No. SJC-13257

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

CHRISTOPHER ANDERSON, et al.,

Plaintiffs-Appellants,

v.

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

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

Defendants-Appellees,

JOSE ENCARNACION, DEBORAH 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

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

The people of Massachusetts are asked to vote on amendments to the state Constitution only rarely. Deciding whether to support an amendment is among a voter's most important duties: amendments bind the political branches' hands, and an improvident amendment can be repealed only after years have passed and irreparable damage has been done. So it is essential that voters are provided *accurate* information when they step into the voting booth—that voters are not misled into amending the Constitution in ways they not only will regret, but *never actually supported* in the first place.

To guard against that risk, the Attorney General must provide a "fair" summary of a proposed amendment ("Summary") to voters, and the Attorney General and the Secretary of the Commonwealth ("Secretary") must together provide a "fair and neutral" one-sentence statement describing the effect of an amendment's adoption ("Yes Statement"). Mass. Const. Amends. art. 48, *as amended by* art. 74; G.L. c. 54, § 53. This Court is charged with policing both the Summary and Yes Statement for accuracy and fairness. If the Yes Statement is unfair or misleading then the Court may fix it, but if the Summary is unfair or misleading then the amendment should be excluded from the ballot.

In this case, the Court should act to prevent voters from being misled concerning 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" ("the Graduated Income Tax Amendment" or "the Amendment"). This Court previously kept an identical measure off the 2018 ballot because, as introduced by initiative petition, it violated Article 48's relatedness requirement. *Anderson v. Att'y Gen.*, 479 Mass. 780, 794-802 (2018) ("*Anderson I*"). Because the Graduated Income Tax Amendment was introduced by a member of the legislature, not by initiative petition, it avoids that particular fatal defect.

Unfortunately, the Attorney General and Secretary (together, "Defendants") now insist on providing voters a Summary and Yes Statement that will mislead millions into thinking the Amendment is something it is not. The problem is this: the Summary and Yes Statement tell voters that revenues raised by the Amendment will be used, if at all, for education and transportation spending. The Yes Statement says that the Amendment will "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." The Summary likewise says "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."

But that is entirely misleading. As the Attorney General explained to the Court in *Anderson I*, for decades now state spending on education and transportation

have exceeded the revenues the Amendment would raise, by a factor of more than five to one. Therefore, because "money is fungible," the Legislature can move funding around—shift current spending on education and transportation to some different purpose, while swapping in the new tax dollars—and thereby use the additional revenues raised by the new tax to increase spending on whatever it wants. Br. of the Appellees, *Anderson I*, No. SJC-12422, 2018 WL 557688, at *25-27 ("AG *Anderson I* Br."). So while the Summary and Yes Statement bait voters with a promise of increased funding for education and transportation, the Legislature might pull a switch and increase spending on something else entirely.

This misleading aspect of the Summary and Yes Statement goes straight to the heart of the public debate over the Amendment. Five times over the last century, Massachusetts voters have rejected attempts to amend the Constitution to allow a graduated income tax. The Amendment seeks to overcome that opposition through naked logrolling—asking voters to approve the graduated income tax by assuring voters the money raised will be used for two popular subjects of state spending. *Anderson I*, 479 Mass. at 799 n.10. Defendants' Summary and Yes Statement advance that partisan logrolling effort. They dangle education and transportation spending as a carrot in front of voters, while concealing that the Legislature has the discretion to increase spending on whatever it wants.

Plaintiffs' concerns about the misleading nature of the Summary and Yes Statement are not just attorney argument. In a poll, a remarkable 72% of poll respondents, from across the political spectrum, reported feeling misled by the materially-identical Summary and identical Yes Statement Defendants proposed to use for the initiative petition in 2018. Defendants made only cosmetic changes to the Summary they propose to use this year, and they made no changes to the Yes Statement at all.

There is a high risk voters will be misled by the Summary and Yes Statement into approving the Graduated Income Tax Amendment, even if they oppose its substance. The same poll showed a slim majority supporting the Amendment when provided the 2018 Summary and Yes Statement, but then a plurality opposing it when provided the clarifying language from the Attorney General's own *Anderson I* brief. Put another way: the Attorney General's decision to tell voters and this Court different versions of how the Amendment works may swing the election.

This case presents the nightmare scenario of the Constitution being amended based not on the will of the people, but because the people were misled. The Court should step in. It should prohibit Defendants from putting the Amendment on the ballot unless the Attorney General has clarified the Summary. If the Amendment does appear on the ballot, then the Court should exercise its statutory authority to amend the "Yes" Statement to make it fair and neutral, not misleading.

QUESTIONS PRESENTED

The Attorney General's proposed Summary states: "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 Attorney General and Secretary's proposed one-sentence statement describing the effect of a vote for the Amendment states: "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."

The question presented is whether these statements are "fair," or whether they are misleading and one-sided because they erroneously imply the Legislature must use the new revenue from the Graduated Income Tax only to increase public education and transportation spending and not to increase spending in other areas of the budget.

The Single Justice also asked the parties to address the following question: "what constitutes an appropriate timetable for the preparation of summaries, titles, and one-sentence 'yes' and 'no' statements in legislative amendment cases."

STATEMENT OF THE CASE AND FACTS

I. Defendants Must Provide Voters With Fair and Neutral Descriptions Of Proposed Constitutional Amendments.

Article 48 allows proposed amendments to the Constitution to be introduced in two ways: by initiative petition, or by a member of the Legislature. This case concerns the latter—a "legislative amendment." A legislative amendment must receive the affirmative votes of a majority of the elected members sitting in Constitutional Convention in order to proceed. Mass. Const. Amends. art. 48, Pt. IV, § 4. If it receives those votes, it is referred to the next legislative session. *Id.* If it again receives a majority vote, the Secretary submits it to the people. *Id.* Pt. IV, § 5. To be adopted, a legislative amendment must be approved by a majority of those voting on the question. *Id.*

The Constitution and General Laws include two provisions intended to ensure voters are given the information they need to cast an informed vote on a proposed constitutional amendment (or other ballot question). First, Article 48, as amended by Article 74, requires the Attorney General to draft a "fair, concise summary … of each proposed amendment to the constitution[.]" That summary must be distributed to voters in advance of the election and also "printed on the ballot" itself. Mass. Const. Amends. art. 74. This Court has the authority to review whether a summary complies with Article 48. *Sears v. Treasurer and Receiver Gen.*, 327 Mass. 310, 321 (1951).

Second, G.L. c. 54, § 53 provides that 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.

Section 53 authorizes "[a]ny 50 voters" to "petition the supreme judicial court for Suffolk county to require that a title or statement be amended" if they are "false, misleading or inconsistent with the requirements of this section."

