COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. SJC-12422

CHRISTOPHER ANDERSON, CHRISTOPHER CARLOZZI, RICHARD LORD, EILEEN MCANNENY, and DANIEL O'CONNELL,

Petitioners-Appellants,

v.

MAURA HEALEY, in her official capacity as Attorney General of the Commonwealth of Massachusetts,

WILLIAM F. GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts,

Defendants-Appellees,

Angel M. Cosme, et al.,

Intervenor-Defendants-Appellees.

ON RESERVATION AND REPORT FROM THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS-APPELLANTS

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RULE 1:21 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch of the Federal Government, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber has many members that were founded or do business in Massachusetts, including members that are pass-through businesses that would be adversely affected by the challenged initiative. In addition, the Chamber has a strong interest in encouraging the use of proper mechanisms for setting budgetary policy—as well as a general interest in sound, fair-minded, responsible government. Nobody wins when a state's finances are in distress—and therefore require substantial tax increases or spending cuts that negatively affect individuals and businesses alike.

Using citizen-initiated petitions to decide complex questions of budgetary policy and embed policies of the moment in a state's constitution, where they will be immune from legislative oversight, almost always yields that harmful result. The Chamber is filing this brief to explain how history and experience show that such initiatives are contrary to effective governance.

STATEMENT OF THE ISSUES

The Chamber's brief will address whether it is advisable to set budgetary policy through the use of initiative petitions, with discussion where applicable of the specific questions presented by Petitioners-Appellants. *See* Opening Br. 5.

INTRODUCTION

This case raises a broad issue of immense significance to the Commonwealth moving forward: Should the Court encourage the use of initiative petitions that change the Commonwealth's Constitution to set tax rates, determine appropriations, and shape the Commonwealth's budgetary policy? There is substantial reason to think that future initiatives seeking to embed tax and spending decisions in the Constitution are likely, given that these topics "have

continued to comprise a significant percentage of the ballot initiatives presented for voter action" nationwide. Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. Mich. J.L. Reform 511, 516 (2002). The Chamber is filing this *amicus curiae* brief to offer both a historical and a modern perspective on the appropriateness of budget-focused initiative petitions—a perspective informed by the wisdom of the Founding Fathers and the drafters of Article 48 of the Massachusetts Constitution, as well as by the work of scholars in this field and the experiences of other states that have enacted such initiatives.

The Framers of the U.S. Constitution were deeply concerned with structuring the federal government to mitigate the effects of conflict between self-interested factions. That same concern animated the debates over Article 48 during the 1917-1918 Massachusetts Convention, informing and shaping its language. While the initiative process can be a powerful tool for amplifying the voice of the people, it can also be a potent weapon wielded by one faction

against another for a greater share of the fiscal pie.

Modern scholarship and the experiences of other states that have enacted such initiatives show that this concern is real. Initiatives to amend state constitutions lack many of the hallmarks of representative democracy and good governance, including deliberation, expertise, comprehensiveness, and flexibility—which are particularly important considerations when addressing complex and esoteric questions of budgetary policy. Indeed, other states that have enacted similar initiatives, most notably California, have found their budgets and fiscal circumstances in disarray after the adoption of piecemeal measures that failed to account for other competing priorities of their states. The Chamber's brief discusses these risks in the hope that the discussion is helpful to the Court as it considers the issues in this proceeding.

ARGUMENT

A. The Framers Of The U.S. Constitution And The Drafters Of Article 48 Of The Massachusetts Constitution Warned About The Dangers Of Factionalism Associated With Constitution-Amending Initiatives

The concern that initiatives and referenda can empower self-interested factions to vote themselves a

greater share of the budget, to the detriment of the public, is not a new one. Both the drafters of the U.S. Constitution and the delegates to Massachusetts' 1917-1918 Constitutional Convention were acutely aware of the risks of factionalism, and both took it into consideration in the formulation of constitutional rules.

