COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-12422

CHRISTOPHER ANDERSON, CHRISTOPHER CARLOZZI, RICHARD LORD, EILEEN MCANNENY, and DANIEL O'CONNELL,

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,

ANGEL M. COSME, et al.,

Intervenor-Defendants-Appellees.

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

Opening Brief of Plaintiffs-Appellants

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INTRODUCTION

Plaintiffs bring this lawsuit to exclude from the 2018 ballot an initiative petition that threatens to undermine our representative system of government and our separation of powers, and the long-standing consensus that the Legislature must maintain ultimate control over public finances. Petition No. 15-17 (the "Challenged Initiative") would amend the Constitution to mandate a 4% surtax on all incomes above a specified level, with the revenue collected earmarked "only" for education and transportation spending. The Initiative is truly radical: Our Constitution never has mandated that a specific tax be imposed – let alone that a specific tax rate be collected – and, in the century since Article 48 introduced the initiative petition process, the Court repeatedly has affirmed that initiative petitions cannot be used to embed spending earmarks in the Constitution. Allowing this Initiative on the ballot would undermine the Legislature's authority with respect to both spending and taxes in one fell swoop, setting the stage for public finances to be determined not in the deliberative legislative process, but in the free-for-all of special interest-fueled initiative petitions.

This Court should hold that the Challenged Initiative violates Article 48 for three reasons, any one of which requires its exclusion from the 2018 ballot. First, Article 48 prohibits grouping together unrelated issues in a single initiative, a crucial protection against voters being put to the Hobson's choice whether to vote for an initiative whose provisions they alternately support and oppose. The Challenged Initiative violates that rule by addressing disparate issues: whether to adopt a graduated income tax for the first time in state history, and whether to earmark billions of dollars for two unrelated subjects of spending – education and transportation. Each of these involves an important public policy question - a graduated income tax has been rejected five times by voters – and each deserves close attention, debate, and (other constitutional flaws with the Initiative aside) a separate vote. Indeed, the Court has invalidated initiatives whose components are much more closely related than those in this Initiative. Gray v. Attorney General, 474 Mass. 638 (2016); Carney v. Attorney General, 447 Mass. 218 (2006); Opinion of the Justices, 422 Mass. 1212 (1996)("Opinion of the Justices (1996)").

Second, by earmarking funds "only" for education and transportation, the Challenged Initiative violates Article 48's explicit ban on "specific appropriations" by initiative petition. This prohibition precludes amending the Constitution to set aside tax revenues for particular purposes, thereby reducing the Legislature's discretion over how to spend public money. In re Opinion of the Justices, 297 Mass. 577, 579–581 (1937) ("Opinion of the Justices (1937)"); Tax Equity Alliance for Mass., Inc. v. Commissioner of Revenue, 401 Mass. 310, 314-15 (1987). This case is on all fours with Opinion of the Justices (1937), which excluded an initiative petition from the ballot that would have amended the Constitution to require that certain revenues be spent "only" on highway purposes.

And third, Article 48 does not authorize initiative petitions to impose taxes or set tax rates in the Constitution. The delegates who adopted Article 48 warned against undermining the Legislature's primacy over public finance, and they never even discussed allowing initiative petitions to be used to impose taxes or set tax rates in the Constitution, where the Legislature cannot repeal or amend them. To the contrary, Article 48 on its face assumes that the

Legislature remains responsible for tax policy, and the contemporaneously enacted Article 63 confirms the Legislature's ultimate responsibility for managing public finances. This constitutional structure demonstrates that, as with public spending, the Legislature was intended to have final say with respect to both public spending and public revenues.

QUESTIONS PRESENTED

The Challenged Initiative states:

> Amendment Article XLIV 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 residents, this $1,000,000 (one million dollar) 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, 2019.

JA 97-98.

The questions presented are:

1. Does the Challenged Initiative, by levying a graduated income tax and introducing spending earmarks for transportation and education, contain subjects that are not "related" or "mutually dependent"?

2. Does the Challenged Initiative constitute an impermissible "specific appropriation" by imposing a constitutional mandate that the Legislature spend specified tax revenues "only" on specified uses?

3. Does the Challenged Initiative infringe the Legislature's authority over public finances by specifying a tax and tax rate in the Constitution?

STATEMENT OF THE CASE AND FACTS

I. The Massachusetts Constitution Places Significant Limits On The Scope Of Initiative Petitions.

Article 48, which was drafted by the Constitutional Convention of 1917-1918, establishes procedures for initiative petitions that can be used to enact statutes or to amend the Constitution.[1] In both cases, Article 48 places "significant limits" on the structure of an initiative petition and the subjects it may address. Bates v. Director of Office

[1] Article 48 was amended by Articles 74 and 81 of the Amendments to the Massachusetts Constitution. All citations refer to the amended version of Article 48.

of Campaign and Political Finance, 436 Mass. 144, 159 & n. 24 (2002).

1. If ten voters sign a proposed initiative to enact a statute, they can submit it to the attorney general. Art. 48, Pt. II, § 3. The attorney general then must certify whether the initiative contains "only subjects not excluded from the popular initiative and which are related or which are mutually dependent." Id. If so, she then files the statutory initiative with the Secretary of the Commonwealth. Id. Once a specified number of additional voters have signed the initiative, the Legislature must vote on it. Id. Pt. V, § 1. If the Legislature fails to enact the initiative then, once a final set of signatures is obtained, the Secretary of the Commonwealth will "submit such proposed law to the people at the next state election." Id. The initiative must be approved by both thirty per cent of the total ballots cast and a majority of voters voting on the initiative. Id.

A statute adopted through the initiative process has the same status as any other statute. The Legislature is free to amend or repeal such a statute as soon as it is adopted, Bates, 436 Mass. at 155, and it routinely does so. E.g., 2017 Mass. Acts and

Resolves c. 55 (amending initiative petition that legalized, regulated, and taxed the sale of marijuana in Massachusetts, 2016 Mass. Acts and Resolves c. 334). The only limitation on the Legislature is that, if the Legislature does not amend or repeal a statute adopted by initiative, the Legislature "shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect." Art. 48, Pt. II, § 2.

