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

BRIEF OF INTERVENORS/APPELLEES

Dated: April 19, 2022

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Massachusetts Rules of Appellate Procedure

QUESTIONS PRESENTED

I. Whether the Attorney General's summary of a proposed legislative amendment is "fair" when it informs voters that "revenues from th[e] tax [imposed by this amendment] would be used, subject to appropriation, for public education, public colleges and universities; and for the repair and maintenance of roads, bridges, and public transportation," and legislative authority over revenues not subject to the amendment is not addressed by the summary.

II. Whether the Attorney General and Secretary's proposed one-sentence statement is misleading when it accurately states that revenue derived from the amendment would be "used subject to appropriation by the state Legislature, on education and transportation."

III. 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

Procedural History

Plaintiffs commenced this action in the County Court on January 27, 2022, in anticipation of objecting to the Attorney General's then yet-to-be-issued art. 48 summary of the amendment, an amendment commonly referred to as the "Fair

Share Amendment." The Attorney General moved to dismiss the Complaint on the grounds that it was based on speculation as to what her summary would say. (D.E. 2.) After the Court declined to act on that motion at that time (D.E. 4), the Attorney General issued her summary, and the Attorney General and Secretary of State ("Secretary") issued their title and 1-sentence "yes-no" statements in accordance with G.L. c. 54, § 53.

Plaintiffs filed an Amended Complaint on March 17, 2022, challenging both the summary and the 1-sentence "yes-no" statements. (D.E. 6). The parties then stipulated to a Statement of Agreed Facts (D.E. 12), the Court allowed an unopposed motion to intervene (D.E. 9), and the Single Justice reserved and reported this case to the full Court (D.E. 14).

Statement of Facts

In January 2019, Representative James O'Day introduced a legislative constitutional amendment in the Massachusetts House "[t]o provide resources for education and transportation through an additional tax on incomes in excess of one million dollars." J.A. 119-20. The Amendment thus imposes, in the words of the amendment, an "additional tax of 4 percent on that portion of annual taxable income in excess of $1,000,000 (one million dollars)." J.A. 119. It does not create a "graduated" income tax analogous to the federal income tax system with several increasing marginal rates as incomes increase. Thus, while voters in Massachusetts

have previously been asked to vote on whether to authorize the legislature to institute a ***graduated*** income tax system similar to that of the federal system, they have never been asked to vote on whether to institute a specific additional tax on that portion of taxpayer income over $1 million. *See* J.A. 411, 414, 416, 418, 427.

Representative O'Day's Fair Share 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.

Earlier this year, the Attorney General prepared a "summary" of the Fair Share Amendment in accordance with her obligations under art. 48, as amended by art. 74, of the Massachusetts Constitution. The summary she prepared reads:

> 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 before January 1, 2023.

J.A. 341. This summary is similar to the one she prepared in 2018 after the Fair Share Amendment had been proposed by ballot initiative but barred by this Court from appearing on the ballot. *Anderson v. Att'y Gen.*, 479 Mass. 780 (2018) ("*Anderson I*"). The 2022 summary is different from the 2018 summary in that she deleted the word "only" before the words "public education" in the sixth line and made some non-substantive grammatical changes to the balance of that sentence.[1]

The Attorney General made no changes to the language of the 1-sentence "Yes" statement from the version she had prepared in 2018. In both cases, that "Yes" statement reads as follows:

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[1] The 2018 version of the summary, as red-lined to reflect the changes the Attorney General made earlier this year, reads as follows:

> This proposed constitutional amendment would establish an additional 4% state income tax on that portion of annual taxable income in excess of $1 million. This income level would be adjusted annually to reflect increases in the cost of living by the same method used for federal income-tax brackets. 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. The proposed amendment would apply to tax years beginning on or before January 1, 2023~~2019~~.

Compare J.A. 267 and J.A. 341.

> 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.

Compare J.A. 270-71 and J.A. 353 (emphasis added).

SUMMARY OF ARGUMENT

I. Plaintiffs' proposal to require the Attorney General to address an admittedly theoretical concern not addressed in the text of the summary fails for at least four reasons.

First, the purpose of a summary is to provide voters with the "sum and substance" and "main outlines" of the measure. Plaintiffs' proposal to require the Attorney General to address a subject not mentioned in the Fair Share Amendment would be inconsistent with that law. Further, they fail to suggest any principle that would guide the Attorney General on when she is required to address in the summary ideas not addressed in the text, and when she is not required to do so. (pp. 13-16).

