SJC-13560

STEPHEN CLARK & others[1] vs. ATTORNEY GENERAL & another.[2]

Suffolk. May 8, 2024. - June 13, 2024.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, & Wolohojian, JJ.

Initiative. Constitutional Law, Initiative petition. Attorney General. Tips. Minimum Wage.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on February 7, 2024.

The case was reported by Kafker, J.

Edmund P. Daley (Elissa Flynn-Poppey also present) for the plaintiffs.

Phoebe Fischer-Groban, Assistant Attorney General, for the defendants.

KAFKER, J. The plaintiffs, a group of Massachusetts registered voters, challenge the Attorney General's

[1] Kathleen Plath, Cory Patterson, Kathi E. Maino, and Andrea Klein.

[2] Secretary of the Commonwealth.

certification of Initiative Petition 23-12 (petition or initiative) proposing "a Law Requiring the Full Minimum Wage for Tipped Workers with Tips on Top." The plaintiffs contend that the petition violates the requirement under art. 48 of the Amendments to the Massachusetts Constitution that initiative petitions contain only related or mutually dependent subjects.

We conclude that the petition, which would require that employers pay the full minimum wage to tipped employees and would permit tip pooling among both tipped and nontipped employees, forms a "unified statement of public policy on which the voters can fairly vote 'yes' or 'no.'" Weiner v. Attorney Gen., 484 Mass. 687, 695 (2020). Accordingly, we affirm the Attorney General's certification of the petition as in proper form to be submitted to voters.

1. Background. In 2023, an initiative petition signed by at least ten registered Massachusetts voters was filed with the Attorney General. The petition proposes a law, titled "An Act to Require the Full Minimum Wage for Tipped Workers with Tips on Top." The Attorney General designated the petition as Initiative Petition 23-12.

Under current State law, the minimum wage for most workers is set at fifteen dollars per hour. See G. L. c. 151, § 1. However, a separate law permits employers to pay their tipped employees an hourly wage of $6.75. See G. L. c. 151, § 7, third

par. The employer can then use any customer tips to cover the remaining $8.25 per hour owed to the employee to reach fifteen dollars. Id. Often referred to as a "tip credit," the statute allows employers to, in effect, subsidize an employee's minimum wage with customer tips. Any tips above the minimum wage that a tipped employee receives may increase his or her pay above the minimum wage. Employers must make up any shortfall if the amount of tips received plus the cash wage of $6.75 is below fifteen dollars per hour. Thus, tipped employees are guaranteed the statutory minimum wage of fifteen dollars per hour, but not all their tips are "on top of" that minimum wage. A separate provision limits the distribution of customer tips to only "wait staff employees," "service employees," and "service bartenders."[3] See G. L. c. 149, § 152A (c). The law prohibits the pooling and

[3] A "wait staff employee" is a person "who prepares or serves food or beverages as part of a team of counter staff or any other counter employee who: (i) serves beverages or prepared food directly to patrons or who clears patrons' tables; (ii) works in a restaurant, banquet facility or other place where prepared food or beverages are served; and (iii) has no managerial responsibility during a day in which the person serves beverages or prepared food or clears patrons' tables." G. L. c. 149, § 152A (a). A "service employee" is "a person who works in an occupation in which employees customarily receive tips or gratuities, and who provides services directly to customers or consumers, but who works in an occupation other than in food or beverage service, and who has no managerial responsibility." Id. A "service bartender" is "a person who prepares alcoholic or nonalcoholic beverages for patrons to be served by another employee, such as a wait staff employee." Id.

distribution of tips to employees other than those in the three defined employee categories. Federal law also prohibits the distribution of tips to "managers and supervisors."[4] 29 C.F.R. § 531.52(b)(2).

The result of the current legal scheme is that many service workers in tipped industries are sorted into two separate compensation structures. Tipped employees can be paid $6.75 per hour, supplemented by tips. Nontipped employees are paid the full statutory minimum wage by their employer but cannot share in any customer tips that tipped employees receive. This compensation structure is common in particular in the restaurant industry, where employees can roughly be divided into "front-of-house" or "back-of-house" workers. "Front-of-house" employees -- e.g., waiters, hosts, bussers, etc. -- have direct contact with customers, whereas "back-of-house" employees -- e.g., cooks, kitchen staff, dish washers, etc. -- do not usually interact with or serve customers. See Betancourt, Hunt, Kwong, & Lopez, Building a Better Plate: Promoting Workplace Equity

[4] "Managers and supervisors" are employees "whose duties match those of an executive employee." 29 C.F.R. § 531.52(b)(2). An "executive employee" is someone whose primary duty is management, who customarily and regularly directs the work of two or more other employees, and who has hiring or firing authority, 29 C.F.R. § 541.100(a)(2)-(4), or is an employee with at least a twenty percent ownership interest in the business "who is actively engaged in its management," 29 C.F.R. § 541.101.

and Worker Satisfaction in the Los Angeles County Restaurant Industry 5 (2023) (student report, University of California, Los Angeles). Reflecting the division between customer-facing and noncustomer-facing roles, front-of-house staff typically receive tips but are paid lower hourly wages, whereas back-of-house staff receive higher (at least minimum) hourly wages but are usually not tipped. Id. at 21.