2. Like a statutory initiative, an initiative petition proposing to amend the Constitution – what is at issue in this case – begins with ten signatures, a certification by the attorney general that the initiative contains only non-excluded and related subjects, the collection of additional signatures, and submission to the Legislature. Id. Pt. II, § 3. Once submitted to the Legislature, an initiative to amend the Constitution need only receive the affirmative votes of one-quarter of the elected members in order to proceed.[2] Id. Pt. IV, § 4. If the initiative receives those votes, it is referred to the next legislative session. Id. If in that session the

[2] A mere quarter of the Legislature can also block any attempt to amend a proposed constitutional initiative petition. Id. Pt. III, § 3.

initiative again receives affirmative votes from just one-quarter of all representatives, the Secretary of the Commonwealth submits the proposed amendment to the people. Id. Pt. IV, § 5. In order to be adopted, the initiative must be approved by both thirty per cent of the total number of ballots cast, and a majority of voters voting on the initiative. Id.

Unlike a statute adopted by initiative, the Legislature cannot amend or repeal a constitutional amendment introduced by initiative petition after its approval by the voters. The Legislature has "no choice" but to comply with the constitutional initiative "unless and until the amendment [is] repealed" by another constitutional amendment. Associated Indus. of Mass. v. Secretary of Commonwealth, 413 Mass. 1, 9 (1992).

Article 48 also includes a separate mechanism for the Legislature to propose constitutional amendments. If a member of the Legislature introduces a proposed constitutional amendment (a "Legislature-proposed amendment"), it must receive the affirmative votes of a majority of the elected members in order to proceed – not 25% as with an initiative petition to amend the constitution. Pt. IV, § 4. If the Legislature-proposed

amendment receives those votes, it is referred to the next legislative session. Id. If it again receives a majority vote, the Secretary of the Commonwealth submits the proposed amendment to the people. Id. Pt. IV, § 5. To be adopted, the amendment must be approved by a majority of voters voting on the Legislature-proposed amendment. Id.

By a wide margin, Legislature-proposed amendments have been the primary means for amending the Constitution under Article 48. While dozens of Legislature-proposed amendments have been adopted, only three initiative petitions to amend the Constitution have ever even appeared on the ballot in the century since Article 48 was adopted. JA 195. Two of those (to move to biennial budgeting and to allow the Legislature to spend transportation taxes on mass transit) passed; the one that failed was a proposal to allow the Legislature to set a graduated income tax. See JA 218, 236, 246. None of them presented multiple unrelated subjects, purported to set aside revenue only for certain purposes, or would have set specific tax rates in the Constitution.

3. Although the delegates to the 1917-1918 Constitutional Convention approved an initiative

process, they were wary of taking too much power away from the Legislature. The delegates therefore imposed "significant limits" on the scope of initiative petitions, Bates, 436 Mass. at 159 & n. 24, to which this Court requires "strict adherence," Opinion of the Justices (1996), 422 Mass. at 1219. One of the technical advisors to the Constitutional Convention described these limitations as Article 48's "distinguishing feature . . . as compared with similar measures in other states." Lawrence B. Evans, The Constitutional Convention of Massachusetts, 15 Am. Pol. Sci. Rev. 214, 218 (1921). These limitations only apply to initiative petitions (whether statutory or constitutional); they do not apply to Legislature-proposed amendments. See Art. 48 Pts. II, IV; Opinion of the Justices, 386 Mass. 1201, 1213 (1982) ("Opinion of the Justices (1982)").

Three limitations on the initiative petition are relevant here. First, an initiative petition can address multiple subjects only if they are "related or . . . mutually dependent." Art. 48, Pt. II, § 3. This requirement was intended, among other purposes, to prevent "logrolling" — the combination of unrelated provisions in a single initiative – and to ensure that

voters are not put to the conundrum of voting for an initiative that combines subject matters of which they alternately approve and disapprove. Infra at 19-20.

Second, an initiative cannot "make[] a specific appropriation of money from the treasury of the commonwealth." Art. 48, Pt. II, § 2. This provision was a compromise after a "hot debate" between those who wanted to bar initiatives that would lead to anything other than "incidental" expenses, and those who wanted to give voters free rein over the treasury. See Bates, 436 Mass. at 156-59; infra at 28-32.

Finally, the delegates specified in Article 48 that the Legislature would retain its existing responsibility[3] for raising revenue as well: "if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry

[3] See Mass. Const., Part II, c. 1, § 1, art. 4 ("full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth"); Id. Amends., art. 44 ("Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided"). The Constitution further specifies that "[a]ll money bills" – meaning tax statutes – "shall originate in the house of representatives." Id. Part 2, c. 1, § 3, art. 7.

such law into effect." Pt. II, § 2 (emphasis added). Concurrently, the delegates specified in Article 63, § 2 that the Legislature would be responsible for the "general appropriation bill," which must match revenues to spending. See Art. 63, § 3; Opinion of the Justices, 375 Mass. 827, 841 (1978) (describing Article 63 as the "constitutional provision for a balanced budget").[4] Reviewing these provisions, this Court has explained that, despite the initiative petition process, "[t]he general supervision of ways and means for the needs of the Commonwealth was reserved to the General Court." Opinion of the Justices (1937), 297 Mass. at 580.

II. The Massachusetts Legislature And Massachusetts Voters Have Rejected Previous Attempts To Impose A Graduated Income Tax.

Under Article 44, the Legislature only is authorized to impose an income tax with a "uniform rate"; a graduated income tax is not permitted. Massachusetts voters consistently have rejected

[4] The budget, which forms the basis for the general appropriation bill, must contain a "statement . . . of all taxes, revenues, loans and other means by which such expenditures shall be defrayed." Art. 63, § 2. If the Legislature wishes to enact a "special appropriation bill," it must "provide the specific means for defraying the appropriations therein contained." Id. § 4. Article 63 has since been replaced by Article 107, which has the same language.

constitutional amendments that would have authorized the Legislature to impose a graduated tax.

Prior to the adoption of Article 44 in 1915, the Massachusetts Constitution did not allow the Legislature to impose an income tax. Opinion of the Justices, 383 Mass. 940, 941-42 (1981) ("Opinion of the Justices (1981)"). Article 44 gave the Legislature "[f]ull power and authority . . . to impose and levy a tax on income." Article 44 specifies, however, that the Legislature may impose a tax only at a "uniform rate throughout the commonwealth upon incomes derived from the same class of property." This language means that the Legislature cannot impose different tax rates based on the amount of income earned. In re Opinion of the Justices, 266 Mass. 583, 588 (1929).