Second, Plaintiffs admit that their concern about the Legislature "moving money around" is a theoretical concern. They write: "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." Opening Brief of Plaintiffs/Appellants ("Anderson Br.") at 8 (emphasis added). There is no Massachusetts law requiring the Attorney

General to address theoretical concerns in the summary; indeed, the law is to the contrary. Moreover, Plaintiffs again fail to suggest a principle that would establish when she is required to address theoretical concerns in her summary and when she is not. (pp. 16-18).

Third, the cases on which Plaintiffs rely from courts outside the Commonwealth are inapposite because the standards their summaries are required to satisfy are different from "fair" and "concise." What's more, they stand for the proposition that the summaries are not satisfactory when they fail to address language in a statute or constitutional amendment that would change existing law. None of the cases holds that theoretical concerns *not* in the text of the proposed statute or amendment should be included in the summary. (pp. 18-24).

Finally, in *Gilligan v. Attorney General*, 413 Mass. 14 (1992) and *Associated Industries of Massachusetts v. Secretary of the Commonwealth*, 413 Mass. 1 (1992) ("*AIM I*"), this Court rejected Plaintiffs' argument in fact patterns more favorable to them than the instant one. In those cases, this Court held that the phrase in the summary, "subject to appropriation," fairly and accurately informed voters that the Legislature might appropriate funds raised by the initiative for a purpose other than that described in the initiative. Because this Court decided in *Gilligan* and *AIM I* that the Attorney General was not required to make the plaintiffs' arguments about possible diversion of the very funds to be raised by the

proposed measure, the Attorney General surely should not be required to make plaintiffs' arguments about the hypothetical diversion of funds ***other than*** the proceeds of the Fair Share Amendment. (pp. 24-33).

II. Plaintiffs' arguments as to the 1-sentence yes-no statement fail for the same reason they fail with respect to the Attorney General's summary, and more. As a threshold matter, the 1-sentence statement says what the text of the Amendment provides: "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." That sentence is not misleading as it hews to the text of the amendment.

Plaintiffs nevertheless want the Attorney General to have the 1-sentence statement include a new sentence that bears no relationship to the text of the amendment. They argue, among other things, that the Court should amend the "Yes" Statement to eliminate the misleading references to education and transportation spending. Plaintiffs' position is rather remarkable. They want the "yes" statement to *include* information *not* in the text of the amendment, and *exclude* information that *is* in the text. (pp. 33-35).

III. The Attorney General should publish her summary, title, and yes-no statements in legislative amendment and ballot initiatives cases no later than 20 days before February 1 of the years in which a state-wide election. While this

schedule affords her less time than she is allowed for titles and yes-no statements by G.L. c. 54, § 53, it would not be too great an inconvenience on the Attorney General to move the dates up to provide the parties the time for briefing afforded by Mass. R. App. P. 19, and to provide the Court sufficient time to hear argument in May and render a decision in late June. (pp. 35-37).

ARGUMENT

I. Plaintiffs' Proposal Would Improperly Require the Attorney General to do More than Provide the "Sum and Substance" of the Amendment in her Summary; It Would Require her to Describe Theoretical Possibilities About State Revenues Unrelated to the Amendment.

The Attorney General's summary of a ballot initiative or legislative amendment must present the "sum and substance" of the matter. *Hensley v. Att'y Gen.*, 474 Mass. 651, 661 (2016) (citation omitted).[2] The summary 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

[2] Because art. 48, as amended by art. 74, requires the Attorney General to draft a "fair, concise summary" of each proposed amendment to the Constitution (Anderson Br. at 11), and the standard is the same for each proposed ballot initiative (*see* art. 74 ("The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a fair, concise summary, as determined by the attorney-general . . ."), this Court's decisions concerning the Attorney General's summaries of ballot initiatives apply equally to her summaries of legislative amendments such as the Fair Share Amendment. *See* Anderson Br. at 25 citing ***Sears v. Treasurer and Receiver Gen.***, 327 Mass. 310 (1951), a case concerning whether the Attorney General's summary of a ballot initiative satisfied art. 74's "fairness" standard.

main outlines of the measure." *Sears v. Treasurer & Receiver Gen.,* 327 Mass. 310, 324 (1951) (emphasis added). That is the role of the summary.

Plaintiffs properly acknowledge that "the *specific* dollars raised by the [Fair Share] Amendment must be spent on education and transportation (if the Legislature appropriates the funds at all)." Anderson Br. at 35 (emphasis in original). They argue, however, that "because 'money is fungible,' the Legislature may 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." *Id*. at 8 (quoting Brief of the Appellees, *Anderson I*, No. SJC-12422, 20). They maintain that "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." *Id*. at 26. (emphasis added). Thus, Plaintiffs contend that the Attorney General must advise voters in her summary of what the Legislature ***might*** do with revenues ***other than*** revenues derived from the Fair Share Amendment even though the amendment does not address and has no effect upon revenues not derived from the Fair Share Amendment.

