SJC-12885

BENJAMIN LOCKE WEINER & others[1] vs. ATTORNEY GENERAL & another.[2]

Suffolk. April 6, 2020. - May 26, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Initiative. Constitutional Law, Initiative petition. Attorney General. Alcoholic Liquors.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on November 25, 2019.

The case was reported by Lowy, J.

Robert J. Cordy for the plaintiffs.

Juliana deHaan Rice, Assistant Attorney General (Anne Sterman & Kendra Kinscherf, Assistant Attorneys General, also present) for the defendants.

The following submitted briefs for amici curiae:

Kevin P. Martin & Joshua J. Bone for Wine & Spirits Wholesalers of Massachusetts, Inc.

David Hadas for Beer Distributors of Massachusetts, Inc.

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[1] Ronald T. Maloney, Jr., Cynthia Newell, Sean Barry, Tina M. Messina, Maximilian Pano Haivanis, and Steven Schechterle.

[2] Secretary of the Commonwealth.

Thomas R. Kiley, Carl Valvo, Meredith G. Fierro, & Matthew T. Durand for Cumberland Farms, Inc., & another.

John Sofis Scheft for Massachusetts Prevention Alliance & another.

CYPHER, J. On or before August 7, 2019, an initiative petition signed by at least ten registered voters, entitled "An Initiative Petition for a Law Relative to the Sale of Beer and Wine by Food Stores," was submitted to the Attorney General and numbered by her as Initiative Petition 19-14. On September 4, 2019, the Attorney General certified to the Secretary of the Commonwealth (Secretary) that Initiative Petition 19-14 was in proper form for submission to the people; that it was not, either affirmatively or negatively, substantially the same as any measure that was qualified for submission or submitted to the people at either of the two preceding biennial State elections; and that it contained only subjects that are related or are mutually dependent and that are not excluded from the initiative process pursuant to art. 48, The Initiative, II, § 2, of the Amendments to the Massachusetts Constitution. In accordance with the requirements of art. 48, the Attorney General prepared a "fair, concise summary" of the measure proposed by Initiative Petition 19-14 and transmitted that summary to the Secretary with the September 4 certification letter. The proponents of Initiative Petition 19-14 then filed it with the Secretary. Following receipt of the summary and

certification from the Attorney General, the Secretary prepared blank signature collection forms and provided them to proponents for circulation to members of the public. On December 20, 2019, the Secretary's elections division sent a letter informing the proponents of Initiative Petition 19-14 that they had submitted a sufficient number of certified signatures pursuant to art. 48, The Initiative, II, § 3, as amended by art. 74 of the Amendments, and art. 48, The Initiative, IV, § 2. The Secretary submitted Initiative Petition 19-14 to the clerk of the House of Representatives on January 1, 2020. See 2020 House Doc. No. 4303.

Thereafter, seven registered voters of the Commonwealth commenced an action in the county court, challenging the Attorney General's certification of Initiative Petition 19-14; alleging that the measure was not in compliance with the requirement that an initiative petition "contain[] only subjects . . . which are related or which are mutually dependent," art. 48, The Initiative, II, § 3, as amended by art. 74, and that the measure included a "specific appropriation" in violation of art. 48, The Initiative, II, § 2; and requesting that the Secretary be enjoined from placing the measure on the ballot. A single justice reserved and reported the case to the full court on a statement of agreed facts. We conclude that Initiative Petition 19-14 neither contains unrelated subjects nor includes a

specific appropriation and that the Attorney General's certification therefore complied with art. 48.[3]

The proposed law. General Laws c. 138, §§ 15 and 15A, govern the retail sale of alcoholic beverages for consumption off the premises, for example, by package stores.[4] Most licenses for such sales are granted by cities and towns, subject to the approval of the alcoholic beverages control commission (commission). See G. L. c. 138, § 15. In most cities and towns, the number of available licenses for the sale of alcoholic beverages, whether to be consumed on or off premises, is set by a quota system based on the municipality's population. G. L. c. 138, § 17. Currently, no one person, corporation, or other entity may hold more than nine off-premises licenses (per-entity limit). G. L. c. 138, § 15, as amended through St. 2011, c. 193.

