



## **Why the Legislature would likely use the proposed tax amendment as a blank check**

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### **Executive Summary**

The summary of a ballot initiative that would amend the state Constitution and raise income taxes on those earning over \$1 million currently reads: “A YES VOTE would amend the state Constitution to impose an additional 4 percent tax on that portion of incomes over one million dollars to be used, subject to appropriation by the state Legislature, on education and transportation.”

In reality, the money would be far more fungible, and much of it would likely be spent for other purposes.

The proposed constitutional amendment, which is scheduled to appear on the statewide ballot in November, would add an additional tax of 4 percent on annual taxable income in excess of \$1 million reported on any individual return.

In January, a group of 55 taxpayers filed a lawsuit, *Christopher R. Anderson et al v. Maura Healey*, requesting that the Massachusetts Supreme Judicial Court (SJC) declare the summary of the proposed amendment that is scheduled to appear on the November ballot unfair, misleading and inaccurate because it doesn’t inform voters that legislators can simply use surtax revenue to replace cuts to revenues from other sources.

In 2018, the SJC ruled that a nearly identical proposed amendment was unconstitutional because it violated the state Constitution’s ban on citizen-initiated ballot questions that combine unrelated subject matters—in that case, a new graduated income tax and two disparate subjects of spending. No such ban applies here because the ballot question was initiated by the Legislature.

At oral argument in the 2018 case, even the attorney for the Massachusetts Attorney General’s office, who was arguing for the constitutionality of the proposed amendment, said “The Legislature would retain ultimate discretion over spending choices for the additional reason that money is fungible. Because the proposed amendment does not require otherwise, the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue.”

But the best indication that legislators would likely use surtax revenues to backfill cuts to education and transportation comes from the Legislature itself. While debating the proposed amendment in a 2019 constitutional convention, an amendment to the language was proposed that would have ensured that

revenue generated by the proposal would add to, not substitute for, revenue already being spent in those areas. The amendment was rejected by a vote of 6-33 in the Senate and 34-123 in the House.

In 2012, California voters approved Proposition 30, a constitutional amendment that hiked the income tax on high-earning individuals to provide additional funding for education. But instead of increasing support for education, about 60 percent of the revenue was substituted for line items that had currently been funded from the general fund. The move freed up nearly \$42 billion in discretionary funds between 2013 and 2021.

The rest of the money was used to meet minimum education funding requirements set in an earlier initiative petition. Proposition 30 didn't increase education funding beyond that pre-existing minimum level.

The plaintiffs in *Anderson v. Healey* have good reason to demand a more accurate description of the graduated income tax amendment.

Already the legislature has *twice* rejected amendments requiring that revenues from the proposed tax be additive to education and transportation.

Experience from other states and the actions of the Massachusetts

Legislature demonstrate that voters should be given a more realistic picture of how the revenue is likely to be spent before going to the polls in November.

## Background

In June 2018, the Massachusetts Supreme Judicial Court (SJC) ruled in the landmark decision *Anderson v. Healey* that the wording of a proposed amendment to the state's constitution to create a graduated income tax structure to be brought before voters violated the Massachusetts Constitution's ban on citizen-initiated ballot questions that combine unrelated subject matters—in that case, a new graduated income tax and two disparate subjects of spending.

But the related subject matter requirement does not apply to proposed constitutional amendments that originate in the Legislature. Almost as soon as the ink was dry on *Anderson*, Beacon Hill supporters of the tax hike moved the graduated income tax into a legislatively-proposed constitutional amendment and set the stage for a renewed battle in 2022. Their expectation remains that voters, eager to support increased education and transportation spending, will vote for the tax increase.

On January 27, 2022, 55 Massachusetts taxpayers filed a lawsuit requesting that the Massachusetts Supreme Judicial Court (SJC) declare that the summary of the proposed graduated income tax amendment that will appear on the November 8, 2022 statewide ballot is unfair, inaccurate, and misleading.<sup>1</sup> Plaintiffs in *Christopher R. Anderson et al v. Maura Healey*, SJ-2022-37 seek an order directing the Massachusetts Attorney General and Secretary of State to exclude the proposed amendment from the ballot, unless they modify the summary to clarify that the graduated income tax amendment does not preclude the Legislature from reducing spending on education and transportation from other revenue sources and replacing it with the new surtax revenue.