Plaintiffs' argument fails for at least three reasons: First, describing the "sum and substance" and "main outlines" of a measure does not include discussion of a subject not addressed in the text of the Fair Share Amendment; Second, summaries do not discuss theoretical possibilities; and Third, the cases cited by Plaintiffs decided by courts in other states are inapposite both because those states apply a standard in evaluating summaries other than "fair" and "concise," and because those cases actually support the conclusion that summaries must describe subjects covered by the text of the summaries and not other matters.

A. Describing the "Sum and Substance" and "Main Outlines" of a Measure Does Not Include a Discussion of Subjects Not Addressed in the Text of the Fair Share Amendment.

As noted above, the Fair Share Amendment does not discuss Legislative appropriation of revenues other than revenues derived from the amendment itself; it also does not discuss the fungibility of money. So, requiring the summary to include a discussion of a subject not addressed by the amendment itself would inappropriately require the Attorney General to go beyond the "sum and substance" and "main outlines of the measure" and write about a subject not addressed in the amendment. Plaintiffs fail to cite a single Massachusetts decision in which the Attorney General has been required to address in her summary a subject not addressed in the measure itself. The reason for that is simple: the purpose of a summary is to summarize the text of the amendment or proposed law,

including changes it would make to existing law, but not a subject not addressed by that text. Further, they fail to suggest any principle that would guide the Attorney General on when it is appropriate to address a subject in the summary not addressed in the text, and when it would not be.

B. Summaries Do Not Discuss Theoretical Possibilities.

Plaintiffs admit that their concerns about "fungibility of money" are *theoretical* concerns when they write:

> 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 . . . . 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***.

Anderson Br. at 8 (emphases added). Thus, Plaintiffs are concerned about what the Legislature "might" do with revenues derived from sources other than the Fair Share Amendment, but can only speculate as to what the Legislature "will" do. This Court has never required the Attorney General's summary to speculate as to the possible consequences of a proposed law. For example, in *Mazzone v. Att'y Gen.*, 432 Mass. 515, 532 (2000), the plaintiffs drew the Court's attention to the "theoretical possibility" that three distinct factors in the proposed law could combine to permit repeat drug dealers to avoid prosecution. The Court described this possibility as consistent with the petition's purpose and noted that public debate would "provide the electorate with the opportunity to decide whether this

petition will have the practical effect of 'decriminalizing' drug dealing," (*id*. at 533), thus indicating that art. 48 did not require the Attorney General to include the theoretical possibilities in the summary. Again, Plaintiffs fail to cite a single decision from this Court in which the Attorney General has been ordered to discuss in her summary mere theoretical possibilities.

Plaintiffs nevertheless persist in arguing that "technically accurate summaries are misleading if they omit information about a measure's practical consequences that would be important to voters." Anderson Br. at 37. As a threshold matter, they cite only to non-Massachusetts cases to support that assertion, an assertion that, as will be discussed, derived from a case in which a summary misled voters because it failed to discuss relevant sections of the text of the proposed law. But for present purposes, no one knows what the practical consequences of the Fair Share Amendment will be. The Legislature might decide to use the proceeds of the Fair Share Amendment to provide for free community college, deliver supplemental assistance to elementary and secondary education, or fund the elimination of the tolls on the Massachusetts Turnpike. Should the Attorney General be required to include those possible outcomes in her summary? Requiring the Attorney General to describe all theoretical possibilities in her summary would constitute a sea change in art. 48 law with no limiting principle. Absent a limiting principle that Plaintiffs have failed to articulate, the Attorney General would be required to

speculate as to all the possible ramifications a proposed law might have, and still risk having her summary challenged if she forgot to summarize one or more theoretical possibilities.[3] Such a rule would mean that failure to discuss a theoretical possibility would render a summary "misleading." That is not the law, and it would create an utterly unworkable standard for the Attorney General.

C. The Cases from States Other than Massachusetts On Which Plaintiffs' Rely Are Inapposite.

Plaintiffs cite decisions from other states where they claim the state Supreme Court invalidated summaries that omitted certain key information. Anderson Br. at 37-40. While these decisions are interesting from an academic perspective, they are inapposite for a number of reasons discussed below including, without limitation, that the standard for what constitutes an adequate summary in those states is different from the "fair, concise" standard applicable in Massachusetts.