II. The Graduated Income Tax Amendment Uses Education And Transportation Spending As Bait For Approval Of A New Tax.

A. Massachusetts Voters Historically Have Refused To Approve A Graduated Income Tax

Prior to 1915, the Massachusetts Constitution prevented the Legislature from imposing any income tax. That changed with the adoption of Article 44, which authorizes the Legislature to adopt an income tax, but only one "levied at a uniform rate" upon "incomes derived from the same class of property." Thus, while different rates may be imposed on different types of income, different rates cannot be applied

to the same type of income based on the amount of income received. There cannot, in other words, be a graduated income tax.

Since 1915, voters have been asked five times to amend Article 44 to allow graduated income taxes. They have rejected every such proposal. J.A. 411, 414, 416, 418, 427. The highest percentage of "yes" votes such a proposed amendment ever received was 28 percent, in 1972 and 1994. J.A. 416, 427.

B. Graduated Income Tax Proponents Introduced an Initiative Petition That Would Impose A Graduated Income Tax Ostensibly Linked To Education And Transportation Spending.

The Graduated Income Tax Amendment is the latest attempt to amend the constitution to introduce a graduated income tax. The Amendment's origins date back to 2015, when ten citizens submitted an initiative petition proposing a constitutional amendment substantively identical to the Graduated Income Tax Amendment ("the Initiative Petition"). J.A. 125.

The Initiative Petition's supporters openly admitted their plan was to get a graduated income tax over the line through logrolling: leveraging popular support for public education and transportation spending to overcome voters' historic antipathy to a graduated state income tax. *Anderson I*, 479 Mass. at 799 n.10. Former Senate President Stan Rosenberg, for example, articulated proponents' strategy most explicitly. He explained that the Initiative Petition "will stand a better chance of being approved" than previous attempts to impose a graduated income tax

because "it is focused specifically on money for education and transportation," and hence is "very differently constructed" than previous proposals. J.A. 128. Former Representative Kaufman, then-Chairperson of the Joint Committee on Revenue, similarly explained that he supported the Initiative Petition because it addressed "two fundamental challenges. One is the lack of adequate funds for education, and the other is the lack of adequate funds for transportation." J.A. 132.

A "FAQ" prepared by the House Committee on Revenue that advocated for the Initiative Petition similarly linked the new tax to increased education and transportation spending. It asserted that the Initiative Petition "provides certainty to the taxpayer on who will be taxed, how much the tax will be, and what the revenue will be spent on (education and transportation)"; that the petition would "fund essential investments in education and transportation"; that the petition was needed due to "underinvestment in our transportation and education system"; and that the petition was "narrowly tailored to meet Massachusetts' education and transportation needs." J.A. 143-46. One of the questions the FAQ addressed was: "How will the government spend the additional revenue?" The answer it provided was: "The language of the Fair Share Amendment explicitly requires that the additional revenue raised may only be spent on education and transportation costs." J.A. 147.

C. In Litigation Concerning The Initiative Petition, Defendants Represented That The Initiative Petition Would Not Restrict How The Legislature Could Spend The New Revenue.

On June 18, 2018, this Court held that the Initiative Petition violated Article 48 because it addressed unrelated subjects. *Anderson I*, 479 Mass. at 794-802. The Initiative Petition therefore did not appear on the 2018 ballot.

In addition to arguing that the Initiative Petition addressed unrelated subjects, the plaintiffs in *Anderson I* argued that, because it created a specific pool of money that must be used for education and transportation, the Initiative Petition constituted a specific appropriation of revenues in violation of Article 48's limits on initiative petitions. While this Court did not reach that issue, the position taken by the Attorney General in response is central to the current litigation.

Specifically, the Attorney General argued in *Anderson I* that the Initiative Petition did not constitute a specific appropriation because it imposed no practical limits on how the Legislature could spend the new tax revenues. As the Attorney General explained, for years state spending on education and transportation has been about $10 billion to $11 billion annually, while the anticipated revenue from the Initiative Petition would be about $1.9 billion annually. Based on these facts:

> The Legislature would retain ultimate discretion over spending choices for the additional reason that money is fungible. Because the proposed amendment does not require otherwise, the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue. *See New*

> *England. Div. of Am. Cancer Soc. v. Comm'r of Admin*., 437 Mass. 172, 181 (2002) (state money may be moved among funds to meet obligations). As long as the total spending in these combined categories did not fall below the revenue generated by the surtax in any particular year, the Legislature would be in compliance with the proposed amendment. *See Mitchell v. Secretary of Administration & Finance*, 413 Mass. 330, 333-334 (1992) (Legislature would remain in compliance with Amend. Art. 78 if it appropriated more for enumerated purposes than dedicated revenue sources yielded).

AG *Anderson I* Br., 2018 WL 557688, at *27 (footnote omitted). In short, the Attorney General acknowledged that the Legislature can engage in a bait and switch, so long as it does not "lower[] its historical spending in the designated areas [*i.e.*, education and transportation] by 80% or more." *Id.* Counsel for the Attorney General then confirmed at oral argument that the Initiative Petition would not require any increase in education and transportation spending:

> C.J. Gants: Do you agree that this may or may not result in any overall increase in education and transportation spending?
>
> Counsel for Defendants: I do agree.

Recording of Oral Argument at 52:57-53:04, *Anderson I*, No. SJC-12422.

D. The Legislature Reintroduces The Initiative Petition As The Graduated Income Tax Amendment And Refuses To Modify It To Prevent A Bait And Switch.

Article 48 does not restrict the contents of legislative amendments in the same manner as initiative petitions. Thus, almost immediately following this Court's decision in *Anderson I*, Representative O'Day reintroduced the Initiative Petition as

a legislative amendment—the Graduated Income Tax Amendment. J.A. 119-20. The Amendment states, in full:

> Article 44 of the Massachusetts Constitution is hereby amended by adding the following paragraph at the end thereof*:*
>
> 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.

J.A. 119-20.

On June 12, 2019, the General Court met to consider the Graduated Income Tax Amendment. At that session, some Representatives proposed modifying the Amendment to close the loophole identified in the Attorney General's *Anderson I* brief. Their proposed modification would have added language specifying that "any funds appropriated [for education and transportation] shall be in addition to and not

in lieu of funds appropriated for [education and transportation] in the fiscal year most recently completed prior to the enactment of this amendment." J.A. 163.

Senator Tarr explained the rationale behind the modification as follows:

> The gentleman's very simple amendment says exactly what's been said all along in this discussion, that the revenues generated by the proposal would be used to add to, not to be supplanted for, the amount of revenue we are already spending on those things. How many times have we heard we are going to have a net gain? A net gain. How many times have we heard we'll have an increase in net amount of spending for transportation and education? Well, we've been educated. The result of the education is the formulation of this amendment. All left to do now is approve this amendment and say, we mean what we've been saying.

J.A. 191. Representative Jones similarly explained that the new language was needed to avoid a "bait-and-switch" scenario in which, after voters approve the Graduated Income Tax Amendment because they want more education and transportation spending, "the $2 billion raised gets spent in those areas, and then we back out money we currently spend in those areas and spend it elsewhere." J.A. 190.

