SJC-13257

CHRISTOPHER R. ANDERSON & others[1] vs. ATTORNEY GENERAL & others.[2]

Suffolk. May 4, 2022. - June 22, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Constitutional Law, Amendment of the Constitution, Taxation, Income tax. Attorney General. Secretary of the Commonwealth. Taxation, Income tax.

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[1] Nick Boldyga, David DeCoste, Colleen Garry, Marc Lombardo, Cece Calabrese, Irina Aguirre, Pascal Aguirre, Robert Ash, Jr., Gordon Bennett, Judith Anne Bevis, Robert H. Bradley, Ronald Brooks, Tony Burr, Gary Campbell, Christopher Carlozzi, John C. Childs, William Clafin, Fourth, Frederic M. Clifford, Paul Craney, Michael M. Davis, Elizabeth Harmer Dionne, Michael D'Onofrio, Walter Downey, Denise A. Doyle, Zhanna Drogobetsky, Peter Goedecke, Jeffrey Gordon, Rick Green, Timothy Francis Hegarty, Charles C. Hewitt, Third, Lucile Hicks, James S. Hughes, Harvey Hurvitz, Matthew P. Jordan, Michael Kane, Robert S. Kaplan, Joshua Katzen, Gary Kearney, Mark Latina, Jake Layton, Pamela Layton, William J. Lundregan, Third, Eileen McAnneny, Joel P. Murray, Tom Palmer, Adam Portnoy, Elizabeth Powell, Robert Reynolds, Grant Schaumburg, Roger Servison, James Stergios, Lawrence Stifler, Frank Wezniak, and Pendleton P. White, Jr.

[2] Secretary of the Commonwealth; Jose Encarnacion, Deborah Frontierro, Nazia Ashraful, Meg Wheeler, John M. Kyriakis, Ziba Cranmer, Keith Bernard, and Zayda Ortiz, interveners.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on January 27, 2022.

The case was reported by Lowy, J.

Kevin P. Martin (Jordan Bock & Jenna Welsh also present) for the plaintiffs.
Robert E. Toone, Assistant Attorney General (Anne Sterman & Adam Hornstine, Assistant Attorneys General, also present) for the defendants.
Thomas O. Bean, for the interveners, submitted a brief.
The following submitted briefs for amici curiae:
Michael Williams for Beacon Hill Institute for Public Policy Research.
John Pagliaro & Daniel B. Winslow for New England Legal Foundation.
Patrick Strawbridge & James P. McGlone for Greater Boston Chamber of Commerce.
Daniel P. Ryan, Caroline A. Kupiec, & Jillian Friedmann for PioneerLegal, LLC.

LOWY, J. Article 48 of the Amendments to the Massachusetts Constitution provides for two processes by which an amendment to our Constitution may be proposed, submitted to the people, and ultimately voted upon. One of these processes begins with a proposal from voters of the Commonwealth, see art. 48, The Initiative, II, § 3, as amended by art. 74 of the Amendments, and the other begins with a proposal from a State legislator, see art. 48, The Initiative, III, § 2. "A proposal for amendment to the constitution introduced into the general court by initiative petition [i.e., by voters] shall be designated an initiative amendment, and an amendment introduced by a member of

either house shall be designated a legislative substitute or a legislative amendment." Art. 48, The Initiative, IV, § 1.

This case involves the latter: a legislative amendment that would impose a tax on that portion of annual incomes over $1 million, to be used, subject to appropriation by the Legislature, for education and transportation purposes. In preparation for the submission of this amendment to voters, the Attorney General and the Secretary of the Commonwealth (Secretary) have prepared informational materials, which will be distributed across the Commonwealth. See art. 48, The Initiative, II, § 3, as amended by art. 74; G. L. c. 54, § 53. The plaintiffs here argue that some of these materials -- specifically, a concise summary of the legislative amendment and one-sentence statements describing the effects of a "yes" vote and a "no" vote -- are unfair and misleading and therefore constitutionally and statutorily defective. We disagree.[3]

Background. Article 44 of the Amendments to the Massachusetts Constitution currently authorizes the Legislature to impose a tax "at different rates upon income derived from different classes of property" but requires that such a tax "be levied at a uniform rate throughout the [C]ommonwealth upon

[3] We acknowledge the amicus briefs submitted by the Beacon Hill Institute for Public Policy Research, the New England Legal Foundation, the Greater Boston Chamber of Commerce, and PioneerLegal, LLC.

incomes derived from the same class of property." That is, the State Constitution prohibits the imposition of a graduated income tax on Massachusetts taxpayers.