For example, in Florida, the ballot summary of the amendment is to be "an explanatory statement . . . ***of the chief purpose of the measure***." Fla. Stat. Ann. § 101.161 (emphasis added). ***Proponents*** of the measure write the summary, *Askew v. Firestone*, 421 So. 2d 151, 153 (Fla. 1982), not a neutral Attorney General as in Massachusetts, that must be approved by the Secretary of State. *See*

[3] If the Attorney General were required to include a discussion of all theoretical possibilities from a proposed law, her summaries would almost certainly fail to be "concise." They would also risk being incomprehensible to voters.

Fla. Stat. Ann. § 101.161(2). Hence, it is no surprise that the Florida courts view their role as guarding against the frequent practice of proponents employing "advantageous but misleading 'wordsmithing' . . . in an attempt to persuade voters to vote in favor of the proposal," *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008) with the result that Florida case law is replete with examples of summary (and title) language that the courts have deemed "deceptive or misleading." This is a dramatically different process than Massachusetts and calls for a far more searching and skeptical judicial role.

In addition to the difference in judicial role, the Florida cases on which Plaintiffs seek to rely simply do not support their contention that a summary is misleading because it neglects to inform voters of matters lying entirely beyond the scope of the question being presented to voters. In fact, in both Florida cases relied on by Plaintiffs, the flaw in the proponent's summary was that it omitted crucial information about the changes in law that would have been effected by the measure being presented to voters.

In *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), the ballot measure proposed to replace an existing two-year prohibition on former state officials lobbying their state agencies with a requirement that they could engage in such lobbying only if they filed certain financial disclosures. But the proponents' summary, while saying that the measure would require former officials to file

disclosures to be able to lobby, made no mention of the fact that the measure would end the existing prohibition on such lobbying. It was this failure to disclose "the chief purpose" of the proposal—a change in existing law—that the Court held to be fatally misleading. *Askew*, 421 So.2d at 155-56.

In *Slough*, the ballot measure proposed to reduce certain taxes that supported the public schools, while requiring the state legislature to provide substitute revenues that would hold the school districts harmless, but, while the tax reductions would be permanent, the hold-harmless provision in the ballot measure, by the measure's own terms, would apply only in the first year after enactment. *Slough*, 992 So.2d at 147-148. The proponents' summary, however, while describing the hold-harmless provision, omitted any reference to its duration limitation, leaving the reader with the clear impression that it was, like the tax reduction, permanent. It was this failure to disclose a key element of the proposal that the Court found misleading. *Id*. at 148.

Plaintiffs' citations to decisions from Hawaii and Arizona are similarly inapposite. In *City & County of Honolulu v. State*, 143 Haw. 455, 465, 467-68 (2018), the Court considered whether the language of a ballot question for a proposed Constitutional amendment that would allow the State to impose a surcharge on investment real estate then taxed exclusively by the counties met the standard that the "language and meaning of a constitutional amendment shall be

clear and it shall be neither misleading nor deceptive." HRS § 11-118.5 (emphasis added). The Court also cited with approval an Oregon decision for the proposition that "[w]hen the major effect of a proposed measure would be a substantive change in existing law, the ballot [] should inform the reader of the scope of the change." *Id*. at 466 (quoting *Rasmussen v. Kroger*, 351 Or. 195, 198 (2011)).

Applying these standards, the Court found that the proposed ballot question's failure to inform voters that the amendment would change existing law by depriving counties of their exclusive authority to tax real estate was "misleading to the public concerning material changes to an existing constitutional provision." *City and Cty. of Honolulu*, 143 Haw. at 468. It reasoned,

> to fully appreciate the scope of the proposed change, a voter would need to know that the Hawai'i Constitution provides independent taxing power to the counties; that the constitution currently allows only the counties to tax real property to the exclusion of all other government entities; and that the proposed amendment would make an exception to this exclusive authority of the counties by granting the State concurrent authority to tax what is presumably a subset of real property. None of this information is conveyed by the ballot question, which is instead likely to leave the average lay voter with the false impression that a vote in favor of the amendment would allow investment real property to be taxed in the first instance.

Id.

In Arizona, when the People file an initiative proposal with sufficient signatures, the secretary of state is to submit it to the voters with a publicity

pamphlet containing, among other things, "***an impartial analysis of the provisions of each ballot proposal***" prepared by the legislative council written in "***clear and concise terms***". A.R.S. § 19–123(A)(4); 19-124(c) (emphasis added).