The General Court rejected the modification by a vote of 6-33 in the Senate and 34-123 in the House. J.A. 163, 192. The General Court then voted in favor of the Graduated Income Tax Amendment as written. J.A. 180, 203. On June 9, 2021, the General Court again convened to consider the Amendment. A majority of the General Court again voted in favor of the Amendment. J.A. 213. Absent action by this Court, the Amendment will be presented to voters on the November 2022 ballot.

E. Proponents of the Graduated Income Tax Amendment Continue To Misleadingly Suggest It Would Increase Education and Transportation Spending.

Despite the Attorney General's acknowledgement in *Anderson I* that the Legislature has the "ultimate discretion" to use the new revenues raised by the Graduated Income Tax Amendment to increase spending on whatever it wants, supporters of the Amendment have persisted in asserting that the new revenues must be used for new education and transportation spending.

At the 2021 convention, members of the Legislature characterized the Graduated Income Tax Amendment as both increasing taxes and "invest[ing] the proceeds in public education and transportation." J.A. 206. Shortly after that convention, Senator Jason Lewis, the lead Senate sponsor of the Amendment, released a press release stating: "The revenue generated [from the Amendment] would fund repair and maintenance projects for roads, bridges and public transportation; preK-12 public schools; and public colleges and universities in Massachusetts." J.A. 216. Senator Lewis also stated that "[t]he 'millionaires tax' proposal is clear that *all the new revenue raised* must be used for *investments* in public education and transportation, both areas that lawmakers and the public overwhelmingly agree need *additional resources*." J.A. 220 (emphases added).

Raise Up Massachusetts, the outside group that has led the campaign to enact the Graduated Income Tax Amendment, has similarly characterized the effect of the

Amendment. For instance, in a May 5, 2021, press release, the group stated that "the proposed state tax on incomes above $1 million … would raise approximately $2 billion a year for spending on transportation and public education." J.A. 224; *see also* J.A. 232 (describing the Amendment as "creating a millionaires' tax of 4% that would raise significant resources for public education and transportation"). Other supporters of the Amendment have likewise said the Amendment will lead to increased education and transportation spending. J.A. 102-03, 235, 238, 241, 245, 248, 255.

III. Defendants Propose A Summary And Yes Statement Implying The New Revenues May Be Used Only To Increase Education And Transportation Spending.

Despite acknowledging in 2018 that the Legislature has the "ultimate discretion" to use the new revenues from the Graduated Income Tax Amendment to increase spending on whatever it wants, Defendants intend to use a Summary and a Yes Statement that refer only to education and transportation spending. This will misleadingly imply to voters that the additional tax revenues can be used to increase spending only on those two subjects, to the exclusion of all other subjects that go unmentioned.

Prior to this Court's decision in *Anderson I*, Defendants had released a Summary and Yes Statement for the Initiative Petition (the "2018 Summary" and "2018 Yes Statement"). The 2018 Summary stated, in relevant part: "Revenues

from this tax would be used, subject to appropriation by the state Legislature, only for public education, public colleges and universities, the repair and maintenance of roads, bridges, and public transportation." J.A. 266-67. The 2018 Yes Statement stated: "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." J.A. 269-71.

On November 16, 2021, counsel for Plaintiffs wrote to Defendants, stating that if Defendants intended to use the 2018 Summary and 2018 Yes Statement, then they should include some of the clarifying language from the Attorney General's *Anderson I* brief to make voters aware of the Legislature's retained discretion. J.A. 332-37. Counsel also asked Defendants to release their Summary and Yes Statement by January 12, 2022, to allow Plaintiffs time to file any litigation by the February 1 deadline this Court provided in *Hensley v. Attorney General*, 474 Mass. 651, 671-72 (2016). J.A. 336. Counsel explained that if Defendants did not release their proposed Summary and Yes Statement by mid-January, Plaintiffs would need to assume Defendants would reuse the 2018 Summary and 2018 Yes Statement. J.A. 336.

Defendants neither substantively responded to Plaintiffs' letter nor released their Summary and Yes Statement by January 12. Plaintiffs therefore filed this

lawsuit on January 27. Defendants moved to dismiss, arguing that any litigation would not be ripe until sometime in April, when they released their Summary and Yes Statement. Defendants characterized as "baseless[]" Plaintiffs' allegation that Defendants "'appear intent' on using 'the same unfair and misleading Summary and Yes Statement they were preparing to use in 2018.'" J.A. 48.

The Single Justice took no action on Defendants' motion and instead asked Defendants to release their final Summary and Yes Statement by March 11, 2022. J.A. 79-80. The Single Justice noted that the parties "appear to agree on how the funding provision of the legislative amendment would work," and urged the parties to "work together" to "reach an agreement." J.A. 80.

On March 7, Defendants provided interested parties a draft Summary that brushed past Plaintiffs' concerns and largely replicated the 2018 Summary. The draft Summary reads, in full:

> 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.

J.A. 340-41. The only changes Defendants made to the key sentence are as follows, with deleted text stricken and added text in bold: "Revenues from this tax would be used, subject to appropriation by the state Legislature, ~~only~~ for public education, public colleges and universities~~,~~**; and for** the repair and maintenance of roads, bridges, and public transportation." *Compare* J.A. 340-41, *with* J.A. 267.

On March 8, counsel for Plaintiffs responded, explaining why the Summary remained misleading. J.A. 339-40. Counsel proposed that Defendants include the following language, taken almost verbatim from the Attorney General's *Anderson I* brief, as a new third sentence: "The Legislature could choose to reduce funding on education and transportation from other sources and replace it with the new surtax revenue because the proposed constitutional amendment does not require otherwise." J.A. 339-40. On March 11, Defendants responded that they would not make any additional changes to the Summary. J.A. 343-44. Among other things, Defendants accused Plaintiffs of proposing language that is "argumentative and one-sided," even though it came from Defendants' own *Anderson I* brief. J.A. 343.

Also on March 11, Defendants provided interested parties a draft Yes Statement that is word-for-word identical to the 2018 Yes Statement. It states: "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." J.A. 353. On March 14,

2022, counsel for Plaintiffs again proposed the inclusion of clarifying language from the Attorney General's *Anderson I* brief. J.A. 352-53. In response, Defendants expressed concern about the "length of the yes statement" Plaintiffs had proposed. J.A. 351. Counsel for Plaintiffs replied by proposing two shorter Yes Statements that would address Plaintiffs' length concerns: (1) "A YES VOTE would amend the state Constitution to impose an additional 4% tax on that portion of incomes over one million dollars"; or (2) "A YES VOTE would amend the state Constitution to impose an additional 4% tax on that portion of incomes over one million dollars to be used for, but not necessarily to increase, state education and transportation spending, subject to appropriation by the state Legislature." J.A. 350-51.