Since Article 44's adoption, "numerous attempts to amend the Constitution to allow a graduated income tax have been unsuccessful." Opinion of the Justices (1981), 383 Mass. at 944. At least 67 graduated income tax proposals were introduced into the Legislature between 1929 and 1967 alone. Legislative Research Council, Report Relative to a Graduated State Income Tax for Massachusetts, 1967 Senate Doc. No. 1199 at 7, 44-55. Of the many attempts to amend the Constitution

to allow a graduated income tax, five made it to the ballot. Voters rejected all of them: a 1962 proposal was defeated by a 5:1 ratio, and subsequent proposals in 1968, 1972, 1976, and 1994 were all defeated by more than a 2:1 ratio. JA 101-102, 230, 233, 235, 237, 246. The highest percentage of "yes" votes such a proposal ever received is 28% of the vote, in 1972 and 1994. JA 235, 246.

III. The Challenged Initiative Attempts To Overcome Historic Opposition To A Graduated Income Tax By Pairing It With Two Unrelated Spending Proposals.

The Challenged Initiative has three separate components. First, it amends Article 44 to impose a specific graduated income tax. Importantly, the Challenged Initiative does not merely authorize the Legislature to impose graduated income taxes at rates of the Legislature's choosing; it imposes, as a constitutional mandate, a 4% tax on all incomes over $1 million. The initiative would mark the first time in the Commonwealth's history that a specific tax and rate have been mandated in the Constitution.

The Challenged Initiative also provides that the Legislature "shall" spend the proceeds from this tax "only" for two specific, but unrelated, purposes: "quality public education and affordable public

colleges and universities;" and "the repair and maintenance of roads, bridges and public transportation." The Challenged Initiative, in other words, allows spending the new tax revenues on items as diverse as teacher salaries and bridge repairs, but bars spending them on public health, law enforcement, poverty relief, or any other public purpose.

Supporters of the Challenged Initiative have acknowledged that the desired effect of combining a graduated income tax with a mandate that the Legislature spend the increased revenue on education and transportation is to overcome voters' traditional opposition to graduated income taxes. Senate President Stanley Rosenberg, for example, has explained that "[i]n 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." JA 49.

On September 2, 2015, the Attorney General certified the Challenged Initiative. JA 98. On May 18, 2016, more than one-quarter of the Legislature voted for the Initiative. JA 99. On June 14, 2017, more than one-quarter of the Legislature again voted for it. Id.

Accordingly, absent any action by the Court, it will be placed on the ballot in 2018. JA 100.

SUMMARY OF ARGUMENT

The Challenged Initiative violates Article 48 for three separate and independent reasons, any one of which is enough to bar its appearance on the ballot.

1. Whether or not the Challenged Initiative's individual components could survive Article 48 review (and they cannot), the Initiative must be excluded from the ballot because it violates Article 48's requirement that all of an initiative petition's components be mutually dependent or concern related subjects. Under Article 48, an initiative petition cannot earmark spending on two unrelated subject matters – education and transportation – nor can it combine such earmarks with a new income tax. The Court repeatedly has excluded initiative petitions from the ballot whose components were more closely related than those at issue here. Infra at 18-27.

2. By requiring that funds raised by the new tax be spent "only" on education and transportation, the Challenged Initiative violates Article 48's prohibition on initiative petitions that limit the Legislature's control over public spending. The

Challenged Initiative is indistinguishable from the "highway purposes" initiative the Court previously rejected as inconsistent with Article 48's bar on specific appropriations. There, as here, an initiative petition sought to amend the Constitution to direct tax revenues "only" to certain purposes. Opinion of the Justices (1937), 297 Mass. at 579. That the Challenged Initiative specifies that the money only will be spent if "appropriated" by the Legislature does not rescue it, for the Initiative still bars the Legislature from using the money for any other purposes, in violation of Article 48. Infra at 27-42.

3. The Challenged Initiative also improperly seeks, for the first time, to amend the Constitution to remove control over taxation from the Legislature. There is no indication that the 1917-1918 Convention intended to allow use of the initiative petition to bind the Legislature's hands with respect to revenue generation, and much evidence that it did not. This includes the explicit provision in Article 48 requiring the Legislature to impose any taxes necessary to fund appropriations resulting from a successful initiative, and the contemporaneous Article 63's requirement that the Legislature match pubic

spending to public revenues. If the framers of Article 48 had understood that they were exposing their own wallets to taxes set by initiative petition without the Legislature as a check, surely someone would have noted it, but no one ever did. Infra at 42-50.

ARGUMENT

I. The Challenged Initiative Violates Article 48's Requirement That A Single Initiative Address Only Related Subjects

The Challenged Initiative first runs afoul of Article 48 because it addresses three subjects that are unrelated, thus violating Article 48's requirement that initiatives contain "only subjects . . . which are related or which are mutually dependent." To satisfy the mutual dependence prong, the various components of a regulatory scheme cannot "exist independently" of each other. Gray, 474 Mass. at 648. An income-based surtax could exist independent of earmarks for education and transportation spending, and earmarks for education and transportation spending could exist independently of each other. Thus, the Challenged Initiative only can survive Article 48 review if it satisfies the relatedness test. For the following reasons, it cannot.

1. At the 1917-1918 Constitutional Convention,

delegates were able to draw on the experience of other States with initiative petitions, adopting those elements of direct democracy that experience had shown to be wise while avoiding those that experience had shown to be dangerous. Consistent with that careful approach, Convention delegates added the relatedness requirement to Article 48 to "foreclose the kinds of abuses and misapplications of initiative petitions that the delegates determined had occurred in other States." Carney, 447 Mass. at 228. One such abuse was what delegates called "the iniquities of log-rolling," 2 Debates in the Massachusetts Constitutional Convention of 1917-1918, 567 (1918) ("Debates"), i.e., the practice of combining in a single initiative "what is popular with what is desired by selfish interests, as the proposers of the measures may choose." Id. at 12; see also Carney, 447 Mass. at 227. Delegates expressed concern that the initiative process was particularly susceptible to this sort of abuse. Unlike legislators, who may amend proposed laws, voters "have no choice save to pass or reject a measure exactly as framed by the petitioners." Debates, supra at 13. Through creative framing, proponents can win support for provisions that would never pass on their own.