In *Fairness and Accountability in Insurance Reform v. Greene*, 180 Ariz. 582, 585 (1994), Council staff's "impartial analysis" of the proposal said it would amend the state Constitution by:

> 1. Allowing the Legislature to enact laws that would eliminate a person's right to bring an action to recover money or benefits for injuries,
>
> 2. Allowing the Legislature to enact laws that would limit the amount of money or benefits a person could recover for death or personal injuries, and
>
> 3. Allowing the Legislature to enact laws that would remove the defense of "contributory negligence" or "assumption of risk" from the consideration of a jury.

Id. at 585. The Council then adopted an amendment to the proposal that read:

> The Arizona Constitution, enacted in 1912, prohibits the people and their elected representatives from controlling what kinds of civil lawsuits are brought into the courts and how they are prosecuted. It also prohibits the people and their elected representatives from limiting the amount of compensation awarded during such lawsuits.
>
> This proposition amends the Arizona Constitution to allow people or their elected representatives to control: 1) the filing and prosecution of civil lawsuits for personal injury and wrongful death; and 2) the amount of compensation awarded during those lawsuits.

Id. at 585-86.

The Arizona Supreme Court found the initiative summary adopted by the Council was not an impartial analysis and description as required by A.R.S. § 19–124(B). *Id*. at 592. The Court noted, among other things, that the challenged summary made no mention of the proposed changes to art. 18, § 5, concerning contributory negligence and assumption of risk. It reasoned that where an initiative amends a small number of distinct constitutional provisions, an impartial analysis and description must include some reference to each of the affected provisions. *Id.* The Arizona Supreme Court then concluded that the summary's failure to address a change to existing law rendered it not "impartial."

The point of the foregoing admittedly laborious discussion of four cases cited by Plaintiffs is to show that Plaintiffs' effort to "cherry-pick" phrases and sentences from these cases that seemingly support their position is unhelpful to their case. In each of the above decisions, the information missing from the summary that led to the Court finding the summary to be unsatisfactory was an integral part of the changes to be effected by the proposed constitutional amendment or law.

Here, however, Plaintiffs' concerns about the Legislature "moving money around" are not referenced anywhere in the Fair Share Amendment, and the Fair Share Amendment does not change the law on the Legislature's supposed ability to "move money around." Accordingly, even in the decisions from other states on

which Plaintiffs rely, Plaintiffs' theoretical concerns would not be addressed in the summary. As much as Plaintiffs would like the Attorney General to include information in the summary not mentioned in the text of the Fair Share Amendment, that is again not the role of the summary.[4]

II. This Court Has Twice Rejected the Argument Advanced by the Plaintiffs in Factual Scenarios More Favorable to the Plaintiffs than The One Here.

While the Plaintiffs' argument fails because the information they want included in the summary is inappropriate for the reasons set forth above, it also fails because this Court has twice rejected their fundamental argument in fact patterns more favorable to them than the instant one. In those cases, this Court rejected plaintiffs' challenges claiming that the Attorney General's summary failed to warn that the Legislature retained the discretion to spend the funds raised by those statutory initiatives for purposes other than those to which they were dedicated in the proposed law, because the summary fairly and accurately

[4] Intervenors agree that summaries must describe how a proposed law or constitutional amendment would change existing law. Drafters of a measure might seek to change existing law expressly—perhaps by providing that a section of the measure would amend an existing statute—or implicitly—perhaps by including in the measure the phrase, "Notwithstanding any other law to the contrary . . .," and then describing the change. Regardless of the approach, Intervenors agree with the holdings in *Askew*, *City & Cty. of Honolulu*, *Rasmussen*, and *Greene*, that when a change to existing law is a main feature of the proposal, and the summary fails to discuss that change, the summary is misleading.

informed voters that the funds raised by the initiative were "subject to appropriation." As the Attorney General was not obliged to provide further warning about the possibility of the Legislature redirecting the funds raised by the measure, the Attorney General is not obliged to provide warnings about possible redirection of funds *not* addressed by the Fair Share Amendment.

A. The Attorney General's Summary Fairly Describes the Fair Share Amendment Because It Advises Voters that the Proceeds of that Amendment are "Subject to Appropriation."

In *Gilligan v. Attorney General*, 413 Mass. 14 (1992), the plaintiffs claimed that the Attorney General's summary was not fair because it did not alert voters to the possibility that the Legislature might appropriate monies in a Health Protection Fund for purposes other than those for which the fund was established. Thus, plaintiffs' claim in that case would be analogous to Plaintiffs here arguing that the Legislature might appropriate monies raised by the Fair Share Amendment to a purpose other than education and transportation.