1. The Framers of the U.S. Constitution

The Founding Fathers were well aware of the dangers presented by factionalism, especially in the setting of budgetary policy. In particular, James Madison's "brilliant and familiar articulation of the problem of the tyranny of the majority, and the separation of powers doctrine as its solution[,] remains unmatched." Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. Colo. L. Rev. 983, 987 (2001).

"To Madison, the primary problem of governance was the control of faction." Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 39 (1985). He defined a faction as "a number of citizens … who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." The Federalist

No. 10, at 43 (James Madison) (George W. Carey & James McClellan eds., 2001). When a faction comprises a majority, Madison wrote, democracy "enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens." *Id.* at 45. In his view, issues of taxation and spending gave factions the greatest "opportunity and temptation … to trample on the rules of justice," because "[e]very shilling with which they over-burden the inferior number, is a shilling saved to their own pockets." *Ibid.*

To temper the passions and influence of individual factions, the Founders designed a system of representative rather than direct democracy. "[A] pure democracy … can admit of no cure for the mischiefs of faction," since "there is nothing to check the inducements to sacrifice the weaker party." *Id.* at 46. But "[a] republic … promises the cure for which we are seeking." *Ibid.* Representative democracy "refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country." *Ibid.*

The Founders were similarly skeptical of “a frequent reference of constitutional questions to the decision of the whole society,” given “the danger of disturbing the public tranquility, by interesting too strongly the public passions.” The Federalist No. 49, at 262 (James Madison). Even “occasional appeals to the people” would make it more difficult “to restrain the several departments within their legal limits” by normalizing otherwise extraordinary direct lawmaking. *Id.* at 264. It is therefore unsurprising that the Founders included no provision for direct legislation in the U.S. Constitution.

In short, the Founders were acutely aware of “[t]he difficulties in squaring modern plebiscitary constitutional process with the democratic ideal.” Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 Rutgers L.J. 787, 816 (1997). That is why they “ultimately rejected direct democracy on the national level in favor of republicanism.” Robinson, 35 U. Mich. J.L. Reform at 514.

2. The drafters of Article 48

In debating Article 48, the delegates to the 1917-1918 Massachusetts Convention voiced the same

fears about the impact of factions on the political process. This Court has frequently identified limitations on the influence of factions as a chief concern of the convention delegates. *See, e.g.*, *Carney v. Attorney Gen.*, 447 Mass. 218, 228 (2006) ("A recurring topic of concern was the possibility that well-financed 'special interests' would exploit the initiative process."); *Bates v. Director of Office of Campaign & Political Fin.*, 436 Mass. 144, 157 (2002) (describing "the people's fears of being tyrannized by a process that would give free rein to the majority's whims"); *Hurst v. State Ballot Law Comm'n*, 427 Mass. 825, 828 (1998) (explaining that the drafters "sought a balance between competing impulses toward direct versus representative democracy"); *Associated Indus. of Mass. v. Sec'y of Commonwealth*, 413 Mass. 1, 6 (1992) (noting concerns about "special interest groups").

The dangers of factionalism animated some of the most contentious debates over Article 48. The dissenting delegates, echoing Madison, argued that "wise, just and intelligent legislation for the whole people is rarely possible by direct action of a majority." 2 Debates in the Massachusetts

Constitutional Convention, 1917-1918, at 7 [hereinafter *Debates*]. Instead, they maintained, the initiative process would result in "[g]overnment by energetic groups and minorities, pushing their views upon an unorganized, uninterested or apathetic people." *Id.* at 12.

The proponents of Article 48 responded to these concerns. A principal supporter, Delegate Joseph Walker, argued that Article 48 would not remove "safeguards which have been built up and which are safe in the hands of the people of Massachusetts." *Id.* at 31. Another, Delegate Sherman Whipple, claimed that legislative action itself "has been directed not to promoting the general public welfare of all the people alike, but has been for the purpose of promoting the interests of those who stood behind." *Id.* at 45. These delegates did not question the *dangers* of factionalism, but asked instead whether Article 48 would exacerbate those dangers.

