

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12422

CHRISTOPHER ANDERSON, et al.,
Petitioners-Appellants,

v.

MAURA HEALEY,
Respondents-Appellees.

ON APPEAL FROM A RESERVATION AND REPORT OF A
SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT

BRIEF FOR AMICI CURIAE PIONEER INSTITUTE, INC. AND THE
TAX FOUNDATION IN SUPPORT OF PETITIONERS-APPELLANTS

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January 22, 2018

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Judicial Court Rule 1:21, Pioneer Institute, Inc. states that it is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts. No publicly held corporation owns more than 10% of the stock of Pioneer Institute, Inc.

Pursuant to Supreme Judicial Court Rule 1:21, the Tax Foundation states that it is a nonprofit corporation organized under the laws of the District of Columbia. No publicly held corporation owns more than 10% of the stock of the Tax Foundation.

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Amici Curiae Pioneer Institute, Inc. and the Tax Foundation respectfully submit this brief pursuant to the Court's solicitation of amicus briefs issued on November 8, 2017.

INTEREST OF AMICI CURIAE¹

Pioneer Institute, Inc. is an independent, non-partisan, privately funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions. To further these goals, Pioneer provides research to legislators and the public that helps predict the impact of a proposed law on Massachusetts' economic growth, job creation, wages, and employment. Pioneer's research is based on free market principles, individual liberty, and effective, accountable government. Pioneer believes these values will help Massachusetts remain economically competitive.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. The Tax Foundation seeks to

¹ Pursuant to Aspinall v. Philip Morris Cos., 442 Mass. 381, 480 n.8 (2004), undersigned counsel state that (1) Wilmer Cutler Pickering Hale and Dorr LLP does not represent any of the parties to this case in other litigation presenting the same issues as are presented in this case; and (2) no counsel for a party authored this brief in whole or in part, nor has any party made a monetary contribution intended to fund the preparation or submission of this brief.

make information about government finance more accessible to the public. Its analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability.

The questions presented in this appeal are of substantial importance to amici given their shared commitment to sound state governance and tax policy, and because the questions at issue will significantly impact state tax administration and state taxpayers. If upheld and enacted, Proposition 80 will significantly redefine how tax and fiscal policy is enacted in Massachusetts, and substantially affect the competitiveness of the Commonwealth's economy.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Proposition 80's distinct provisions imposing, on the one hand, a 4% tax on income in excess of \$1,000,000, and appropriating, on the other hand, that revenue for two different purposes-- transportation and education--fail to satisfy the "relatedness" requirement of Article 48, Pt. II, § 3 of the Amendments to the Massachusetts Constitution.

2. Whether Proposition 80's appropriation of all tax revenue generated by a newly imposed 4% tax on income in excess of \$1,000,000 for exclusive spending on transportation and education constitutes a "specific appropriation of money from the treasury" in violation of Article 48, Pt. II, § 2 of the Amendments

to the Massachusetts Constitution.

STATEMENT OF THE CASE

At issue before the Court is whether Proposition 80, an initiative petition intended to impose an additional 4% tax on income exceeding \$1,000,000 and appropriate that revenue exclusively for education and transportation, complies with Article 48 of the Amendments to the Massachusetts Constitution ("Article 48"). This Court's precedent unequivocally demonstrates that Proposition 80 does not comply. But in addition to whether Proposition 80 is unconstitutional, at issue is whether public policy as complicated and divisive as taxing and spending should be enshrined in the Commonwealth's Constitution. This is particularly true given that Proposition 80 deprives the electorate of voting for a single, unified statement of public policy. History, and settled scholarly research, are equally as unequivocal in demonstrating that such public policy should not be the subject of constitutional amendment.

I. PROPOSITION 80 ABUSES THE INITIATIVE PETITION PROCESS BY BUNDLING THREE UNRELATED POLICY OBJECTIVES, PRECLUDING VOTERS FROM EXPRESSING A UNIFIED STATEMENT OF PUBLIC POLICY

Initiative petitions, by their nature, are subject to a binary "yes" or "no" vote by the electorate. When an initiative petition combines multiple provisions embracing different public

policies, a voter's binary choice precludes expressing independent preferences among them. Thus, combining multiple, distinct policy objectives unfairly inhibits the electorate's ability to express its preferences for each individual objective.

Initiative petitions that combine multiple policy objectives also present an opportunity for political gamesmanship. That is, drafters can entice voters to approve policies that voters would otherwise reject by bundling them with more popular proposals. The undemocratic result is that policies can be enacted even though a voting majority would disapprove if presented separately. Indeed, there is simply no way to tell, because voters are offered only a combined "package," rather than an opportunity to express their views on each individual policy component.

Proposition 80 is the epitome of this problem. Its provisions bundle no less than three distinct policy objectives. First, it includes the often-rejected idea of graduated income tax, in this case an additional 4% on income exceeding \$1,000,000. This expresses the policy that the wealthier should pay a greater share of their income in taxes. Second, Proposition 80 includes an appropriation for education, expressing the policy that the Commonwealth should invest additional resources in its schools. Third, Proposition 80 includes an appropriation for

transportation, expressing the policy that the Commonwealth should invest additional resources in its transportation infrastructure. Indeed, advocates of Proposition 80 champion the petition on all three distinct grounds.²

Bundling the oft-rejected graduated income tax with the more popular policies of increased public spending on education and transportation is a transparent attempt to obtain voter approval of an unpopular graduated income tax by "packaging" it with the completely unrelated, but more popular, policies of improving education and transportation. Specifically, proponents of a graduated tax have tried, on five separate occasions, to enact a graduated tax by initiative petition. Voters have rejected a graduated income tax each time, most recently by a margin of two to one. Given this history, the prospects for passage of Proposition 80

² Compare Massachusetts Teachers Association, "What is the Fair Share Amendment?", available at <https://massteacher.org/current-initiatives/fair-share-amendment> (last visited Jan. 16, 2018), with Raise Up Massachusetts, "Fair Share Amendment: Why Investing in Transportation and Public Education Matters," available at <https://raiseupma.org/wp-content/uploads/2017/01/RUM-Fair-Share-Amendment-Fact-Sheet.pdf> (last visited Jan. 16, 2018); cf. International Refugee Assistance Project v. Trump, 857 F.3d 554, 595 (4th Cir.) (holding that campaign statements "provide direct, specific evidence of what motivated" legal enactments), vacated and remanded sub nom. on other grounds, Trump v. International Refugee Assistance, 138 S. Ct. 353 (2017).

would appear dim indeed if not tethered to more popular provisions.

However, this is exactly what Article 48's "relatedness" requirement is intended to prevent. See Mass. Const. Amend. Art. 48, Pt. II, § 3. Fear of such attempts was the very reason that delegates to the Massachusetts Constitutional Convention of 1917-1918 limited initiative petitions to "related or . . . mutually dependent" subjects. Carney v. Attorney General, 447 Mass. 218, 230-231 (2006). Article 48's "relatedness" requirement was expressly intended to ensure that any initiative petition put before the electorate expresses, as a whole, a single unified statement of public policy that voters can approve or reject without compromise. Id. Proposition 80, which includes multiple, different public policy issues subverts the democratic process just as if voters were required to vote "yes" or "no" for a political party ticket of candidates with no way to express their individual preferences among them.

