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 AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

John Pagliaro, Staff Attorney
BBO No. 634483
JPagliaro@newenglandlegal.org
Daniel B. Winslow, President
BBO No. 541972
DWinslow@newenglandlegal.org
New England Legal Foundation
150 Lincoln Street, Unit 6B
Boston, MA 02111
Tel.: (617) 695-3660

Dated: April 25, 2022

[This page intentionally left blank.]

CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 17(c)(1), amicus curiae New England Legal Foundation (NELF) states that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other

INTEREST OF AMICUS CURIAE[1]

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's members and supporters include large and small businesses in New England, other business and non-profit organizations, law firms, and individuals, all of whom believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

NELF's interest in this case stems from its foundational concern that any law that regulates property or economic activity should be validly and fairly enacted. As NELF explains, the summary written for this ballot initiative falls short of the requirements set out in art. 48 (as amended) of the Massachusetts constitution. As a result of the incomplete nature of the summary, there exists a substantial likelihood that voters may be misled as to what they are asked to vote on. The

[1] No party or party's counsel nor any other individual or entity, aside from Amicus and its counsel, authored this brief in whole or in part, or made any monetary contribution to its preparation or submission. Neither Amicus nor its counsel has ever represented any party to this appeal on similar issues, or has been either a party or counsel to a party in a proceeding or transaction that is at issue in this appeal.

likelihood is considerably increased by the well-known fact that many of the most vocal proponents of the initiative have described the proposed constitutional change in terms that are appealing to the public but misleading. NELF believes that its views on this issue may be of assistance to the Court and so has filed this brief in response to the Court's amicus announcement.

ISSUE PRESENTED

Is the Summary fair and in compliance with art. 48 of the Massachusetts Constitution?[2]

ARGUMENT

I. A Summary Provides "Key" Information and Must Be Evaluated from the Point of View of the Average Voter.

In *Evans v. Secretary of the Commonwealth*, this Court set out the purpose of the summary prepared by the Attorney General for initiatives based on art. 48 of the Massachusetts constitution.

> The constitutional provision requiring a description to be determined by the Attorney General was intended to insure, first, that the signers of an initiative or referendum petition understand the law which they propose to submit to the voters, and, secondly, that the *voters understand* the law upon which they are voting.

[2] NELF has chosen to focus on the Summary, but concurs with the plaintiffs' argument concerning inadequacy of the Yes Statement as well. All references to art. 48 are as amended by art. 74.

306 Mass. 296, 298–299 (1940) (emphasis added). *See Barnes v. Secretary of the Commonwealth*, 348 Mass. 671, 674 (1965) (summary case quoting *Evans* and noting, "Clearly the change [from description] to 'fair, concise summary' did not change the intent of the amendment in this respect.").

Accordingly, the Court has repeatedly emphasized that the fairness of a summary is to be determined by the response the voter would have to it. "It must in every particular be *fair to the voter* to the end that intelligent and enlightened judgment may be exercised by the ordinary person in deciding how to mark the ballot." *In re Opinion of the Justices*, 271 Mass. 582, 589 (1930) (emphasis added). The issue therefore revolves around how the "ordinary," "average voter," as a "reasonable reader," would conceive of the ballot question upon reading the Attorney General's summary of it. *Id.*; *Hensley v. Attorney General*, 474 Mass. 651, 663, 664 (2016).

To fulfill its constitutional purpose as a "key" piece of information, *Hensley*, 474 Mass. at 660, a summary must give the ordinary voter "a fair and intelligent conception of the main outlines of the measure," *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310, 324 (1951); *accord Abdow v. Attorney General*, 468 Mass. 478, 505 (2014). That is why, too, the

summary should be cast in "plain English," *Hensley*, 474 Mass. at 664, and is "not to be clouded by undue detail, nor yet [be] so abbreviated as not to be readily comprehensible," *Opinion*, 271 Mass. at 589.

In particular, a summary may not be drafted to be "wholly silent on [an] important point [that]. . . . [a] voter would have a natural interest in knowing." *Sears*, 327 Mass. at 325. So, too, a summary would not be adequate if the omitted information were such that "a reasonable voter could not fairly infer [it] from the language of the summary as written." *Hensley*, 474 Mass. at 662.

