COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13257

CHRISTOPHER R. ANDERSON AND 54 OTHER VOTERS

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, *et al*.,

Intervenors.

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

BRIEF OF PIONEERLEGAL, LLC AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

April 25, 2022

Daniel P. Ryan (BBO #650474)
Caroline A. Kupiec (BBO #698786)
Jillian Friedmann (BBO #707195)
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, MA 02109
P: (617) 338-2800
dryan@sullivanlaw.com
ckupiec@sullivanlaw.com
jfriedmann@sullivanlaw.com
Counsel for Amicus Curiae PioneerLegal, LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, PioneerLegal, LLC states that it is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts. PioneerLegal, LLC has no parent corporation and no publicly held corporation owns more than 10% of the units of PioneerLegal, LLC.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

PioneerLegal, LLC ("PioneerLegal")[1] is a nonprofit, nonpartisan legal research and litigation entity that defends and promotes educational options, accountable government, and economic opportunity across the Northeast and around the country. Through legal action and public education, PioneerLegal works to preserve and enhance liberties grounded in the constitutions and civil rights laws of the United States and the individual New England states.

In furtherance of PioneerLegal's mission of a well-informed citizenry, it is of utmost importance that any ballot initiative that seeks to amend the Massachusetts Constitution is accurately described to voters. Absent an accurate summary of the effect of a vote, citizens of the Commonwealth are effectively robbed of their voice in the governance of Massachusetts.

[1]Pursuant to Mass. R. App. P. 17(c)(5), PioneerLegal hereby certifies as follows: no party or party's counsel authored this brief in whole or in part; no party, or party's counsel, or other person or entity contributed money that was intended to fund preparing or submitting this brief; and neither PioneerLegal nor its counsel represents or has represented one of the parties to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUE PRESENTED

Whether the Attorney General's summary description of the ballot question titled "Additional Tax on Income Over One Million Dollars" (the "Proposed Amendment" or the "Surtax") and the associated "yes"/"no" statements are fair and not misleading when they fail to inform voters that the proceeds from the Surtax will not necessarily be additive to current spending for education and transportation.

STATEMENT OF THE CASE

In 2019, the Proposed Amendment was introduced in the Legislature. Comp. Ex. 1 at p.1.[2] The text of the Proposed Amendment is as follows:

> 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

[2]Exhibits to the Plaintiffs' Amended Complaint are cited as "Comp. Ex. [exhibit number] at p. [page number]."

> method used for federal income tax brackets. This paragraph shall apply to all tax years beginning on or after January 1, 2023.

Id. at pp. 1-2. The Proposed Amendment was approved in joint legislative sessions of the House of Representatives and the Senate on June 12, 2019 and on June 9, 2021. Comp. Ex. 07; Comp. Ex. 10. Following the approval of the Proposed Amendment by the Legislature, the Proposed Amendment will be submitted to the citizens of the commonwealth in the November 2022 election. Comp. Ex. 19. *See* MASS. CONST., art. 48, § 4.

On March 11, 2021, the Attorney General prepared a summary of the Proposed Amendment (the "Summary"). *See* Comp. Ex. 26. The Summary states:

> 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.

Id. at p. 2. On March 15, 2022, the Attorney General and Secretary of the Commonwealth announced the ballot question title and one-sentence "yes"/"no" statements for the Proposed Amendment. Comp. Ex. 27. The ballot question title is "Additional Tax on Income Over One Million Dollars." *Id.* The "yes" statement (the "Yes Statement") is:

> 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.

Id. at p. 2. The "no" statement is:

> A NO VOTE would make no change in the state Constitution relative to income tax.

Id.

SUMMARY OF THE ARGUMENT

The Summary and the Yes Statement are misleading as they both indicate that the proceeds from the Surtax would be used for "education and transportation". Yet, due to the fungibility of money and the budgeting and spending practices and procedures of the Legislature, there is no assurance whatsoever that the proceeds from the Surtax would be spent in such a manner (pp. 15-18, 22-30). Indeed, if the position the Attorney General took in a prior proceeding before this Court addressing an almost identical proposed amendment (the "Initiative Petition") and the Legislature's spending practices are any guide, it is entirely possible that spending on education and transportation will not increase at all as a result of the Surtax (pp.18-20, 22-30).

Both the Legislature's actions and the Attorney General's words confirm this conclusion. In the Attorney General's brief addressing the Initiative Petition, she stated:

> 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.