II. PROPOSITION 80'S CONSTITUTIONAL ENACTMENT OF FISCAL POLICY WOULD LIKELY HARM THE COMMONWEALTH

Proposition 80's 4% tax increase on income in excess of \$1,000,000, and its constitutionally-directed exclusive appropriation of that tax for specific spending, also usurps the Legislature's exclusive authority over the state treasury. Absent further constitutional amendment--which would take at

least three years to enact--the Legislature is powerless to reduce the tax on income exceeding \$1,000,000, or to allocate the revenue to unanticipated or more pressing needs. For these reasons, preserving the Legislature's authority over the entirety of Commonwealth's treasury was a central concern at the Constitutional Convention of 1917-1918 and was the object of Article 48's "specific appropriations" prohibition. See In re Opinion of the Justices, 297 Mass. 577, 580 (1937).

Moreover, Proposition 80 not only usurps the Legislature's exclusive authority over the Commonwealth's treasury, but it sets a precedent of setting fiscal policy by constitutional amendment, a form of governance that is universally condemned. And it would do so in service of public policy preferences that may be disastrous for the Commonwealth's economic and fiscal health.

A. Setting Fiscal Policy By Initiative Petition Amending The Constitution Is Bad Governance

1. Constitutional Amendments Setting Fiscal Policy Constrain Legislative Flexibility

Constitutional amendments setting fiscal policy deprive the government of the flexibility necessary to address changing circumstances and unexpected crises. Every government faces the prospect of future uncertainty and unexpected crises, circumstances that

require difficult and complex public policy decisions to address. To address those crises, the government must retain fiscal flexibility. However, constitutional amendments that "prioritize certain types of spending over others," "limit policy flexibility" and "constrain[] policy making." Primo, "State Constitutions and Fiscal Policy", Mercatus Center: George Mason University, 25 (2016).³

Further, constitutional amendments "that increase or create new taxes to fund new or existing programs" also "negatively affect the legislature's ability to impose reasonable taxes to fund [future] necessary programs for citizens" or address future crises. National Conference of State Legislatures, "Initiative and Referendum in the 21st Century: Final Report and Recommendations of the NCSL I&R Task Force", 19 (2002).

Finally, given the additional procedural steps necessary to amend state constitutions, enshrining tax and fiscal policy by constitutional amendment "sharply circumscribe[s] the authority and discretion of the legislature," preventing the Legislature from quickly

³ See also Murray et al., "Structurally Unbalanced: Cyclical and Structural Deficits in California and the Intermountain West," Brookings Mountain West, Morrison Inst. for Pub. Pol. 7-8 (Jan. 2011) (explaining how structural deficits persist in Arizona, California, Colorado, and Nevada post-recession in part because of fiscal policy constraints in constitutional amendments created by voter initiatives).

reversing poor fiscal decisions or better allocating funds to areas of greater need in time of crisis. See Schrag, *Paradise Lost: California's Experience, America's Future* 12 (1998) ("Each measure, because it further reduces governmental discretion, and because it moves control further from the public-- . . . from the legislature to the constitution, from simple majorities to supermajorities--makes it even harder to write budgets, respond to changing needs, and set reasonable priorities.").⁴

For these reasons, "making fiscal policy by public referendum through amendments to the . . . [c]onstitution" has been deemed the "most serious" threat to the economic viability of states in which such amendments have been passed. See *id.* "These measures . . . , in effect, set up the government to fail in its basic responsibilities." Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* 223 (2000).

2. Setting Fiscal Policy By Constitutional Amendment Is Subject To Special Interest Abuse

Setting fiscal policy by constitutional amendment

⁴ See also, e.g., Colorado Economic Futures Panel, "Principles for Progress: Shaping the Economic Future of Colorado", 4 (2005) ("Once a policy has been established [in the constitution] . . . it is, effectively, cast in concrete. No one, not even duly elected officials, can change the policy except by going through another cumbersome election process, which can take years . . . to complete.").

is inevitably a haphazard process, loading the constitution with disparate policy preferences lacking cohesion. For this reason, once begun, setting public policy by constitutional amendment is subject to significant abuse by special interest groups.

Unlike the legislative process, which involves committee hearings and deliberation, the initiative petition process is generally a "haphazard approach where citizens are asked to make major fiscal decisions in isolation, based on one-sided 'facts' provided by proponents and opponents[,]" and by which "over-simplification and under-analysis are the established norms." Colorado Economic Futures Panel, supra note 4, at 3-4; see also Sullivan, "Back to Taxachusetts Series: Capital Gains," Pioneer Institute Public Policy Brief, 2 (Oct. 2017) ("Government by initiative petition often amounts in using a machete where a scalpel is needed.").⁵

Scholars widely recognize that voters lack the tools and structures necessary to analyze complex fiscal issues presented in initiative petitions.

⁵ See also Levinson & Stern, "Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem," 37 Hastings Const. L.Q. 689, 700-701 (2010) ("The problem with budgeting by initiative is that it is done by an electorate that cannot amend proposals, but can vote only 'yes' or 'no' on isolated proposals drafted approximately one year before they reach the ballot, without regard to how they affect the rest of the budget.").

Levinson, supra note 5 at 713 ("The biggest problem with ballot box budgeting is that voters do not have a complete view of the budget when deciding important issues which will affect the budget.").⁶ Indeed, research has shown that "as many as one-third of . . . voters first encounter[] the initiatives and other measures the moment they step[] into the voting booth[,] " requiring that they make a critical decision about the Commonwealth's fiscal policy in a few minutes based on limited information. Lunch, supra note 6 at 669-670.

Because of voters' inability to effectively evaluate proposed laws, initiatives are vulnerable to manipulation by special interests. See Senik, "Who Killed California?" National Affairs 58 (Fall 2009) (explaining that "the referendum system" in California "often falls prey to exactly the oligarchic interests its Progressive creators were trying to counter. Rather than vehicles for grassroots change, many of

⁶ See also Donovan & Bowler, "Responsive or Responsible Government?" in Citizens as Legislators: Direct Democracy in the United States, Bowler, et al., eds. 258 (Ohio State U. Press 1998) ("Direct democracy . . . provides no comparable, readily used mechanism for aggregating preferences about numerous decisions and tradeoffs that must be made about spending over hundreds of programs and agencies."); Lunch, "Budgeting by Initiative: An Oxymoron", 34 Willamette L. Rev. 663, 670 (1998) ("[B]udgeting decisions made via the initiative process . . . are half-choices [T]he initiative process does not and cannot engage voters in the trade-offs that are at the heart of a representative budget process.")

the initiatives that make it to the ballot are the pet projects of a handful of wealthy donors or interest groups."). Special interest groups are better organized, better funded, and better able to coordinate effectively the signature gathering necessary to place petitions on the ballot. This ensures that their special preferences are the ones that are enshrined in the Constitution. See DuVivier, "Out of the Bottle: The Genie of Direct Democracy", 70 Alb. L. Rev. 1045, 1046-1047 (2007) (special interests have outsized influence on government through initiative petitions); Broder, supra p.9 at 167 (many "'public interest' initiatives got onto the ballot not through some mass movement but because a handful of highly motivated people were prepared to . . . qualify the measures and persuade the voters that they were worth supporting.").

Moreover, once a spending priority favored by one interest group is enshrined as a constitutional amendment, there is a "temptation that leads to a slippery slope[,]" with each interest group wanting to ensure that its own spending priority is treated as favorably as the others'. Primo, supra p.8, at 30. The complexity and implications of fiscal policy invite such intrusion, and turn initiative petitioning--a process that would appear to be archetypically democratic--into a tool to advance

special interests instead.

