

August 18, 2023

Attorney General Andrea J. Campbell
Office of the Massachusetts Attorney General
1 Ashburton Place
Boston, MA 02108

Dear Attorney General Campbell:

We are writing, on behalf of ourselves and the organizations we represent, to urge you not to certify Initiative Petition 23-36, “A Law Requiring that Districts Certify that Students have Mastered the Skills, Competencies and Knowledge of the State Standards as a Replacement for the MCAS Graduation Requirement.” The Initiative Petition is deceptively short. It states:

Section 1D of chapter 69 of the General Laws, as appearing in the 2022 Official Edition, is hereby amended by striking from the first sentence of sub-paragraph (i) the words, “, as measured by the assessment instruments described in section one I.” and replacing them with the following: “by satisfactorily completing coursework that has been certified by the student’s district as showing mastery of the skills, competencies, and knowledge contained in the state academic standards and curriculum frameworks in the areas measured by the MCAS high school tests described in section one I administered in 2023, and in any additional areas determined by the board.”

This Initiative Petition, however, contains two aspects that present voters with very different public policy questions, and therefore it fails the relatedness requirement of Article 48 of the Amendments to the Massachusetts Constitution.

First, the Initiative Petition eliminates the current requirement of G.L. c. 69, § 1D that every student in Massachusetts pass the Massachusetts Comprehensive Assessment System test (“MCAS”) as a condition for high school graduation. This part of the Initiative Petition acts to limit the Commonwealth’s current exercise of control over local graduation requirements. Second, the Initiative Petition dictates to local school districts how the “competency determination” as a requirement for graduation must instead be made: solely based on a student’s “satisfactorily completing coursework” that is certified by the student’s school district as demonstrating “mastery” over a range of subject areas.¹

In contrast to the Initiative Petition’s first aspect, its second aspect acts as a limit on local decision-making, precluding a city or town that still wants to rely on something *more* than a student’s “satisfactorily completing coursework” as an indicator of competency—including but not limited to MCAS scores—from doing so. Yet local control over schools is a longstanding public policy

¹ The Initiative Petition does not specify how school districts are to “certify” that a student’s performance in any particular course demonstrates “mastery” of the subject matter that MCAS was designed to test. Any certification should involve the kind of validation process that the Commonwealth spent many millions of dollars over many years developing: the MCAS itself.

principle of many voters that is not linked to any particular method of measuring students' academic performance. A given voter might favor eliminating a statewide mandate that students pass the MCAS to graduate, but believe that local school boards should have the freedom to adopt a standardized-testing requirement in addition to, or in lieu of, "satisfactorily completing coursework." Such a voter is placed in an impossible position, since a vote for the Initiative Petition is a vote both to eliminate the statewide MCAS mandate and to preclude local governments from choosing to rely on MCAS scores.² The Initiative Petition therefore fails the relatedness requirement as it has been articulated by the Supreme Judicial Court, and the Attorney General should not certify it for inclusion on the 2024 ballot.

Legal Background. As you know, Article 48 requires, among other things, that a ballot measure proposed by initiative petition "contain[] only subjects ... which are related or which are mutually dependent." Art. 48, The Initiative, II, § 3, as amended by art. 74.

The relatedness requirement ensures that any initiative petition "express[es] an operational relatedness among its substantive parts" to "permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy." *Carney v. Att'y Gen.*, 447 Mass. 218, 230-31 (2006). This is necessary because, "[u]nlike a legislator, the voter has no opportunity to modify, amend, or negotiate the sections of a law proposed by popular initiative," or to "sever the unobjectionable from the objectionable." *Id.* at 230. Instead, "[h]e or she must vote the measure 'up or down' as one piece." *Id.* For this reason, the petition must be "sufficiently coherent to be voted on 'yes' or 'no' by the voters." *Id.* at 226. "It is not enough that the provisions in an initiative petition all 'relate' to some same broad topic at some conceivable level of abstraction." *Id.* at 230. Rather, the "crux of the relatedness" requirement is "whether a petition's provisions come together to present voters with a sufficiently coherent or unified policy proposal." *Koussa v. Attorney General*, 489 Mass. 823, 828 (2022).