Delegates were particularly worried about the possibility that a faction might use the initiative process for its own financial benefit—a concern that motivated the adoption of Article 48's exclusion of "specific appropriations." Delegate Robert Luce argued

that such an exclusion was "necessary to prevent demagoguery, and in particular the taking of the property of one group of citizens by another." *Bates*, 436 Mass. at 157 (citing *Debates* at 817-18). Delegate Allan Buttrick reiterated these concerns, fearing that, without Luce's amendment, "you will have the whole thing wide open to allow Tom, Dick and Harry to come in and mulct the citizens of the Commonwealth." *Debates* at 819. Delegate John McAnerney ultimately proposed a variant of the "specific appropriation" language that he thought would prevent "any combination or interest in the Commonwealth asking for a specific appropriation of money for a certain purpose" (*id.* at 826), to broad acclaim.

It was the dangers of factionalism, in sum, that animated Article 48. The result is that, while Article 48 permits citizen-initiated ballot measures, it imposes "significant limits" as well (*Bates*, 436 Mass. at 159 n.24)—such that "its distinguishing feature as compared with similar measures in other states may be said to be its exemptions" (Lawrence B. Evans, *The Constitutional Convention of Massachusetts*, 15 Am. Pol. Sci. Rev. 214, 218 (1921)). To prevent abuse of

the initiative, the Court should ensure that those limits are honored.

B. Modern Scholarship And The Experiences Of Other States Demonstrate That Using Initiatives To Set Budgetary Policy In A State's Constitution Can Lead To Disaster

The importance of restraining factionalism is illustrated by the experiences of other states that have used citizen-initiated petitions to shape budgetary policy in their constitutions. As scholars have shown, the initiative is an inherently flawed mechanism for making coherent decisions about a state's tax rates, its budgetary appropriations, and its overall financial plan. Indeed, the initiative has been an abject failure in many of the states in which it has been used in these fiscal areas.

1. Modern scholarship

As the scholarship on this subject demonstrates, ballot initiatives lack several important attributes of legislative decisionmaking: deliberation, expertise, comprehensiveness, and flexibility. They accordingly are a poor means of setting budgetary policy.

a. Deliberation

Most important, initiatives lack the careful

consideration and deliberation that is (in theory, if not always in practice) the hallmark of legislative action. Compared with initiatives, representative democracy "not only aggregates preferences, it also provides opportunities for refinement of proposals, informed deliberation, consensus-building, and compromise." Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 Santa Clara L. Rev. 1037, 1051–54 (2001). That process of deliberation, in turn, "offers time for reflection, exposure to competing needs, and occasions for transforming preferences." Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1527 (1990).

In contrast, initiatives leave "no opportunity to collaboratively address broader questions of policy." Robinson, 35 U. Mich. J.L. Reform at 548. "Hundreds of thousands of scattered citizens cannot effectively bargain with each other over public policies, yielding on one issue in exchange for support on another." Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687, 689 (2010). Instead, initiatives present individual citizens with nothing more than an

up-or-down vote.

To be sure, representative democracy is not perfect. But even when it does not "achieve its ideal of dispassionate debate and logical persuasion, … it does institutionalize deliberative processes of choice" that an initiative necessarily lacks. Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, *17* Hastings Const. L.Q. 159, 169 (1989).

b. *Expertise*

Initiatives and their proponents often suffer from a lack of expertise, particularly regarding complex subjects like budgetary policy. "[M]any initiatives are amateur efforts done in private by ardent proponents with no critical counsel." Collins, 72 U. Colo. L. Rev. at 995. They may be "drafted by unelected individuals or partisans of interest groups and may be clumsily written," especially when "the authors were more interested in making a statement than in writing law." K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. Cin. L. Rev. 1185, 1205 (1995). In contrast, legislation and budgets are typically drafted by experienced legislators and staff with specialized knowledge of the subject.

Initiatives can therefore lead to “half-baked, simplistic legislation.” Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 Seattle U.L. Rev. 47, 80 (1995). That result is especially problematic in the area of tax and spending policy, which often depends on detailed knowledge of a state’s budget and programs, and of complicated projections of future revenue and outlays.