On March 15, 2022, Defendants informed interested parties that they were sticking with the March 11 draft Yes Statement as their final Yes Statement. J.A. 349.

SUMMARY OF ARGUMENT

I. The Attorney General's Summary pursuant to Article 48 and the Attorney General and Secretary's Yes Statement pursuant to Section 53 both fail because they are unfair and misleading. Defendants recognized in *Anderson I* that, as a practical matter, the Graduated Income Tax Amendment leaves the Legislature with the "ultimate discretion" to use the new revenue however it wants. That is because money is fungible, and state spending on education and transportation have

exceeded the amount of the new tax for many years. Because money is "fungible," and "[b]ecause the proposed amendment does not require otherwise, the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue." AG *Anderson I* Br., 2018 WL 557688, at *27. The Legislature then could use the funding it freed up to increase spending on whatever it wants.

Both the Summary and Yes Statement, however, imply to voters that the additional revenues raised by the new tax can be used only to increase spending on education and transportation. Those are the only subjects of spending the Summary and Yes Statement mention, so a reasonable voter would assume that by voting for the new tax, she will be funding new spending only in those budget categories and not others (*e.g.*, renovations for legislators' offices). Polling data confirms that voters find the Summary and Yes Statement misleading and that this could even swing the outcome of the vote. *Infra* pp. 41-42.

This Court has stated that a Summary violates Article 48's fairness standard if its omits "material" information about a measure's operation that "[a] voter would have a natural interest in knowing" before voting. *Sears*, 327 Mass. at 325. Other state supreme courts from around the country consistently reject summaries if they fail that same standard. *See infra* pp. 37-39. Here, the Summary and Yes Statement are not just unfair, they are partisan and one-sided, because they amplify proponents'

attempt to logroll voters into supporting the tax with a false promise of increased education and transportation spending. Defendants should be required to explain to voters that funding previously dedicated to education and transportation can be redirected to any other spending area the Legislature chooses, potentially resulting in no net increase in education and transportation spending even as spending increases elsewhere. Otherwise, this will be an election "marred by misunderstanding or confusion." *Hensley*, 474 Mass. at 669.

II. The Court should ask Defendants to release their summary, title, and yes/no statements for a legislative constitutional amendment by January 12, and plaintiffs to file any Article 48 or Section 53 litigation by February 1. *Infra* pp. 49-51.

ARGUMENT

I. The Summary And Yes Statement Regarding The Graduated Income Tax Amendment Are Misleading And One-Sided.

The Summary and Yes Statement each serve the same crucial purpose in a democracy: "giving the voter … who is present in a polling booth a fair and intelligent conception of the main outlines of the measure" on which he or she is voting, *Sears*, 327 Mass. at 324, to avoid an election "marred by misunderstanding or confusion," *Hensley*, 474 Mass. at 669. Indeed, "[t]he ballot title and summary are arguably the most important part of an initiative in terms of voter education. Many voters never read more than the title and summary of the text of initiative

proposals. Therefore, it is of critical importance that titles and summaries be concise, accurate and impartial." National Conference of State Legislatures, *Initiative and Referendum in the 21st Century*, at 24 (2002), available at http://www.iandrinstitute.org/docs/NCSL-Final-Task-Force-Report-on-IandR-IRI.pdf. Under the Constitution and General Laws, this Court must ensure that the summaries Defendants provide to voters fulfill those crucial purposes and are not misleading or "in any way one-sided." *Sears*, 327 Mass. at 324.

This case requires the Court to exercise that Constitutional and statutory oversight authority. The Summary and Yes Statement create a serious risk that voters will be misled into approving an amendment to the Constitution not because they support it, but because they have been misled about its effects. Having told this Court the Amendment leaves the Legislature with the "ultimate discretion" to spend the new tax revenues however it wants, Defendants should not suggest the very opposite to voters.

A. The Massachusetts Constitution and General Laws Prohibit Misleading Or One-Sided Summaries And Yes Statements.

1. Article 48 prohibits presenting ballot questions to voters with misleading or one-sided Summaries.

As originally adopted, Article 48 required the Attorney General to prepare "a description of the proposed measure" for voters. *See Sears*, 327 Mass. at 324. This Court interpreted the word "description" to have two distinct requirements. First,

the description had to be fair and impartial: it must be "a fair portrayal of the chief features of the proposed law in words of plain meaning, so that it can be understood by the persons entitled to vote"; and it "ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy." *Opinion of the Justices*, 271 Mass. 582, 589 (1930). Second, "[t]he word 'description' had been interpreted as implying a very substantial degree of detail," resulting "in very long and cumbersome statements of details of proposed laws." *Sears*, 327 Mass. at 324.

Article 74 "was designed to remedy th[e] difficulty" caused by the "cumbersome" nature of the descriptions this Court had required. *Id.* Article 74 replaced the requirement of a "description" with the requirement of a "fair, concise summary." *Id.* While this reduced the level of detail required, it maintained the existing requirement that the summary be "fair," preserving this Court's precedent that a description "ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy." *Opinion of the Justices*, 271 Mass. at 589.

In *Sears*, this Court further explained the standard for "fair" summaries. The initiative in *Sears* concerned financial and medical assistance for certain senior citizens. 327 Mass. at 325-26. The Attorney General's summary, however, mentioned only financial assistance; it did not address medical assistance or "how this money was to be obtained." *Id.* at 325. The Court explained that even after Article 74, the summary "must not be partisan, colored, argumentative, or in any

way one-sided, and it must be complete enough to serve its purpose of giving the voter who is asked to sign a petition or who is present in a polling booth a fair and intelligent conception of the main outlines of the measure." *Id.* at 324. The Court concluded that the Attorney General's summary failed that test because it did not give the voter "a fair comprehension of what the law will be if the measure is adopted." *Id.* at 326. It omitted reference to "material provisions," that "[a] voter would have a natural interest in knowing" about in voting on the measure. *Id.* at 325.

Sears also makes clear that the validity of the summary "is a justiciable question to be determined in the last analysis by the judicial department of the government." *Id.* at 321, 323. "Failure to comply" with Article 48 in putting a measure before the voters "will mean that no valid law has been enacted." *Id.* at 321. Indeed, it would be "astonishing and intolerable if the safeguards so carefully inserted in art. 48 could be disregarded without consequences by individual State officers and so in effect turned into mere admonitions and recommendations." *Id.* at 321-22. While the Court subsequently has questioned whether it has the authority to itself amend a summary to fix its defects, *Hensley*, 474 Mass. at 667 n.26, *Sears* leaves no doubt that a ballot initiative is invalid if presented to voters with an unfair and misleading Summary.