The SJC has not hesitated to find that initiative petitions presenting voters with two or more distinct public policy questions—one policy that a given voter might support, while reasonably rejecting the other—fail the relatedness requirement, even if those public policy questions could be thought to come within some broadly-defined subject matter area. For example, in *Anderson v. Attorney General*, 479 Mass. 780 (2018), the SJC held that the so-called "millionaire's tax" amendment, which would have imposed a new 4% income surtax and also dictated that the money raised be spent in two specified areas (public education and transportation), failed the relatedness requirement: "a voter who favored a graduated income tax but disfavored earmarking any funds for a specific purpose, for example," would be placed "in the untenable position of choosing which issue to support and which must be disregarded." *Id.* at 799. "Placing voters in the untenable position of either supporting or rejecting two important, but diverse, spending priorities, accompanied, in either case, by a major change in tax policy, is the specific misuse of the initiative process that the related subjects requirement was intended to avoid." *Id.* That was the case, even though one could consider the ballot question's provisions to all relate to "state finances" or "state budgeting."

² The Legislature, of course, could choose to resolve both these public policy questions through the adoption of a statute, but Article 48 precludes an initiative petition that places them both before voters in a single ballot question.

Other examples abound. In *Oberlies v. Attorney General*, 479 Mass. 823 (2018), the SJC affirmed the Attorney General’s decision not to certify measure that would have mandated both minimum nurse-patient ratios and financial disclosure obligations on health care facilities, even though both prongs related to the broad topic of health care administration. In *Gray v. Attorney General*, 474 Mass. 638 (2016), the SJC rejected certification of a measure that would both end the use of common core standards in public education and require the State “to publicly release each year all of the questions and other ‘test items’ included in the prior year’s comprehensive assessment tests” taken by all public school students, even though both prongs related to education. And in *Carney v. Attorney General*, 447 Mass. 218 (2006), the SJC rejected certification of a measure that would both end the dog racing industry in Massachusetts and broaden the criminal statutes that penalized dog fighting, abuse, and neglect, even though all aspects of the measure related broadly to canine welfare.

Analysis. In the case of Initiative Petition 23-36, voters would be confronted with at least two public policy questions and it is easy to imagine a given voter who would support one aspect of the Initiative Petition, while strongly rejecting the other aspect. Accordingly, the Initiative Petition fails the relatedness test under SJC precedent.

First, the Initiative Petition would eliminate the existing requirement of G.L. c. 69, § 1D that a student pass the MCAS for tenth graders as a condition for high school graduation. Section 1D currently states, in relevant part:

The “competency determination” shall be based on the academic standards and curriculum frameworks for tenth graders in the areas of mathematics, science and technology, history and social science, foreign languages, and English, and shall represent a determination that a particular student has demonstrated mastery of a common core of skills, competencies and knowledge in these areas, *as measured by the assessment instruments described in section one I [i.e., the MCAS]*. Satisfaction of the requirements of the competency determination shall be a condition for high school graduation. (emphasis added).

Whether to eliminate a passing score on the MCAS as a statewide graduation mandate is, standing alone, a hotly-debated public policy question. One poll, commissioned by the Fiscal Alliance Foundation, found that 63% of respondents *opposed* eliminating the MCAS as a graduation requirement; a second poll, commissioned by the Massachusetts Teachers Association, found that 74% of respondents *favor* its elimination. See <https://www.masslive.com/news/2023/07/poll-finds-wide-support-for-standardized-testing-as-mass-teachers-try-to-upend-them.html?outputType=amp>. Assuming the truth lies somewhere in between, this is a question over which the voting public is torn.