Since art. 44 was ratified in 1915, there have been six unsuccessful attempts to amend the Constitution to allow for a graduated income tax. See Anderson v. Attorney Gen., 479 Mass. 780, 782-783 (2018) (Anderson I). In the first five of these attempts, a proposed amendment was submitted to and rejected by voters. In 2015, the Attorney General certified an initiative petition, which constituted the sixth attempt to amend art. 44 and authorize a graduated income tax. See id. at 783-784. Voters, including the lead plaintiff here, challenged that certification, arguing that the initiative petition failed the "related subjects requirement" of art. 48, The Initiative, III, § 3, as amended by art. 74, which requires that "initiative petitions contain only subjects that are 'related' or 'mutually dependent.'" Id. at 787. We agreed and excluded the question from the November 2018 ballot. Id. at 802.

In 2019, Representative James J. O'Day introduced in the Legislature a "[p]roposal for a legislative amendment to the Constitution to provide resources for education and transportation through an additional tax on incomes in excess of one million dollars." As required by art. 48, a majority of legislators at two successive joint sessions -- the first in

2019 and the second in 2021 -- voted to approve the proposed amendment.[4] Consequently, the Secretary intends to place this legislative amendment on the ballot for the upcoming Statewide election in November 2022.

The text of this legislative amendment almost is identical to the text of the initiative amendment proposed in 2015. See Anderson I, 479 Mass. at 784. However, unlike the 2015 amendment, the instant amendment was proposed through the legislative process. The related subjects requirement of art. 48 applies only to initiative petitions, not to legislative amendments.[5] See art. 48, The Initiative, II, § 3, as amended by

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[4] A joint session refers to the meeting of both branches -- the Senate and the House of Representatives -- of the Legislature. General Court of the Commonwealth, Glossary, https://malegislature.gov/StateHouse/Glossary#J [https://perma.cc/E7S4-Y32G]. Because State senators and representatives are elected biennially, see art. 82 of the Amendments to the Massachusetts Constitution; G. L. c. 54, § 62, a new joint session convenes every two years.

[5] This distinction between initiative amendments and legislative amendments both reflects the different processes by which they are submitted to the voters and accords with the purpose behind the relatedness requirement.

First, in the same way that voters may propose new laws, initiative amendments are proposed through initiative petitions, which the Attorney General must certify before presenting to the Legislature and, ultimately, to the public. See art. 48, The Initiative, II, § 3, as amended by art. 74. As part of this certification process, the Attorney General must conclude that an initiative petition meets the relatedness requirement of art. 48. Id. As discussed supra, legislative amendments instead are proposed through the legislative process, and the Attorney

art. 74. Accordingly, our holding in Anderson I, which was grounded solely on the relatedness requirement, does not control the instant case.

The legislative amendment would add the following paragraph to the end of art. 44, which currently prohibits the imposition of a graduated income tax on Massachusetts taxpayers:

> "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 [a]rticle, there shall be an additional tax of [four] 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 [C]ommonwealth's highest income taxpayers, this $1,000,000 (one million dollars) income level shall be adjusted annually to reflect any increases in the cost of living by the same method used for [F]ederal income tax brackets. This paragraph shall apply to all tax years beginning on or after January 1, 2023."

General is not required to provide certification at any stage of that process. Id.

Second, the relatedness requirement came about because "the drafters of art. 48 were concerned that initiatives could confuse voters, or could be used for 'logrolling.'" Oberlies v. Attorney Gen., 479 Mass. 823, 830 (2018). "'Logrolling' refers to the bundling of multiple provision such that they all gain approval, even if one or more of them would, standing alone, be rejected." Id. Where voters themselves are crafting initiative petitions, and they then engage in logrolling, there is no mechanism for accountability to their peers or continued dialogue among parties. However, where legislators are those involved in drafting a measure, and they engage in logrolling, that fact is a matter for the political process.

The Attorney General proposes the following summary:

> "This proposed constitutional amendment would establish an additional 4% [S]tate 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 [F]ederal income-tax brackets, to reflect increases in the cost of living. Revenues from this tax would be used, subject to appropriation by the [S]tate 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." (Emphasis added.)