3. Setting Fiscal Policy By Constitutional Amendment Precludes Addressing Unintended Consequences

In large part because of the idiosyncratic manner in which fiscal policy is made by initiative petition and the whim of special interests, enacted initiatives can lead to significant unanticipated consequences. When adopted as constitutional amendments, legislatures are effectively precluded from remedying any adverse, unintended, or unexpected consequences due to barriers to re-amending the constitution.

"[V]oter mandates can have unintended, or at least not well understood, budgetary consequences, particularly when economic, demographic, and/or fiscal conditions shift after the initiatives were approved." Murray et al., supra note 3, at 16. "Legislators can wind up hamstrung, without sufficient flexibility to make needed and appropriate policy changes that are responsive to those changing conditions." Id.⁷ Tax policy in particular is complicated and unpredictable, engendering unintended and unexpected consequences requiring immediate correction.

⁷ See also Senik, supra p.11, at 58 (discussing California's Proposition 98, which guarantees 40% of every year's budget to education spending: "By pre-ordaining appropriations, the move also undermined much of the impetus for increasing the cost-effectiveness of California schools, hastening the decline of the state's education system into one of the nation's worst, even as it drove up spending.").

For example, in 2014, Massachusetts lawmakers enacted a sales tax on computer and software services to help balance the budget. However, once its design flaws and adverse impact on the Commonwealth's economy became evident, the Legislature acted quickly to repeal the new sales tax just months after it went into effect.⁸ Similarly, in 2000, voters in Massachusetts overwhelmingly passed a ballot initiative that would have lowered the income tax rate to 5% by 2003. But by 2002, the Commonwealth was facing a recession and a 12% drop in tax revenues, requiring that the Legislature suspend the statute and freeze the income tax rate at 5.3%.⁹

In both of these examples, a quick remedy was available. The Legislature could revise what was passed by initiative petition by employing legislative action of its own. But enacting tax policy as a constitutional amendment precludes such a speedy remedy. A constitutional amendment in Massachusetts must be approved by the Legislature in two consecutive two-year sessions, and then by voters at the polls. See Mass. Const. Amend. Art. 48, Pt. IV § 4. As a

⁸ See Massachusetts Taxpayers Found., "Changing the Constitution: 5 Questions to Consider", 8-9, available at http://www.masstaxpayers.org/publications/public_finance/taxes/income_tax/20170612/changing_constitution_5_questions_consider (last visited Jan. 16, 2018).

⁹ See Massachusetts Taxpayers Found., supra note 8, at 9.

result, remedying any unintended consequences resulting from Proposition 80 would take at least three years, risking disastrous consequences.

The context in which Proposition 80 will be put to the electorate demonstrates why setting tax policy by constitutional amendment is unwise. Proposition 80 was proposed nearly three years ago, well before the United States Congress began reforming the federal tax code.¹⁰ Congress has now passed a tax reform bill that caps the state and local tax deduction. This will substantially increase the tax burden on high income wage earners in the Commonwealth even without Proposition 80, a result that was unforeseen at the time Proposition 80 was first proposed. See Sullivan, "The Federal Tax Reform Act's Cap on Deductions of State Income Taxes Has Turned Proposition 80 Into an Economic Time Bomb For Massachusetts", Pioneer Institute 1 (forthcoming Feb. 2018); Parlapiano & Lai, "Among the Tax Bill's Biggest Losers: High-Income, Blue State Taxpayers," N.Y. Times, Dec. 5, 2017, available at <https://www.nytimes.com/interactive/2017/12/05/us/politics/tax-bill-salt.html> (last visited Jan. 16, 2018). In fact, according to Pioneer Institute research, "the combined effect of Proposition 80 and the [federal state and local tax

¹⁰ See Raise Up Massachusetts, "Our Plan to Win", available at <https://raiseupma.org/campaigns/fair-share-amendment> (last visited Jan. 16, 2018).

deduction] limitation will more than double the effective after-tax amount that the average Massachusetts taxpayer with adjusted gross income of \$1 million or more will pay in state and local income taxes," something no one could have foreseen when Proposition 80 was first proposed three years ago. Sullivan, supra p.15, at 1.

Whatever the perceived merit of Proposition 80 at the time it was proposed, the Legislature needs flexibility to address consequences like those that Congress's reform of the federal tax code may have on Massachusetts taxpayers and the Massachusetts economy. But by enacting a 4% income tax on high earners as a constitutional amendment, the Legislature is precluded from responding to this or any other unintended or unforeseen consequences.

B. Raising Taxes On Income In Excess Of \$1,000,000 Will Likely Injure The Commonwealth's Economy

1. Proposition 80 Will Likely Reduce Investment

Proposition 80's 4% income tax increase does not discriminate between wage or capital gains income. Nor does Proposition 80 exempt purely inflationary asset appreciation. As a result, Proposition 80's 4% tax increase would effectively raise the Commonwealth's marginal capital gains tax rate from 5.1% to 9.1% (and to 12% for certain short-term

capital gains). This would catapult the state tax burden in Massachusetts from exactly in the middle of all states (twenty-fifth), to the fourth highest. Sullivan, supra p.10, at 2 (noting Massachusetts' rank of 25th). Massachusetts' combined federal and state top marginal capital gains rate is slated to become the second highest in the country as a result of Proposition 80, creating a substantial disincentive for investment in the Commonwealth. Id.

A capital gains tax is a tax imposed on the sales of assets, including land, equipment, stocks and bonds, and other business interests. See Joint Econ. Comm. Staff Rep. Office of the Chairman, Connie Mack, "Cutting Capital Gains Tax Rates: The Right Policy for the 21st Century," ii, 5 (Aug. 1999). Where an income tax applies to capital gains but does not exempt purely inflationary asset appreciation from its scope, the taxable income on the sale of a capital asset is the difference between the purchase price and the sale price. Id. Thus, the taxpayer pays income tax on the entire appreciation of the asset. Id. at 16.

For this reason, most economists agree that larger capital gains taxes impede investment. See Id. at 6 ("Lowering capital gains tax rates . . . fosters more new business creation--especially technology startup firms--and increased expansion by existing firms."); Gompers & Lerner, "What Drives Venture

Capital Fundraising?" Brookings Papers: Microeconomics (1998) (finding that capital gains taxes decrease the availability of venture capital). Indeed, Nobel Laureate Robert Lucas has estimated that if the U.S. eliminated its capital gains and dividend taxes, the capital stock of American plan and equipment would double. Sullivan, supra p. 10, at 1-2; see also Lucas, Jr., "Supply-Side Economics: An Analytical Review," Oxford Economic Papers 42, No. 2, 293-316 (1990) (arguing that "neither capital gains nor any of the income from capital should be taxed at all.").

Without investment, job creation and wage growth are significantly inhibited. See Edwards, "Advantages of Low Capital Gains Tax Rates", Cato Institute: Tax & Budget Bulletin, 1, 5 (2012) ("Higher [capital gains] rates will harm investment, entrepreneurship, and growth."); Beach, et al., "Economic Effects of Increasing the Tax Rates on Capital Gains and Dividends", The Heritage Foundation: WebMemo (Apr. 15, 2008), available at <https://www.heritage.org/taxes/report/economic-effects-increasing-the-tax-rates-capital-gains-and-dividends> (last visited Jan. 16, 2018) (explaining that the "lock-in" effect caused by high capital gains taxes "can reduce economic growth by preventing the reallocation of capital in low-performing investments to more profitable ventures. Economic growth slows as new businesses find it

difficult to acquire start-up or expansion capital.").