Brief of Appellees at 26, *Anderson v. Attorney General*, 479 Mass. 780 (2018) (No. SJC 12422) ("Anderson I") (pp. 18-20).

Further, as discussed below, the Legislature routinely moves revenues among various spending categories, including "dedicated" revenues required to be spent on a certain item (pp. 22-30). Accordingly, in order to be fair and not misleading, the Summary and the Yes Statement must accurately inform voters of the undeniable fact that the Proposed Amendment does not require revenue from the Surtax to be additive to current spending for education and transportation. In short, the Summary and Proposed Amendment's description does not accurately or fairly describe the Proposed Amendment as required to allow voters to make an informed decision in the voting booth.

ARGUMENT

I. The Legislature has Significant Discretion in the Budgeting Process

The process of budgeting and spending in Massachusetts is complex. However, this Court provided a good description of the process in *New England Div. of Am. Cancer Soc. v. Comm'r of Admin.*, 437 Mass. 172, 180-181 (2002), where it explained:

> The Commonwealth accounts for its finances through a system of "funds."[3] In addition to three major funds (the General Fund, the Local Aid Fund, and the Highway Fund), there are over one hundred minor funds that have been established by statutes, which generally specify a particular revenue source that is to be credited to the fund and particular objectives for which the credited revenues may be used.[4] At the end of each fiscal year, the comptroller certifies how all types of funds were used and provides a report that, for accounting purposes, associates monies appropriated and expenditures made from each fund.

Id. See also G. L. c. 7A, § 12. However, this Court continued,

> As a matter of cash management and flow, however, the Commonwealth maintains its cash resources in pooled accounts entirely disassociated with any particular fund. See G. L. c. 29, § 23. This system assumes that sufficient funds will exist in the State treasury to cover each allotment made by the Governor pursuant to [G. L. c. 29,] § 9B. From an accounting standpoint, some funds are routinely in a deficit condition; other funds may vary from having positive to

[3]A "[f]und" is defined as "an accounting entity established by general or special law to record all the financial resources or revenues, together with all related expenditures or liabilities, that are segregated for a particular purpose[.]" G. L. c. 29, § 1.

[4] For example, G. L. c. 64C, § 7C, provides that revenues collected on cigarettes are to be credited to the Health Protection Fund, G. L. c. 29, § 2GG, and expended, subject to appropriation, primarily on education, advertising, and various programs devoted to smoking prevention and cessation.

> negative balances throughout the year. Still other funds may begin the fiscal year with a negative balance, but the Legislature continues to designate line items in the budget to be further funded from them. So long as the total revenues are adequate to meet expenditures expected to be charged to every fund, a deficiency in any particular fund does not present a fiscal shortfall or crisis situation.

Id. This indicates that state monies can, and in fact are, moved among various funds in order to meet the funding obligations for each particular fund.

This Court's decision in *Mitchell v. Sec. Admin. & Fin.*, 413 Mass. 330 (1992) further explained the budgeting and spending process. Notably, that case involved the interpretation of a constitutional amendment which limited the use of tax and fee revenue related to motor vehicles and gasoline to construction and maintenance of public roads, bridges, and mass transportation.[5] In that case, the Highway Fund had a significant surplus, and the undesignated component of the

[5] Article 78 states, "No revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than cost of administration of laws providing for such revenue, making of refunds and adjustments in relation thereto, payment of highway obligations, or cost of construction, reconstruction, maintenance and repair of public highways and bridges and of the enforcement of state traffic laws; and such revenue shall be expended by the commonwealth or its counties, cities and towns for said highway purposes only and in such manner as the general court may direct; provided, that this amendment shall not apply to revenue from any excise tax imposed in lieu of local property taxes for the privilege of registering such vehicles." MASS. CONST. art. LXXVIII (1948). Article 78 was subsequently annulled by Article 104.