And the Attorney General and the Secretary propose the following "yes" and "no" statements:

> "A YES VOTE would amend the [S]tate Constitution to impose an additional 4% tax on that portion of incomes over one million dollars to be used, subject to appropriation by the [S]tate Legislature, on education and transportation" (emphasis added).
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> "A NO VOTE would make no change in the [S]tate Constitution relative to income tax."

The plaintiffs take issue specifically with the portions of the summary and "yes" and "no" statements that refer to the use of the proposed additional tax revenue for education and transportation purposes, "subject to appropriation by the [S]tate Legislature." The plaintiffs note that State spending on education and transportation has, for decades, exceeded the additional tax revenue expected to be generated by the proposed amendment. Accordingly, the plaintiffs claim that, if the amendment were approved, "the Legislature [could] move funding around -- shift current spending on education and transportation

to some different purpose, while swapping in the new tax dollars -- and thereby use the additional revenues raised by the new tax to increase spending on whatever it wants." The plaintiffs contend that as written, the summary and "yes" and "no" statements mislead voters by suggesting otherwise. We disagree.

Discussion. 1. Attorney General's summary. "Article 48, The Initiative, II, § 3, as amended by art. 74, requires the Attorney General to prepare a 'fair, concise summary' of each" ballot measure. Hensley v. Attorney Gen., 474 Mass. 651, 659 (2016). "The summary is one of the key pieces of information available to voters," appearing both in the Information for Voters guide prepared and distributed by the Secretary prior to the election and on the ballot itself. Id. at 659-660. See art. 48, The Initiative, II, § 3, as amended by art. 74. "To be 'fair,' a summary 'must not be partisan, colored, argumentative, or in any way one sided, and it must be complete enough to . . . giv[e] the voter . . . a fair and intelligent conception of the main outlines of the measure.'" Hensley, supra at 660, quoting Abdow v. Attorney Gen., 468 Mass. 478, 505 (2014). However, "[t]he Attorney General is not required to conduct a comprehensive legal analysis of the measure, including possible flaws." Hensley, supra, quoting Abdow, supra. Indeed, the Attorney General must weigh the need for sufficient completeness against the requirement of conciseness. Hensley, supra at 661.

See id., quoting Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 243 (1946) ("Before its amendment by art. 74 in 1944, the original art. 48 required the Attorney General to provide a 'description' of the proposed act . . . . When art. 48 was amended and the word 'description' was replaced with the phrase 'fair, concise summary,' 'the intention was to relax the requirements which have been found implicit in the word description. Conciseness is emphasized in art. 48 as amended, and conciseness and completeness are often incompatible'" [alteration omitted]). Given the balancing act required, as well as the fact that the Attorney General is a "constitutional officer with an assigned constitutional duty," we give deference to the Attorney General's exercise of discretion in crafting a summary, Hensley, supra, quoting Abdow, supra at 506, and "will not substitute our judgment for that of the Attorney General's over a 'matter of degree,'" Associated Indus. of Mass. v. Secretary of the Commonwealth, 413 Mass. 1, 11 (1992) (AIM), quoting Massachusetts Teachers Ass'n v. Secretary of the Commonwealth, 384 Mass. 209, 229-230 (1981).

Here, the plaintiffs raise a single issue with respect to the Attorney General's summary, namely that the summary impermissibly misleads voters by suggesting that, to the extent additional revenue were appropriated under the proposed legislative amendment, such an appropriation would lead to an

increase in education and transportation spending. Plaintiffs contend that such an increase in education and transportation spending is not, in fact, guaranteed, as the Legislature could use the monies newly appropriated under the amendment to replace prior sources of education and transportation spending, thereby keeping that spending constant, and then redirect those prior sources of spending elsewhere, thereby increasing State expenditures in a wholly different area.[6]

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[6] The plaintiffs' reliance on Opinion of the Justices, 271 Mass. 582, 589-592 (1930), and Sears v. Treasurer & Receiver Gen., 327 Mass. 310, 325-326 (1951), is misplaced. First, the plaintiffs misapply Opinion of the Justices, 271 Mass. at 589-592, by stating that "th[is] [c]ourt wrote that the initiative petition itself was . . . 'easily susceptible of being misunderstood.'" While we did use that phrase in that decision, we applied it not to the measure as a whole but rather to the "title of the act," which was included in the Attorney General's summary. Id. at 589. Moreover, we concluded that the ambiguity of the title, "standing alone," would not render the proposed summary "defective." Id. at 590. Rather, it was the presence of other deficiencies -- such as the Attorney General's failure to mention several substantive provisions of the measure -- that proved fatal. Id. at 590-592 (summary "contain[ed] no reference to the highly responsible duties imposed by the proposed bill upon State officers" and also inaccurately described which statutes measure would repeal).