The Chamber does not make any specific assertion about the expertise of the proponents of the initiative challenged here. But of course the Court’s decision in this case will apply regardless of the identity of the proponents of any particular initiative petition.

c. *Comprehensiveness*

Because citizen-initiated ballot measures frequently change one tax rate or impose one appropriation at a time, they are often piecemeal rather than comprehensive—making it difficult for the state to implement a coherent policy. Initiative lawmaking “effects ad hoc changes in the use of financial resources and limits with potentially

crippling effect the ability of elective bodies to implement a collectively rationalized financial scheme." Robinson, 35 U. Mich. J.L. Reform at 518. Indeed, taxation and spending are usually zero-sum: lifting one tax may require imposing another, and increasing spending in one area may require cutbacks elsewhere. Sensible budgeting thus requires the decision-maker to look at all of a state's priorities, not some isolated subset.

This is a problem that the delegates to the 1917-1918 Convention took seriously and attempted to manage. In excluding specific appropriation measures from the initiative process, the delegates also aimed to prevent "piecemeal" expenditures (*Associated Indus. of Massachusetts*, 413 Mass. at 6), which would "knock spots … out of any State budget" (*Slama v. Attorney Gen.*, 384 Mass. 620, 627 (1981) (internal quotation marks omitted)). The very same delegates also proposed Article 63 (ratified on the same date), which requires that the Legislature pass a general appropriation bill—a requirement intended "to centralize, and improve control of, the Commonwealth's funds and to insure careful consideration of their expenditure." *Opinion of the Justices*, 349 Mass. 804, 807 (1965).

d. ***Flexibility***

Citizen-initiated ballot measures make it more difficult for a legislature to adapt its budgetary policy to future events and circumstances. Many initiatives are "designed specifically to divest the institutions and processes of ordinary governance of resources, flexibility, and authority." Scheiber, 28 Rutgers L.J. at 819. The initiative challenged in this case, for instance, ties the Legislature's hands by mandating a permanent appropriation for certain kinds of spending, even though the Commonwealth's circumstances in any given year may pose other, perhaps unanticipated, fiscal priorities.

These concerns are especially pertinent when, as here, an initiative would amend a state's constitution. "Once constitutional language is in place, it is not easily undone." Robinson, 35 U. Mich. J.L. Reform at 518. Thus, "[c]onstitutional initiatives are particularly problematic because they allow voters to embed contradictory fiscal priorities into rules that representatives cannot amend or repeal," leaving future legislators "to conduct long-term crisis management." Todd Donovan, *Direct*

Democracy As "Super-Precedent"?: Political Constraints of Citizen-Initiated Laws, 43 Willamette L. Rev. 191, 193 (2007).

* * *

For all of these reasons, the Court should cast a wary eye on proposed initiatives that have as their principal aim the setting of budgetary policy.

2. The experiences of other states

The experiences of other states that have used initiatives to shape budgetary policy offer a cautionary tale. Those experiences should weigh heavily in the Court's consideration of this case—especially because Article 48 was designed precisely to "foreclose the kinds of abuses and misapplications of initiative petitions that the delegates determined had occurred in other States." *Carney*, 447 Mass. at 228.

a. *California*

Perhaps the clearest example of this phenomenon is California, which came to the brink of fiscal collapse after a series of budget initiatives beginning in the 1970s. In 1978, California enacted Proposition 13, which imposed several stringent limits on real-estate taxes despite skyrocketing property

values in California. *See* Leo P. Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 Loy. U. Chi. L.J. 297, 315 (2009); *see also Nordlinger v. Hahn*, 505 U.S. 1, 28-29 (1992) (Stevens, J., dissenting) (explaining that, over time, Proposition 13 created "severe inequities" in property taxes). For a time, "the legislature still enjoyed sufficient revenues to bail-out local governments crippled by the property tax cuts, and thus help to support health, educational, and other local services." Scheiber, 28 Rutgers L.J. at 819. "By the mid 1990's, however, … the legislature could no longer sustain the annual bail-outs," leaving localities to fend for themselves. *Id.*