As an example of logrolling, delegates repeatedly cited Oregon's adoption through initiative of a new tax on certain increases in land value. See id. at 567; see also id. at 664, 673. After voters in previous elections consistently had rejected this proposal, proponents "hitched to the front of it, like a locomotive to the front of a freight train, a proposal that there should be no more poll or head taxes." Id. at 567. Inclusion of these more popular provisions was sufficient to carry the unpopular property tax to passage. To avoid repeating Oregon's experience, the delegates added to Article 48 the requirement that all initiatives in Massachusetts must concern only related subjects. The delegates intended that this requirement would "secure to voters the right to enact a uniform statement of public policy through exercising a meaningful choice in the initiative process." Carney, 447 Mass. at 232.

Of course, at a high level of generality, any two subjects might seem related. But a "common purpose" cannot be "so broad as to render the 'related subjects' limitation meaningless." Massachusetts Teachers Ass'n v. Secretary of Commonwealth, 384 Mass. 209, 219 (1981). Thus, in Opinion of the Justices

(1996), 422 Mass. at 1220-1221, the Court deemed "unacceptably broad" a proposed common purpose of "making government more accountable to the people." The Court instead accepted a narrower articulation — promoting "legislative accountability" — and found that one key component of the initiative at issue was unrelated to this purpose. Id. Likewise, in Gray, the Court rejected on relatedness grounds an initiative that would have ended use of Common Core standards in public education, and also required annual publication of state comprehensive assessment exams. See 474 Mass. at 647-48. Although, "at a conceptual level, curriculum content and assessment are interconnected," the Court deemed the two components "separate public policy issues," and held that the initiative in question would place voters "in the untenable position of casting a single vote on two or more dissimilar subjects." Id. at 648-649.

Even if all components of a given initiative serve a sufficiently concrete common purpose, the Court still examines whether "the initiative petition expresses an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified

statement of public policy." Hensley v. Attorney General, 474 Mass. 651, 658 (2016). Put differently, are the various means of accomplishing some common end sufficiently related that a reasonable voter likely would favor or disfavor the initiative as a whole? In Carney, for example, the Court answered this question in the negative, holding that tightening criminal penalties for animal abuse lacked a sufficient operational relation to the regulatory shutdown of the pari-mutuel dog racing industry. 447 Mass. at 231. Although both of these components might have served a common purpose of advancing the welfare of dogs, the initiative improperly combined "criminal law and administrative overhaul," and voters might reasonably have supported one means, but not the other. Id.

2. The Challenged Initiative – which combines a repeatedly-rejected graduated income tax with an earmark for education and transportation spending – addresses subjects that are far less related than those at issue in Opinion of the Justices (1996), Gray, and Carney. A novel surtax on incomes above a certain level no matter how derived also shares no "operational relatedness" with a dedication of public revenues to transportation and education spending. The

Challenged Initiative therefore does not satisfy the relatedness requirement.

At the outset, education spending does not share a sufficiently related purpose with transportation spending, particularly given the Court's holding in Gray that two proposals both related to aspects of education policy did not share a common purpose, supra at 21, and its holding in Carney that two proposals both related to animal welfare were unrelated, supra at 22. As particularly relevant here, the delegates to the 1917-1918 Convention illustrated the logrolling they hoped to avoid by pointing to an Oregon petition that concerned two types of taxes. Supra at 19-20. An initiative petition that combines two types of spending is simply the opposite side of the same coin.

Proponents of the Challenged Initiative might argue that both types of spending serve to improve the economy or increase welfare, but such a broad purpose would "render the 'related subjects' limitation meaningless." Massachusetts Teachers Ass'n, 384 Mass. at 219. Such an argument also would prove too much – one might argue that increased spending on affordable housing or improved healthcare serves those broad purposes too, yet the Challenged Initiative prohibits

spending the new tax's revenue on such purposes. See Opinion of the Justices (1996), 422 Mass. at 1220-1221 (a purpose is inappropriately broad where "[o]ne could imagine a multitude of diverse subjects all of which would 'relate'" to it).

Combining these two unrelated spending subjects with a new graduated income tax compounds the Challenged Initiative's constitutional infirmities. Article 48 on its face shows that the delegates did not contemplate that an income tax would be combined in a single initiative petition with an unrelated subject of spending; hence, they provided in Article 48 that if a petition initiative requires new spending, then "the general court" must "raise by taxation or otherwise and shall appropriate such money as may be necessary." That language in Article 48, intended to avoid successful initiative petitions being starved of needed funds, would have been unnecessary if an initiative could be combined with a dedicated income tax. Moreover, it is significant that in a century of initiative petitions, none have come before the Court that combined a general income tax with earmarked spending. Cf. Carney, 447 Mass. at 231 ("Significantly, in none of the petitions cited by the

Attorney General do we find the same mixture of criminal law and administrative overhaul").

Troublingly, this particular initiative petition's combination of earmarks with a graduated income tax is plainly the sort of "logrolling" that the delegates intended to prohibit. When presented with a straightforward choice between a graduated income tax and the current flat income tax, voters time and again have rejected the tax, always by large margins. Supra at 12-14. So proponents of a graduated income tax decided to sweeten the pot and improve the tax's chances of passage by promising that the revenue raised will be spent only on education and transportation. Supra at 15. Article 48 does not allow such disparate components to be cobbled together to form a potentially winning initiative – the Court cannot "check common sense at the door" and ignore the logrolling at play here. Carney, 447 Mass. at 533.

To be sure, the Court previously has approved statutory initiatives that combine revenue and spending components. But in those initiatives, unlike in the Challenged Initiative, the revenue and spending components shared a clear link as part of a common scheme of regulatory reform: the initiatives raised

revenue from a type of activity and spent it on addressing the negative externalities of that very same activity.[5] There is no such link between incomes over $1 million in a particular year – which might be derived from sources as diverse as the sale of a family farm or investments in Italian bonds – and increased education and transportation spending. The Challenged Initiative truly is unprecedented.