The complaint is based on the argument made in "The Graduated Income Tax Amendment – A Shell Game?" a 2021 Pioneer Institute study authored by Kevin Martin, the attorney who prepared and filed

the plaintiff's 2018 and 2022 complaints.<sup>2</sup> Eleven Pioneer Institute officers, directors, and committee members are among the 55 plaintiffs as individual taxpayers.

Plaintiff's 2018 complaint resulted in a landmark decision by SJC in *Anderson v. Healey*, in which the court ruled that the initiative petition violated the state Constitution's ban on citizen-initiated ballot questions that combine unrelated subject matters—in that case, a new graduated income tax and two disparate subjects of spending.<sup>3</sup>

Following the SJC decision in *Anderson v. Healy* in 2018, the legislature approved a proposed constitutional amendment on June 9, 2021 that will appear on the November 2022 statewide ballot. The proposal is identical to the previous citizen-initiated proposal, except that it has a later effective date. The original proposal had an effective date of January 1, 2019; the current proposal has an effective date of January 1, 2023. Because the current proposal was initiated by the legislature rather than by citizens, it evades the constitutional ban on combining unrelated subject matters. The proposal would add a surtax of 4 percent on the portion of annual taxable income in excess of \$1 million reported on any individual return. 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. The proposal further provides that, pursuant to the amendment, all revenues received shall be expended, subject to appropriation, 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.

At issue in *Anderson v. Healey* (2022) is the language that will appear in the voter summary on the ballot when voters go to the polls in November 2022. In 2018, the Attorney General-approved summary language for a virtually identical proposal included two sentences that are the heart of the controversy:

1. Attorney General's previously approved summary language: "Summary: 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."
2. The one-sentence language previously approved by the Attorney General was: "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."

Plaintiffs ask the court to declare that the Attorney General's summary violates Article 48 of the Massachusetts Constitution, which requires the Attorney General to provide a "fair" summary of the amendment (the "Summary") and that the Yes statement violates the provision of Mass. General Laws Chapter 54, § 53 that requires the Attorney General and the Secretary of the Commonwealth to provide a "fair and neutral" one-sentence statement describing the effect of a vote in favor of the Amendment (the "Yes statement").<sup>4</sup>

Plaintiffs ask the court to require that the Attorney General and Secretary of State include the following alternative Summary and Yes vote statements:

1. Plaintiffs' suggested alternative summary: "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 Legislature could, however, 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."

2. Plaintiff's suggested alternative one-sentence Yes statement: "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."

Plaintiffs have asked the SJC to order the defendants not to place the graduated income tax amendment on the 2022 ballot unless the Attorney General amends the summary to clarify that it does not preclude the Legislature from reducing spending on education and transportation from other revenue sources and replacing it with the new surtax revenue, and unless the defendants amend the Yes Statement to clarify that the amendment does not preclude the Legislature from reducing spending on education and transportation from other revenue sources and replacing it with the new surtax revenue.

The AGO's own brief argues that the Legislature retains that "money is fungible" and that the Legislature could reduce current education and transportation funding and simply backfill it with new surtax revenue.

In Martin's previously cited 2021 paper, the author identified two parts of the record in the 2018 *Anderson* case that ultimately led to the filing of the current complaint. The first was a statement in a brief submitted by the Attorney General; the second was a video recording of an exchange between the late SJC Chief Justice Ralph Gants and counsel for the Attorney General:

1. Excerpt of Attorney General's brief: "The Legislature would retain ultimate discretion over spending choices for the additional reason that money is fungible. Because the proposed amendment does not require otherwise, the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue. 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. Secretary of Administration & Finance*, 413 Mass. 330, 333-334 (1992) (Legislature would remain in compliance with Amend. Art. 78 if it appropriated more for enumerated purposes than dedicated revenue sources yielded).<sup>5</sup>
2. Video record of oral argument: The late Chief Justice Ralph Gants asked the Attorney General's counsel at oral argument whether she agreed that, if the graduated income tax amendment passed, it "may or may not result in any increase in education or transportation or education spending." Counsel responded that the Chief Justice's understanding was correct.<sup>6</sup>

The Attorney General's brief stated, "The Department of Revenue has estimated that the proposed surtax would generate annually an amount ranging from \$1.6 to \$2.2 billion, with its best estimate at about \$1.9 billion. . . . In Fiscal Years 2014 through 2017, [education and transportation] categories were collectively funded at a level fluctuating from around \$10 billion to over \$11 billion and representing around one quarter of the total state budget for those years."<sup>7</sup>

The central points of Martin's 2021 paper and the *Anderson v. Healey* complaint are that the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with

the new surtax revenue. They point out that the Attorney General told the SJC exactly that in 2018, citing as precedent the SJC’s decision in *New England Division of American Cancer Soc. v. Commissioner of Administration*, 2002.