General Fund[6] had a significant deficit. In the final supplemental appropriation enacted by the Legislature for the fiscal year at issue, the state comptroller was directed to transfer the surplus funds in the Highway Fund to the General Fund to offset the deficit.[7]

This Court found no constitutional violation in the movement of monies from the Highway Fund to the General Fund, first noting the fungibility of the state's receipts: "The monies comprising the General Fund and the Highway Fund are pooled together for banking and investment purposes. Expenditures charged to either fund are made from these pooled accounts without regard to the original source of cash in any particular account." *Id.* at 332. For purposes of compliance with Article 78 of the constitution, because the Legislature was given the power to direct how revenue subject to Article 78 was spent, then so long as expenditures for Article 78 purposes were at least equal to revenue from Article 78 sources, there was no constitutional violation. Therefore, for the year at issue in *Mitchell*, since the Legislature appropriated more money for Article 78 purposes than it

[6] The General Fund is a fund into which all revenue payable to the commonwealth is paid, except for revenue required to be paid to a fund other than the General Fund. See G.L. c. 29, § 2.

[7] The state comptroller is responsible for ensuring that budgetary control is maintained on an individual appropriation account basis. *See* G. L. c. 7A, § 12; G. L. c. 29, § 5C. To resolve deficits reported in budgeted funds, he may recommend that the Legislature authorize the transfer of monies from other budgeted funds with surplus balances.

received from Article 78 sources, the transfer of certain monies to the General Fund created no issue.

II. Since Money is Fungible, Proceeds from the Surtax may not Necessarily be Spent on Education and Transportation

A. The Attorney General's Prior Brief Concedes this Point

In the Attorney General's reply brief in *Anderson I*, the Attorney General indicated that under the proposed amendment at issue:

> [T]he 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).

Further, the Attorney General stated:

> 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).

Id. at 26-27. During the oral argument in *Anderson I*, the Chief Justice asked counsel for the Attorney General whether she agreed that, if the amendment passed, it "may or may not result in any overall increase in education or

transportation spending."[8] Counsel for the Attorney General responded that the Chief Justice's understanding was correct. *Id.*

Thus, the Attorney General's understanding of the Initiative Petition, which had almost the exact same language as the Proposed Amendment, is that the Legislature has the power to reduce funding for education and transportation and replace it with proceeds from the Surtax. Further, by the Attorney General's understanding, there would be no constitutional or statutory violation should the Legislature decide to reduce funding in other areas and replace the funding with proceeds from the Surtax. The Attorney General's conclusion is well supported by his Court's decisions in *New England. Div. of Am. Cancer Soc*. and *Mitchell.*

The Summary and the Yes Statement are misleading in that Surtax revenue will not necessarily be additive to current funding for education and transportation, but rather could simply replace current funding in those areas. The Legislature would then be able to spend money on other items, or not at all. Therefore, this Court must rule that the Summary and the Yes Statement are deficient.

An appropriate Summary, one that would fully inform voters of the effect of the Proposed Amendment would be:

> This proposed constitutional amendment would establish an additional 4% state income tax on that portion of annual taxable income in excess

[8] Oral Argument at 52m:04s, Anderson I, YOUTUBE (Apr. 15, 2022) https://youtu.be/i_ITXZ8qcGw.

> 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 does not mandate that the expenditure of revenues from this tax be additive to current expenditures, and the Legislature could reduce funding on education and transportation from other sources and replace it with revenues from this tax. The proposed amendment would apply to tax years beginning on or after January 1, 2023.

Similarly, an appropriate Yes Statement would be:

> A YES VOTE would amend the state Constitution to impose an additional 4% tax on that portion of incomes over one million dollars to be used, subject to appropriation by the state Legislature, on education and transportation, though the Legislature could choose to reduce funding on education and transportation from other sources and replace it with the new surtax revenue because the proposed amendment does not require otherwise.

B. The Legislature Could Have Required the Surtax Proceeds be Additive to Current Spending for Education and transportation but Failed to do so

The Legislature had the opportunity to ensure that the proceeds from the Surtax would be additive to current spending for education and transportation. At the June 12, 2019 session of the state constitutional convention that considered the Proposed Amendment, the Legislature was presented with alternative language for the Proposed Amendment by State Senator Bruce Tarr (the "Tarr Amendment"). The Tarr Amendment stated 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." HB86. *Proposal for Constitutional Amendment*. (Amendment ID: H86-1) (2019). Senator Tarr explained that the purpose of the Tarr Amendment was to ensure that revenues generated by the proposal would be used to add to, not substitute for, the revenue already being spent in those areas. State Representative Brad Jones, speaking in support of the Tarr Amendment, explained that the new language was needed to avoid a "bait-and-switch" scenario in which, after voters approve the graduated income tax amendment, the $2 billion raised via the Surtax "get[s] spent [on education and transportation] and then we back out money we are currently spending in those areas and spend [it] elsewhere." State House News Service – Constitutional Convention (June 12, 2019).[9] The Legislature rejected the Tarr Amendment by a vote of 6-33 in the Senate and 34-123 in the House. HB86 (HD3300). *Floor Vote - On Adoption of Amendment #11 - Education and Transportation Trust Fund*. (June 12, 2019). As such, the Legislature was aware that the Surtax was not guaranteed to provide additional funding to education and transportation, but did nothing to address this issue.