3. If this initiative makes it onto the ballot, its lack of common purpose and operational relatedness will deprive voters of their "right to enact a uniform statement of public policy through exercising a meaningful choice in the initiative process." Carney, 447 Mass. at 232. There is no reason why a voter who supports a graduated income tax, but believes the money is better spent on healthcare and is unnecessary for transportation or education, should be required to vote for this particular mix of policies. Likewise, a

[5] E.g., Hensley, 474 Mass. at 673 (excise tax on retail marijuana sales to be paid into special "Marijuana Regulation Fund"); Mazzone v. Attorney General, 432 Mass. 515, 523-524 (2000) (forfeitures for drug crimes to be placed in "drug treatment trust fund"); Associated Indus., 413 Mass. 1, 7 (1992) (excise tax on hazardous waste to be paid into "Environmental Challenge Fund"); In re Opinion of the Justices, 309 Mass. 571, 584-87 (1941) (employer premiums to be paid into workers' compensation fund).

voter who favors dedicated spending for transportation and education, but believes government is wasteful in other areas, should not be required to support a new tax. Assuming any of the unrelated components of the Challenged Initiative are permissible (and for the reasons given below, they are not), they should be put to voters individually, not as a package, so that voters are not faced with a Hobson's choice.

For these reasons, the Court should hold that the Initiative violates Article 48's relatedness requirement and exclude it from the ballot.

II. The Challenged Initiative Is An Impermissible Specific Appropriation

Article 48 is clear: "No measure . . . that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition." Pt. II, § 2. The Challenged Initiative falls squarely into the prohibited category by forcing the Legislature to spend designated income tax revenues "only" on education and transportation. In Opinion of the Justices (1937), the Court rejected the only other initiative petition proposing to amend the Constitution in such a way. It should do the same here. The damage to our system of government from

allowing the Challenged Initiative on the ballot is as much from the precedent it would set as from this specific initiative itself. It will spur other interest groups to sponsor ballot initiatives carving off a share of income tax revenue "only" for their purposes too, before the entire pie is dedicated "only" to other priorities. That is precisely the public battle over state spending, fought via bumper stickers and 30 second commercials rather than in the deliberative legislative process, that Article 48 was designed to avoid.

1. The debates in the Constitutional Convention demonstrate the delegates' intent that, while initiative petitions could enact statutory programs that cost money, ultimate control over the funding of state programs must remain with the Legislature. At the time of the Convention, other states had adopted initiative processes that allowed initiatives to direct how specific revenue should be spent; the delegates' focus on maintaining legislative budgetary control was a deliberate decision to take a different approach. See Bates, 436 Mass. at 159 & n.24.

The original version of the appropriations ban would have barred any measure "calling for an

appropriation of money from the treasury of the Commonwealth, except for purposes incidental to the administration thereof." Debates, supra at 815. Proponents of the ban emphasized the importance of maintaining legislative control over the State's treasury. The delegate who introduced the ban argued that it was necessary to prevent a governor from using the initiative process to spend money "without the calm, deliberate, judicious, fair scrutiny that is given by legislative investigation." Id. at 817. Another proponent emphasized the lack of any financial controls that would govern initiatives, explaining that "unless this amendment is adopted you have no restriction, you have no regulation whatever, and you will have the whole thing wide open to allow Tom, Dick and Harry to come in and mulct the citizens of the Commonwealth." Id. at 819.

Opponents of this initial version of the ban were concerned that its broad phrasing would bar not only initiatives that set aside specific resources for specific purposes, but also any initiative that would cost money to implement. One delegate, for instance, expressed concern that the proposal will "make absolutely useless any legislation proposed by the

initiative and referendum looking toward health insurance, toward old age pensions or toward any social welfare legislation." Id. at 818. The original proposal was thus defeated, as most delegates did not want to bar any initiative "which would involve the expenditure of money." Id. at 823-24.

The next day, however, it became clear that while many delegates did not want to ban all initiatives that cost money, most delegates did want to ensure that spending decisions ultimately would rest with the Legislature. E.g., id. at 825-26 ("We are all interested in some proposition which will bring us near to a real budget system, some real business proposition for handling the finances of this State. It cannot be done, we cannot work it, if we have this unlimited proposition that is before you in this measure now"). The delegates ultimately settled on the current phrasing, barring initiatives that make "a specific appropriation of money." Id. at 827.

In advocating for this proposal, the delegates noted the importance of legislative processes for evaluating and controlling expenditures across the state budget. One delegate, for instance, emphasized that "it is not wise to throw down the barriers

against appropriations which in our Legislature, and in all legislatures, during the history of law-making bodies, have been found all important." Id. at 824. Another delegate explained that "all true friends of democratic government desire to approximate a budget system of running the finances of the State, and that we cannot do it in any reasonable sense if we do not make an amendment of the sort that has been proposed here." Id. at 828. Yet another delegate warned that "an appropriation by the people of specific sums of money would knock spots, if I may use a slang expression, out of any State budget, and prevent any real regulation and careful administration of the finances of the State." Id. at 829.

The delegates gave several examples of the types of initiatives they viewed as impermissible. One delegate explained that while an initiative could establish a public university, it could not set aside money for the university. Instead, once the initiative passed, "those who understood the financial situation of the Commonwealth" would figure out "how it should be provided for." Id. at 825. Similarly, delegates discussed whether an initiative could respond to a perceived underfunding in "correspondence schools" by

"appropriat[ing] a reasonable sum of money" to further develop such schools; the delegates concluded that such an initiative would not be permitted under the specific-appropriation provision. Id. at 833.

2. Consistent with the provision's origins in protecting the Legislature's control of the budget, this Court has emphasized that the "essential aspect" of a "specific appropriation" is "remov[ing] public monies, and the decision how to spend them, from the control of the Legislature." Associated Industries of Mass., 413 Mass. at 6. Put another way, a specific appropriation "seize[s] upon all the revenue received from the designated sources and [] appropriate[s] it permanently to a specified public use," such that it "may not be reached by the Legislature (or any other entity or person) except for its specified purpose." Bates, 436 Mass. at 162.

Applying these principles, the Court held in Opinion of the Justices (1937) that an initiative petition that proposed amending the Constitution to require that all revenue from automotive-related taxes and fees be spent "only for highway purposes" was a "specific appropriation." 297 Mass. at 579, 581. As the Court noted, the Legislature would be "powerless

to appropriate any revenue from that source to any other public use." Id. at 580. Article 48 requires that the Legislature retain such discretion, as the specific-appropriation ban was meant to prevent "resort[s] to the initiative in order to segregate public moneys or a part of the public revenue to any narrow purpose." Id. at 581. The Court thus concluded that "[p]ermanently to lay hold of and appropriate to a single public use all the revenue derived from one source of taxation we think is a 'specific appropriation' within th[e] prohibition" of Article 48. Id.; see also Tax Equity Alliance, 401 Mass. at 315 ("a measure intended to limit the use of particular State revenues solely to highway purposes is excluded from the initiative process as making a specific appropriation").