After Proposition 13, California voters continued to approve a series of initiatives dealing with taxation and spending. The result was that, by the 1990s, "a large proportion of the state's budget" had become "permanently subject to control by initiatives adopted in the past." Philip L. Dubois, *Lawmaking by Initiative: Issues, Options and Comparisons* 83 (1998). Although there is some disagreement on the precise aggregate effect of these initiatives, "according to one estimate, by 1990 the legislature controlled only eight percent of the state budget in California;

voters had tied up the rest through the initiative process." Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 Willamette L. Rev. 421, 430 (1998). Lawmakers were thus forced to "labor in the interstices left by ballot measures that, in California, they cannot amend or repeal." Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. Rev. 1735, 1737 (1998).

In short, "[t]he California model reveals a dark side" to initiatives and illustrates the pitfalls of "partisanship, incomplete knowledge of the issues, and manipulative behavior." Amleto Cattarin, *Hands Off My Taxes! A Comparative Analysis of Direct Democracy and Taxation*, 9 J.L. Soc'y 136, 136 (2008).

b. *Other states*

Oregon experienced problems similar to those of California, with "[b]allot measures that mandate[d] tax cuts and funding for programs," and took "budgets out of the hands of state legislators." Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 Cal. L. Rev. 1191, 1191 (2005). Many of these initiatives originated with organized special

interests; “the number of Oregon initiatives using only volunteers, as opposed to paid signature gatherers, dropped from more than half to less than one fifth.” *Id.* at 1203. The initiatives included “laws that reduced public employee retirement benefits, cut funding for Portland light rail, limited property taxes, prohibited the state from compensating for financial loss through new taxes, and enacted a double-majority requirement” for new tax initiatives. *Id.* at 1207.

On the other hand, Maine—the only other state in New England to have an initiative process—barely avoided enacting piecemeal, contradictory budget initiatives that would have dramatically disrupted the state’s finances. In 2003, Maine voters enacted an initiative that increased the state’s spending on education by roughly $500 million but “contained no funding mechanism, leaving such issues for the legislature to deal with.” The Honorable Jeremy R. Fischer, *Exercise the Power, Play by the Rules: Why Popular Exercise of Legislative Power in Maine Should Be Constrained by Legislative Rules*, 61 Me. L. Rev. 503, 514 (2009). Just two years later, however, Maine voters narrowly voted *against* another initiative that

would have significantly decreased the state's revenue and expenditures. *Id.* at 515. As Maine's experience reflects, negotiating these complex fiscal realities and priorities requires "more deliberation and compromise than is available through the initiative process." *Id.*

California, Oregon, and Maine do not stand alone in enacting, or coming close to enacting, ill-considered, contradictory initiatives often favored by one faction or another. Florida has too. *See* John B. Anderson & Nancy C. Ciampa, *Ballot Initiatives: Recommendations for Change*, Fla. B.J., Apr. 1997, at 71, 71 (describing pitched battle between anti-tax and pro-tax forces in 1996 initiative). So has Colorado. *See* John Dinan, *State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 Chap. L. Rev. 61, 85 (2016) (describing a 2000 amendment that required annual increases in education spending despite a 1992 amendment imposing caps on overall annual spending increases). All in all, many states have enacted budget initiatives "that interfere with an orderly and comprehensive consideration of all fiscal matters," and thereby "relocated, not eliminated, special interest politics." Thomas Gais &

Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 Temp. L. Rev. 1291, 1294 (1995) (internal quotation marks omitted).

* * *

The experiences of other states that have enacted initiatives on issues of tax and spending policy show that such initiatives are structurally incompatible with well-considered, responsible government.

CONCLUSION

In deciding this case, the Court should consider the historical concerns expressed at the federal and state level, the modern scholarship, and the recent experiences of other states described above.

Respectfully submitted,

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Dated: January 22, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) (pertinent findings or memorandum of decision);
Rule 16(e) (references to the record);
Rule 16(f) (reproduction of statutes, rules, regulations);
Rule 16(h) (length of briefs);
Rule 18 (appendix to the briefs); and
Rule 20 (typesize, margins, and form of briefs and appendices).

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