2. Proposition 80 Will Likely Reduce Overall Tax Revenue

Empirical studies have demonstrated that high wage earners are more likely to move to or choose to live in states with lower tax rates. See Moretti & Wilson, "The Effect of State Taxes on the Geographical Location of Top Earners: Evidence from Star Scientists," Cato Institute: Research Briefs in Economic Policy, 2 (July 2015) ("Our empirical analysis uncovers large effects of personal and corporate taxes on [top] scientists' migration patterns: the probability of moving from an origin state to a destination state increases when the tax rate differential between origin and destination increases."); Sullivan, "Back to Taxachusetts? Lessons from Connecticut", Pioneer Institute, 18 (forthcoming Jan. 2018) (noting that "it's not that hard to change your principal address for tax purposes given the options opened up by modern travel and the personal computer and the internet. It can be as simple as listing a second home as a main residence.").

Indeed, experts are predicting that the new federal tax law will cause high taxpayers to leave high-tax states because, by capping the federal deduction for state and local taxes, it increases their impact on the taxpayer. See Sullivan, supra

p.15, at 1 (“[C]urtailment of tax deductions of state income taxes is likely to increase the migration of high income taxpayers away from states with high income taxes to those with lower rates.”).¹¹

Tax flight is particularly likely where neighboring states, like New Hampshire, have substantially lower tax rates. See Cohen, et al., “Tax Flight Has Tangible Effects on Income Tax Revenues,” State Tax Notes 63, no. 8 (2012) (finding “that an increase in a state’s average income tax rate will increase out-migration from that state” and that the effect is more acute when tax rates differ between nearby states). As it is, Massachusetts suffers from a net out-migration of adjusted gross income, with nearly 27% of that out-migration going to neighboring New Hampshire. Sullivan, supra p.15, at 10. Higher tax rates will only exacerbate this loss of tax base.

Other states’ experiences with the effects of tax increases on the state’s wealthiest are revealing.

¹¹ See also Goodkind, “Trump’s Tax Plan is Making Rich People Flee to Florida to Dodge Higher Taxes,” Newsweek (Nov. 27, 2017), available at, <http://www.newsweek.com/trump-tax-plan-rich-people-florida-taxes-723778> (last visited Jan. 16, 2018) (explaining that new research by Goldman Sachs predicts that the tax plan will cause “between two and four percent of top-income earners in New York City” to “move to lower-taxed states[.]”); Tax Bill May Spark Exodus from High-Tax States, Seeking Alpha (Dec. 6, 2017), available at <https://seekingalpha.com/article/4129961-tax-bill-may-spark-exodus-high-tax-states> (last visited Jan. 16, 2018).

For example, in Connecticut, tax increases over the last thirty years--and serial income tax increases in the last decade--have made Connecticut less desirable for high earners. Between 2011-2012 and 2014-2015, fifty-seven percent of the individuals with an aggregate gross income exceeding \$200,000 migrated out of Connecticut. This out-migration of high earners represented \$10.87 billion in capital flight. See Sullivan, supra p. 19, at 15-18. Connecticut's tax revenues have been severely damaged, with taxes paid by the state's top 100 taxpayers plunging by 45% in just one year, from 2015 to 2016. Id.

New Jersey's experience with its "millionaire's tax" enacted in 2004 is similarly instructive. The tax failed to increase overall revenue. Instead, by 2010, New Jersey lost 20,000 taxpayers and \$2.5 billion in annual income to the state treasury. See Cohen, et al., "The Effects of Marginal Tax Rates on Interstate Migration", N.J. Dep't of Treasury, Office of the Chief Economics/Office of Revenue and Econ. Analysis (Oct. 2011).

Proposition 80 likely will have similar effects in Massachusetts. More than half of the revenues raised by Proposition 80's tax

would come from the 900 wealth[iest] individuals and families [in Massachusetts], who would be on the hook for an additional \$1 billion in taxes. If a third of these families opted to move, that would result in

a loss of \$750 million, not just from the new [4% tax proposed by Proposition 80], but also in income taxes they currently pay.

Sullivan, supra p.19, at 20. This effect will only be exacerbated by the loss of the state and local tax deduction on federal returns--something no one could have foreseen when Proposition 80 was first proposed.

3. Proposition 80 Will Likely Inhibit Small Business Growth

Proposition 80's indiscriminate 4% tax increase on income in excess of \$1,000,000 would also increase the taxes paid by pass-through businesses, which will impede small business growth in Massachusetts.

A pass-through business is a business entity that reports income on the owner or shareholder's tax return filings rather than on a separate corporate filing. See Pomerleau, "An Overview of Pass-through Businesses in the United States," Tax Foundation (Jan. 21, 2015), available at <https://taxfoundation.org/overview-pass-through-businesses-united-states> (last visited Jan. 16, 2018). Such entities include partnerships, S-Corporations, and limited liability companies. Unlike C-corporations, pass-through business owners pay income tax on their business income--even income that is reinvested in the company. See U.S. Dep't. of the Treasury, IRS Publication 535: Business Expenses, (Jan. 19, 2017).

In Massachusetts, pass-through businesses employ

more than 50% of the private sector workforce. See Pomerleau, supra p.22. Around 10,000 Massachusetts filers in 2013 listed income from partnership or S-Corporations that was above \$1,000,000, representing nearly 63% of pass-through income in the Commonwealth. Jahnsen, "Millionaire's Tax Would Revive 'Taxachusetts'", Tax Foundation (June 13, 2017).

The combined federal and state marginal income tax rate in Massachusetts on pass-through businesses is currently 46.9%. Id. While federal tax changes will ease the federal tax burden somewhat for these businesses, Proposition 80 would put the Commonwealth at a competitive disadvantage compared to other states. That is, Proposition 80 would raise the income tax on such businesses from 5.1% to 9.1%. Id.

Raising tax rates on pass-through businesses will not only make Massachusetts a less attractive place to start such enterprises, but will have a significant impact on existing pass through businesses and their employees. Higher tax rates will result in less accumulation of assets within the business. See Blouin, "Taxation of Business Income," Penn Wharton Issue Brief, Vol. 1, No. 1 (Jan. 2013) ("Because the income is reported by the entity's owners, and owners will require the conduit to distribute greater amounts of cash to cover their tax liabilities, there will be less accumulation of assets inside the business. The

rate change could be particularly harmful to small business conduits, as small businesses typically have a more difficult time obtaining external financing.”). It will also substantially impact pass-through businesses’ ability to expand or even maintain their workforce, as the tax reduces the cash on hand available for the businesses’ workforce. Sullivan, supra p.15, at 18-21.

These negative consequences are real. In 2016, when Illinois considered a similar tax increase on pass-through business, an analysis from the Illinois Department of Revenue showed that an increase in the pass-through tax rate would cost the state nearly 20,000 jobs and \$1.9 billion in GDP over its first four years of implementation. See Jahnsen, supra p.22. Nearly 43,000 individuals were projected to leave Illinois as a result of the tax increase. Id.

* * *

For these reasons, a decision that sanctioned Proposition 80 as constitutional would countenance political gamesmanship through initiative petitions and embrace a universally rejected method of fiscal governance with potentially dire consequences for Massachusetts’s economy.

SUMMARY OF ARGUMENT

Article 48 expressly forbids initiative petitions from including multiple distinct provisions that are

not "related." See Mass. Const. Amend. Art. 48, Pt. II, § 3. As construed by this Court, multiple distinct provisions are only "related" to the extent each provision, when evaluated separately, shares a common dominant purpose. See Carney v. Attorney General, 447 Mass. 218, 230-231 (2006). Eschewing this requirement, Proposition 80's separate provisions individually embrace three distinct purposes, rendering Proposition 80 unconstitutional.