3. The Challenged Initiative does precisely what the specific-appropriation ban prohibits — it "permanently lay[s] hold of and appropriat[es] to [two] public use[s] all the revenue derived from one source of taxation." Tax Equity Alliance, 401 Mass. at 315 (quoting Opinion of the Justices (1937), 297 Mass. at 581). In fact, the Challenged Initiative has the same operative language that doomed the initiative

petition at issue in Opinion of the Justices (1937). Just as the proposed constitutional amendment in that case ordered that certain revenue "shall" be spent "only" on "highway purposes," the Challenged Initiative states that revenue from the graduated income tax "shall" be spent "only" on education and transportation. In each case, "the Legislature would be powerless to appropriate any revenue from that source to any other public use." Id. at 580.

The Challenged Initiative also is strikingly similar to the types of initiatives that Convention delegates described as barred by the specific-appropriation provision. For example, the delegates explained that an initiative petition cannot be used to correct a perceived under-funding of certain types of public education. Debates, supra at 833. The Challenged Initiative does precisely that: it responds to a perceived under-funding in public education and transportation by directing that certain funds be spent "only" on these purposes.

Supporters of the Challenged Initiative have argued that Article 104 is precedent for the Challenged Initiative, because Article 104 sets aside certain transportation-related revenues "only" for

certain transportation purposes. JA 174. But that ignores the relevant Constitutional history. It was Article 78, not Article 104, that introduced the dedication of transportation-related taxes for transportation purposes, and Article 78 was a Legislature-proposed amendment, not an initiative petition. See 1947 Mass. Acts and Resolves at 823-824. Article 78 therefore was not subject to the specific-appropriation ban and was not challenged on that basis. See supra at 10; Opinion of the Justices (1982), 386 Mass. at 1213. A quarter century later, Article 104 amended Article 78 by adding mass transit to the preexisting list of approved purposes. See JA 236. Because Article 104 loosened, rather than tightened, Article 78's existing restrictions on the Legislature's spending authority, it did not constitute a specific appropriation within the meaning of Article 48 and this Court's precedents, and it too drew no legal challenge.

Supporters of the Challenged Initiative also have contended that the Initiative's "subject to appropriation" language means it is not itself a specific appropriation. JA 149. That ignores the impact of the word "only" in the Initiative. Even if

the Legislature never spends revenue raised by the Initiative's tax component for transportation or education, it still cannot spend that revenue on any other purposes.[6] The same was true with respect to the initiative at issue in Opinion of the Justices (1937): nothing in that initiative required that automotive taxes actually be spent on highway purposes, but if not spent on highway purposes, "the Legislature would be powerless to appropriate any revenue from that source to any other public use." 297 Mass. at 580. Now as then, that limit on legislative discretion is enough to violate the specific appropriation clause.

The proponents' "subject to appropriation" argument further ignores the "important distinction," Associated Industries, 413 Mass. at 9, between statutes and constitutional amendments. The Court has explained that a statute adopted by initiative petition that calls for certain spending is not a specific appropriation because the Legislature's

[6] The Staff of the House Committee on Revenue, in a memorandum circulated by the Chair of that Committee, has noted that, if the Challenged Initiative were adopted, the Legislature would be "bound . . . to spend the money on education and transportation" because "[i]f the legislative or executive branch ever did attempt to use the revenue for other purposes, it would be violating the Constitution." JA 99, 148.

ability to amend or repeal the statute acts as a "constitutional safety valve . . . [i]f the Legislature wishes not to appropriate funds for the law . . . ." Bates, 436 Mass. at 175. On the other hand, the Legislature cannot amend or repeal a constitutional amendment adopted by initiative petition. If such an amendment directs the Legislature to spend funds "only" in a certain way, "the Legislature would be bound by [that constitutional] mandate. It could not afterwards annul the earmarking of the funds, and devote them to other purposes, as it might under a mere statute." Evans v. Secretary of Commonwealth, 306 Mass. 296, 297-298 (1940). For this reason, one cannot "minimize the significance of the constitutional nature of the measure involved in [Opinion of the Justices (1937)]," Associated Indus., 413 Mass. at 9 & n. 10, and it is that 1937 decision, not any later decision concerning a mere statute, that governs "the earmarking of public monies through a constitutional amendment," id.; cf. Evans, 306 Mass. at 297-98 (noting that the question whether a mere statute constitutes a specific appropriation "is not answered" by Opinion of the Justices (1937), "which related to a proposed constitutional amendment").

4. Allowing the Challenged Initiative to reach the ballot would threaten the Legislature's control over state finances, which the delegates to the Constitutional Convention intended to preserve.

The Court previously has recognized that the delegates adopted the specific-appropriation bar "to preserve the Legislature's general authority over the state treasury, and to preclude special interest groups from attempting to usurp that authority through the use of initiatives which might compel the expenditure of public funds in a piecemeal fashion." Associated Indus., 413 Mass. at 5-6; see also Opinion of the Justices (1937), 297 Mass. at 580-81; Slama v. Attorney General, 384 Mass. 620, 625-626 (1981). Initiative petitions that force the Legislature to spend particular revenue streams "only" on certain budget categories would dramatically undermine the Legislature's budgetary authority and ability to respond to changing public spending needs. As the delegates warned, such initiative petitions would allow a governor with only minority support in the Legislature (more than a quarter, less than half) to go around that representative body, and seize control of public spending by enlisting voters in a series of

initiative petitions to amend the Constitution. Supra at 29. Article 48 was designed to avoid this threat to the separation of powers. See Bates, 436 Mass. at 162 & n. 26 (explaining that "a specific appropriation encroaches on the Legislature's constitutional and 'quintessential prerogative' to appropriate funds," which is "secured by art. 30 of the Declaration of Rights . . . and art. 63 of the Amendments").

