law.com

**/s/ Michael Williams**

Michael Williams