Article 48 also expressly forbids initiative petitions from including a "specific appropriation." See Mass. Const. Amend. Art. 48, Pt. II, § 2. This Court already has construed Article 48's "specific appropriation" prohibition as precluding initiative petitions when the "direct purpose is to seize upon all the revenue received from [a] designated source[] and to appropriate it permanently to a specified public use." In re Opinion of the Justices, 297 Mass. 577, 580 (1937). Proposition 80 violates this requirement, expressly seizing all revenue derived from a 4% income tax increase and appropriating it permanently and exclusively to education and transportation.

ARGUMENT

Proposition 80 is an unconstitutional effort to simultaneously amend the Massachusetts Constitution to impose a tax on income in excess of \$1,000,000, and to

appropriate the entirety of that revenue exclusively for spending on education and transportation. Proposition 80 not only would violate the letter of the Constitution, but would undermine the very purposes for which these constitutional limitations exist. Article 48 prohibits passage of an unpopular initiative by tethering it to unrelated but popular policies, and ensures the Legislature's responsibility to appropriate money as it sees fit is not usurped. And Proposition 80 would do so by enshrining in the Constitution--subject to no legislative right to amend or repeal--policies that could have disastrous consequences for the Commonwealth.

I. PROPOSITION 80'S DISTINCT PROVISIONS VIOLATE ARTICLE 48'S "RELATEDNESS" REQUIREMENT

Article 48 of the Massachusetts Constitution provides that the Attorney General shall certify an initiative petition that "contains only subjects . . . which are related or which are mutually dependent." Mass. Const. Amend. Art. 48, Pt. II, § 3. Proposition 80 does not comply.

A. Provisions Of An Initiative Petition Are "Related" Only If Every Provision, Evaluated Separately, Shares A Dominant Purpose

The constitutional requirement that separate provisions of an initiative petition be "related" is intended to ensure that voters can vote yes or no on a "unified statement of public policy." See Carney v.

Attorney General, 447 Mass. 218, 230-231 (2006) (explaining that the relatedness requirement is intended to "permit a reasonable voter to affirm or reject . . . a unified statement of public policy"); Gray v. Attorney General, 474 Mass. 638, 645-646 (2016) (explaining that the various provision of an initiative petition "must present a 'unified statement of public policy' that the voters can accept or reject as a whole"); Abdow v. Attorney General, 468 Mass. 478, 499-500 (2014) (explaining that provisions are insufficiently related where voters could be "place[d] . . . in the untenable position of casting a single vote on two or more dissimilar subjects").

The "relatedness" requirement was driven by a concern that special interests would use the initiative process to enact unpopular policies--or policies that disproportionately benefit a minority--by bundling them with initiatives having popular support. See Dunn v. Attorney General, 474 Mass. 675, 679 (2016) (noting the relatedness requirement was adopted "in response to delegates' concerns about . . . the dangers of 'log-rolling' in the initiative process, i.e., the 'practice of including several propositions in one measure or proposed constitutional amendment so that the . . . voters will pass all of them, even though these propositions might not have passed if they had been submitted separately").

Indeed, a "recurring topic of concern" by the delegates creating Article 48 "was the possibility that well-financed 'special interests' would exploit the initiative process to their own ends" by "'hitching' alluring provisions" to "controversial proposals." Carney, 447 Mass. at 228-229.

Thus, to satisfy the "relatedness" requirement of Article 48, Pt. II, § 3, the separate provisions of the initiative must each, when evaluated separately, have a specific and dominant purpose in common. See Carney, 447 Mass. at 226 (describing the "salient inquiry" as: "Do the similarities of an initiative's provisions dominate what each segment provides separately?") (emphasis added); Gray, 474 Mass. at 645 (same) (citing Carney, 447 Mass. at 226); Abdow, 468 Mass. at 500-501 (same) (citing Carney, 447 Mass. at 226); Dunn, 474 Mass. at 680 (same) (citing Carney, 447 Mass. at 226).¹²

¹² See also Massachusetts Teachers Assoc. v. Secretary of Commonwealth, 384 Mass. 209, 221 (1981) (describing as the salient test the ability to "whether there is a common purpose to which each element is germane" (emphasis added)); see also Opinion of the Justices to the House of Representatives, 422 Mass. 1212, 1220 (1996) (noting that "[s]ubjects are related 'if . . . one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane'"); Opinion of Justices, 309 Mass. 555, 561 (1941) (explaining that the relevant inquiry is whether "[t]he particular subjects of the proposed law appear to be germane to [its] general subject").

It is not enough that both provisions are enacted as part of a comprehensive scheme with a single overarching objective. Carney, 447 Mass. at 230 ("It is not enough that the provisions of an initiative petition all 'relate' to some broad topic at some conceivable level of abstraction"); Abdow, 468 Mass. at 499-500 ("[R]elatedness cannot be defined so broadly that it allows the inclusion in a single petition of two or more subjects that have only a marginal relationship to one another."). Only by ensuring that each provision shares the same dominant purpose can voters vote on a unified statement of public policy.¹³

This Court's decisions in Carney and Gray are instructive. In Carney, the Court considered whether an initiative petition that enhanced animal cruelty laws and abolished parimutuel dog racing satisfied the "relatedness" requirement of Art. 48, Pt. II, § 3. The Attorney General argued that the two provisions both related to the common purpose of "promoting the more humane treatment of dogs." 447 Mass. at 219, 224.

Rejecting that assertion, this Court noted that, evaluated alone, the two provisions have different dominant purposes. Id. at 231. The first advocates a

¹³ Nor it is enough to identify a purpose "common" to each provision by stating in a single sentence what the separate provisions do together. Contra Br. of Appellees at 40-43; Br. of Intervenors at 37-38. Were that so, any initiative petition would pass muster.

policy of increased punishment for perpetrators of animal abuse. Id. The purpose of the second, however, was eliminating parimutuel dog racing, in part to ensure the humane treatment of the animals. Id. Voters, the Court reasoned, should not be required to support one simply to enact the other: "The voter who favors increasing criminal penalties for animal abuse should be permitted to register that clear preference without also being required to favor eliminating parimutuel dog racing." Id. The Court went on to explain that "[t]he voter who thinks that the criminal penalties for animal abuse statutes are strong enough should not be required to vote in favor of extending the reach of our criminal laws because he favors abolishing parimutuel dog racing." Id. Because the separate provisions of the initiative petition, when evaluated separately, did not share a dominant common purpose, the initiative petition did not offer a meaningful choice to express a uniform public policy. Id. at 232.

In Gray, the Court considered an initiative petition ending the use of Common Core education standards and requiring that the Commissioner of Elementary and Secondary Education publish each year the prior year's comprehensive assessment tests. 474 Mass. at 638-639. The Attorney General asserted that the two provisions were "related" because they both

operated to "impos[e] 'new procedural requirements on the development and implementation of educational standards.'" Id. at 648.

Concluding the initiative petition did not satisfy the "relatedness" requirement, the Court explained that the two provisions, when evaluated separately, embraced "two separate public policy issues:" (1) redefining the contents of academic standards; and (2) publishing assessment tests to better inform educators about their content. Id. at 648-649. "[B]ecause the issues combined in the petition are substantively distinct, it is more likely that voters would be in the 'untenable position of casting a single vote on two or more dissimilar subjects.'" Id. at 649.