[9] https://www.statehousenews.com/news/20191055

III. An Analysis of the State Transportation and Education Budget Demonstrates the Fungibility of the Commonwealth's Receipts

Because the Legislature has the authority to reduce funding for education and transportation and replace it with new Surtax revenue, it is instructive to examine specifically how this could be accomplished. For this purpose, we use the Fiscal Year 2020 ("FY2020") budget information for education and transportation[10] and explain how the trends derived from the FY2020 budget information reveals how the Surtax revenues will likely be applied. The examples discussed below conclusively demonstrate that the Surtax proceeds will not necessarily be additive to the state's current spending on education and transportation, due to the fungibility of money and the Legislature's power to appropriate the funds. Because the Legislature could freely substitute Surtax proceeds for current education and transportation expenditures, both the Summary and the Yes Statement, which suggest that the Surtax proceeds would be additive to current spending, are misleading.

A. The FY2020 Budget's Education and Transportation Spending

The below table shows a summary of Massachusetts' FY2020 education and transportation funding, including all relevant state budget appropriations, capital

[10] Financial reporting has been completed and is available from all relevant state departments and authorities.

expenditures, and pension contributions. The total funding for these two purposes was $18.99 billion in FY2020.

$9,567,767,016	Appropriations - Education[11]
$4,466,108,939	Appropriations-Transportation[12]
$4,174,578,870	Capital Expenditures - Transportation[13]
$228,891,956	Capital Expenditures – Education[14]
$1,867,918,385	Pension Contributions - Education and Transportation[15]
$18,988,561,296	Total FY2020 Education and Transportation Funding

[11] House No. 4002, *An Act Making Appropriations for the Fiscal Year 2020*, § 2 at 77-84; 203-234 (Mass. 2019); Commonwealth of Massachusetts, *Comprehensive Annual Report, Fiscal Year Ending in June 30, 2020* at 78.

[12] Massachusetts Department of Transportation, *Basic Financial Statements, Required Supplementary Information and Other Supplementary Information* (June 30, 2020), at 15 and 24; Commonwealth of Massachusetts, *Comprehensive Annual Report, Fiscal Year Ending in June 30, 2020* at 78.

[13] Massachusetts Department of Transportation, *Basic Financial Statements, Required Supplementary Information and Other Supplementary Information* (June 30, 2020), at 15 and 24.

[14] University of Massachusetts Building Authority, *Financial Statements* (June 30, 2020) http://www.umassba.net/wp-content/uploads/2021/01/FINAL-UMBA-FY20-Financial-Statements-1.pdf at 12; Massachusetts State College Building Authority, *Financial Statements* (June 30, 2020) https://www.mscba.org/docs/130_MassachusettsStateCollegeBuildingAuthority(Audit)-FinalFY20.pdf at 22.

[15] Massachusetts Teachers' Retirement System, *Schedule of Nonemployer Allocations and Schedule of Collective Pension Amounts* (June 30, 2020) https://mtrs.state.ma.us/wp-content/uploads/2021/04/gasb68Report_FY2021.pdf at 3; http://cthrupensions.mass.gov/api/checkbook_data.csv?search_hash={}&year=2021&org1=MSERS&employee_types=&pay_types=pay1.

Education and transportation are funded in different ways. Massachusetts funds education through line-item appropriations in the state budget each year that are funded through the General Fund (the "Line-Item Expenditures"). Additionally, a dedicated portion of sales tax revenues are allocated by statute to the Massachusetts School Building Authority ("MSBA"). G.L. c. 10, § 35BB. In FY2020, these Line-Item Expenditures included items such as Early Education and Care, the University of Massachusetts, and the STEM Pipeline.