Likewise, our decision in Sears, 327 Mass. at 325-326, rested on the Attorney General's failure to include in the summary key provisions of the measure. There, the Attorney General had attempted to summarize "eight pages of rather fine print" in a single sentence, leading us to conclude that "the so called 'summary' is no more than would fairly serve as a title for the measure." Id.

In the instant case, the plaintiffs do not allege that there are similar deficiencies in the summary. Their argument

Our decisions in AIM, 413 Mass. at 10, and Gilligan v. Attorney Gen., 413 Mass. 14, 19-20 (1992), are instructive on this issue. Each concerned an initiative petition proposing statutes that would raise revenue through an excise and channel that revenue into a specific fund, to be spent on certain enumerated purposes subject to appropriation by the Legislature.[7] See Gilligan, supra at 15-16; AIM, supra at 2-4. In both cases, the plaintiffs argued that the Attorney General's summaries could mislead voters because they failed to explain adequately that, according to the plaintiffs' interpretation of the proposed statutes, the Legislature might not be obligated to spend the money as designated. See Gilligan, supra at 19-20; AIM, supra at 12.

We held that the summaries in both cases satisfied art. 48's requirements. See Gilligan, 413 Mass. at 19-20; AIM, 413

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is that the Attorney General failed to explain more comprehensively the implications of the measure, not that the Attorney General omitted a key provision. Accordingly, our decisions in Opinion of the Justices and Sears are not dispositive or applicable here.

[7] We acknowledge that Associated Indus. of Mass. v. Secretary of the Commonwealth, 413 Mass. 1, 2 (1992) (AIM), and Gilligan v. Attorney Gen., 413 Mass. 14, 14-15 (1992), involved proposed statutes and not, as in the instant case, a proposed constitutional amendment. This distinction was quite relevant to our analysis whether the proposed statute in AIM was, in contravention to art. 48, a "specific appropriation," AIM, supra at 5-9, but that portion of the opinion has no bearing on the question facing us today regarding the adequacy of the Attorney General's summaries, see id. at 11-12.

Mass. at 12. Each "track[ed] the basic language of the measure" by accurately describing that the revenues were subject to appropriation, and, far from being misleading, each summary "apprise[d] the voters both that the expenditure of monies for the stated purposes would be contingent on ('subject to') an action of the Legislature, and exactly what that action is ('appropriation')." AIM, supra. See Gilligan, supra. So too here: the summary closely tracks the language of the proposed amendment and thus "fairly informs voters" of its operation. Gilligan, supra at 20.

Moreover, in both cases we held that the summaries need not address the plaintiffs' assertions that the raised revenues could, in theory, be spent by the Legislature for nondesignated purposes. See Gilligan, 413 Mass. at 19-20; AIM, 413 Mass. at 12. We reasoned that, where the text of the proposed statutes did not expressly address that possibility, "[n]othing in art. 48 requires the summar[ies] to include legal analysis or an interpretation."[8] AIM, supra. See Gilligan, supra.

That reasoning is equally applicable to the case at bar. The proposed amendment does not address how the Legislature may

[8] That, in a brief as a party to Anderson I, the Attorney General offered legal analysis regarding art. 48's prohibition against specific appropriations is therefore of no moment here, where we are concerned solely with her duty to prepare an adequate summary.

spend monies other than those raised by the amendment. Consequently, the Attorney General's summary need not opine on whether, as plaintiffs contend, monies that historically have been spent on education and transportation could, at some future point, be spent elsewhere. The summary need only describe the amendment itself; we hold that it does so fairly, in compliance with art. 48.[9]