This Court in *Gilligan* wrote, "the inclusion in the summary of the phrase 'subject to appropriation by the state Legislature' accurately and fairly informs voters of the precise contingency involved," that contingency being appropriation by the State Legislature. *Id*. at 19-20. Thus, *Gilligan* establishes the principle that if a summary or 1-sentence statement includes the phrase, "subject to appropriation," there is no need for a separate, specific warning that the funds

raised by a ballot initiative might be used for purposes other than as described in the initiative.

The rule of *Gilligan* applies when discussing funds not addressed by the amendment with even greater force. As noted, the Attorney General wrote in her summary, "[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. 341 (emphasis added). While Plaintiffs request that the summary expressly state that other funding previously dedicated to education and transportation could be redirected to any other spending area the Legislature chose, the phrase "subject to appropriation by the state Legislature" is sufficient to "accurately and fairly inform[] voters" that monies may be moved around when the Legislature formulates the state budget. Because it is sufficient, *Gilligan* forecloses Plaintiffs' claims for elaboration on the phrase, "subject to appropriation by the state Legislature," particularly when the requested elaboration is based only on a theoretical possibility concerning a portion of the state budget unmoored from the text of the amendment.

As the *Gilligan* Court explained, "[t]he plaintiffs certainly can attempt to persuade the voters that the measure should be defeated because the expenditure of the monies in the Health Protection Fund would be subject to appropriation by the

Legislature. The Attorney General is not required under art. 48, however, to advocate the plaintiffs' position." *Gilligan*, 413 Mass. at 20. If it were unnecessary in *Gilligan* for the Attorney General to make the Plaintiffs' arguments about possible diversion of the very funds covered by the proposed measure, *a fortiori* it is not necessary for the Attorney General to make Plaintiffs' arguments here about the hypothetical diversion of funds ***other than*** the proceeds of the Fair Share Amendment.

Assoc. Indus. of Mass v. Sec'y of the Comm., 413 Mass. 1 (1992) ("*AIM I*") is to the same effect. There, a ballot initiative proposed to impose an excise tax on the "first possession" of oil and hazardous material within the Commonwealth. *Id.* at 2. "[A]ll of the revenue generated by the excise would be credited to the Environmental Challenge Fund and be used, subject to appropriation by the Legislature, for the purposes designated in the statute governing the fund." *Id*. at 3. The statute governing the fund, as written, provided that "[a]mounts credited to said fund shall be used, subject to appropriation, solely for the clean up, control or response actions for oil and hazardous materials, reducing the production of hazardous waste or for any other action necessary to implement sections three A and four of chapter twenty-one E." *Id*. In conjunction with adding the proposed law, the petition would amend the foregoing statute to provide that "[a]mounts credited to the Fund shall be used, subject to appropriation, solely for" certain

specified purposes. *Id*. at 3-4. The amended section would further provide that, "while the amounts credited to the fund from the excise would be used, subject to appropriation, for both of the stated purposes, any amounts credited to the fund from other sources would be used, subject to appropriation, for the first purpose only, i.e., implementation of G.L. c. 21E." *Id*. at 4-5.

Voters challenged the Attorney General's summary of how the excise tax revenue would be used. The Attorney General had written that it would be used, "'subject to legislative appropriation,' to assess and clean up contaminated sites and to implement and enforce the excise." *Id*. at 12.

The plaintiffs in *AIM I* argued that the summary did not fairly inform the voters that the Legislature enjoyed the discretion to spend the funds raised by the excise tax for purposes other than as described in the proposed law. *Id*. As in *Gilligan*, this Court expressly rejected the plaintiffs' arguments, writing:

> The use of the phrase, "subject to legislative appropriation" is not inaccurate, since it tracks the basic language of the measure. Nor is that phrase misleading, since it apprises the voters both that the expenditure of monies for the stated purpose would be contingent on ("subject to") an action of the Legislature, and exactly what the action is ("appropriation").

Id.

The Attorney General's summary here, like the summary in *AIM I*, uses the phrase, "subject to appropriation," to advise voters, "[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. 341. Thus, as in *Gilligan* and *AIM I*, the summary apprises voters that the expenditure of monies for the stated purposes would be contingent on ("subject to") an action of the Legislature, and exactly what that action is ("appropriation").

This Court in *AIM I* went further in explaining the reasons the Attorney General was not required to include in her summary a discussion of the ***possibility*** that the Legislature might use the monies raised by the excise tax for purposes other than those stated in the proposed law. It wrote,

> The measure does not expressly state that the monies may be used for purposes other than those set forth in G.L. c. 29, § 2J. To require the Attorney General to state that the monies could be spent for other purposes would, in essence, require him to state a legal interpretation of the measure. Nothing in art. 48 requires the summary to include legal analysis or an interpretation.