2. Yes Statements also must be "fair and neutral," not "misleading."

The Attorney General and Secretary are required by G.L. c. 54, § 53 to jointly prepare "fair and neutral 1-sentence statements describing the effect of a yes or no vote" that will be sent to voters and appear on the ballot. Section 53 also authorizes this Court, in an action brought by fifty voters, to "amend[]" these statements if they are "false, misleading or inconsistent with the requirements of this section." This Court's duty is to "ensure that the information provided to voters in the title and one-sentence statements is fair, neutral, and accurate so that all sides to the ballot question do battle on an even playing field and so that the election is not marred by misunderstanding or confusion." *Hensley*, 474 Mass. at 669.

The Court has acted, when necessary, to amend a Yes Statement to ensure it is fair, non-partisan, and not misleading. In *Hensley*, the Yes Statement provided that the proposed law "would allow the possession, use, distribution, and cultivation of marijuana, including tetrahydrocannabinol (THC), in limited amounts by persons 21 and older and would provide for the regulation and taxation of commercial sale of such marijuana, marijuana accessories, and marijuana products." *Id*. at 667. The Court required this Yes Statement to be amended because it was "clearly misleading" in *practical* ways: most notably, "[t]he reference to 'marijuana products' in the second clause of the sentence … does not adequately inform voters that the proposed act would legalize the sale of edible marijuana products, especially

where the summary fails to make this as clear as it could." *Id*. at 669-70 (emphasis added). That, technically, "marijuana products" could be read broadly to capture "marijuana edible products" was not good enough, where voters would be particularly interested in knowing whether edible products would be subject to the law. For this and other reasons, the Court revised the Yes Statement to ensure that it was "fair and neutral, and neither false nor misleading." *Id*. at 670-71.

B. The Attorney General's Summary And Yes Statement Are Misleading and One-Sided.

1. The promise of increased education and transportation spending is classic logrolling and is false.

The Amendment's proponents have not been shy about the fact they are relying on logrolling to convince voters to adopt the Graduated Income Tax Amendment. This Court recognized as much in *Anderson I*: "[T]he focus of legislators … was specifically on proposals to appropriate funds for education and transportation, because those proposals would stand a better chance of being approved by voters who would be forced to disregard the elimination of the flat tax in order to approve publicly beneficial funding initiatives." 479 Mass. at 799 n.10. As recounted above, proponents advocating for both the 2018 Initiative Petition and the Graduated Income Tax Amendment consistently have tried to link the new tax in voters' minds to increased state education and transportation spending. *Supra* pp. 13-14, 19-20. This message has been amplified in the media and other outlets.

Supra p. 20. The consistent message has been clear: the new tax revenues must be used, if at all, only to increase education and transportation spending.

Plaintiffs and Defendants agree, however, that the Amendment does not actually require the new tax revenues to be used on increased education and transportation spending, as opposed to increased spending in other areas. Because "money is fungible," 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. And the Legislature has plenty of room to maneuver. The anticipated revenue from the tax is only approximately $1.9 billion per year. J.A. 147; AG *Anderson I* Br., 2018 WL 557688, at *25. And in the last quarter-century, the Commonwealth has *never* spent less than $1.9 billion per year in those areas; in the last decade, it has never spent less than $6 billion; and in recent years it has spent approximately $10 or $11 billion. J.A. 371 (para. 16 and cited Statutory Basis Financial Reports), 443-46; AG *Anderson I* Br., 2018 WL 557688, at *25-27.

Therefore, "[b]ecause the proposed amendment does not require otherwise, the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue.... As long as the total spending in these combined categories did not fall below the revenue generated by the surtax in any particular year, the Legislature would be in compliance with the

proposed amendment." AG *Anderson I* Br., 2018 WL 557688, at *27. In this way, "[t]he Legislature would retain ultimate discretion over spending choices," and can spend the new incremental revenue however it wants. *Id.* Even though the new tax is being linked in voters' minds to education and transportation, the Amendment "may or may not result in any overall increase in education and transportation spending." *Supra* p. 16.

The legislative debates over the Amendment show that the Legislature knows it has that "ultimate discretion" and fully intends to wield it. As recounted above, the Legislature considered a proposal to modify the Amendment to require that funds raised by the new tax and appropriated for education and transportation "be in addition to and not in lieu of funds" previously appropriated for those areas. *Supra* pp. 17-18. The stated purpose of the proposal was to avoid a "bait-and-switch" scenario in which, after voters approve the Graduated Income Tax Amendment because they want more funding for education and transportation, "the $2 billion raised gets spent in those areas, and then we back out money we currently spend in those areas and spend it elsewhere." J.A. 190. No one disputed that the Amendment permits such a "bait-and-switch." Yet the Legislature voted against the change, maintaining its discretion to spend the new tax revenues to increase spending on whatever it wants.

2. The Summary and Yes Statement are misleading and one-sided because they suggest to voters something different than what Defendants told this Court.

Given this reality, the Summary and Yes Statement are highly misleading. The Summary states that "[r]evenues 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." J.A. 369. And the Yes Statement informs voters that the revenue is "to be used, subject to appropriation by the state Legislature, on education and transportation." J.A. 369. These statements do not give the "voter … who is present in a polling booth a fair and intelligent conception of the main outlines of the" Amendment. *Sears*, 327 Mass. at 32. A reasonable voter would not read these statements as technical descriptions of government bookkeeping that have no real-world implications. Instead, the voter would read the references to education and transportation spending as meaning the new tax revenue is raising funds to increase spending on those two subjects only. Otherwise, why would the Summary and Yes Statement single out those spending areas for mention, to the exclusion of others? *Cf. United States v. Morrison*, 529 U.S. 598, 638 (2000) (Souter, J., dissenting) (referring to the "sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned"); *Burns v. Lawther*, 53 F.3d 1237, 1241 (11th Cir. 1995) (explaining that the doctrine of

"*inclusio unius, exclusio alterius*" recognizes that "the listing of some things implies that all things not included in the list were purposefully excluded").

The fact it is technically accurate that the *specific* dollars raised by the Amendment must be spent on education and transportation (if the Legislature appropriates the funds at all) is not enough to save the Summary and Yes Statement, because "technical accuracy" is not the test. The summary must be "free from any misleading tendency, whether of amplification, *of omission*, or of fallacy," *Opinion of the Justices*, 271 Mass. at 589 (emphasis added), such that it "serve[s] its purpose of giving the voter … who is present in a polling booth a fair and intelligent conception of the main outlines of the measure," *Sears*, 327 Mass. at 324. The "yes" statement, too, must be not just "accurate" but also "fair," ensuring that "the election is not marred by misunderstanding or confusion." *Hensley*, 474 Mass. at 669. Here, the "omission" of any explanation that "the Legislature could choose to reduce funding" for education and transportation "from other sources and replace it with the new surtax revenue," and then spend the funding it has freed up on whatever it wants, *supra* pp. 15-16, makes the Summary and Yes Statement unfair and misleading.