If passed into law, section 1 of Initiative Petition 19-14 would amend G. L. c. 138 by adding § 15D, which would create a

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[3] We acknowledge the amicus briefs of Wine & Spirits Wholesalers of Massachusetts, Inc.; Beer Distributors of Massachusetts, Inc.; Cumberland Farms, Inc., and New England Convenience Store and Energy Marketers Association; and Massachusetts Prevention Alliance and Health Foundation of Central Massachusetts. The proponents of Initiative Petition 19-14 were invited to file a motion to intervene, but did not do so.

[4] Licenses to sell alcoholic beverages for consumption on the premises, at establishments such as restaurants and taverns, are governed by G. L. c. 138, § 12.

new type of license, known as a "food store license," allowing the sale, for consumption off the premises, of wine and malt beverages[5] by retail food stores. Food stores eligible for such licenses are defined in section 1 of the measure by reference to other State and Federal laws. The number of these food store licenses to be granted would be "at the sole discretion of each local licensing authority"; food store licenses would be subject neither to existing local quotas for off-premises licenses nor to the per-entity limit. Moreover, Initiative Petition 19-14 would also amend § 15 to gradually increase, and eventually eliminate, the per-entity limit on off-premises licenses.

Section 1 of Initiative Petition 19-14 would also add a new § 15C to G. L. c. 138. The proposed § 15C would impose new procedures to prevent the sale of alcohol to persons under twenty-one years of age. Under current law, although retailers face criminal penalties if they sell alcohol to any person under twenty-one years of age, G. L. c. 138, § 34, they are not obligated to use any particular means to verify the age of any

[5] For purposes of G. L. c. 138, "malt beverages" are defined as "all alcoholic beverages manufactured or produced by the process of brewing or fermentation of malt, with or without cereal grains or fermentable sugars, or of hops, and containing not more than twelve per cent of alcohol by weight." G. L. c. 138, § 1.

person purchasing alcohol.[6] The proposed § 15C would require all off-premises retailers, whether food stores or package stores, to demand certain forms of identification as proof of age for any sale. Eventually, under sections 2 and 11 of Initiative Petition 19-14, off-premises retailers would be required to check identification using a barcode scanner or "such other comparable technology as may be approved by the commission."

Finally, the measure would provide for additional resources for the enforcement of the laws concerning alcoholic beverages. Section 8 of Initiative Petition 19-14 would establish "a separate fund which, subject to appropriation, shall consist of all monies required to be paid into the state treasury under [§§] 27 and 62 of said chapter 138 and which, subject to appropriation, shall be expended by the commission first for the implementation of this Act and second for the ongoing administration and enforcement of said chapter 138 generally." Under section 9 of the petition, the commission would be required to employ at least one investigator for every 250 off-premises retail licenses granted under § 15 or § 15D, again subject to appropriation.

[6] Retailers do, however, enjoy a defense if they reasonably rely on certain forms of identification. G. L. c. 138, § 34B, second par.

Standard of review. As noted, the Attorney General certified that Initiative Petition 19-14 was in compliance with art. 48. We review that determination de novo. See, e.g., Abdow v. Attorney Gen., 468 Mass. 478, 487 (2014). At the same time, "we acknowledge 'the firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws.'" Id., quoting Carney v. Attorney Gen., 451 Mass. 803, 814 (2008) (Carney II). See Buckley v. Secretary of the Commonwealth, 371 Mass. 195, 199 (1976) (art. 48 establishes "people's process").

Relatedness. Article 48, The Initiative, II, § 3, as amended by art. 74, requires the Attorney General to certify that a proposed measure "contains only subjects . . . which are related or which are mutually dependent" before the measure can be placed on the ballot. The plaintiffs argue that Initiative Petition 19-14 contains four distinct subjects that they argue are unrelated to each other: the creation of food store licenses; the reduction and eventual elimination of the per-entity limit on all off-premises licenses under G. L. c. 138, § 15; the new age-verification requirements; and the increase in funding for enforcement by the commission. We disagree. In our view, these subjects are all operationally related, as we shall explain.