The funding of capital expenditures for construction and maintenance of education assets almost entirely comes from bond proceeds. Certain bond covenants restrict the expenditure of specified education revenues to payments and reserves for debt service. As of June 30, 2020, there was approximately $6.3 billion outstanding on MSBA special obligation bonds that are backed by sales tax revenues. *Commonwealth of Massachusetts, Comprehensive Annual Report, Fiscal Year Ending in June 30, 2020* at p. 39.[16] Finally, the Commonwealth is mandated by statute to make employer contributions to the Massachusetts Teachers Retirement System ("MTRS"). In FY2020, the state's contributions to MTRS totaled $1.55 billion. *Id*. at 122.

[16] https://www.macomptroller.org/wp-content/uploads/acfr_fy-2020.pdf.

Unlike education funding, transportation is not funded by state budget line-items. Instead, the Legislature has created the Commonwealth Transportation Fund ("CTF"). The Legislature has directed that revenues from 23 different sources, including the gas tax, Registry of Motor Vehicle charges and fees, motor vehicle sales tax, bridge, tunnel and highway tolls, and contributions from the state general fund be deposited into the CTF and are to be used exclusively for transportation-related purposes. G.L. c. 6C, § 4; G.L. c. 10, § 63(1)(2); G.L. c. 29, § 2ZZZ(c); G.L. c. 64A, § 13; G.L. c. 90, § 7A; G.L. c. 90, § 34. These dedicated sources generated $2.13 billion in revenue in FY2020. In addition, the Legislature has dedicated a certain amount of sales tax (1%) revenue to the Massachusetts Bay Transportation Authority ("MBTA"). G.L. c. 10, § 35T.

The Legislature has further directed that CTF revenues be used to fund the Massachusetts Transportation Trust Fund, the MassDOT Special Revenue Funds, and to fund other transportation agencies. *See*, e.g., House No. 4000, An Act Making Appropriations for the Fiscal Year 2020, § 2E, 1595-6368–1595-6370 (Mass. 2019). Certain revenue from the CTF is also used to secure special obligation bonds issued by the state. In total, transportation-related appropriations from these funds totaled $4.47 billion in FY2020. *Massachusetts Department of Transportation, Basic Financial Statements, Required Supplementary Information and Other Supplementary Information* (June 30, 2020), at 15 and 24;

Commonwealth of Massachusetts, Comprehensive Annual Report, Fiscal Year Ending in June 30, 2020 at 78.

In addition to the appropriations from the various funds described above, there were also capital expenditures for the construction and maintenance of transportation assets. Almost all such expenditures come from the proceeds of bond funds. *Massachusetts Department of Transportation, Basic Financial Statements, Required Supplementary Information and Other Supplementary Information* (June 30, 2020), at 31.[17] Additionally, certain revenues from transportation-related fees, taxes, and charges are restricted for the purpose of paying interest and principal on bonds. *Id*. at 13. In total, transportation-related capital expenditures totaled $4.17 billion in FY2020. *Massachusetts Department of Transportation, Basic Financial Statements, Required Supplementary Information and Other Supplementary Information* (June 30, 2020), at 15 and 24.

In FY2020, the Massachusetts Department of Transportation collected $440 million in toll revenue from the Metropolitan Highway System, Western Turnpike, and Tobin Bridge. *MassDOT Fiscal Office, Revenue and Expense Report Budget Fiscal Year Ended June 30, 2020*, at p.4.[18] Historically, tolls have been pledged as

[17] https://www.mass.gov/doc/fiscal-2020-massdot/download.

[18] https://www.mass.gov/doc/legislative-revenue-and-expenditure-report-fy-2020/download.

restricted revenue to pay for debt service on highway and bridge construction projects. *Massachusetts Department of Transportation, Basic Financial Statements, Required Supplementary Information and Other Supplementary Information* (June 30, 2020) at 52.[19] As of June 30, 2020, the Commonwealth had an outstanding balance of approximately $4.6 billion in transportation-related special obligation bonds. *Id*. at 7.

B. The Effect of the Proposed Amendment on Education and Transportation Funding

With a background on the various sources of funding for education and transportation currently enacted by the Legislature, along with dedicated funds and Line-Item Expenditures, we can now analyze the ways in which the Legislature will be free to use Surtax revenues as a substitute for current education and transportation funding sources. As explained above in Section I, the Legislature could employ such budgetary sleight of hand with Surtax revenue. Accordingly, the Summary and the Yes Statement are inherently misleading because each imply that the Surtax revenue will serve as additional, rather than substitute, education and transportation funding.