By contrast, this Court's decision in Mazzone v. Attorney General, 432 Mass. 515 (2000), demonstrates when the relatedness test is met. In Mazzone, the Court considered a challenge to an initiative petition proposing to broaden the class of drug crime defendants eligible for drug treatment in lieu of prosecution. The initiative petition also established a drug treatment trust fund to pay for that treatment, to be funded by monies forfeited by drug crime defendants. Id. at 518-519. Thus, expenditures for a program to treat drug crime defendants were funded by revenues drawn from the those forfeited by drug crime

defendants. Id. at 529.

The Court concluded that "the provisions . . . before us are related to a single, common purpose": expanding access to the Commonwealth's drug treatment programs. Id. Each of the provisions at issue--increased class of eligible participants, a fund to pay for the treatment, and a source of revenue for the fund--had as a dominant purpose the expansion of drug treatment; there was no rationale for the separate provisions absent that common purpose. Indeed, because the source of funding for the drug treatment programs was the illicit profits of illegal drug activity, the funding provision was closely tethered to the expansion of those eligible for drug treatment; it did not purport to raise a tax on an entirely separate class of persons to fund treatment.

B. Proposition 80's Provisions, Evaluated Separately, Do Not Share A Dominant Purpose

Proposition 80 combines three different policy objectives into a single initiative petition through three separate provisions: (1) "an additional tax of 4 percent on that portion of annual taxable income in excess of \$1,000,000"; (2) the appropriation of that tax revenue "[t]o provide the resources for quality public education and affordable public colleges and universities"; and (3) appropriation of that tax revenue "[t]o provide the resources for . . . the repair and maintenance of roads, bridges and public

transportation." None of these provisions, evaluated separately, have a dominant purpose in common.

The dominant purpose of raising additional money from wealthy taxpayers is to address the perceived lower tax burden borne by the wealthy, not to improve education or transportation infrastructure. According to Proposition 80's proponents, its purpose is to ensure that wealthy taxpayers "pay their fair share"; Proposition 80 is expressly named "the Fair Share Amendment." See Massachusetts Teachers Association, supra note 2. Indeed, proponents of Proposition 80 emphasize that "the state's wealthiest residents are paying a smaller share of their income than everyone else in state and local taxes," and that "[w]ith the Fair Share Amendment in place, the top 1 percent would still pay a smaller-than-average share of their incomes . . . , but the gap would be narrowed." See Massachusetts Teachers Association, supra note 2; cf. International Refugee Assistance Project v. Trump, 857 F.3d 554, 595 (4th Cir.) (holding that campaign statements "provide direct, specific evidence of what motivated" legal enactments), vacated and remanded sub nom. on other grounds, Trump v. International Refugee Assistance, 138 S. Ct. 353 (2017).

The dominant purpose of the provision appropriating some of the additional tax revenue to transportation is to improve transportation

infrastructure, keep Massachusetts competitive, and improve public safety. See Raise Up Massachusetts, "What the Fair Share Amendment Means for Improved Transportation Infrastructure," available at <http://raiseupma.org/campaigns/fair-share-amendment> (last visited Jan. 16, 2018) ("Right now, our transportation network is stuck in the last century. For Massachusetts to compete against other regions around the nation and the globe, we need to invest in modern, reliable transportation."). Indeed, proponents of Proposition 80 highlight the "backlog of neglected bridges, tunnels, roads, paths, and public transportation infrastructure in need of repair." Id. They cite "446 bridges" that "are structurally deficient, meaning they have major deterioration, cracks, or other flaws that reduce [the] ability to support vehicles," requiring "an estimated \$14.4 billion of bridge repairs." Id.; cf. International Refugee Assistance Project, 857 F.3d at 594.

The appropriation for education similarly has its own entirely distinct purpose. Its dominant purpose is to increase education spending to improve school programs. See Raise Up Massachusetts, supra note 2. Proposition 80's advocates cite the "need to re-invest in [science, technology, engineering, and math (STEM), music, art, and athletics] programs now to give all of our students access to a complete education." Id.

Proponents note opportunities to spend on "higher education to make it affordable for middle and working class students in our state." Id.; cf. International Refugee Assistance Project, 857 F.3d at 594.

Thus, just as in Carney and Gray, these three provisions have three entirely distinct purposes that embrace three diverse policy initiatives, none of which are evident in the other provisions: (1) fairer taxation; (2) increased transportation spending; and (3) increased education spending. A single voter interested in increasing spending on education or transportation cannot support those policies without also endorsing a policy that wealthier taxpayers should pay a greater portion of their income, and without embracing a method of governance that leaves the Legislature powerless to redirect spending or reduce taxes in case of other unforeseen or undesirable consequences. And notably distinct from Mazzone, the source of funding for the spending provisions of Proposition 80 is wholly unrelated to policy initiatives the spending provisions espouse.

Proposition 80 also bundles a hugely unpopular initiative (raising taxes) with initiatives that have large popular support, in a particularly naked effort to enact an unpopular initiative that would fail if presented alone. This is the very result that Article 48's "relatedness" requirement was intended to

prevent. It is no secret that Massachusetts voters have rejected initiatives proposing only a graduated income tax five times since Massachusetts implemented a flat income tax: in 1962, 1968, 1972, 1976, and 1994. See Jacoby, "The return of the grad-tax hustle," The Boston Globe (July 29, 2015), p.A,11,3. Each time, Massachusetts voters rejected the graduated tax, most recently by a margin of more than two to one. See Secretary of the Commonwealth Of Mass., Massachusetts Statewide Ballot Measures: 1919-2016, available at <http://www.sec.state.ma.us/ele/elebalm/balmidx.htm> (last visited Jan. 16, 2018); Scharfenberg, "Tax hike on top earners offered; Ballot measure would aid transit projects, schools," The Boston Globe (July 23, 2015), p.A,1,1.

Unsurprisingly, proponents of the graduated tax are now pairing this unpopular idea with the far more popular policies of improving education and repairing our roads. Indeed, Senate President Stanley Rosenberg has explained that Proposition 80 stands a "better chance of being approved" than prior tax initiatives because "it is focused specifically on money for education and transportation[.]" Tuthill, "Backers of Proposed Tax Hike on Massachusetts Millionaires File Signatures," WAMC (Dec. 2, 2015), available at <http://wamc.org/post/backers-proposed-tax-hike-massachusetts-millionaires-file-signatures> (last

visited Jan. 16, 2018). This bundling is exactly what the relatedness requirement is intended to protect against.

II. PROPOSITION 80'S APPROPRIATION OF ALL NEW TAX REVENUE EXCLUSIVELY FOR EDUCATION AND TRANSPORTATION SPENDING VIOLATES ARTICLE 48'S PROHIBITION AGAINST "SPECIFIC APPROPRIATION"

Proposition 80 violates Article 48's prohibition against an initiative petition that "makes a specific appropriation of money from the treasury of the commonwealth." Mass. Const. Amend. Art. 48 Pt. II § 2.

A. Initiative Petitions Proposing An Amendment To The Constitution Are "Specific Appropriations" If They Direct All Revenue From A Designated Source To A Specific Use

Article 48's prohibition of "specific appropriations" is intended to ensure that the people do not usurp legislative control over the treasury. See In re Opinion of the Justices, 297 Mass. at 580-581 (noting that "the general supervision of ways and means for the needs of the Commonwealth was reserved to the General Court," and that Article 48 Pt. II § 2 was "designed to prevent any interference with that general plan by means of the initiative"); Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 158-159 (2002) (explaining that the "specific appropriation" provision was intended to "preserve the Legislature's power to appropriate money from the treasury"); Associated Indus. of Mass. v. Secretary of Commonwealth, 413 Mass. 1, 8 (1992) ("The

basic purpose of excluding specific appropriation measures is to preserve the Legislature's general authority over the State treasury.").