"There is no single 'bright-line' test for determining whether an initiative meets the related subjects requirement." Hensley v. Attorney Gen., 474 Mass. 651, 657 (2016), citing Abdow, 468 Mass. at 500. We have said that "the related subjects requirement is met where 'one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane.'" Hensley, supra, quoting Abdow, supra at 499. This purpose "may not be so broad as to render the relatedness limitation 'meaningless.'" Carney v. Attorney Gen., 447 Mass. 218, 225 (2006) (Carney I), quoting Massachusetts Teachers Ass'n v. Secretary of the Commonwealth, 384 Mass. 209, 219 (1981). "At some high level of abstraction, any two laws may be said to share a 'common purpose.'" Carney I, supra at 226. "[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, which might confuse or mislead voters, or which could place them in the untenable position of casting a single vote on two or more dissimilar subjects." Abdow, supra, citing Carney I, supra at 224-232. At the same time, if we construe the relatedness requirement too strictly, we risk limiting initiative petitions to a single subject, a requirement rejected by the constitutional convention that approved art. 48. See Abdow, supra, citing Massachusetts Teachers Ass'n, supra at 219-220 &

nn.9, 10. This would "frustrate the ability of voters to use the popular initiative as 'the people's process' to bring important matters of concern directly to the electorate." Abdow, supra. We therefore balance these considerations by asking two questions: "First, '[d]o the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on "yes" or "no" by the voters?' . . . Second, does the initiative petition 'express an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy'?" (Citations omitted.) Hensley, supra at 658.

The Attorney General argues that the various provisions of Initiative Petition 19-14 all relate to a common purpose: "the lifting of restrictions on the number and allocation of licenses for the retail sale of alcoholic beverages to be consumed off the premises." We agree. The provisions that create the new food store licenses would directly implement this purpose by expanding the off-premises licenses available to entities in the business of selling groceries. Moreover, food store licenses would not count against a municipality's quota on the number of retail licenses available, further lifting restrictions on licensing. Initiative Petition 19-14 would also gradually

increase and ultimately eliminate the per-entity limit. This, too, directly implements the measure's purpose.

The remaining provisions, concerning the new age-verification requirements and the increased funding for enforcement, do not directly lift restrictions on licensing, but "anticipate[] and address[] a potential consequence" thereof. Oberlies v. Attorney Gen., 479 Mass. 823, 832 (2018). In Oberlies, an initiative petition proposed limits on the number of patients assigned to each nurse in health care facilities and also prohibited facilities from reducing their remaining workforce as a result. Id. at 831. We observed that hospitals, compelled to hire more nurses to meet the patient assignment limits, might respond by eliminating other staff. Id. at 832. The workforce-reduction prohibition sought to mitigate this objectionable consequence and thus was operationally related to the patient assignment limits. Id. Initiative Petition 19-14 similarly anticipates and mitigates the foreseeable consequences of lifting restrictions on licenses. One might reasonably be concerned that granting retail licenses to food stores, a class of business having less experience than existing package stores in the sale of alcoholic beverages, would result in more unlawful purchases of alcohol by underage persons. Requiring age verification before every such purchase might mitigate this danger. Similarly, the expansion of available off-premises

licenses would likely necessitate greater enforcement efforts by the commission, requiring additional resources as provided in section 8 of Initiative Petition 19-14. The age-verification and enforcement provisions are thus operationally related to the other provisions of the measure. We are persuaded that Initiative Petition 19-14 sets forth a unified statement of policy and is sufficiently coherent to permit a "yes" or "no" vote.

Our view is bolstered by comparing Initiative Petition 19-14 to the measure at issue in Hensley. That measure, which was ultimately adopted by the voters as G. L. c. 94G, legalized the possession and use of marijuana, in limited amounts, by adults over twenty-one years of age; created a comprehensive scheme for the licensing, operation, and regulation of marijuana-related businesses; provided for the taxation of retail sales of marijuana; and permitted medical marijuana treatment centers to participate in the retail scheme. Hensley, 474 Mass. at 653-655. Despite the complexity of that measure and its numerous different provisions, we held that it "easily satisfie[d] the related subjects requirement of art. 48." Id. at 658. All of its provisions, including the ones pertaining to medical marijuana treatment centers, were "piece[s] of the proposed integrated scheme." Id. at 659. In the same way, each provision of Initiative Petition 19-14 is one piece of a

proposed scheme to lift restrictions on off-premises licenses for the retail sale of alcoholic beverages.