[19] https://www.mass.gov/doc/fiscal-2020-massdot/download.

1. Line-Item Expenditures

If adopted, the Legislature could use revenues from the Surtax to fund some subset of the Line-Item Expenditures, currently funded by the General Fund, and spend the resulting General Fund savings elsewhere, including in areas other than education and transportation. For example, the Legislature could fund the Line-Item Expenditure for Early Education and Care, which was allocated $819,083,030 in FY2020, solely with a portion of the proceeds from the Surtax rather than the General Fund. *See* House No. 4002, *An Act Making Appropriations for the Fiscal Year 2020*, § 2 at 77-84 (Mass. 2019) The amount of the Early Education and Care Line-Item Expenditure would be satisfied, and the Proposed Amendment would also technically be satisfied as the proceeds will have funded education, but the Legislature would be free to allocate the $819,083,030 of Early Education and Care Line-Item Expenditure that would have been paid from the General Fund into anything else, or into nothing else. In effect the Surtax proceeds would replace an expenditure that would have come from the General Fund, but there is no requirement that the Surtax proceeds would be in addition to an allocation from the General Fund, contrary to the Summary and the Yes Statement.

2. Funds Dedicated to Education and Transportation by Statute

The Legislature has statutorily dedicated one percent of Massachusetts' 6.25 percent sales tax to the MSBA, which totaled $925 million in FY2020, and one

percent to the MBTA, which totaled $1.096 billion in FY2020. Commonwealth of Massachusetts, *Comprehensive Annual Report, Fiscal Year Ending in June 30, 2020* at 78. However, the Legislature could amend the sales tax statute to use Surtax proceeds as a substitute for sales tax revenues in whole or in part. Much like the Line-Item Expenditures, and contrary to the Summary and the Yes Statement, such a statutory amendment would free up sales tax revenues previously dedicated to the MSBA or the MBTA for another expenditure unrelated to education or transportation.

3. State Special Obligation Bonds

As discussed above, 30 percent of the bonds issued by the state, representing $11.2 billion, include special obligation bonds that are secured by revenue sources such as toll or sales tax revenue, as well as CTF revenues. Should the Proposed Amendment be enacted, the Legislature would be authorized to pledge revenue from the Surtax to meet bond covenant requirements in future bond issuances. The Legislature would then be able to use the currently pledged toll, fee, and motor vehicle sales tax revenue for other purposes.

Ultimately, under *Mitchell*, the Legislature would remain in compliance with the Proposed Amendment if it substituted revenues from the Surtax for revenues that are dedicated to highway obligations, construction and maintenance of public highways and bridges and mass transportation lines, and traffic

enforcement duties, as well as for education Line-Item Expenditures. The Legislature would also be within its rights to utilize revenue from the Surtax in its capital financing plan, substituting for the issuance of new debt, for the pay-off of existing debt, or to be used for debt service.

The three examples discussed above demonstrate how the Summary and the Yes Statement are patently misleading as to the Proposed Amendment's effects. At no point does either the Summary or the Yes Statement indicate that, due to the fungibility of money, the proceeds from the Surtax could replace current spending on education and transportation, with no increase in overall funding in those two areas. At a minimum, the Summary and the Yes Statement should be reworded to indicate that the Legislature could choose to reduce funding for education and transportation from other sources and replace it with Surtax revenue because the Proposed Amendment does not require otherwise.

C. California's Experience with a Similar Ballot Initiative Demonstrates there is no Guarantee of Additional Funding

In 2012, California voters approved a ballot initiative known as Proposition 30, which enacted a temporary, seven-year increase in the state income tax for high-income individuals, with revenues dedicated to education and community colleges. Official Voter Information Guide, Text of Proposed Laws for Proposition 30: *The Schools and Local Public Safety Protection Act of 2012*, Cal. Secretary of

State.[20] Proposition 30 directed that the revenues from the tax increase be deposited into a newly created "Education Protection Account" (the "Account") within the state's general fund.

