



Kevin P. Martin
+1 617 570 1186
kmartin@goodwinlaw.com

Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210

goodwinlaw.com
+1 617 570 1000

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Attorney General Maura Healey
Office of the Attorney General
One Ashburton Place, 20th Floor
Boston, MA 02108

The Honorable William Francis Galvin
Secretary of the Commonwealth
One Ashburton Place, Room 1705
Boston, MA 02108

Dear Attorney General Healey and Secretary Galvin:

I am writing, on behalf of a group of clients, concerning a proposal to amend the state constitution that will be appearing on the November 2022 ballot, and in particular concerning the Attorney General's duty to draft a "fair, concise summary" for any proposal that will appear on the ballot, and the Attorney General's and Secretary's joint duty to prepare "fair and neutral 1-sentence statements describing the effect of a yes or no vote."

As you know, in the 2019 and 2021 Constitutional Conventions the Massachusetts Legislature advanced a proposed constitutional amendment that would impose a surtax of four percent on incomes in excess of \$1 million, with the revenue raised spent "only" on public education and transportation (the "Graduated Income Tax Amendment"). The Graduated Income Tax Amendment states, in full:

Article 44 of the Massachusetts Constitution is hereby amended by adding the following paragraph at the end thereof:

To provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges and public transportation, all revenues received in accordance with this paragraph shall be expended, subject to appropriation, only for these purposes. In addition to the taxes on income otherwise authorized under this Article, there shall be an additional tax of 4 percent on that portion of annual taxable income in excess of \$1,000,000 (one million dollars) reported on any return related to those taxes. To ensure that this additional tax continues to apply only to the



Attorney General Maura Healey
The Honorable William Francis Galvin
November 16, 2021
Page 2

commonwealth's highest income taxpayers, 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, 2023.

The Graduated Income Tax Amendment is substantively identical to Initiative Petition No. 15-17 (the "Initiative Petition"), which the Attorney General certified for the 2018 ballot. In *Anderson v. Attorney General*, 479 Mass. 780 (2018), the Supreme Judicial Court held that the Initiative Petition violated the "relatedness" requirement of Article 48, and therefore the Initiative Petition did not appear on the 2018 ballot.

As of the date of this letter, neither the summary of the ballot question required under Article 48 of the Amendments to the Massachusetts Constitution (as amended by Article 74), nor the "yes" and "no" statements required under M.G.L. c. 54, § 53, have been released to the public. We understand that, in the ordinary course, it may be some weeks or months before they are.

We do know, however, what summary and "yes" statement were provided with respect to the substantively identical Initiative Petition in 2018. As you will recall, the summary for the Initiative Petition stated (with emphasis added):

This proposed constitutional amendment would establish an additional 4% state income tax on that portion of annual taxable income in excess of \$1 million. This income level would be adjusted annually to reflect increases in the cost of living by the same method used for federal income-tax brackets. *Revenues from this tax would be used, subject to appropriation by the state Legislature, only for public education, public colleges and universities, the repair and maintenance of roads, bridges, and public transportation.* The proposed amendment would apply to tax years beginning on or after January 1, 2019.

And the "yes" statement for the Initiative Petition stated (with emphasis added): "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.*"

By this letter, my clients are asking you not to use the same summary and "yes" statement for the Graduated Income Tax Amendment in 2022 because they are not fair and are misleading to voters. Each of the summary and "yes" statement suggest that the additional tax revenues raised by the Graduated Income Tax Amendment can be used to increase spending only on education and transportation, and not to increase spending on other purposes. Yet, as the Attorney General recognized in her brief to the



Attorney General Maura Healey
The Honorable William Francis Galvin
November 16, 2021
Page 3

Supreme Judicial Court in *Anderson*, the Graduated Income Tax Amendment would *not* actually require the incrementally higher tax revenues to be used to increase spending on education and/or transportation, as opposed to other purposes. As the Attorney General explained in that brief, “[i]n Fiscal Years 2014 through 2017, [education and transportation] were collectively funded at a level fluctuating from around \$10 billion to over \$11 billion.” The Graduated Income Tax Amendment, on the other hand, “would generate annually an amount ranging from \$1.6 to \$2.2 billion, with [the] best estimate at about \$1.9 billion.” Therefore, the brief explained:

The Legislature would retain ultimate discretion over spending choices for the ... 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). 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. Sec’y of Admin. & Fin.*, 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).

As the Attorney General’s brief continued, the Graduated Income Tax Amendment will not impose any *practical* limit on what the Legislature can do with the incremental tax revenues “[u]nless and until the Legislature lowered its historical spending in [education and transportation] by 80% or more,” a hypothetical that the brief described as a “remote” possibility.