The Challenged Initiative illustrates the problem with allowing special interests to embed spending priorities in the Constitution through the strategic use of initiative petitions. Education and transportation account for about 20% of the State's current spending; health and human services, by contrast, account for about 50%. JA 295, 306-307. Under the Challenged Initiative, the Legislature could not spend a penny of the revenue generated by the new tax on the area that has required the most resources. Barring yet another multi-year effort to successfully amend the Constitution, the Legislature's hands would be tied in responding to sudden crises or even emerging needs.

The Court has, in analogous circumstances, observed that such concerns would be magnified if an

earmark incentivizes other interest groups to submit more initiative petitions to direct further slices of the income tax "only" to specific purposes. Slama, 384 Mass. at 627 & n. 6 ("If Initiative 11/81 were not viewed as a specific appropriation, further initiatives might ultimately remove the allocation of all tax money from the control of the Legislature"). In fact, interest groups that do not seek their own allocation of the pie risk being cut out altogether – if initiatives divvy up much of the Commonwealth's revenue in the Constitution, the Legislature would have authority only over whatever little is left.[7]

That is not an unlikely outcome of a decision allowing the Challenged Initiative on the ballot, as budgeting in states where popular initiatives are allowed to appropriate money is hampered in precisely these ways. California provides one example. There, ballot initiatives can limit the Legislature's

[7] The likelihood of special interests sponsoring initiatives is increased by the fact that our campaign finance law places no limit on the amount of money corporations or individuals can spend to support an initiative petition – in contrast to the strict limits which exist on donations to members of the legislative branch. See Massachusetts Office of Campaign and Political Finance, Campaign Finance Guide: State Ballot Question Committees (Aug. 2016), available at http://files.ocpf.us/pdf/guides/guidestatebq.pdf.

budgetary discretion and, as a result, "special interest groups" have sponsored initiatives "guarantee[ing] funding for certain programs," leading to "a substantial impact on the budget process." Cal. Dept. of Finance, Initiatives and Ballot Propositions.[8] One particularly striking example is California Proposition 98. Despite being approved by a bare majority of those who voted in one election, the proposition permanently allocates approximately 40% of California's budget to education. Cal. Legislative Analyst's Office, Proposition 98 Primer.[9] The proposition has frustrated advocates of other social welfare programs, who are unable to secure funding for health or child care spending.

5. In summary, departing from precedent to allow spending earmarks in the Constitution would undermine the Constitution's separation of powers and the Legislature's management of public finances, contrary to the intent and design of Article 48. Because constitutional initiatives that earmark revenues "only" to specific purposes are forbidden by

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[8] Available at http://www.dof.ca.gov/budget/Initiatives_Ballot_Propositions.html.

[9] Available at http://www.lao.ca.gov/2005/prop_98_primer/prop_98_primer_020805.htm.

Article 48, the Court should order that the Challenged Initiative be excluded from the ballot.

III. The Challenged Initiative Cannot Be Used To Impose A Tax In the Constitution

The Court has recognized that under Article 48 "[t]he general supervision of ways and means for the needs of the Commonwealth was reserved to the General Court." Opinion of the Justices (1937), 297 Mass. at 580. Accordingly, just as initiative petitions cannot intrude on the Legislature's fiscal authority by embedding restrictions on how tax revenues are spent in the Constitution, so too they should not be allowed to dictate how such tax revenues are generated.

1. In considering this issue, the Court cannot ignore the backdrop to the Constitutional Convention of 1917-1918. Up until that time (and since), our Constitution imposed no tax and set no tax rate. While the Constitution in various places authorized taxes, it always left the imposition of such taxes to the Legislature's sound discretion. E.g., Part II, c. 1, § 1, art. 4. Plaintiffs have been unable to locate any provision in another State's constitution that, as of a century ago, dictated tax rates. The idea of a tax set in the Constitution was thus outside the

delegates' experience.

If Article 48 was understood to mark a sea change in how income taxes could be imposed – removing the Legislature as a check on the taking of the delegates' income – surely some delegate to the Convention would have mentioned it, but no one ever did. That silence is significant. The Court has commented, for example, that the delegates "would hardly have [] passed over in silence" "[s]o important a matter" as the meaning of the term "fiscal year." Opinion of the Justices, 308 Mass. 601, 613 (1941). The use of initiative petitions to amend the Constitution to get around the Legislature on matters of taxation, and potentially to raise taxes on the delegates themselves, would have been at least as important as the meaning of term "fiscal year." Indeed, it would have been far more important, given "the people's fears of being tyrannized by a process that would give free rein to the majority's whims." Bates, 436 Mass. at 157. Yet the subject went unmentioned. What discussion there was of taxation by initiative petition concerned only taxation by statute, with the delegates reassuring that they were not talking about constitutional amendments. E.g., Debates, supra at 430 (discussing

taxation in the context of "the legislative initiative - I am not speaking of the constitutional initiative"); id. at 431 (noting that the discussion of taxation concerned "the legislative initiative rather than the constitutional initiative").[10]

The absence of any debate over tax policy being set in the Constitution by initiative petition is particularly striking given the extensive debate that did occur over the linked subject of spending, with the delegates concluding that the Legislature must retain ultimate control. Supra at 29-32. It beggars belief that the same delegates who extensively debated the issue of public spending and were careful to preserve the Legislature's control would allow use of

[10] See also id. at 428 (discussing the "legislative initiative . . . as applied to taxation"); id. at 437 (discussion of taxes being set by initiative petition "on the statute-book"). The delegates considered amending Article 44, which gives the Legislature power to enact tax laws, but not constitutional amendments, to clarify that "no exercise of this power shall be the subject of an initiative petition." Debates Vol. III, supra, at 758. That proposal failed following procedural objections; no delegate spoke in favor of allowing voters to impose taxes, let alone by constitutional amendment. Id. at 825-26 (delegates observing that if Article 48 were not enacted, then the proposed amendment to Article 44 would be awkward). In any event, because tax laws can be repealed or amended by the Legislature, they do not present the same issues as constitutional amendments. Supra at 36-37.

an initiative petition to gain control over the other side of the coin – generation of the revenue needed to fund public spending – with nary a word about it.