The complaint also cites a statement submitted to the court by the Attorney General in the same matter, asserting that so long as 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, citing another SJC decision in *Mitchell v. Secretary of Administration & Finance*, 1992.

Given the fact that the defendant Attorney General told the court in 2018 that the legislature would have clear authority to reduce funding in specified budget categories and replace it with the new surtax revenue, citing as precedent two prior SJC decisions, the following analysis examines how this could be accomplished by the legislature in the annual state budget process.

The following analysis examines how the Legislature can easily use common budgetary practices to render new tax revenues fungible.

**How the legislature can use revenues from the graduated income tax to substitute for existing education and transportation funding and free up that funding for other purposes.**

Given the Legislature’s constitutional authority to reduce funding in education and transportation budget categories and replace it with new surtax revenue, it is instructive to examine specifically how this could be accomplished. For this purpose, Fiscal Year 2020 will be used as a basis for analysis because financial reporting has been completed and is available from all relevant state departments and authorities. The Attorney General’s 2018 brief estimated that education and transportation categories were collectively funded at a level fluctuating from around \$10 billion to over \$11 billion. As described below, total spending for education and transportation funding is much greater than that when capital expenditures and pension contributions are included, bringing the total in FY2020 to \$18.99 billion.

Figure 1 presents a summary of FY2020 Massachusetts education and transportation funding, including all relevant state budget appropriations, capital expenditures, and pension contributions. The total funding for these two purposes was \$18.99 billion in FY2020, which is approximately 10 times the amount of revenue that may be generated by the tax amendment, were it to pass.

**Figure 1. Summary of FY2020 total state budget appropriations, capital expenditures, and pension contributions for education and transportation**

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

Figure 2 presents FY2020 state budget line item appropriations for education, as well as sales tax revenues provided to the Massachusetts School Building Authority.<sup>8</sup> If adopted, the Legislature could use revenues from the graduated income tax to fund a subset of these state budget line items, currently funded by the state general fund, and spend the resulting general fund savings elsewhere, including in areas other than education and transportation. The Legislature has statutorily dedicated one cent of Massachusetts' 6.25 percent sales tax to the Massachusetts School Building Authority, which totaled \$925 million in FY2020. There is no impediment to the Legislature amending state statutes to use revenues from the graduated income tax as a substitute for sales tax revenues in whole or in part.

**Figure 2. FY2020 budget appropriations and sales tax funding for education**

\$819,083,030	EEC Early Education & Care
\$26,333,056	EDU Office of the Secretary of Education
\$916,079,026	DOE Department of Elementary and Secondary Education.
\$5,503,268,224	DOE Chapter 70
\$192,512,716	RGT Department of Higher Education
\$574,858,384	UMS University of Massachusetts
\$292,590,233	State Universities
\$316,542,347	Community Colleges
\$925,000,000	Sales Tax (1%) to MSBA
\$1,500,000	STEM Pipeline
\$9,567,767,016	Total FY20 State Budget Appropriations - Education

Unlike education funding, transportation is not funded by state budget line items in Massachusetts. Instead, the Legislature has created a series of funds into which it has directed that revenues from the gas tax, registry of motor vehicle charges and fees, motor vehicle sales tax, bridge, tunnel and highway tolls, and contributions from the state general fund be deposited.

As noted in the Attorney General's brief (see *Anderson v. Attorney General*, 2018), an earlier SJC decision established that the Legislature would remain in compliance with the Massachusetts Constitution if it substituted revenues from the graduated income tax for revenues that are dedicated by Article 78 of the Massachusetts Constitution to highway obligations, construction and maintenance of public highways and bridges and mass transportation lines, and traffic enforcement duties. In total, transportation-related appropriations from these funds totaled \$4.47 billion in FY2020.

Figure 3 presents Commonwealth of Massachusetts FY2020 spending on transportation, funded from the Massachusetts Transportation Trust Fund, MassDOT Special Revenue Funds, Commonwealth Transportation Fund, and from sales tax revenues dedicated to the MBTA.