Thus, the entire approximately \$2 billion of *incremental* tax revenues raised by the Graduated Income Tax Amendment could be steered to other purposes, leaving education and transportation spending levels untouched. The Legislature clearly understands this feature of the Amendment: during the 2019 Constitutional Convention a delegate proposed to amend the Graduated Income Tax Amendment to require that the incremental new tax revenues be used only to increase education and transportation spending. That proposal was overwhelmingly defeated, by a 40-to-156 vote. This shows that the Legislature intends to retain—and presumably to exercise—full discretion over how to spend the incremental new tax revenues, including the discretion to spend them entirely on subjects other than education and transportation.

Given how the Graduated Income Tax Amendment actually works, the 2018 summary and “yes” statement are misleading to voters. Nowhere in the summary or “yes” statement is there an explanation that the legislature could “reduce funding in specified budget categories from other sources and replace



Attorney General Maura Healey
The Honorable William Francis Galvin
November 16, 2021
Page 4

it with the new surtax revenue,” such that education and transportation spending are untouched even as spending on other purposes increases. And it will be the rare voter who is familiar with SJC precedents such as *American Cancer Society* and *Mitchell*, cited by the Attorney General in 2018 to explain to the SJC how the Amendment really works.

While the 2018 language’s misleading nature is clear on its face, we decided to test the issue with actual voters. We therefore hired a leading polling and analytics firm to determine how voters perceive the Graduated Income Tax Amendment. In the poll, respondents were:

- (1) presented with the summary and “yes” and “no” statements that had been prepared for the 2018 ballot;
- (2) asked, after hearing that summary and those statements, how they likely would vote on the Graduated Income Tax Amendment;
- (3) provided with the language from the Attorney General’s *Anderson* brief quoted above, explaining that the Graduated Income Tax Amendment leaves the Legislature with “ultimate discretion” over how to spend the incremental tax revenues, because “the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue”;
- (4) asked, after hearing the Attorney General’s explanation from *Anderson*, whether they felt misled by the 2018 summary and “yes” statement; and
- (5) asked, based on hearing the Attorney General’s explanation from *Anderson*, whether that affected how they might vote.

The results were unambiguous and decisive: after hearing the Attorney General’s explanation from her *Anderson* brief, an astonishing 72% of voters, from across the political spectrum, felt misled by the 2018 summary and “yes” statement. The polling also showed that the misleading nature of the summary and “yes” statement has a material impact on voter behavior, with many voters switching how they are likely to vote. (The results of this poll will be released publicly, but I also would be happy to provide the full poll results to you upon request.)

Those poll results thus confirm that the 2018 summary and “yes” statement, to the extent they single out education and transportation spending and dangle them in front of voters, are not fair and are materially misleading. There can be no question that they therefore violate the requirements of Article 48 and Chapter 54.



Attorney General Maura Healey
The Honorable William Francis Galvin
November 16, 2021
Page 5

To fix this problem, we propose that, in the 2022 summary and “yes” statement, you make the following changes from the 2018 summary and “yes” statement, incorporating language from the Attorney General’s *Anderson* brief:

- Add, as a new fourth sentence in the summary, the following language: “The Legislature could choose, however, 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.”
- Revise the “yes” statement to read: “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.”

We believe that this additional language, which comes almost verbatim from the Attorney General’s brief in *Anderson*, would address the concerns we have raised.

If such clarifying language is not used, then our clients are likely to challenge the summary and “yes” statement before the Supreme Judicial Court. In that regard, we remind you that in *Hensley v. Attorney General*, 474 Mass. 651 (2016), the Supreme Judicial Court wrote that all such challenges should be brought “not later than February 1 of the election year.” *Id.* at 671. To make that deadline possible, the Court “ask[ed] the Attorney General and the Secretary to consider preparing and publishing the title and one-sentence statements under § 53 no later than twenty days in advance of February 1 of the election year,” *i.e.*, by January 12, 2022. *Id.*

In order to facilitate orderly litigation regarding any challenge to the proposed summary and statement, we ask that you release the proposed summary and statement as soon as possible, and at the very latest by January 12, 2022, as requested by the Supreme Judicial Court in *Hensley*.

If you do not release a proposed summary and/or statement by January 12, 2022, we will assume that you plan to use the same summary and statement you released regarding the 2018 Initiative Petition.



Attorney General Maura Healey
The Honorable William Francis Galvin
November 16, 2021
Page 6

Thank you in advance for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read 'KPM', with a long horizontal flourish extending to the right.

Kevin P. Martin

Cc: Christopher R. Anderson
President, Massachusetts High Technology Council
chris@mhtc.org

Juliana Rice
General Counsel, Office of the Attorney General
juliana.rice@state.ma.us