In the California Secretary of State's 2012 voter guide for Proposition 30, proponents and opponents were allowed to set forth their respective arguments. Proponents said in part: "The money raised for schools is directed into a special fund the legislature can't touch and can't be used for state bureaucracy." *Id.* The opponents' statement indicated that the California Legislature could "take existing money for schools and use it for other purposes and then replace that money with the money from the new taxes . . . Prop. 30 does not guarantee one penny of new funding for schools." *Id.*

Following Proposition 30's enactment, the California state assembly and governor used the Account to fund K-12 and community college line items in the state budget in substitution for funds that had previously been appropriated from the general fund. California Department of Education, *Audit Report, Education Protection Account Recorded in the State General Fund*, July 1, 2012 through

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[14] http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf. California voters later extended the tax increase by 12 years when they approved Proposition 55 on November 8, 2016. Official Voter Information Guide, Text of Proposed Laws for Proposition 55: *Tax Extension to Fund Education and Healthcare, Cal. Secretary of State,* https://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop55.

June 30, 2015 at 6 [21]; California Department of Education, *Audit Report, Education Protection Account Recorded in the State General Fund,* July 1, 2015 through June 30, 2017 at 5 [22]; Department Detail of Appropriation and Adjustments, *California State Budget* 2019–20 [23]; Department Detail of Appropriation and Adjustments, California State Budget 2020–21 [24]. By doing so, California effectively freed up $41.8 billion in discretionary funds between 2013 and 2021. *Id.* Over that period, 59.6 percent of the revenue from Proposition 30 was used to substitute for appropriations previously made from the state general fund. The balance was used to meet minimum funding requirements that had been established in 1998 and did not increase overall funding above the pre-existing minimum funding levels.

California's experience demonstrates how misleading the Summary and the Yes Statement are. Like the Proposed Amendment, Proposition 30 strongly

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[21] https://trackprop55.sco.ca.gov/AuditReport/CDE_EPA_AuditReport2012to2015.pdf.

[22] https://trackprop55.sco.ca.gov/AuditReport/CDE_EPA_AuditReport_FY2015-17.pdf.

[23] http://www.ebudget.ca.gov/2019-20/pdf/Enacted/GovernorsBudget/6000/6100RWA.pdf.

[24] http://www.ebudget.ca.gov/2020-21/pdf/Enacted/GovernorsBudget/6000/6100FCS.pdf.

suggested that the proceeds from the additional tax would be additive to then-current spending for education. However, more than half of the proceeds from the tax increase substituted for current education spending rather than increased spending on education. There is nothing to prevent this result in Massachusetts if the Proposed Amendment is enacted, and voters must be so informed in order to make a meaningful choice at the voting booth come November. Accordingly, it is imperative that this Court find the Summary and the Yes Statement deficient.

CONCLUSION

For the foregoing reasons, the relief sought by the Plaintiffs-Appellants should be granted.

Respectfully submitted,

PIONEERLEGAL, LLC

By its Attorneys

April 25, 2022

/s/ Daniel P. Ryan

Daniel P. Ryan (BBO #650474)
Caroline A. Kupiec (BBO #698786)
Jillian Friedmann (BBO #707195)
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, MA 02109
P: (617) 338-2800
dryan@sullivanlaw.com
ckupiec@sullivanlaw.com
jfriedmann@sullivanlaw.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to, the requirements imposed by Mass. R. App. P 16 and Mass. R. App. P. 20. I further certify that the foregoing brief complies with the applicable length limit in Mass. R. App. P. 20 because it uses a 14-point Times New Roman font and is 5,090 words long (not including the portions of the brief excluded under Mass. R. App. P. 20), counted with the word-count function of Microsoft Word for Office 365.

April 25, 2022

/s/ Daniel P. Ryan

Daniel P. Ryan (BBO #650474)
Sullivan & Worcester LLP
One Post Office Square
Boston, Massachusetts 02109
P: (617) 338-2800
dryan@sullivanlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, I caused this brief to be filed electronically through the Supreme Judicial Court's e-filing system and served via e-mail to all counsel of record listed below.

Kevin P. Martin
Goodwin Procter LLP
100 Northern Avenue
Boston, Massachusetts 02210
617-570-1000
kmartin@goodwinlaw.com

Anne Sterman
Office of the Massachusetts Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2524
Anne.Sterman@mass.gov

Thomas O. Bean
Verrill Dana, LLP
One Federal Street, 20th Floor
Boston, MA 02110
617-309-2606
tbean@verrill-law.com

April 25, 2022

/s/ Daniel P. Ryan
Daniel P. Ryan (BBO #650474)
Sullivan & Worcester LLP
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2800
dryan@sullivanlaw.com