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Harold Hubschman
11 Linden Pl., #2
Brookline, MA 02445

Re: Initiative Petition No. 26-07, Initiative Petition for a Law Relative to Limiting State Tax Collection Growth and Returning Surpluses to Taxpayers

Dear Mr. Hubschman:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition which was submitted to the Attorney General on or before the first Wednesday of August this year. I regret that we are unable to certify that this proposed law complies with Article 48. Our decision, as with all decisions on certification of initiative petitions, is based solely on Article 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed law.

Below, we describe the proposed law and then explain why Article 48 precludes certification. Specifically, Art. 48, The Initiative, Pt. II, § 2, as amended by Art. 74, provides that an initiative petition should be certified only if it "is not, affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding state elections." *Id.* As explained below, this proposed law is substantially similar to a measure that has been qualified for submission to the people in the November, 2026 state election, and thus, certification of the measure would be inconsistent with the clear intent of the framers of Art. 48.

<u>*Description of Petition*</u>

G.L. c. 62F establishes a cap on state revenue, beyond which tax credits are issued to taxpayers for the following year. *See* St. 1986, c. 555. In 2025, this Office certified Initiative Petition 25–17, which will appear as Question 5 on the November 2026 ballot. That proposed law, if approved by the voters in November, would change the cap-and-credit system imposed by G.L. c. 62F by: (1) calculating the cap as the prior year's actually collected revenue (or, if the cap is exceeded for the prior year, the capped revenue), plus the allowable state growth factor (which is tied to wage and salary growth)[1]; and (2) subjecting revenue from the millionaire's tax to the cap. In response to Initiative Petition 25-17, the Legislature is presently considering proposed changes to G.L. c. 62F that would make it more difficult for the taxpayer credits to be triggered.

As you have described it to us, "the language of [Initiative Petition] 26–07 is identical to the language of Chapter 62F after being amended by Question 5."[2] The proposed law begins with a definitions section, which it labels Section § 1; a very similar provision is currently codified as G.L. c. 62F, § 2. Key definitions are as follows:

- "allowable state tax revenues" is defined as "amount equal to the computed maximum state tax revenues" unless the maximum amount is less than the amount collected during the prior year (addressing the unlikely contingency of wage and salary rates falling over a three year average). In that contingency, maximum state tax revenues "shall be equal to the allowable" revenues for the prior year.

- "Net State Tax Revenues" is defined as all "State Tax Revenue," less abatements or refunds. "State Tax Revenue" is defined to include "revenues of the Commonwealth from every tax, surtax, receipt, penalty, and other monetary transaction," and specifically includes certain enumerated revenues, including millionaire's tax revenue.

The definitions are the same as those presently set forth in G.L. c. 62F, § 2, except that (1) "State Tax Revenue" is defined to include millionaire's tax revenue; and (2) the cap is set as the prior year's net state tax revenue plus the growth factor (tied to state wage and salary growth), rather than the prior year's *cap* plus the growth factor. Each of those differences tracks the language of the law proposed by Question 5.

Section 2 of the proposed law provides that the Governor and Legislature should "endeavor" to "set rates of taxation . . . such that net state tax revenues" do not "exceed allowable state tax revenues for said fiscal year." This language is currently codified at G.L. c. 62F, § 3.

Section 3 addresses what happens if the state delegates its taxing authority to "local governmental units," i.e., those tax revenues are offset against the "allowable state tax revenues," so as to *lower* the state revenue cap. This section is currently codified at G.L. c. 62F, § 4.

Section 4 reflects the current G.L. c. 62F, § 5, and describes the process by which the

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[1] Under current law, the cap is the prior year's *allowable* revenue, increased by the average wage and salary growth. Because actual state tax revenue almost always falls below the allowable revenue, this results in a higher cap than what is proposed by Question 5.

[2] We largely agree with this characterization, though there are several scrivener's errors that we identified to you during our review.

Commissioner of Revenue must report collections to the Legislature; and the process by which the Auditor evaluates whether the allowable state tax revenues have been exceeded.

Section 5 reflects the current G.L. c. 62F, § 6, and provides that if net state tax revenues in any fiscal year "exceed allowable state tax revenues," the amount of the excess "shall result in a credit equal to the total amount of such excess," applied "against the then current personal income tax liability of each taxpayer who files an income tax return in both the then current and the previous taxable year."

Sections 6 and 8 allow taxpayer suits to enforce the credits (if they are not given) and provide for severability, respectively.

Section 7 is not in current law, but is a feature of Question 5. It would strike subparagraph (d) of G.L. c. 29, § 2BBBBBB, which states that millionaire's tax income "shall not be subject to the allowable state tax revenue limitations established by" G.L. c. 62F.

Art. 48's Bar on "Substantially Similar" Measures Precludes Certification of the Petition

For purposes of Art. 48, a measure is "substantially the same" as "a previous measure when it affirms or negates essentially the same provisions, with little or no substantive difference." *Bogertman v. Attorney Gen.*, 474 Mass. 607, 622 (2016). Initiative Petition 26-07 is expressly designed to achieve the same end as would Question 5. We thus conclude that it is "substantially the same" as Question 5.