Second, after eliminating a passing score on the MCAS as a statewide graduation mandate, the Initiative Petition would introduce a *different* statewide mandate in its place. Under the Initiative Petition, a school district could need to determine whether a student has shown a “demonstrated mastery of a common core of skills, competencies and knowledge” only by asking whether the student has “*complet[ed] coursework* that has been certified by the student’s district as showing

mastery of the skills, competencies, and knowledge contained in the state academic standards and curriculum frameworks in the areas measured by the MCAS high school tests described in section one I administered in 2023, and in any additional areas determined by the board.” (emphasis added).

Though it is not explicit about it, through its singular focus on “coursework” the Initiative Petition would preclude an individual school district itself deciding to rely, in whole or part, on a student’s performance on the MCAS (or some other standardized test) in deciding whether the student has “demonstrated mastery of a common core of skills, competencies and knowledge.” Under the Initiative Petition, that “competency determination” for individual students only may be based on their “satisfactorily completing coursework.” Put in simple terms, the determination whether a given student has “demonstrated mastery” can no longer take into account the statewide MCAS examination, but must be left to the grading decisions of a particular student’s particular teachers. Even if a school district wanted to use the MCAS as a safeguard with respect to individual students, the Initiative Petition’s focus on “coursework” would prohibit that.

Whether local school districts should be prohibited from *choosing* to use the MCAS (or some other standardized test) to gauge students’ competency presents a very different public policy question than whether the state should continue to *mandate* use of MCAS to gauge competency. Whatever a voter’s views on the MCAS, local control of public schools is a widely-held public policy principle, embraced by many voters. *E.g.*, <https://www.adi.org/journal/ss01/chapters/chapter18-hiatt-michael.pdf>. The issue of state mandates versus local control of public schools, for example, recently was highlighted by debates over school closings and re-openings and remote learning in response to the pandemic. On the other hand, many voters—including voters who may be opposed to the MCAS in particular—support strong state supervision of local school districts, as reflected in our state Constitution’s guarantee, at the state level, of an adequate education for all children. See *McDuffy v. Sec’y of Exec. Off. of Educ.*, 415 Mass. 545, 606 (1993) (explaining that “[t]he Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level,” and “[w]hile it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty to local governments, such power does not include a right to abdicate the obligation imposed on magistrates and Legislatures placed on them by the Constitution”).

Given the entirely separate public policy debate about the proper balance between statewide and local control of education, it is reasonable to think that some voters who favor eliminating the existing statewide MCAS mandate do so precisely because it is a statewide mandate—because they believe local governments should have greater control over education policy. One can therefore easily imagine a hypothetical voter who would support eliminating the statewide MCAS requirement, but who also believes that local school districts should have the freedom to choose to take account of MCAS results in deciding whether to graduate a student. Such a voter is put to an impossible choice by Initiative Petition 23-36: a “yes” vote eliminates the statewide MCAS mandate while tying local school districts’ hands, while a “no” vote leaves the statewide MCAS mandate in place. As in *Anderson*, “a voter who favored [eliminating the statewide MCAS requirement] but disfavored [tying local districts’ hands], for example,” would be placed “in the untenable position of choosing which issue to support and which must be disregarded.” 479 Mass. at 799.

For at least this reason, Initiative Petition 23-36 fails Article 48's relatedness requirement as the SJC has explicated it. The Attorney General therefore should not certify the question for the 2024 ballot.

Respectfully,

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Karen E. Andreas, *President & CEO, North Shore Chamber of Commerce*
Stephen Clark, *President & CEO, Massachusetts Restaurant Association*
Mary Z. Connaughton, *Chief Operating Officer, Pioneer Institute*
Michael Contompasis, *Superintendent (ret.), Boston Public Schools*
Lucile Hicks, *Fmr. Massachusetts State Senator, 5th Middlesex District*
Jon Hurst, *President, Retailers Association of Massachusetts*
Edward M. Lambert Jr., *Executive Director, Massachusetts Business Alliance for Education*
Pamela Layton, *CEO, 4immune Therapeutics*
Eileen McAnneny, *Senior Fellow in Economic Opportunity, Pioneer Institute*
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