**Figure 3. FY2020 spending on transportation**

\$553,010,000	MTTF expenditures Highway
\$133,287,000	MTTF expenditures Planning and Enterprise Services
\$105,099,000	MTTF expenditures Registry of Motor Vehicles
\$94,672,000	MTTF expenditures Rail and Transit
\$2,767,000	MTTF expenditures Aeronautics
\$154,753,000	MTTF expenditures Debt Service
\$11,155,000	MassDOT Special Revenue Funds - Highway
\$1,508,000	MassDOT Special Revenue Funds - Planning and Enterprise Services
\$13,855,000	MassDOT Special Revenue Funds - Registry of Motor Vehicles
\$38,097,000	MassDOT Special Revenue Funds - Rail and Transit
\$1,096,000,000	Sales Tax (1% w/ inflation adjustment) to MBTA
\$94,000,000	Commonwealth Transportation Fund - Transfer to RTA's
\$127,145,000	Commonwealth Transportation Fund - Transfer to MBTA
\$11,267,069	Commonwealth Transportation Fund - Transfer to Merit Rating Board
\$4,466,108,939	Total FY20 State Appropriations - Transportation

Figure 4 presents Commonwealth of Massachusetts capital expenditures for transportation in FY2020. These are for the construction and maintenance of transportation assets. Almost all such expenditures come from proceeds of bond funds. Certain revenues from transportation-related fees, taxes, and charges are restricted for the purpose of paying interest and principal on bonds, as explained later. In total, transportation-related capital expenditures totaled \$4.17 billion in FY2020.

**Figure 4. Commonwealth of Massachusetts capital expenditure for transportation, FY2020**

\$1,284,841,000	MassDOT Capital Expenditures - Highway
\$120,051,000	MassDOT Capital Expenditures - Planning and Enterprise Services
\$718,000	MassDOT Capital Expenditures - Registry of Motor Vehicles
\$502,725,000	MassDOT Capital Expenditures - Rail and Transit
\$17,382,000	MassDOT Capital Expenditures - Aeronautics
\$154,753,000	MassDOT Debt Service
\$11,155,000	MassDOT Special Revenue Funds - Highway
\$1,508,000	MassDOT Special Revenue Funds - Planning and Enterprise Services
\$13,855,000	MassDOT Special Revenue Funds - Registry of Motor Vehicles
\$38,097,000	MassDOT Special Revenue Funds - Rail and Transit
\$2,145,085,000	MassDOT Capital Expenditures
\$2,029,493,870	MBTA Capital Expenditures
\$4,174,578,870	Total Capital Expenditures - Transportation

Figure 5 presents Commonwealth of Massachusetts capital expenditures for education in FY2020. These are for the construction and maintenance of education assets. Almost all such expenditures come from proceeds of bond funds. Certain bond covenants restrict the expenditure of specified education revenues to payments and reserves for debt service.

**Figure 5. Commonwealth of Massachusetts capital expenditure for education, FY2020**

\$207,663,000	Capital Asset Expenditures - University of Massachusetts Building Authority
\$21,228,956	Capital Asset Expenditures - Massachusetts State College Building Authority
\$228,891,956	Total Capital Expenditures - Education

The Commonwealth is responsible for making employer contributions to the Massachusetts State Employee Retirement System (MSERS) and the Massachusetts Teachers Retirement System (MTRS). The Commonwealth's FY2020 contributions for the education and transportation share of the state retirement system totaled \$1.87 billion. According to the Massachusetts State Comptroller's CThru website, retirees of state-funded public education institutions and state transportation agencies received 29 percent of total retirement benefits paid to MSERS retirees in FY2021. Since state education and transportation retirees constitute 29 percent of the MSERS retirement system membership, then 29 percent, or \$319 million, of the \$1.1 billion state MSERS pension fund appropriations would represent a



rough approximation of the amount pertaining to education and transportation expenditures. Contributions to MTRS in FY2020 totaled \$1.55 billion.<sup>9</sup>

**Figure 6. Pension Contributions - Education & Transportation, FY2020**

\$1,553,433,000	MA pension contribution to MTRS
\$314,485,385	MA pension contribution to MSERS for education/transportation share of members
\$1,867,918,385	Total Pension Contributions - Education and Transportation

### **Dedicated Funds and Pledges**

The state Legislature has enacted statutes that dedicate specific transportation-related fees, charges, and taxes to the operation of state transportation agencies and authorities. Figure 7 presents a list of 23 types of revenue that are deposited into the Commonwealth Transportation Fund (CTF), a separate fund to be used exclusively for transportation-related purposes.<sup>10</sup> These dedicated sources generated \$2.13 billion in revenue in FY 2020.