The drafters of Article 48 realized that legislative flexibility is necessary to ensure that the Commonwealth can respond quickly and effectively in times of crisis. Moreover, Article 48 guarantees that the Commonwealth's revenues are spent only after legislative deliberation--not in response to the passing whim of a majority. See Slama v. Attorney General, 384 Mass. 620, 627 (1981). Indeed, one delegate at the constitutional convention explained his fear that "'an appropriation by the people of specific sums of money would knock spots, if I may use a slang expression, out of any State budget, and prevent any real regulation and careful administration of the finances of the state.'" Id. (quoting 2 Debates in the Massachusetts Constitutional Convention of 1917-1918, at 828-829 (1918)); see also Associated Indus. of Mass., 413 Mass. at 5-6 ("The basic purpose of excluding specific appropriation measures is to . . . preclude special interest groups from attempting to usurp [the Legislature's control over the treasury] through the use of initiatives which might compel the expenditure of public funds in a piecemeal fashion.").

These concerns are heightened when the initiative proposes to enshrine fiscal policy in the

Massachusetts' Constitution, requiring that any change in fiscal policy be subject to the arduous process of constitutional amendment rather than legislative repeal. See Associated Indus. of Mass., 413 Mass. at 9 (noting that a constitutional amendment setting aside funds in the public treasury for a particular purpose "would have left the Legislature with no choice but continually to expend the monies for the designated purpose, unless and until the amendment was repealed," in effect having a "permanently binding effect on the Legislature").¹⁴

For that reason, it has long been settled that, when an initiative petition proposes a constitutional amendment, the "direct purpose [of which] is to seize upon all the revenue received from [a] designated source[] and to appropriate it permanently to a specified public use," it violates the "specific appropriation" prohibition of Article 48. In re

¹⁴ See also Staudenmaier v. Municipality of Anchorage, 139 P.3d 1259, 1261-1262 (Alaska 2006) (explaining that the Alaska Constitution's prohibition on appropriations by voter initiative is designed to prevent "rash, unwise spending that would threaten the state fisc," and to ensure "that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs"); cf. State ex rel. Card v. Kaufman, 517 S.W.2d 78, 80-81 (Mo. 1974) (noting that its constitutional restrictions on appropriations were implemented because of concern for "the dangerous business of making appropriations by initiative, without regard to other constitutional requirements").

Opinion of the Justices, 297 Mass. at 580. This Court has never held to the contrary.

This Court's decision in the seminal case of In re Opinion of the Justices is directly on point, and controlling. In that case, the Court considered the constitutionality of an initiative petition proposing to amend the Massachusetts Constitution to set aside all revenue from the gasoline excise tax and various other sources of state revenue for exclusive spending on "highway purposes." Id. at 577. The text of the amendment in full provided:

[T]hat, with the exception of money derived from a motor vehicle excise tax for the privilege of using the highways, the net proceeds of all gasoline excise taxes and all motor vehicle fuel, motor vehicle and trailer registration fees, licenses, duties, excises and similar taxes shall be expended only for highway purposes, including policing, under the direction of the state department which has jurisdiction over state highways, except when jurisdiction thereof is given to some other department, and for the payment of interest, sinking fund and serial payments on loans and obligations for the payment of which such proceeds were obligated before January 1, 1937.

Id. at 579-580.

In assessing its constitutionality, the Court considered the general framework of the Massachusetts Constitution. Id. at 580. It noted that the Constitution "is an instrument of solemn and permanent character designed to establish fundamental maxims and to fix unvarying rules to which all departments of

government must conform." Id. The Court specifically referenced Article 63 of the Amendments to the Massachusetts Constitution, which describes the collection and appropriation of revenue by the legislature, noting that "[t]he general supervision of ways and means for the needs of the Commonwealth was reserved to the General Court." Id. Article 63 was intended "to centralize the financial affairs of the Commonwealth in its own treasury and place responsibility for their control in the General Court." Id. For that reason, all money belonging to the Commonwealth "must be paid in to the treasury," and "[n]o money can be paid out of the treasury except under the provisions of the budget." Id.

Given that overarching constitutional framework, the Court noted that Article 48's prohibition on "specific appropriation" was "designed to prevent any interference with that general plan by means of the initiative." Id. at 581. The "aim of [Article 48's specific appropriation prohibition] was to prevent resort to the initiative in order to segregate public moneys or a part of the public revenue to any narrow purpose." Id. at 580-581. For that reason, "the word 'specific' was not intended to be interpreted in any narrow or constricted sense." Id. at 580.

Accordingly, the Court held that "[p]ermanently to lay hold of and appropriate to a single public use

all the revenue derived from one source of taxation . . . is a 'specific appropriation' within [the] prohibition" of Article 48. Id. at 581. Because the proposed amendment in that case "permanently [] la[id] hold" of all revenue from motor vehicle excise taxes, and "permanently . . . appropriate[ed]" that revenue to the "single public use" of highway spending, it violated Article 48's prohibition on specific appropriations. Id.¹⁵

B. Proposition 80 Permanently Lays Hold Of And Appropriates To A Single Public Use All The Revenue Derived From One Source Of Taxation

Proposition 80 is functionally indistinct from the initiative petition in In re Opinion of the Justices. Proposition 80 states in relevant part:

¹⁵ Respondents-Appellees' and the Intervenors' argument that the petition at issue in In re Opinion of the Justices was only unconstitutional because it automatically transferred tax revenue to the Department of Highways is misplaced. See Br. of Appellees at 19-20; Br. of Intervenors at 14-16. Nowhere in In re Opinion of the Justices did the Court so construe the initiative petition at issue. Rather, the Court explained that it was the "lay[ing] hold of and appropriate[ing] to a single **public use**"--not an executive **department's use**--that rendered the initiative an impermissible "specific appropriation." 297 Mass. at 581. Indeed, when this Court distinguished In re Opinion of the Justices in Associated Industries, the exclusive control of the Department of Highways was not among the Court's distinctions; the Court instead noted that the initiative petition at issue left the "Legislature with no choice but to continually expend the monies for the designated purposes"--i.e., "highway purposes, including policing." 413 Mass. at 9 (emphasis added).

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.

It restricts "all revenues received" from a 4% increase in income tax on taxpayers earning more than \$1,000,000 "only for" spending on education and transportation. It thus "permanently [] lays hold of . . . all the revenue derived from one source of taxation." In re Opinion of the Justices, 297 Mass. at 581. And it "appropriates" that revenue "to a [specific] public use." Id. at 580. The Legislature is rendered powerless to appropriate any revenue from the new 4% tax to any other public use. Proposition 80 would thereby upend the constitutional structure reflected in both Articles 48 and 63, removing a portion of the treasury from the unfettered control of the Legislature. Accordingly, just as the initiative petition at issue in In re Opinion of the Justices violated Article 48's prohibition against "specific appropriation," so does Proposition 80.

C. Precedent Addressing Statutory Initiative Petitions Does Not Change The Analysis

In evaluating initiative petitions proposing legislation, this Court has previously held that inserting the phrase "subject to appropriation" into an initiative petition setting aside certain revenues for a particular purpose may save the statutory enactment from the "specific appropriations" provision of Article 48. See Associated Indus. of Mass., 413 Mass. at 7-9 (upholding initiative petition to enact statute appropriating excise tax on first possession of oil and hazardous materials for spending on environmental protection). However, for at least two reasons, that case law does not apply here.