This Court's precedents confirm that a Summary or Yes Statement can be technically accurate but still misleading. As previously described, in *Hensley* the phrase "marijuana products" technically was broad enough to pick up edible marijuana products. Nonetheless, the Court required the Yes Statement to be

amended to specifically reference edible products, because the sale of such products was important conduct that "the new law will allow," and "the summary fails to make this as clear as it could." *Hensley*, 474 Mass. at 670. That the Summary and Yes Statement use the language of the Amendment itself also is no excuse. In *Opinion of the Justices*, the initiative petition referred to a "Motor Vehicle Insurance Fund," when the initiative petition did not actually involve insurance but only required owners of certain vehicles to furnish security. 271 Mass. at 589-90. The Court wrote that the initiative petition itself was thus "easily susceptible of being misunderstood." *Id.* at 589. The Court relied on the description's failure to correct the misleading nature of the initiative petition itself as one of several factors that required rejecting the Attorney General's description.[1] *Id.* at 589-90.

The Court also has rejected a Summary and Yes Statement where they accurately characterized parts of a measure, but failed to acknowledge other aspects of the measure's operation that would be important to voters. In *Sears*, the Court rejected the Attorney General's Summary because, while it accurately characterized the provisions it addressed, it omitted reference to "material provisions" that a "voter would have a natural interest in knowing" about when deciding how to vote. *Sears*,

[1] Though *Opinion of the Justices* was a pre-Article 74 case, this aspect of the opinion addressed whether the description was misleading—not whether it was insufficiently detailed—and so remains relevant.

327 Mass. at 325. Because of these omissions, the Summary did not give the voter "a fair comprehension of what the law will be if the measure is adopted." *Id.* at 326.

Other state Supreme Courts, applying functionally identical standards for summaries of initiative petitions, have recognized that technically accurate summaries are misleading if they omit information about a measure's practical consequences that would be important to voters. For instance, in *Florida Department of State v. Slough*, 992 So. 2d 142 (Fla. 2008), a proposed constitutional amendment would have eliminated school property taxes, lowered other taxes, and required that the state, for one year, replace the lost education revenue. *Id.* at 147-49. The court rejected the summary of that amendment, writing that the summary "cannot 'fly under false colors' or 'hide the ball' with regard to *the true effect* of an amendment." *Id.* at 147 (emphasis added). The summary did not make clear that the state could stop its revenue-replacement after one year, which "might weigh significantly in [voters'] decision to vote for or against the amendment." *Id.* at 148. It also did not address the impact on taxes other than school property taxes, which might lead voters to "reconsider voting for [the amendment]." *Id.* at 149. The court concluded by criticizing the trend towards "advantageous but misleading 'wordsmithing'" of summaries to make ballot measures attractive to voters. *Id.* It urged the drafting of summaries that are "straightforward, direct, accurate and do[]

not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous." *Id.*

An emphasis on a measure's "true effect," *id.* at 147, is seen in other decisions from around the country. In *City and County of Honolulu v. State*, 431 P.3d 1228 (Haw. 2018), for instance, the court wrote that where important background legal principles "will not be self-evident," then a summary's failure to address them "will render it unclear, misleading, and deceptive." *Id.* at 1239. In that case, the summary of a proposed constitutional amendment accurately stated that the amendment authorized the state legislature to impose a property tax to fund education, but misleadingly failed to explain that counties already had that power. *Id.* at 1239-41. And in *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982), the summary accurately described a measure as requiring former legislators to file public disclosures in order to act as lobbyists, but misleadingly failed to acknowledge that, under current law, such lobbying was prohibited altogether. As the Florida Supreme Court put it, the problem was "not with what the summary says, but, rather, with what it does not say." *Id*. at 156; *see also Alaskans for Efficient Gov't, Inc. v. State*, 52 P.3d 732, 735-37 (Alaska 2002) (citing this Court's decision in *Sears* and rejecting a summary because it omitted information about the measure's operation that "would give the elector serious grounds for reflection" (quotation marks omitted)); *Fairness & Accountability in Ins. Reform v. Greene*, 886 P.2d 1338, 1346-

49 (Ariz. 1994) (rejecting a summary because it "minimize[d] [an] important effect" of the measure).

The Summary and Yes Statement in this case are misleading in ways similar to the summaries in those cases. The Summary and Yes Statement place education and transportation spending in front of voters to the exclusion of all other subjects of state spending, without acknowledging that, because money is "fungible," the Legislature retains "ultimate discretion" to use the new revenues to increase spending on whatever it wants. AG *Anderson I* Br., 2018 WL 557688, at *27. The Legislature's ability to "reduce funding" for education and transportation "from other sources and replace it with the new surtax revenue," such that the new tax "may or may not result in any overall increase in education and transportation spending," *supra* pp. 15-16, is clearly "material" information that a "voter would have a natural interest in knowing" when deciding how to vote. *Sears*, 327 Mass. at 325. But the Summary and Yes Statement hide all that information from voters.

Given the emphasis the Amendment's proponents have placed on the link to education and transportation spending, it should be beyond serious dispute that understanding the "true effect" of those spending provisions "might weigh significantly in [voters'] decisions," *Slough*, 922 So. 2d at 147, and "would give the elector serious grounds for reflection," *Alaskans for Efficient Gov't*, 52 P.3d at 736 (quotation marks omitted). And, as in cases like *Honolulu* and *Askew*, the fact that

the Legislature's "ultimate discretion" comes, in part, from background principles concerning the state budget process does not save the Summary. The problem, as in *Askew*, "lies not with what the summary says, but, rather, with what it does not say." 421 So. 2d at 156.

The Summary and Yes Statement are not just misleading, they also are impermissibly "partisan" and "one-sided" given the background against which voters will read them. *See Sears*, 327 Mass. at 324 (summary "must not be partisan, colored, argumentative, or in any way one-sided"); G.L. c. 54, § 53 (yes statement must be "fair and neutral"). Again, it is no secret that education and transportation spending are being put in front of voters to overcome their historic refusal to amend the Constitution to allow a graduated income tax. *See Anderson I*, 479 Mass. at 799 n.10; *supra* pp. 12-14, 16-20. Defendants support that effort by focusing voters' attention on education and transportation, without clarifying that the Legislature can reduce spending on those subjects from other sources and thereby use the new tax to increase spending elsewhere. This not only deprives the voter of "a fair and intelligent conception of the main outlines of the" Amendment, *Sears*, 327 Mass. at 324, it does so in a one-sided and partisan way, furthering the proponents' misleading logrolling effort.

3. Polling data confirms that the Summary and Yes Statement are misleading and one-sided.

The misleading and one-sided nature of the Summary and Yes Statement is confirmed by polling data. To determine how voters would understand the Summary and Yes Statement, the nationally-recognized polling firm Cygnal conducted a survey of likely general election voters in November 2021. J.A. 278-80. Cygnal presented respondents with the materially-identical 2018 Summary and identical 2018 Yes Statement, and asked respondents (1) how they likely would vote on the Amendment and (2) whether they believed the Amendment will cause funding on education and transportation to increase. J.A. 279. Respondents then were provided with the Attorney General's clarifying statements from *Anderson I* and asked, based on that additional information, how they likely would vote on the Amendment. J.A. 279-80. Respondents also were asked whether they felt misled by the 2018 Summary and 2018 Yes Statement. J.A. 280.