The plaintiffs argue that this case is distinguishable from Hensley because Initiative Petition 19-14 proposes to alter the existing statutory and regulatory scheme for retail sales of alcohol, whereas the measure at issue in Hensley proposed a novel regulatory scheme governing legalized marijuana. In point of fact, the Hensley measure not only created a new scheme for the legalization and regulation of recreational marijuana, but also altered the existing regulation of medical marijuana. See Hensley, 474 Mass. at 653-655. More importantly, we have never held that relatedness is to be evaluated in terms of an initiative's effect on existing law. Surely, the voters must be permitted to amend statutes, not only to enact new ones. "A measure does not fail the relatedness requirement just because it affects more than one statute, as long as the provisions of the petition are related by a common purpose." Albano v. Attorney Gen., 437 Mass. 156, 161 (2002). Article 48 requires that the subjects in an initiative be related to or mutually dependent on each other and says nothing about their relationship to other law.

The plaintiffs also take issue with individual provisions of Initiative Petition 19-14. They note that, although the food store licenses would permit only retail sales of wine and malt

beverages for off-premises consumption, other provisions would apply more broadly. The elimination of the per-entity limit and the new age-verification requirements would apply to all off-premises retailers, whether food stores or package stores, and to sales of spirits as well as wine and malt beverages. The provisions concerning enforcement -- both as to funding and as to the number of investigators -- would apply to the commission's enforcement responsibilities generally, not just to policing the new food store licensees. In our view, these administrative details go to the scope of the measure and do not vitiate the relatedness of Initiative Petition 19-14 as a whole. The provisions of an initiative petition need not be "drafted with strict internal consistency." Mazzone v. Attorney Gen., 432 Mass. 515, 528-529 (2000). It is sufficient that the "similarities . . . dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on 'yes' or 'no' by the voters." Oberlies, 479 Mass. at 830, quoting Abdow, 468 Mass. at 500. As we have discussed, Initiative Petition 19-14 passes this test.

It is also of no moment that Initiative Petition 19-14 might have included other provisions related to its purpose. "It is not for the courts to say that logically and consistently other matters might have been included or that particular subjects might have been dealt with differently." Massachusetts

Teachers Ass'n, 384 Mass. at 220. So long as the provisions that have been included are sufficiently related, the initiative petition passes muster.

Finally, Anderson v. Attorney Gen., 479 Mass. 780 (2018), does not require a different result. In that case, we determined that a proposed constitutional amendment did not comply with the relatedness requirement, where it would have imposed a graduated income tax on incomes over $1 million and earmarked all revenues therefrom, subject to appropriation, for two disparate purposes: education and transportation. Id. at 784. Those two purposes, we held, were "not related beyond the broadest conceptual level of public good" and were "entirely separate from the subject of a stepped rather than a flat-rate income tax." Id. at 798. The proposed amendment thus contained no "common purpose or unified public policy that the voters fairly could vote up or down as a whole." Id. Voters who favored, for example, a graduated tax but not the earmarking provisions, or who favored designating funds for transportation but not for education, would have been placed in an untenable position. Id. at 799-800. That is not the case here, where, as we have explained, all the provisions of Initiative Petition 19-14 do relate to the common purpose of lifting restrictions on licenses for the retail sale of alcohol. It presents a unified

statement of public policy on which the voters can fairly vote "yes" or "no."

We conclude that, as the Attorney General certified, Initiative Petition 19-14 contains only subjects that are related or mutually dependent, in compliance with art. 48.

Specific appropriation. Article 48, The Initiative, II, § 2, provides: "No measure . . . that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect." The plaintiffs argue that section 8 of Initiative Petition 19-14 makes a specific appropriation in violation of this provision by requiring that certain monies be directed to a new fund for the enforcement of G. L. c. 138. Again, we disagree.