The Legislature has also specified that CTF revenues be used to fund the Massachusetts Transportation Trust Fund (MTTF), the general fund of the Massachusetts Department of Transportation, and to directly fund other transportation agencies. The preponderance of Commonwealth of Massachusetts special obligation bonds are secured by certain revenues of the Commonwealth Transportation Fund (CTF). Figure 7 reports CTF revenue from fees, charges, and taxes.

**Figure 7. Commonwealth Transportation Fund (CTF) revenue, FY2020**

\$3,605,858	Citable Motor Vehicle Inspections Collections
\$90,089,246	Diesel Fuel Excise Tax
\$21,440,190	Driver Vehicle Data/Records Fees
\$609,817,511	Gasoline Excise Tax
\$23,601	Gasoline License Fee
\$32,937	Grant/Loan Repayment
\$59,932	Highway Fines
\$347,902	International Fuel Tax Agreement License Fee
\$666,393	Jet Fuel Excise Tax
\$10,168,209	Merit Rating Board Assessments
\$6,387,798	Motor Carrier Excise Tax
\$134,881	Motor Vehicle Inspection Fees
\$74,739,122	Motor Vehicle License Fees
\$317,741,275	Motor Vehicle Registration Fees
\$542,214,827	Motor Vehicle Sales Tax
\$88,038,031	Motor Vehicle Title Fees
\$236,171,293	Operating Transfers
\$22,371,302	Operating Transfers - Category 1 Gaming Revenues
\$12,454,395	Parking Ticket Surcharge on Rental Cars
\$9,725,105	Reducible Load Permits
\$37,303,719	Registry Fees
\$22,300	Spec/Motor License Fee
\$44,802,358	Underground Storage Tank Cleanup Fee
\$2,128,358,187	TOTAL CTF REVENUE

In FY2020, the Massachusetts Department of Transportation collected \$440 million in toll revenue from the Metropolitan Highway System, Western Turnpike, and Tobin Bridge. Historically, tolls have been pledged as restricted revenue to pay for debt service on highway and bridge construction projects. The Legislature would instead be authorized to pledge revenue from the graduated income tax, if enacted,

to meet bond covenant requirements in future MassDOT revenue bond issuances. This would allow toll revenue to be used for other transportation purposes instead of general fund appropriations.

**Figure 8. Massachusetts Department of Transportation toll revenue, FY 2020**

\$225,087,704	Metropolitan Highway System - Toll Collections
\$176,736,822	Western Turnpike - Toll Collections
\$38,385,778	Tobin Bridge - Unpledged Toll Collections
\$440,210,304	Total

On June 30, 2020, the Commonwealth of Massachusetts had an outstanding balance of \$37.3 billion in bond obligations according to the FY2020 Comprehensive Annual Financial Report (FY2020 CAFR).<sup>11</sup> Of these, \$26.1 billion, or 70 percent, were general obligation bonds backed by the full faith and credit of the Commonwealth, and \$11.2 billion were special obligation bonds, which are secured by specific revenue sources pledged to bondholders and are not general obligations of the Commonwealth. Included in the \$11.2 billion balance of special obligation bonds are \$4.6 billion in transportation-related bonds and \$6.6 billion in Massachusetts School Building Authority bonds that are special obligation bonds backed by sales tax revenues. Figure 7 presents the amount of Commonwealth of Massachusetts bonds outstanding as of June 30, 2020.

Total education and transportation funding in FY20 totaled \$19 billion, 10 times the revenue potentially generated by the tax amendment were it to pass.

According to the brief filed by the Attorney General in 2018, the Legislature would remain in compliance with Article 78 of the Massachusetts Constitution if it substituted revenues from the graduated income tax for revenues that are dedicated by Article 78 of the Massachusetts Constitution to highway obligations, construction and maintenance of public highways and bridges and mass transportation lines, and traffic enforcement duties. For this reason, the Legislature would be within its rights to utilize revenue from the proposed graduated income tax in its capital financing plan, substituting for the issuance of new debt, pay-off of existing debt, or debt service.