The results were conclusive. Based on the 2018 Summary and 2018 Yes Statement, 35% of poll respondents inaccurately believed that "the amendment will require spending on education and transportation to increase by the amount of the new taxes." J.A. 283. Only 24% of voters accurately understood that the Graduated Income Tax Amendment would not require increased spending on education and transportation. J.A. 283-84. Another 41% of voters answered "Not Necessarily" or "Unsure." J.A. 283-84. In addition, after being provided the clarifying language

from the Attorney General's *Anderson I* brief, an overwhelming majority of poll respondents—72%, with consistency across the political spectrum—responded feeling "misled" by the 2018 Summary and 2018 Yes Statement. J.A. 285. More disturbingly, the poll suggests that the misleading Summary and Yes Statement could change the result of the election. When provided only the 2018 Summary and 2018 Yes Statement, a slight majority of poll respondents said they would support the Amendment. J.A. 283. But when provided the Attorney General's clarifying language from *Anderson I*, a plurality of respondents said they would *oppose* the proposal. J.A. 285. Individual respondents' narrative statements confirm the troubling nature of these quantitative results. *E.g.*, J.A. 107, 303, 328.

The Summary is materially identical to the 2018 Summary and the Yes Statement is identical to the 2018 Yes Statement. This case thus raises the real prospect that, due to the misleading nature of the Summary and Yes Statement, voters will be misled into approving an amendment to the Massachusetts Constitution that most voters do not actually support. This is the nightmare scenario that Article 74's requirement of a "fair" Summary, and Chapter 54's requirement of a "fair and neutral" one-sentence Yes Statement, were intended to prevent.

C. Defendants Have Offered No Valid Reason For Refusing To Clarify The Summary And Yes Statement.

Plaintiffs have proposed straightforward changes to the Summary and Yes Statement, largely based on Defendants' own statements to this Court in *Anderson*

I, that would not mislead voters. For the Summary, Plaintiffs have proposed adding the following language, taken almost verbatim from Defendants' brief in *Anderson I*: "The Legislature could choose to reduce funding on education and transportation from other sources and replace it with the new surtax revenue because the proposed constitutional amendment does not require otherwise." J.A. 339-40. For the Yes Statement, Plaintiffs have proposed several alternatives, including removing any reference to education and transportation spending altogether (if the nature of the spending provision is clarified in the Summary) or adding clarifying language from Defendants' *Anderson I* brief. J.A. 350-52.

Throughout Plaintiffs' correspondence with Defendants, Defendants never disavowed their representations to this Court in *Anderson I* concerning the Amendment's operation. Yet Defendants still refused to make any meaningful change to the Summary or any change to the Yes Statement, sticking to the very language from the 2018 Summary and 2018 Yes Statement that is demonstrably misleading—and perhaps dispositively so. None of Defendants' attempts to justify that refusal withstand scrutiny.

First, Defendants accused Plaintiffs of proposing language that is "argumentative and one-sided, not fair and neutral." J.A. 343. That is frivolous, as the language Plaintiffs proposed came straight from the Attorney General's own brief to this Court. It hardly can be "argumentative and one-sided" for the Attorney

General to provide voters *the Attorney General's own description* of a proposed Constitutional amendment. Defendants' related accusation that Plaintiffs' proposals added "new words and ideas" that "could confuse voters" is similarly misguided. J.A. 343. The Summary and Yes Statement already introduce the "idea[]" of how the revenue from the new tax must be spent; Plaintiffs simply want that idea to be presented in a manner that is fair, not misleading, and not partisan. And it is Defendants' Summary and Yes Statement that would "confuse voters" by telling voters something fundamentally different about how the new tax revenue must be used than what Defendants told this Court in *Anderson I*.

Second, Defendants noted there may be a dispute between Plaintiffs and Intervenors as to the Amendment's operation, and that a summary and yes statement "need not state a legal interpretation of the measure or include legal analysis." J.A. 343, 349. The Court has explained, however, that "the Attorney General must . . . craft a fair summary and, in doing so, *must inevitably form her own understanding* of the meaning of the language in the initiative and its operation and effect." *Abdow v. Att'y Gen.*, 468 Mass. 478, 507 (2014) (emphasis added). Constitutional amendments (and statutes) are ultimately legal documents, and the Attorney General can scarcely offer voters a "summary" of the amendment or sentence "describing *the effect* of a yes or no vote" if she refuses to proffer any legal analysis whatsoever.

This objection by Defendants is particularly weak because Defendants *share* Plaintiffs' "understanding" of the Amendment's "operation and effect." The problem is that Defendants are unwilling to inform *voters* of their "own understanding of the meaning of the language," despite having already shared it with *the Court*. That Intervenors apparently disagree with both Defendants and Plaintiffs about the Legislature's discretion is not a reasonable basis for Defendants to provide this Court one explanation of how the Amendment works and voters an entirely different—and misleading—explanation.

Third, Defendants stated that the phrase "subject to appropriation by the state Legislature" would "adequately apprise voters that expenditure of revenue for the stated purposes would be contingent on appropriation by the Legislature." J.A. 343. That is wrong. At best, that statement clarifies that the Legislature need not appropriate the revenue from the Amendment *at all*, but could leave it unspent. The phrase "subject to appropriation" does not inform voters that the Legislature could perform the bait-and-switch the Amendment actually permits—that it could appropriate revenue from the Amendment for education and transportation, but then "choose to reduce funding" on those "budget categories from other sources" and redirect that funding to other areas. *Supra* pp. 15-16. Because a link to education and transportation spending is being used to sell voters on the tax increase, voters should be informed that the link is illusory.

This case is fundamentally different from *Associated Industries of Mass. v. Secretary*, 413 Mass. 1, 12 (1992) ("*AIM*"), in which the Court held that, in light of the phrase "subject to appropriation," it was not misleading for the summary of a statutory initiative to tell voters excise taxes raised on hazardous waste would be spent on cleanups and environmental enforcement. As an initial matter, *AIM* was a *statutory* case, not a *constitutional* case, and statutory earmarks are inherently always subject to superseding legislation. In this case, on the other hand, the Summary and Yes Statement misleadingly suggest to voters that the Constitution will force the Legislature to use its increased revenues only on education and transportation. Moreover, there is overwhelming evidence in this case that proponents of the Amendment are using the ostensible link between the new tax and education and transportation spending to logroll the tax to victory; *AIM* mentions no similar evidence of logrolling. And in that regard, the polling data discussed above demonstrates conclusively that voters are confused by the Summary and Yes Statement, and their confusion could be outcome dispositive in the election. Again, *AIM* mentions no evidence that the voters were especially interested in how the new excise tax would be spent.