2. "Yes" and "no" statements. General Laws c. 54, § 53, provides, in relevant part, that the Secretary "shall cause to be printed and sent to all residential addresses and to each voter . . . fair and neutral [one]-sentence statements describing the effect of a yes or no vote prepared jointly by the attorney general and the state secretary." It further provides that after the statements are published in the Massachusetts Register, and upon the timely petition of fifty or more voters, this court may require the Attorney General and the Secretary to amend these "yes" or "no" statements if they are "false" or "misleading." Id. We have recognized "that the one-sentence statements cannot, and should not, attempt to describe all the elements of a proposed measure" because "[t]hat would

[9] Further, as we noted in Gilligan, "the full text of the measure will be made available to voters, together with partisan arguments for and against the measure." Gilligan, 413 Mass. at 20, citing art. 48, General Provisions, IV, as amended by art. 74; G. L. c. 54, §§ 53-54.

undermine their usefulness as a shorthand reference for voters." Dunn v. Attorney Gen., 474 Mass. 675, 688 n.12 (2016). We may order an amendment to the one-sentence statement "'only if it is clear' that the statement 'in question is false, misleading, or inconsistent with' the statute's requirements." Id., quoting G. L. c. 54, § 53. Moreover, as with the Attorney General's summaries, we afford deference to "the Attorney General's and the Secretary['s] reasonable judgments in deciding what to include in the one-sentence statements." Dunn, supra.

The plaintiffs claim that the instant "yes" and "no" statements are misleading for the same reasons that they claim the instant summary is unfair. They seek to add language purportedly clarifying that, at the discretion of the Legislature, the potential revenue from the proposed tax might or might not actually increase State education and transportation spending. For the reasons discussed supra, we likewise disagree with the plaintiffs' contention that the "yes" and "no" statements are false or misleading. Consequently, we decline to exercise our power to rewrite the statements.

3. Timing of publication. Finally, the single justice asked the parties to also brief the issue of when the Attorney

General and the Secretary should release the summary and "yes" and "no" statements for legislative amendments.[10]

The plaintiffs argue that the timeline for legislative amendments should be that which we suggested for initiative petitions in Hensley, 474 Mass. at 671-672, and Dunn, 474 Mass. at 685-687. In Hensley, supra at 671, "we ask[ed] the Attorney General and the Secretary to consider preparing and publishing the title and one-sentence statements under [G. L. c. 54, § 53,] no later than twenty days in advance of February 1 of the election year," and in Dunn, supra at 687, we suggested a similar timeline as to the Attorney General's summaries drafted pursuant to art. 48, The Initiative, III, § 3, as amended by art. 74. Both cases involved initiative petitions, as opposed to legislative amendments.

The defendants, instead, advocate the following:

> "[I]f a legislative amendment receives a second vote of approval by a joint session of the Legislature by March of an election year, the [materials] for the measure should be prepared in accordance with the deadline for all titles and

[10] The plaintiffs commenced the present action in the county court before the materials at issue had been released, preemptively challenging them. At that time, the single justice took no action and instead urged the defendants to release the materials in a timely fashion. After the release of the materials, the plaintiffs amended their initial complaint, and eight voters who supported the legislative amendment intervened. The single justice reserved and reported the case to the full court and asked the parties to brief additionally the issue of when the Attorney General and the Secretary should be required to publish the informational materials for legislative amendments.

> one-sentence statements set forth in G. L. c. 54, § 53. If a legislative amendment is finally approved later in an election year, [the Attorney General and the Secretary] should prepare those materials as soon as possible, with any litigation to follow in the county court."

They also note that the Legislature has not chosen to amend the deadline in G. L. c. 54, § 53, despite our explicit invitation in Hensley, 474 Mass. at 672.

We endorse the defendants' proposed timeline. A legislative amendment requires an affirmative vote at two successive joint sessions of the Legislature, and, despite our invitation, the Legislature has opted not to impose statutorily a more abbreviated timeline on this process. While we can request that parties strive for a different schedule, where legislative amendments are at issue, it is not appropriate for us to impose a schedule that could be at odds with the pace of a fulsome legislative process, however the Legislature chooses to engage in that process.

Conclusion. The matter is remanded to the county court for entry of a judgment declaring that the Attorney General's summary is in compliance with the requirements of art. 48, as amended by art. 74, and that the Attorney General and the Secretary of the Commonwealth's one-sentence statements describing the effects of a "yes" vote and a "no" vote are in compliance with the requirements of G. L. c. 54, § 53.

So ordered.