We must next determine whether Question 5 has been "qualified for submission or submitted to the people at either of the two preceding state elections" where the Attorney General must make a certification decision before the November 2026 election, even though most other parts of the initiative process, such as signature submission and legislative consideration will occur after November. Art. 48, The Initiative, Pt. II, § 2. In making that determination, the historical record is illustrative. *E.g.*, *Citizens for a Competitive Massachusetts v. Secretary of Commonwealth*, 413 Mass. 25, 31 (1992) ("we refer to the legislative history of art. 48 as one avenue only for construing the words of the amendment in such a way as to carry into effect what seems to be the reasonable purpose of the people in adopting it"). Likewise, the "general ideas" embodied in Article 48 are important, and its text is to be construed in light of those ideas "in the sense most obvious to the common intelligence." *Buckley v. Secretary of Commonwealth*, 371 Mass. 195, 199 (1976) (quoting *Yont v. Secretary of Commonwealth*, 275 Mass. 365, 366 (1931). The Delegates to the 1917 Convention purposefully established the Attorney General as the certification gatekeeper on the issue of substantially similar initiatives "before the petition [even] gets started." *Debates*, Vol. II at 670 (Mr. Quincy of Boston). They did so because they wanted to prevent serial debate on the same issue, election after election cycle. *Debates*, Vol. II at 666–674; *see, e.g., id.* at 671 (Mr. Bates of Boston) (noting that, though the language was proposed by Mr. Luce, an opponent of the popular initiative, Mr. Bates, one of the initiative power's chief proponents, would vote for it because "I do not think it is fair to the ordinary voter—to put upon him the burden of deciding every year a question to which he may have given his thought, and have decided, the year before. That puts too great a weapon for annoyance into the hands of the cranks, and I do not think it serves any useful purpose"). Instead, the Delegates determined that on a particular ballot question, "there ought to be a decision and then a wait," rather than the "constant forcing of [similar] questions." *See, e.g.* Debates at 673 (Mr. Youngman of Boston).

We therefore conclude that certification of this proposed law would be inconsistent with the purpose and structure of Art. 48. Forcing consideration of a substantially similar question during the very next election by submitting it in an even-numbered year immediately before the people vote on the initial question, when the same question would be barred if submitted the following year for the same election, is plainly contrary to the purpose of the bar on "substantially similar" measures, and is what the Delegates aimed to prevent. That conclusion is further supported by the confusion that would be caused by petitioners collecting signatures on a proposed initiative at the very time voters are voting on it, as would occur if Initiative Petition 26-07 were certified and then circulated this fall.

We acknowledge that the text of Article 48, as it was amended by Article 74, is ambiguous in its application to the current circumstance; this is in part because Article 48 was adopted at a time when state elections were annual, and the timelines set forth in the text of Article 48 are most straightforward in that context. *See Herrmann v. Attorney General*, 492 Mass. 51, 59 (2023) ("We recognize that when art. 48 was originally passed and the deadlines . . . were established, the Commonwealth had annual elections, making deadlines straightforward and simpler to interpret. Today this process occurs in the context of biennial elections," and "interpretation of art. 48 is less obvious in this context"). *Hermann* is the only Supreme Judicial Court decision to describe the timeline of petitions submitted during an even-numbered year; and it recognized that Article 48's timelines are not crystal clear in this context. *Id.*

However, the text "qualified for submission" must serve some purpose. *Cf. Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 596, 601 (2020) ("[A] statute must be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous"). It is clear that Question 5 has "qualified for submission" at the November, 2026 election, since all constitutional prerequisites have been met. *See* Art. 48; The Initiative, Pt. V, § 2, as amended by Art. 81, § 2 (after the second round of signatures are verified, "then the secretary of the commonwealth *shall* submit such proposed law to the people at the next state election") (emphasis added). Therefore, the "qualified for submission" language appears to cover measures bound for the ballot but not yet submitted to the people, i.e., the present circumstance.

We cannot conclude that the term "two preceding biennial state elections" was meant to require the Attorney General to certify an election -year petition substantially similar to a measure bound for the ballot later two months later. The Legislature in its drafting and initial adoption of Article 74 would not have thought it appropriate to allow Question 5 to appear on both the November 2026 ballot and the November 2028 ballot, but only if an even-year petition was filed, requiring voters to confront the issue essentially non-stop from September 2025 (when signatures were gathered for Question 5) through November 2028. Indeed, there is ample evidence that Article

48 was deliberately structured to avoid such repetition. *E.g.* Debates at 673 (Mr. Youngman of Boston). Nor does it make sense that Question 5 could appear on the ballot in both November 2026 *and* November 2028, but not thereafter until November 2034.The most logical reading of the structure, purpose, and text of Article 48 is that the Attorney General may not certify a question functionally identical to one qualified for submission to the people in two months.

That conclusion is not altered by the petition's anticipation of the possibility that the Legislature will, in the interim, amend G.L. 62F. The Delegates to the 1917 Convention expected such a scenario but did not except it from the bar on "substantially similar" measures:

> Mr Brown of Brockton: I want to ask the gentleman [Mr. Luce] from Waltham this question: Suppose the people voted for a measure this year; under your amendment they no sooner have voted for it than the Legislature could repeal it; what shall we do then? Are you placing the Legislature to have the last word, and repeal a law about as soon as the people pass it, and then require a wait of three years before it can come back to the people.
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> Mr. Luce of Waltham: I understand that the law repealing the amendment is open to the referendum, and therefore the repeal may be constantly rejected if the majority of voters so desire.

Debates, Vol. II at 672. The Delegates were clear that voters' recourse in the event of a legislative repeal of an initiative is the referendum, not serial presentation of the initiative to the electorate. *Id.*

For these reasons, we are unable to certify that Initiative Petition No. 26-07 meets the constitutional requirements for certification set by Amendment Article 48.

Very truly yours,

Anne Sterman
Chief, Government Bureau
617-963-2524

cc: William Francis Galvin, Secretary of the Commonwealth