Fourth, and finally, Defendants complained that Plaintiffs' proposals made the Summary and Yes Statement too long. J.A. 343, 351. But while the Summary must be "concise," art. 74, it also must be "fair," not misleading and not "in any way

one-sided," *Sears*, 327 Mass. at 324. And this is a *constitutional amendment* we are talking about, not some statute that might be quickly amended by the Legislature. *See Honolulu*, 431 P.3d at 1245 ("[T]he provisions of our constitution are of such foundational importance that the utmost care must be taken to apprise citizens of the effect of their vote on a proposed constitutional amendment."). If it take a few extra words to ensure voters are not misled into amending the Constitution by mistake, they will be words well spent. With respect to the Summary in particular, any loss in "concise[ness]" from Plaintiffs' proposed single-sentence addition is far outweighed by the need to avoid misleading voters into believing the Amendment requires the new tax revenues only to be used to increase education and transportation spending. As for the Yes Statement, Plaintiffs actually suggested *shortening* the Yes Statement by eliminating its misleading reference to education and transportation spending, leaving it to the Summary to then address the spending provision with appropriate clarity. To the extent Defendants insist on including a reference to how the money will be used in the Yes Statement, however, they cannot invoke length considerations as a justification for misleading voters.

* * *

In striking down a technically accurate but misleading summary, the Supreme Court of Florida wrote that "[t]he voters … deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the

foundational document that embodies the fundamental principles through which organized government functions." *Slough*, 992 So. 2d at 149. Surely Massachusetts voters "deserve nothing less" than Florida voters. If Massachusetts voters are to amend the Constitution to approve a graduated income tax for the first time in the Commonwealth's history, the election should not be "marred by misunderstanding or confusion." *Hensley*, 474 Mass. at 669. Defendants' insistence on using an unfair, misleading, and one-sided Summary and Yes Statement should not be the deciding factor.

The Court therefore should prohibit the Secretary from placing the Amendment on the ballot unless the Attorney General has added, as a new third sentence, the following: "The Legislature could choose to reduce funding on education and transportation from other sources and replace it with the new surtax revenue because the proposed constitutional amendment does not require otherwise." If the Attorney General has so amended the Summary, the Court itself should amend the Yes Statement to eliminate the misleading reference to education and transportation spending: "A YES VOTE would amend the state Constitution to impose an additional 4% tax on that portion of incomes over one million dollars." In the alternative, the Court could amend the Yes Statement to clarify the nature of the spending provision, along the lines Plaintiffs proposed to Defendants: "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."

These changes would ensure that when voters go to the polls in November, they will be voting with a full understanding of the Amendment's true "operation and effect," *Abdow*, 468 Mass. at 507, as the law requires. They would avoid the risk that voters are misled into amending the Constitution by mistake.

II. The Timeline For Summaries, Titles, And One-Sentence Statements Should Be The Same For Legislative Amendments and Initiative Petitions.

The Single Justice asked the parties to "include in their briefs their views on what constitutes an appropriate timetable for the preparation of summaries, titles, and one-sentence 'yes' and 'no' statements in legislative amendment cases." J.A. 80; J.A. 452. For the reasons the Attorney General and this Court gave in *Hensley*, 474 Mass. at 671-72 and *Dunn v. Attorney General*, 474 Mass. 675, 685-87 (2016), the Summary and Yes Statement should be prepared by January 12, allowing any litigation to be brought by February 1.

In *Hensley* this Court warned of an "inevitabl[e] … mad scramble" when cases challenging a summary, title, or yes/no statement for an initiative petition are filed close to the July printing deadline. 474 Mass. at 671-72. The Court experienced such a "mad scramble" in the lead-up to the 2016 election, when challenges to two

initiative petitions were filed in late April and early May. *See Dunn*, 474 Mass. at 678; *Hensley*, 474 Mass. at 656. At the Attorney General's suggestion, *see* J.A. 60, this Court "strongly urge[d] plaintiffs to file" challenges to summaries and yes/no statements by February 1. *Dunn*, 474 Mass. at 687; *Hensley*, 474 Mass. at 671-72. To make that deadline possible, the Court asked Defendants "to consider preparing and publishing the title and one-sentence statements under § 53 no later than twenty days in advance of February 1." *Hensley*, 474 Mass. at 671.

The same deadlines should apply in the case of legislative constitutional amendments, and for the same reasons. The Attorney General and Secretary will have years of advance warning that a legislative amendment may be appearing on the ballot. Article 48 requires a legislative amendment to be approved at two separate constitutional conventions, *supra* p. 11, which necessarily means that there will be no less than *two years'* warning that an amendment might appear on the ballot. There is no reason why the Attorney General and Secretary could not begin considering the content of a summary and yes statement after the amendment has been approved at the first constitutional convention. If the amendment passes at the second constitutional convention, then the work of preparing the summary and yes statement already is done. And if the amendment fails at the second constitutional convention, the only damage is a very small amount of wasted effort.

This case illustrates why these deadlines are both feasible and desirable. Defendants have known about the Graduated Income Tax Amendment since the Legislature first approved it in June 2019. The Legislature gave its second approval in June 2021, seven months before mid-January 2022. *Supra* pp. 17-18. Yet, despite knowing that litigation was likely, J.A. 332-337, Defendants insisted they would not release a draft Summary and Yes Statement until April, J.A. 50-51. It was only at the Single Justice's urging that Defendants accelerated that process. J.A. 79-80, 339-53. And even with that acceleration, the briefing schedule is exceptionally rushed, with each party having approximately two weeks for its principal brief and Plaintiffs having only one week (which falls on the April school break) for their reply. At the Single Justice's prodding, Defendants managed to get both the Summary and Yes Statement out in just over *one week*. Defendants easily could have undertaken that single week's effort between June 2019 and January 2022, instead of in March 2022.

CONCLUSION

The Court should: (1) declare that the Summary does not comply with Article 48 and order the Secretary not to place the Amendment on the ballot unless the Secretary has clarified the Summary as Plaintiffs propose; and (2) revise the Yes Statement pursuant to G.L. c. 54, § 53, consistent with Plaintiffs' suggestions.

Dated: April 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) 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 briefs, including but not limited to Mass. R. App. P. 16(b), 16(e), 16(f), 16(h), 18, and 20.

This brief was prepared using Microsoft Word 2016 in 14-point Times New Roman, a proportionally spaced typeface, and contains 10,999 words.

Dated: April 4, 2022

/s/ Kevin P. Martin
Kevin P. Martin

CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for Plaintiffs-Appellants, hereby certify that I have served two copies of this Opening Brief and of the Joint Appendix by causing them to be sent via first class mail and email to counsel for Defendants-Appellees and Intervenor-Defendants-Appellees this 4th day of April, 2022:

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