First, this Court expressly held that initiative petitions proposing constitutional amendments implicate a different set of concerns--and therefore require a different standard--than mere statutory initiatives. In Associated Industries, this Court considered whether an initiative petition that imposed an excise tax on the "first possession" of oil and hazardous material and allocated that revenue to the Environmental Challenge Fund violated the "specific appropriation" prohibition in Article 48. Pursuant to the existing statute governing the Environmental Challenge Fund, the funds in the Environmental Challenge Fund could be used, "subject to appropriation," for the purposes set forth in the

existing statute. 413 Mass. at 2, 6-7. The initiative petition provided the Environmental Challenge Fund with a new source of revenue, and altered the purposes for which it could be used--the "subject to appropriation" language remained.

Although the Court upheld the initiative petition as constitutional, it did so because, unlike the initiative petition in In re Opinion of the Justices, it was not a "proposed constitutional amendment," and made clear that the standards for initiative petitions proposing constitutional amendments and statutory enactments are not identical. See Associated Indus. of Mass., 413 Mass. at 9 n.10 (explaining that In re Opinion of the Justices "was limited to the earmarking of public monies through a constitutional amendment," and that the same concerns--and therefore constitutional test--"does not apply necessarily to the earmarking of monies under a statute"). Id. Echoing the concerns that animated the Justices in In re Opinion of the Justices, the Court distinguished that case by noting that "due to [its] constitutional nature," "the measure would have left the Legislature with no choice but continually to expend the monies for the designated purposes, unless and until the amendment was repealed." Id. at 9. "The measure effectively would have bypassed the Legislature's power and discretion under Art. 63."

Id. By contrast, the initiative petition at issue in Associated Industries "would not create the same permanently binding effect on the Legislature"--it was subject to repeal by a future legislature. Id.

Second, this Court also has made clear that the phrase "subject to appropriation" may only save a "specific appropriation" if that phrase is intended to give "the Legislature . . . the discretion whether to appropriate funds or not" for the purpose specified by the initiative. Bates, 436 Mass. at 160, 164-168.

In Bates, the Court considered an initiative petition to enact a statute permitting candidates for statewide office to receive public campaign funding in lieu of private contributions. The public funding was to be supplied, "subject to appropriation," from the Clean Elections Fund, for which the initiative petition did not provide a source of funding. Id. at 161. At issue was whether the Legislature was required to fund the Clean Elections Fund.

This Court held that it was, explaining that, if the Legislature always had discretion as to whether it funded an initiative petition, Article 48's prohibition on "specific appropriation" would be superfluous; there could be no "specific appropriation" because all initiative petitions would have been "subject to appropriation" regardless of whether that language appeared in the initiative

petition. The Court also noted that, in those circumstances, it could not have previously held in Associated Industries that the phrase "subject to appropriation" in a proposed initiative petition saves what would otherwise be an excluded "specific appropriation.'" Bates, 436 Mass. at 160. That is, there would be nothing to "save." Rather, the phrase "subject to appropriation" can "effectively provide[] that the Legislature has the discretion whether to appropriate funds" for the purposes specified by the initiative petition, absolving it from its baseline obligation to fund the enacted initiative. Id.

Critically, however, the Court went on to hold that it is not the mere words "subject to appropriation" alone that are determinative. Instead, what is determinative is whether the phrase "subject to appropriation" is intended to "giv[e] the Legislature discretion" over the appropriation of the necessary funding, or whether it is merely "supererogatory"--indicative of the obvious fact that removing funds from the treasury requires legislative action. Relevant to that inquiry are: (1) the language in the petition itself; (2) the intent of the law's drafters; and (3) the considerations of the voters, as evidenced by advocacy for and against the initiative. Although language is important, the Court will not interpret an initiative petition in a way

that leads to "absurd or unreasonable results." Bates, 436 Mass. at 167-168. There was no evidence that the initiative petition in Bates was intended to vest the Legislature with discretion whether or not to fund the Clean Elections Fund. Accordingly, the Court concluded that the phrase "subject to appropriation" was "supererogatory."

Here, as in Bates, there can be no doubt that the phrase "subject to appropriation" is "supererogatory." 436 Mass. at 168. The text is unequivocal. The very first sentence of Proposition 80 establishes that its purpose is to "provide the resources for quality public education . . . and public transportation," and that "all revenues received [by the tax on millionaires] shall be expended . . . only for these purposes." See Boston Hous. Auth. v. National Conf. of Firemen & Oilers, Local 3., 458 Mass. 155, 162 (2010) ("It is a fundamental canon of statutory construction that statutory language should be given effect consistent with its plain meaning . . . unless to do so would achieve an illogical result.") (internal quotation marks omitted). The unequivocal text is also consistent with the express purposes articulated by the proponents of Proposition 80: "The new revenue generated by this tax could only be spent on quality public education, affordable public colleges and

universities, and for repair and maintenance of roads, bridges, and public transportation." (emphasis added). Raise Up Massachusetts, "What the Fair Share Amendment Would Do," available at <http://raiseupma.org/%20campaigns/fair-share-amendment/> (last visited Jan. 16, 2018).¹⁶

Reading the phrase "subject to appropriation" to vest the Legislature with the power to spend the revenue on other purposes, or with the discretion to not spend it at all, would render the mandatory and exclusive language of Proposition 80 irrelevant. Cf. Yont v. Secretary of Com., 275 Mass. 365, 368 (1931) ("Every part, clause, phrase and word of the Constitution and its Amendments must be given meaning commensurate with the importance of the instrument of government in which it occurs."). It would also lead to absurd results. It could result in the raising of large sums of tax revenue that the legislature could let sit idly by. Cf. Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 665 (2011) ("In determining the meaning of a constitutional provision, we look to the language and structure of the provision, so that it is 'construed so as to accomplish a reasonable result and to achieve its

¹⁶ See also Massachusetts Teachers Association, supra n.2 ("**Dedicate** the estimated \$2 billion raised annually to public education, public higher education and transportation infrastructure." (emphasis added)).

dominating purpose.'"). Or it could confirm that Proposition 80 is nothing more than an effort to pass an unpopular initiative by combining it with popular policies, an interpretation that violates Article 48's "relatedness" requirement, see Section I supra, and a construction the Court has an obligation to avoid. Cf. Commonwealth v. Maloney, 447 Mass. 577, 589 (2006) ("[W]e construe statutes to avoid constitutional problems where possible.").

By contrast, reading the phrase "subject to appropriation" as a mere acknowledgement that the Legislature must direct the collected revenue to the specific purposes gives meaning to every provision of Proposition 80. Accordingly, even if this Court's precedent regarding legislative petitions for statutory enactments was relevant, addressing Proposition 80 remains an impermissible "specific appropriation" precluded by Article 48.

CONCLUSION

Proposition 80 is an unwise attempt to cement a potentially harmful fiscal policy in the Massachusetts Constitution by doing exactly what the framers of Article 48 sought to prevent, and in violation of the Constitution's prohibition on making specific appropriations by initiative. This Court should hold that Proposition 80 is unconstitutional.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert Kingsley Smith, hereby certify, under the penalties of perjury that on January 22, 2018, I caused true and accurate copies of the foregoing to be filed in the office of the clerk of the Supreme Judicial Court and served two copies upon the following counsel by electronic and overnight mail:

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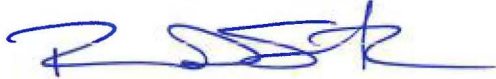
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MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K)
CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.



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