**Figure 9. Outstanding Commonwealth of Massachusetts bonds, June 30, 2020**

\$225,087,704	Metropolitan Highway System - Toll Collections
\$176,736,822	Western Turnpike - Toll Collections
\$38,385,778	Tobin Bridge - Unpledged Toll Collections
\$440,210,304	Total

The amount of restricted cash and investments held as of June 30, 2020 by the various funds and accounts established by MassDOT for debt covenant requirements and other purposes is presented in Figure 10. These funds had a combined ending fund balance of \$1.45 billion on June 30, 2020.<sup>12</sup>[iii] The

Legislature would be authorized to use revenues from the graduated income tax to satisfy debt covenant requirements in the future, and to use the currently pledged toll, fee, and motor vehicle sales tax revenue for other purposes.

**Figure 10. Balance of restricted cash and investments, by transportation fund, FY2020 (in thousands)**

\$768,148	General Fund - Toll related accounts restricted by bond covenants
\$20,067	General Fund - MTF Other
\$70,598	Major Capital Projects - Statewide Road and Bridge Program
\$3,217	Major Capital Projects- - Transportation Infrastructure and Development Fund
\$355,172	Other Government Funds - Central Artery Repairs and Maintenance
\$5,603	Other Government Funds - Motor Vehicle Safety Inspection
\$3,225	Other Governmental Funds - Other
\$219,250	Bond Trustee - Toll related accounts as restricted by bond covenants
\$1,445,280	Total

### Lessons for Massachusetts from California’s “blank check” tax on high earners

The strategy of dedicating funding through an initiative petition to “sweeten the pot” for voters, as suggested by the SJC in reference to the Massachusetts surtax proposal, was successfully used in California when voters approved the Proposition 30 constitutional amendment on November 6, 2012. The amendment imposed a temporary (seven-year) income tax hike for high-income individuals, with revenues dedicated to K–12 education and community colleges. Voters approved Proposition 30 by 55.4 percent to 44.6 percent.<sup>13</sup> It increased income taxes to the nation’s highest rate on single filers in California, including a 13.3 percent marginal tax rate on annual income over \$1 million — a 29.1 percent increase over the previous “millionaires tax” rate of 10.3 percent.<sup>14</sup> Voters later extended the income tax hike by 12 years when they approved Proposition 55 on November 8, 2016.<sup>15</sup>

In the California Secretary of State’s 2012 voter guide for Proposition 30, proponents and opponents were allowed to set forth their respective arguments. Proponents said in part: “The money raised for schools is directed into a special fund the legislature can’t touch and can’t be used for state bureaucracy.” Opponents’ statement called the proposal “a \$50 billion political shell game that doesn’t guarantee new funds for schools...They can take existing money for schools and use it for other purposes and then replace that money with the money from the new taxes. They take it away with one hand and put it back with the other hand. No matter how you move it around, Prop. 30 does not guarantee one penny of new funding for schools.”<sup>16</sup>

**In California, proponents of Proposition 30 promised an ‘education lock box’ for new tax revenues. Opponents called it a shell game.**

Opponents were subsequently proven correct. As explained in a Pioneer Institute [analysis of Proposition 30](#), the initiative petition directed that revenues from the tax increase be deposited into a newly created “Education Protection Account” within the state’s general fund.<sup>17</sup> Following the enactment of Proposition 30, the state assembly and governor used the account to fund K–12 and community college line items in the state budget in substitution for funds that had previously been appropriated from the general fund. By doing so, the Assembly and Governor effectively freed up \$41.8 billion in discretionary funds between 2013 and 2021. Over that period, 59.6 percent of revenue from Proposition 30 was used to substitute for appropriations previously made from the state general fund. The balance was used to meet minimum funding requirements that had been established in 1998 by another constitutional initiative petition, Proposition 98. Between Fiscal Years 2013 and 2021, the state funded K–12 education and community colleges at the minimum funding level established by a constitutional initiative petition approved by voters 24 years prior to the enactment of Proposition 30, and did not increase overall funding above the pre-existing minimum funding levels.