AIM I, 413 Mass. at 12. Here, Plaintiffs' claim is even more speculative than the claims of the plaintiffs in *AIM I* and *Gilligan*.

Plaintiffs here do ***not*** contend that the Legislature could use the proceeds from the Fair Share Amendment for purposes other than education and transportation. Anderson Br. at 35. Rather, they theorize 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." *Id*. at 45. They want the Attorney General to be required to alert voters in the summary to a subject entirely separate from the use of the proceeds of the Fair Share Amendment. They want this Court to require her to describe the theoretical possibility that the Legislature might appropriate less money from sources other than the Fair Share Amendment for education and transportation. Anderson Br. at 35.

That is not the role of the summary. As discussed above, the summary is to describe the "sum and substance" and "main outlines" of the matter. The Attorney General has no obligation to inform voters in the summary about revenues unrelated to the measure or about other facts or laws unaffected by the measure.

Moreover, consistent with Plaintiffs' failure in other areas to articulate limiting principles, Plaintiffs do not even begin to suggest what limits or standards should cabin the information the summary should obtain. Granting the Plaintiffs' request would "blow the doors wide open" as to the information that would be required to be in a summary.

B. Plaintiffs' Efforts to Distinguish *AIM I* Fail.

Plaintiffs do not even attempt to distinguish *Gilligan* from the instant case; their efforts to distinguish *AIM I* are unsuccessful.

They argue first that "*AIM* was a *statutory* case, not a *constitutional* case, and statutory earmarks are inherently always subject to superseding legislation."

Anderson Br. at 46. While these statements are true, the distinction is inapplicable to Plaintiffs' argument. Plaintiffs' expressed concern is with the Legislature redirecting funds from revenues other than the Fair Share Amendment from education and transportation to other priorities. Thus, their concern is with actions the Legislature might take with respect to formulation of the state budget, a ***statutory*** act, like the statutory act in *AIM I* and *Gilligan* about which plaintiffs were concerned, ***not*** a constitutional act.

Second, Plaintiffs argue, "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." Anderson Br. at 46. Plaintiffs' reliance on an inference from *AIM I*'s failure to discuss evidence of "logrolling" proves little.[5] The reader of *AIM I* cannot discern from the decision whether logrolling was an issue. More importantly, Plaintiffs cite no case law that would require the Attorney General's summary to be dictated, or even influenced by, what Plaintiffs claim to be the proponents' ***intent*** in linking the new tax with education

[5] Indeed, contrary to Plaintiffs' suppositions about the intentions of the Amendment's proponents, if the language of the Fair Share Amendment is taken at face value, the proponents' intent would appear not to be using the linkage to education and transportation as a way to leverage support for a new tax, but rather to be using a new tax to raise needed new revenues for two critically important governmental functions.

and transportation, and there is none.[6] To the contrary, extant case law requires the summary to describe the "sum and substance" of the measure, not the perceived intent of proponents of a measure in constructing or advancing the measure.

Third, Plaintiffs rely on a poll they commissioned to argue that voters are confused by the Summary and "Yes" statement, and that their confusion could be outcome dispositive in an election. Anderson Br. at 46. They note that *AIM I* mentions no evidence that the voters were especially interested in how the new excise tax would be spent. *Id.* Again, little may be made from the absence of discussion in a decision as to the matters in which voters were and were not interested.

Moreover, this Court does not seem to have addressed whether the law concerning the facts the Attorney General may consider in making certification decisions is the same or different from the facts she may consider in issuing her summary. With respect to certification decisions, "the Attorney General should consider the facts implied by a petition's language and officially noticeable facts when determining whether to certify that a submitted petition contains only subjects not excluded from the initiative petition's operation." *Yankee Atomic Elec. Co. v. Sec'y of Com.*, 402 Mass. 750, 759 (1988). The results of a poll commissioned by the Plaintiffs may not be inferred from the petition's language

[6] *Hensley*, 474 Mass. at 661 (citation omitted).

and do not constitute "officially noticeable facts." As such, they should not have been considered by the Attorney General and should not be considered by this Court. But even more importantly, in the context of rapidly proceeding litigation before this Court where there was no opportunity to cross-examine the pollster or present evidence as to invalidity or unreliability of the poll, this Court should not consider the poll. The poll was completed last November. If the Plaintiffs had wanted to have a hearing on the evidentiary value—if any—of their poll, they could have requested such a hearing before the County Court. They chose not to do so.

III. The Attorney General's 1-Sentence Statement is Not False, Misleading, or Inconsistent with the Requirements of G.L. c. 54, § 53.