In a word, in order to assess "its likely impact on the voters," a summary must be viewed through the eyes of the voters. *Massachusetts Teachers Ass'n v. Secretary of the Commonwealth*, 384 Mass. 209, 234 (1981) (*MTA*).

In this regard, the Court's approach is identical to the approach it adopts when judging another important constitutional question, whether the subjects dealt with in a popular initiative are related to a common purpose for art. 48 purposes and would present voters with "a uniform statement of public policy." *Carney v. Attorney General*¸ 447 Mass. 218, 220 (2006). In making that determination, too, the Court looks at the issue through the eyes of the voters who would be faced with the ballot question

at the polls. *Id.* at 225 ("obligation" of Attorney General to "protect the voters"). There, too, the proper inquiry concretely "scrutinize[s]" the parts of the initiative for their "impact" on voters "at the polls." *Id*. at 226.

For the reasons given below, NELF believes that the summary in this case is likely to mislead a substantial proportion of the voters and therefore does not comply with art. 48. *See Opinion*, 271 Mass. at 589 (governing constitutional provisions "highly important"; there "must be compliance with them").

II. In Evaluating the Summary, The Court Should Be Aware that Proponents of the Amendment Have Carefully Shaped the Context within Which Voters Will Read the Summary and Cast Their Ballot.

Because a summary must be evaluated as the voters would likely understand it, the Court must take into account the specific circumstances in which the voters find themselves on any given ballot question. As the Court has said, "No final definition which will fit every case can be given of the words 'fair, concise summary.' Each instance must be judged by itself according to the nature of the proposed measure and the character of the 'summary' in question." *Sears*, 327 Mass. at 324.

Hence, a summary "must be assessed in the context of the entire proposal and its likely impact on the voters," and such a "determination

cannot be made in a vacuum." *MTA*, 384 Mass. at 234. *See also Hensley*, 474 Mass. at 666.

In the present case, the text of the proposed Amendment first saw the light of day as a 2015 popular initiative and is word for word the same as the latter. *See* Opening Brief of Plaintiffs-Appellants (Pl. Br.) at 13-18. Proposals to amend the constitution to do away with the flat tax inscribed there had already been rejected by voters five times decisively.[3]

It is the worst kept secret of this case that the text proposed in the 2015 initiative was drafted with an eye to finding a way to overcome the historical resistance of voters to abandoning the flat tax. In a news story, one of the initiative's strongest supporters, then State Senate President Stan Rosenberg, acknowledged this quite candidly:

> Massachusetts voters, in the past, have soundly rejected attempts to change the state constitution to permit a graduated income tax, but Rosenberg believes the outcome could be different if this proposed amendment makes it to the 2018 ballot.

[3] The five previous amendments garnered only 13%, 23%, 28%, 24%, and 28% of the vote cast on the question versus 65%, 55%, 58%, 68%, and 65% against. *See* Secretary of State, Statewide Ballot Questions——Statistics by Year: 1919–2016, http://www.sec.state.ma.us/ele/elebalm/balmresults.html (last accessed April 20, 2022).

> "In the past, constitutional amendments have been very differently constructed. This one because it is focused specifically on money for education and transportation will stand a better chance of being approved."

J.A. 128. *See also* Pl. Br. at 13-14.

By repackaging the repeatedly rejected graduated income tax with two presumably more appealing subjects, the initiative's drafters engaged in the "logrolling" the authors of art. 48 strove to prevent by imposing the "unrelated subjects" limitation on use of the popular initiative. *See Carney*, 447 Mass. at 226-30 (discussing concern of constitutional framers of initiative about misuse of "alluring" popular measures to logroll unpopular measures past voters). *See also Abdow*, 468 Mass. at 502 (noting logrolling in *Carney*, where "very controversial proposal" was "hitched" to unrelated but more popular one).

While the "alluring," but unrelated subjects of education and transportation doomed the popular initiative, *see Anderson v. Attorney General*, 479 Mass. 780 (2018), they remain in the text now that it has been revivified as a proposal of the Legislature, which is not bound by the "unrelated subjects" limitation. The problem raised in this case is that these two subjects are likely to serve all too well their intended

purpose of distracting the voters from the actual meaning and effect of the proposed Amendment. *See* Pl. Br. at 41-42; J.A. 282-330.