Kevin Gordon, the former long-time executive director of the California Association of School Business Officials and an expert on Proposition 98, says [It was a shell game.](#) that “as soon as [Proposition 98] got implemented, the Legislature was always trying to figure out, what does it take just to do the minimum — and once they do the minimum, check the box, we’re done. And that’s what happened: it became a funding cap instead of a funding floor.”<sup>18</sup>

In part because of discretionary funding effectively generated by Proposition 30, California’s state employee payrolls increased by more than twice the national average between FY2013 and FY2020. Revenue from Proposition 30 has also helped pay for sizable pay raises and increased retirement and health benefit contributions for California public employees. In FY2019, California’s expenditures for wages, retirement contributions, and health care contributions for state employees were \$8.2 billion higher than in FY2013, before voters approved Proposition 30, according to data published by the State Controller.<sup>19</sup> In FY2019, Proposition 30 generated less revenue than that, \$7.7 billion.

## Conclusion

The requests made by plaintiffs in *Anderson v. Healey and Galvin* are reasonable and critically important. Plaintiffs ask the Supreme Judicial Court to direct the Attorney General and Secretary of State to make it clear to voters on the ballot summary that 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.

The plaintiff’s complaint includes an example of why this issue is important. At the June 12, 2019 session of the state constitutional convention, the General Court considered an amendment to the graduated income tax wording that would close the loophole identified by the Attorney General in her 2018

[The Massachusetts legislature twice rejected amendments requiring that revenues from the proposed tax be additive to education and transportation.](#)

*Anderson v. Attorney General* brief. The amendment would have provided that “any funds appropriated [for education and transportation] shall be in addition to and not in lieu of funds appropriated for [education and transportation] in the fiscal year most recently completed prior to the enactment of this

amendment.” State Senator Bruce Tarr, the author of the amendment, explained that its purpose was to ensure that revenues generated by the proposal would be used to add to, not substitute for, the revenue already being spent in those areas. Representative Brad Jones explained that the new language was needed to avoid a “bait-and-switch” scenario in which, after voters approve the graduated income tax amendment because they want more education and transportation spending, “the \$2 billion raised gets spent in those areas, and then we back out money we currently spend in those areas and spend it elsewhere.” The General Court rejected the amendment by a vote of 6-33 in the Senate and 34-123 in the House, and then voted in favor of the graduated income tax amendment as written.

It would be unfair for the Attorney General and Secretary of State to allow voters to read the ballot summary and conclude that revenues from the proposed graduated income tax would be used to increase state spending on education and transportation. The overwhelming defeat by the Legislature of the above-cited amendment makes clear that voters should be provided with a fair and accurate description of what it is they are voting on and not be fooled by the kind of sweetener; i.e. increased funding, that former Chief Justice Gants warned about in 2018.

The complaint simply asks that the summary voters will see when they enter the voting booth be fair and accurate. It is only fair to include what the Attorney General told the Supreme Judicial Court in 2018: “The Legislature would retain ultimate discretion over spending choices for the additional reason that money is fungible. Because the proposed amendment does not require otherwise, the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue.”

**It would be unfair for the Attorney General and Secretary of State to issue a misleadingly worded ballot summary that leads voters to believe revenues from the tax amendment, if passed, will increase education and transportation spending.**

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<sup>1</sup> Christopher R. Anderson v. Maura Healey, SJ-2022-37, Supreme Judicial Court (Suffolk County). January 27, 2022, [http://www.mhtc.org/wp-content/uploads/2022/01/MHTC-Complaint\\_1.27.22.pdf](http://www.mhtc.org/wp-content/uploads/2022/01/MHTC-Complaint_1.27.22.pdf); Kevin Martin.

<sup>2</sup> “The Graduated Income Tax Amendment - A Shell Game?” Pioneer Institute. March, 2021, <https://pioneerinstitute.org/download/the-graduated-income-tax-amendment-a-shell-game/>

<sup>3</sup> Anderson v. Healey, 579 Mass. 780 (2018), <http://masscases.com/cases/sjc/479/479mass780.html>

<sup>4</sup> G.L. c. 54, § 53; Mass. Const. Amends. art. 48, amended by Mass. Const. Amends. art. 74

<sup>5</sup> Article 78 requires that all “revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicle[s] on public highways or to fuels used for propelling such vehicles be used such purposes as payment of highway obligations, construction and maintenance of public highways and bridges and mass transportation lines, and traffic enforcement. See Mass. Const. Amend. Art. 78, as amended by Amend. Art. 104.; [http://masscases.com/briefs/sjc/479/479mass780/SJC-12422\\_03\\_Appellee\\_Attorney\\_General\\_Brief.pdf](http://masscases.com/briefs/sjc/479/479mass780/SJC-12422_03_Appellee_Attorney_General_Brief.pdf)