We discussed the origins of the clause prohibiting specific appropriations, and the Legislature's concomitant obligation either to repeal a law enacted by initiative or to "raise . . . and . . . appropriate such money as may be necessary to carry such law into effect," in detail in Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 156-160 (2002). We determined that the specific appropriations exclusion was intended to "preserve the Legislature's power to

appropriate money from the treasury while giving the people power to enact meaningful reform legislation in the face of legislative recalcitrance, even though such reforms would necessarily require the expenditure of public funds." Id. at 158-159, citing 2 Debates in the Massachusetts Constitutional Convention 1917-1918, at 833 (1918). In addressing claims that a given initiative petition would impermissibly make a specific appropriation, we have long adhered to the definition set forth in Opinion of the Justices, 323 Mass. 764, 766 (1948): "To appropriate has been defined as 'to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other'" (citation omitted). See Associated Indus. of Mass. v. Secretary of the Commonwealth, 413 Mass. 1, 8 (1992), and cases cited. However, merely setting aside public monies for a public purpose does not amount to an appropriation. Id. "It is not until the Executive Branch becomes authorized to use the monies that the monies are removed from the further control of the Legislature. Merely setting aside the monies, in the sense of placing them in a separate fund, does not necessarily remove them from the Legislature's control." Id. Similarly we have said that "[a] general law that directs that funds be used for a specific purpose is not an appropriation. . . . Rather,

an appropriation occurs when, as a result of an appropriations bill proposed and adopted according to the constitutional requirements of art. 63 [of the Amendments to the Massachusetts Constitution], monies are committed and released by the Legislature to the executive branch and are no longer within the control of the Legislature." Mazzone, 432 Mass. at 523. "The essence of a 'specific appropriation' under art. 48 is that money is segregated from the public coffers to be used for a targeted, narrow purpose. . . . The crucial determinant of a specific appropriation is that its 'direct purpose' is 'to seize upon all the revenue received from the designated sources and to appropriate it permanently to a specified public use'" (emphasis in original). Bates, supra at 162, quoting Slama v. Attorney Gen., 384 Mass. 620, 626 (1981). "The basic purpose of excluding specific appropriation measures is to preserve the Legislature's general authority over the State treasury, and to preclude special interest groups from attempting to usurp that authority through the use of initiatives which might compel the expenditure of public funds in a piecemeal fashion. . . . The essential aspect of a specific appropriation is that it removes public monies, and the decision how to spend them, from the control of the Legislature." Associated Indus. of Mass., supra at 5-6, quoting Slama, supra at 627. Simply crediting certain identified monies "to a statutorily created, earmarked fund

itself [does not] constitute an appropriation." Gilligan v. Attorney Gen., 413 Mass. 14, 17 (1992).

Moreover, we have consistently held that "the insertion of the words 'subject to appropriation' excludes any possibility that the initiative is an impermissible 'specific appropriation.'" Bates, 436 Mass. at 161. See Mazzone, 432 Mass. at 523 ("Monies directed by operation of a general law to a specific purpose that remain 'subject to appropriation' are expressly left within the Legislature's control and are not appropriations"); Associated Indus. of Mass., 413 Mass. at 7 ("It is difficult to imagine how a measure which states that it is 'subject to appropriation' could have been intended to be an appropriation in and of itself"). Where a measure expressly "condition[s] the use of monies in [a] fund on appropriation by the Legislature, [it] preserves the Legislature's power and discretion." Gilligan, 413 Mass. at 19.

Under these principles, section 8 of Initiative Petition 19-14 would not make a specific appropriation. The measure would create a fund to provide the enforcement resources that would likely be necessary due to the expansion of off-premises licenses provided for elsewhere in Initiative Petition 19-14. However, the measure would also leave the Legislature's authority intact by providing expressly that both the placement of public monies into the fund and their expenditure by the

commission would be subject to appropriation.[7] The commission, that is, would not be authorized to use the monies identified by section 8 without further action by the Legislature. See Gilligan, 413 Mass. at 17. Accordingly, the measure would not make a specific appropriation in violation of art. 48.

Conclusion. We remand the matter to the county court for entry of a judgment declaring that the Attorney General's decision to certify Initiative Petition 19-14 was in compliance with the requirements of art. 48.

So ordered.

[7] The Legislature also would retain its authority to repeal or amend Initiative Petition 19-14 if it is enacted by the voters. Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 155 (2002). This authority would, of course, carry the "attendant consequences of democratic accountability to the voters." Id. at 159.