The summary rejected in *Sears* offers an illuminating comparison:

> [The proposal] necessarily calls for the expenditure of large sums of money. Clearly the voters were entitled to be informed as to how this money was to be obtained. The summary is wholly silent on this important point. . . . A voter would have a natural interest in knowing this.

327 Mass. at 325. As in *Sears* the present proposal calls for the "expenditure of large sums of money," but unlike *Sears*, here the voters do know "how this money [is] to be obtained." It would be obtained from "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." Pl. Br. at 17 (quoting proposed Amendment).

However, while voters in *Sears* knew how the money would be spent, many voters in this case only *think* that they know how the revenues collected from the surtax are to be spent and what the effect of the expenditures must be on the state education and transportation budgets. As the plaintiffs explain in detail in their brief, there exists a gap between the legal reality and the belief held by many voters on these crucial questions. *See id*. at 15-18, 31-33, 41-42. Many voters

are under the distinct impression that surtax revenues will be — must be — budgeted into the equivalent amount of *additional* spending on education and transportation. In other words, they believe that the surtax will be more than just another source of revenue for these budget areas; it will be the constitutionally earmarked source of *increased spending* in these areas, and that belief has been shown to be a strong motivator of how voters are likely to vote, just as the Amendment's drafters intended it to be. *See id*. at 41-42; J.A. 263 (public opinion survey shows support for Amendment linked to increased funding), 282-330 (same). That belief is mistaken, however. *See* Pl. Br. at 15-16.

It is a mistake that proponents of the Amendment, both now and back in its popular initiative form, have diligently nurtured. Sometimes, they explicitly say that the new revenues will fund increased spending on education and transportation. "The 'millionaires tax' proposal," declared one state senator, "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. Similarly, in its FAQs on the Amendment, the House Committee on Revenue

noted reassuringly that similar taxes in other states have "increased resources for schools." J.A. 149.

The senator quoted above openly treated a "new revenue" source as implying "additional" spending for education and transportation. As the plaintiffs explain, however, a new revenue source for education does not necessarily imply that an old dollar from another source will not be diverted from education, resulting in no net gain in spending on education. *See* Pl. Br. at 15-16, 34. A "new" dollar raised by the tax does not guarantee that there will be budgetary authorization to spend the "new" dollar as an additional dollar on top of all the old dollars. Proponents sometimes exploit this ambiguity when they use such hopeful expressions as "new revenue" and "new investments"; when they do so, it may be far from clear what exactly the speaker is committing himself to. That, of course, is the point of the ambiguity.

Frequently, though, the proponents unmistakably mean to promote the Amendment as a sure means to increase spending on education and transportation. Besides making direct statements about it, *see supra* p. 14, they very often refer to the new tax revenues in a context in which they dwell on the inadequacy of current funding in meeting current needs or achieving desired future goals.

> As we recover, new revenue is necessary to improve our public schools and pre-K programs; rebuild crumbling roads, bridges, sidewalks, and bike paths; make high-quality education affordable; and invest in fast and reliable public transportation.
>
> Proponents, however, said the amendment would enable Massachusetts to meet crucial needs that are currently being neglected[.]
>
> For transportation, this would mean improved maintenance for our roads, bridges, and public transportation infrastructure but could improve services for people with disabilities through services like The Ride. For education, this could mean expanding early education and care, more direct funding for public elementary and secondary schools, as well as lower tuition and fees for public higher education, increased state aid for students, and more robust job training and adult basic education programs.

J.A. 228, 245, 147. *See also* J.A. 132 ("lack of adequate funds for education . . . the lack of adequate funds for transportation"), 145 ("underinvestment in our transportation and education system[s]"), 188 ("Our transportation and education systems are in desperate need of funding.").

In light of this ongoing campaign of obfuscation, it is scarcely surprising that when the Legislature was sitting as the Constitutional Convention in order to propose the Amendment, its proponents voted down a change that was intended merely to "[e]nsur[e] that funds appropriated are in addition to and not in lieu of funds already

appropriated for such purposes." J.A. 190 ("We can't create a bait-and-switch"). *See* Pl. Br. at 17-18. In other words, the change would have simply ensured the very budgetary result that so many proponents have striven so hard to implant in the thinking of voters. Considering the amount of misinformation and misdirection put out about the very point sought to be clarified, it is grimly ironic that one proponent member of the Legislature objected to the clarification on the grounds that the "public has been *educated* on the exact amendment we're considering." J.A. 191 (emphasis added). "To make changes at this stage," he declared, "is against the democratic imperative of making sure the public is educated on this." *Id*.