<sup>6</sup> Massachusetts Supreme Judicial Court, “SJC 12422,” Commonwealth of Massachusetts, December 9, 2020, <https://www.youtube.com/watch?v=O8bFdcNvQKQ&feature=youtuve>

<sup>7</sup> Excerpt of brief of the Attorney General. [http://masscases.com/briefs/sjc/479/479mass780/SJC-12422\\_03\\_Appellee\\_Attorney\\_General\\_Brief.pdf](http://masscases.com/briefs/sjc/479/479mass780/SJC-12422_03_Appellee_Attorney_General_Brief.pdf)

<sup>8</sup> <https://malegislature.gov/Budget/FY2022/ConferenceCommittee>

<sup>9</sup> [https://mtrs.state.ma.us/wp-content/uploads/2021/04/gasb68Report\\_FY2021.pdf](https://mtrs.state.ma.us/wp-content/uploads/2021/04/gasb68Report_FY2021.pdf);  
[http://cthrupensions.mass.gov/#!/year/2021//pay1/explore/0-0-1-0-0/retirement\\_system/MSERS/1-0/](http://cthrupensions.mass.gov/#!/year/2021//pay1/explore/0-0-1-0-0/retirement_system/MSERS/1-0/);  
<https://www.mass.gov/doc/2020-annual-report-final-11242020/download>

<sup>10</sup> MGL Chapter 29 Section 2ZZZ, Commonwealth Transportation Fund, [https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIII/Chapter29/Section2ZZZ#:~:text=Section%202ZZZ%3A%](https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIII/Chapter29/Section2ZZZ#:~:text=Section%202ZZZ%3A%3A)

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<sup>11</sup> FY2020 Commonwealth of Massachusetts Comprehensive Annual Financial Report, [https://www.macomptroller.org/wp-content/uploads/acfr\\_fy-2020.pdf](https://www.macomptroller.org/wp-content/uploads/acfr_fy-2020.pdf)

<sup>12</sup> Massachusetts Department of Transportation. Basic Financial Statements, Required Supplementary Information and Other Supplementary Information June 30, 2020, <https://www.mass.gov/doc/fiscal-2020-massdot/download>

<sup>13</sup> Proposition 30 also included a temporary increase in the state sales tax from 7.25 percent to 7.5 percent for four years.

<sup>14</sup> Ballotpedia, “California Proposition 30, Sales and Income Tax Increase (2012),” 2012,

[https://ballotpedia.org/California\\_Proposition\\_30,\\_Sales\\_and\\_Income\\_Tax\\_Increase\\_\(2012\)](https://ballotpedia.org/California_Proposition_30,_Sales_and_Income_Tax_Increase_(2012))

<sup>15</sup> Ballotpedia, “California Proposition 55, Extension of the Proposition 30 Income Tax Increase (2016),” 2016,

[https://ballotpedia.org/California\\_Proposition\\_55,\\_Extension\\_of\\_the\\_Proposition\\_30\\_Income\\_Tax\\_Increase\\_\(2016\)](https://ballotpedia.org/California_Proposition_55,_Extension_of_the_Proposition_30_Income_Tax_Increase_(2016))

<sup>16</sup> California Secretary of State, “Prop 30: Temporary Taxes To Fund Education. Guaranteed Local Public Safety Funding. Initiative Constitutional Amendment.” 2012, [http://](http://vigarchive.sos.ca.gov/2012/general/propositions/30/argumentsrebuttals.htm)

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<sup>17</sup> California Budget Center, “What would Proposition 30 mean for California September, 2012,

[https://calbudgetcenter.org/app/uploads/120911\\_Proposition\\_30\\_BB.pdf](https://calbudgetcenter.org/app/uploads/120911_Proposition_30_BB.pdf)

<sup>18</sup> California Association of School Business Officials, “Adventures in Ed Funding. Have We Got A Proposition For You? Proposition 98 and a Brisk Hike Through California School Funding History.” February 20, 2020,

<https://www.casbo.org/content/have-we-got-proposition-youproposition-98-and-brisk-hike-through-california-school-funding>

<sup>19</sup> California State Controller, “Government Compensation in California,” State of California, 2021,

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