Under G.L. c. 54, section 53, this Court may issue an "order requiring amendment [of the title or 1-sentence statement] . . . only if it is clear that the title [or] 1–sentence statement . . . is false, misleading or inconsistent with the requirements of this section." Plaintiffs argue that the 1-sentence statement is an "attempt to logroll voters into supporting the tax with a false promise of increased education and transportation spending." Anderson Br. at 25-26. They also posit that the 1-sentence statement is misleading, arguing that "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." *Id*. at 34.

Plaintiffs' arguments as to the 1-sentence yes-no statement fail for the same reason they failed with respect to the Attorney General's summary and more. As a threshold matter, the 1-sentence statement says exactly what the text of the Amendment says: "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." That sentence is not misleading as it hews to the text of the amendment. Plaintiffs nevertheless want the Attorney General to have the 1-sentence statement include a new sentence that bears no relationship to the text of the amendment: "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." Anderson Br. at 48. Then they argue that the "Court itself should amend the Yes Statement to eliminate the misleading reference to education and transportation spending." *Id*. Plaintiffs' position is rather remarkable. They want the "yes" statement to *include* information that is *not* in the text of the amendment, and *exclude* information that *is* in the text and that Plaintiffs concede accurately describes that the proceeds of the Fair Share Amendment must be dedicated to education and transportation. Now, *that* would be misleading.

In addition, the 1-sentence statement contains the protective phrase, "subject to Legislative appropriation," thus adequately advising voters of the possibility about which Plaintiffs are concerned. Additionally, if the Attorney General were required to list all the theoretical ramifications of a proposed law, those ramifications would not readily fit within a 1-sentence statement.

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

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 like this." J.A. 80, 452. As this Court in *Hensley*, 474 Mass. at 671-72, asked voters to file any litigation by February 1 of the election year, and G.L. c. 54, § 53, requires voters to file any challenges to the title or 1-sentence statements "within 20 days after the publication of the title and statement," the Attorney General should publish her summary and yes-no statements in legislative amendment cases no later than 20 days before February 1 of the years in which a state-wide election is held. While the Attorney General is not required to publish her titles and 1-sentence yes-no statements until the second

Wednesday in May,[7] it would be helpful if the schedules for ballot initiatives and legislative amendment were aligned so that any and all challenges were filed before February 1, particularly when a challenge to a title or "yes-no" statement requires fifty plaintiffs, and requires the complaint to be filed within 20 days after publication.[8] Having all challenges filed by February 1 should afford the parties the time for briefing afforded by Mass. R. App. P. 19, and enable the Court to hear argument in May and render a decision by late June.

The foregoing should not create a hardship for the Attorney General. Article 48 requires a legislative amendment to be approved at two separate constitutional conventions,[9] which necessarily means that there will be no less than *two years'* advance notice that an amendment might appear on the ballot. There is no reason

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[7] G.L. c. 54, § 53, requires the "secretary [to] make available for public examination a copy of the ballot question titles, 1–sentence statements describing the effect of a yes or no vote and fiscal effect statements and shall publish them in the Massachusetts register by the second Wednesday in May."

[8] "Any 50 voters may petition the supreme judicial court for Suffolk county to require that a title or statement be amended; provided, however, that the petition shall be filed within 20 days after the publication of the title and statement." G.L. c. 54, § 53.

[9] 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, the measure 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. That is the procedural posture of the Fair Share Amendment.

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, the work of preparing the summary and yes statement will be done. And, if the amendment fails at the second constitutional convention, the only harm is some amount of wasted effort by the Attorney General.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court declare that the Attorney General's summary complies with art. 48, as amended by art. 74, of the Massachusetts Constitution, and dismiss Plaintiffs' Amended Complaint.

Respectfully submitted,

Dated: April 19, 2022

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CERTIFICATE OF SERVICE

I, Thomas O. Bean, hereby certify that on the 19th day of April 2022, I caused a true and accurate copy of the Brief of the Plaintiffs/Appellants to be served by email on all counsel of record.

/s/ Thomas O. Bean
Thomas O. Bean

CERTIFICATE OF COMPLIANCE

I, Thomas O. Bean, hereby certify that this brief complies with the rules of Court that pertain to the filing of briefs including, but not limited to: Mass. R. A.P. 16€ (references to the record); Mass. R. A. P. (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices and other documents.

This brief is printed in Times New Roman, a proportionally spaced font, in 14-point type. The "word count" feature on Microsoft WORD 2019, determined that the sections of the brief required by Mass. R. A. P. 16(a)(5)-(11) contain 7881 words.

/s/ *Thomas O. Bean*