As a matter of constitutional interpretation, Article 48's bar on appropriations should be treated akin to how the United States Supreme Court treats the limited discussion of sovereign immunity in the U.S. Constitution's Eleventh Amendment. While the Eleventh Amendment addresses only one aspect of sovereign immunity – suits in federal court against states by non-citizens – the Supreme Court has explained that is only because a suit by a citizen against his own State "was a thing unknown to the law" and thus inconceivable. Hans v. Louisiana, 134 U.S. 1, 15-16 (1890). The Eleventh Amendment therefore implicitly protects the full breadth of sovereign immunity, not only the one aspect explicitly mentioned. See Morris v. Massachusetts Maritime Academy, 409 Mass. 179, 182-86 (1991) (recounting the Eleventh Amendment's history, and applying "the implicit assumption that States would retain their sovereign immunity" to bar a suit against a state entity in state court).

A similar interpretive approach is warranted here. The delegates to the 1917-1918 Convention never

considered that taxes might be set in the Constitution because such a thing was outside their experience. Thus, they never addressed that issue during the debates or in the text of Article 48, other than to note that it was not being discussed. Supra at 43-44. Nonetheless, the delegates' extensive discussion of legislative primacy over financial matters makes clear that, had they given it much thought, they would have explicitly forbidden initiative petitions that remove legislative control over taxation. If anything, the implication here is even stronger than with the Eleventh Amendment, for here Article 48's plain text confirms the delegates' understanding that the Legislature would remain responsible for raising taxes: "the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary" to fund spending required by a successful, non-repealed initiative. Pt. II, § 2 (emphasis added); see also Bates, 436 Mass. at 159 ("[t]he delegates explicitly chose to bind the Legislature to make monies available to 'carry into effect' any successful initiative petition unless the law is repealed").

That the delegates who wrote Article 48 did not envision control over taxes being taken from the

Legislature is further evidenced by the contemporaneously enacted Article 63, which "describes the process by which the General Court appropriates, i.e., receives and disburses, State revenues," Mazzone, 432 Mass. at 522, and which requires the Legislature to match spending and revenues. Supra at 12. This Court has explained that Article 63 reflects a "general intent . . . to centralize the financial affairs of the Commonwealth in its own treasury and to place responsibility for their control in the General Court." Opinion of the Justices (1937), 297 Mass. at 580 (emphasis added).[11] Allowing use of an initiative petition to set tax policy in the Constitution – including to lower tax rates and thus diminish tax revenues – would fundamentally undermine the Legislature's Article 63 "responsibility" to manage

[11] Notably, prior attempts to impose a graduated income tax have assumed that laws, not the Constitution, must be used to establish specific taxes. In 1994, an initiative petition proposed amending Article 44 to remove the uniformity requirement. The majority report of the Joint Committee on Taxation explained that "no rates have yet been established" in the Challenged Initiative because "a General Law change cannot be included with a constitutional change." JA 287. The minority report similarly stated that because the proposal "is a constitutional petition, it cannot include the General Law changes necessary to specifically implement a graduated tax." JA 289. To address this, a separate statutory petition setting specific tax rates was submitted. JA 274-283.

"the financial affairs of the Commonwealth," by potentially cutting the taxes on which the Legislature had been depending. We know from the Debates that the delegates did not intend to diminish the Legislature's fiscal authority on the spending side, and there is no evidence the delegates intended to diminish it on the revenue side either.

2. In prior cases involving statutory reform initiatives with linked revenue-generating and spending components (see supra at 26 & n. 5), and in its decision concerning Proposition 2 ½, the Court has suggested that Article 48 does not bar initiative petitions with respect to taxation. Tax Equity Alliance, 401 Mass. at 314-16 (discussing "State revenue legislation" (emphasis added)); Massachusetts Teachers Ass'n, 384 Mass. at 226 & n. 15 (discussing "income tax legislation" (emphasis added)). None of those cases, however, involved the introduction of a specific tax or tax rate into the Constitution, where it cannot be altered by the Legislature. As the Court has recognized in the spending context, constitutional amendments pose far different separation-of-powers concerns than mere statutes, which always are subject to repeal or amendment by the Legislature. Supra at

36-37. Thus, there is no precedent for allowing on the ballot an initiative petition to amend the Constitution with respect to taxation.

The risk of the Commonwealth's finances being undermined by initiative petitions to amend the Constitution that take control of tax policy away from the Legislature is no mere hypothetical. For example, in 2000, voters approved a statutory initiative petition that proposed to cut the personal income tax rate to 5% from 5.85% over three years. 2000 Mass. Acts and Resolves c. 343 § 1. Shortly after the initiative passed, however, the State's economy went into recession, resulting in lower tax revenue and greater demand for state services. Rather than allow the tax cut to deepen the State's budget crisis, the Legislature revised the law to provide for annual reductions in the income tax rate only if the State's economy met certain benchmarks. 2002 Mass. Acts and Resolves c. 186 §§ 13, 14. Had the 2000 initiative introduced an amendment to the Constitution, the Legislature would have been powerless to so quickly respond to the recession by such statutory changes.

3. Finally, as with spending, the governance problems inherent in the Challenged Initiative would

be magnified many times over if this Initiative inspires a parade of future initiatives, each seeking to amend the Constitution to cap or eliminate taxes on some favored group, or to increase taxes on unpopular industries or groups of individuals. Indeed, a patchwork system under which certain groups have the taking of their property through taxation locked into the Constitution, while others need only advocate a statutory amendment to have their taxes reduced, conceivably could give rise to a due process or equal protection challenge under either Massachusetts or federal law. To avoid the constitutional question, the Court should read any ambiguity in Article 48 to preclude initiative petitions to amend the Constitution to set a tax. See Commonwealth v. Crosscup, 369 Mass. 228, 231 (1975) (interpretations that "avoid[] constitutional doubt" are favored). As has been the case since our founding, taxes should remain a matter of statutory law.

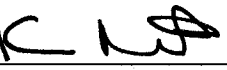
CONCLUSION

For any or all of the foregoing reasons, the Court should declare that the Challenged Initiative does not comply with the requirements of Article 48 and order its exclusion from the November 2018 ballot.

Respectfully submitted,

Plaintiffs-Appellants

By their attorneys,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(b), 16(e), 16(f), 16(h), 18, and 20.

Dated: December 11, 2017

Kevin P. Martin

CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for Plaintiffs-Appellants, hereby certify that I have served two copies of this Opening Brief and of the Joint Appendix by causing them to be delivered by hand and email to counsel for Defendants-Appellees and Intervenor-Defendants-Appellees this 11th day of December, 2017:

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