To be clear, then, the actual budgetary effect of surtax revenues is put at issue in this case because the proponents chose to make it a decisive, motivating issue for voters from the beginning, and they did so as part of an electoral strategy of *mis*education.

For all of these reasons, Amicus agrees with the plaintiffs, *see* Pl. Br. at 39: a summary should not be drafted to be "wholly silent on [an] important point [that]. . . . [a] voter would have a natural interest in knowing." *Sears*, 327 Mass. at 325. Here voters certainly have a "natural interest in knowing" the actual budgetary effect of the

Amendment. So, while the statements made in the Summary may satisfy a bookkeeper technically, *see* Pl. Br. at 34-6, it is their "impact" on the "average voter" that counts, *MTA*, 384 Mass. at 234; *Hensley*, 474 Mass. at 663. *See also Hensley*, 474 Mass. at 664 ("use of a term of art . . . although accurate, invites the risk that voters may not understand the meaning of the term and, therefore, the consequence of approval of the petition").

To that end, the Court should not evaluate the Summary "in a vacuum." *MTA*, 384 Mass. at 234. Voters have been barraged with talk about "underfunded" schools, "crumbling" infrastructure, and the need for "new investments" and "increased funding" so that we can "rebuild" and "improve." *See*, e.g., J.A. at 25, 189, 212, 263, 285, 296. Many voters would likely view the Amendment in a very different light than they do now, were the truth to be disclosed in the Summary as candidly as the Attorney General acknowledged it to this Court in *Anderson*. *See* Pl. Br. at 15-16, 41-42. "But the Summary and Yes Statement hide all that information from voters." *Id*. at 39.

CONCLUSION

The Court should therefore rule that the Summary does not comply with art 48.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

/s/ John Pagliaro
John Pagliaro, Staff Attorney
JPagliaro@newenglandlegal.org
BBO No. 634483
Daniel B. Winslow, President
BBO No. 541972
New England Legal Foundation
150 Lincoln Street, Unit 6B
Boston, MA 02111
Telephone: (617) 695-3660

April 25, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I certify that this brief complies with the rules pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. A. P. 16, 17, 18, 20, and 21, where pertinent. The document was composed on Microsoft Word 2003 in 14-point Times New Roman. As determined by Word's word-count tool, the number of non-excluded words in this brief is **2553** and the number of excluded words is **1045**. *See* Rules 16(a)(5-11) and (k) and Rule 20(a)(2)(C), (D), and (F).

Dated: April 25, 2022

/s/ John Pagliaro
John Pagliaro

CERTIFICATE OF SERVICE

In *Anderson et al. vs. Attorney General et al.*, pending in the Supreme Judicial Court, No. SJC-13257, I certify that on the date subscribed below, on behalf of New England Legal Foundation, I served the Brief of Amicus Curiae New England Legal Foundation by e-file on counsel for Plaintiffs-Appellants and by email on counsel for Defendants-Appellees (with that counsel's permission), and by first-class mail, postpaid, in two bound copies on counsel for Intervenors-Appellees, who does not appear to be registered for e-file.

For Plaintiffs-Appellants:
Kevin P. Martin, Esq.
Goodwin Procter LLP
100 Northern Ave., Boston, MA 02210
Tel. (617) 570-1000
kmartin@goodwinlaw.com

For Defendants-Appellees:
Robert E. Toone, A.A.G.
Anne Sterman, A.A.G.
Office of the Attorney General
One Ashburton Place, Boston, MA 02108
Tel.: 617-963-2592
robert.toone@state.ma.us
anne.sterman@state.ma.us

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

Signed under the penalties of perjury on April 25, 2022.

/s/ John Pagliaro
John Pagliaro, Staff Attorney
JPagliaro@newenglandlegal.org
New England Legal Foundation
150 Lincoln Street, Unit 6B
Boston, MA 02111
Telephone: (617) 695-3660