The petition proposes a law that would change this compensation structure. First, the proposed law amends G. L. c. 151, § 7, to increase gradually the hourly wage employers must pay tipped employees up to the full statutory minimum wage. Starting January 1, 2025, the required wage would be sixty-four percent of the statutory minimum wage and increase by nine percent increments each year until reaching the full statutory minimum wage on January 1, 2029. Second, the proposed law amends G. L. c. 149, § 152A, to allow employers, if they so choose, to pool and distribute tips to all employees, not just "wait staff employees," "service employees," and "service bartenders," provided the employer pays all employees the full statutory minimum wage.[5] In sum, all employees would be guaranteed the full statutory minimum wage, and tipped employees

[5] The prohibition on distributing tips to "managers and supervisors" pursuant to 29 C.F.R. § 531.52(b)(2) would remain in place.

are guaranteed that any tips they receive are always on top of the full statutory minimum wage. By permitting tip pooling among tipped and nontipped employees, the proposed law also allows employers to distribute tips among all employees, including back-of-house employees who generally do not receive customer tips.

In September 2023, the Attorney General certified the petition as compliant with the requirements of art. 48 and issued a summary of the petition as required under art. 48, The Initiative, II, § 3, as amended by art. 74 of the Amendments. By January 2024, the proponents of the petition had timely gathered and filed sufficient signatures to require the Secretary of the Commonwealth to transmit the petition to the Legislature, which the Secretary then did.

In February 2024, the plaintiffs commenced this action in the county court, claiming that the Attorney General's certification of the petition was in error because the petition did not, as required by art. 48, contain only related or mutually dependent subjects. On the joint motion of the parties and a statement of agreed facts, the single justice reserved and reported the case to the full court.

2. Discussion. Before a petition can be presented to the Legislature and then put before voters, the Attorney General must certify that it meets the requirements of art. 48. See El

Koussa v. Attorney Gen., 489 Mass. 823, 827 (2022), citing art. 48, The Initiative, II, § 3, as amended by art. 74. We review the Attorney General's decision to certify an initiative petition de novo, keeping in mind "the firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws." Colpack v. Attorney Gen., 489 Mass. 810, 814 (2022), quoting Oberlies v. Attorney Gen., 479 Mass. 823, 829 (2018).

a. Related subjects requirement. Article 48 requires that a law proposed by 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. The relatedness requirement, as we have previously explained, is carefully designed.[6] It allows voters to "express [their] will apart from the process of representative democracy," but it also recognizes that voters, unlike legislators, cannot "modify, amend, or negotiate the sections of a law proposed by popular initiative." Carney v. Attorney Gen., 447 Mass. 218, 230 (2006), S.C., 451 Mass. 803 (2008). Voters casting a ballot on an initiative petition "cannot 'sever the

[6] We have not definitively resolved "whether the mutual dependence requirement is separate from or subsumed within the relatedness requirement," and need not do so here, as the tips initiative readily satisfies the relatedness requirement. El Koussa, 489 Mass. at 837 n.11.

unobjectionable from the objectionable' and must vote to approve or reject an initiative petition in its entirety." Anderson v. Attorney Gen., 479 Mass. 780, 786 (2018), quoting Carney, supra. Therefore, the related subjects requirement ensures that "voters are not placed 'in the untenable position of casting a single vote on two or more dissimilar subjects.'" El Koussa, 489 Mass. at 827, quoting Weiner, 484 Mass. at 691.

To determine whether the subjects of an initiative petition satisfy the relatedness requirement, we ask whether "one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane." Weiner, 484 Mass. at 691, quoting Hensley v. Attorney Gen., 474 Mass. 651, 657 (2016). For there to be a common purpose, there must be more than an abstract connection. See Gray v. Attorney Gen., 474 Mass. 638, 648 (2016). More particularly, "[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," but neither can it be construed "too strictly," as doing so would "risk limiting initiative petitions to a single subject, a requirement rejected by the constitutional convention that approved art. 48." Weiner, supra, quoting Abdow v. Attorney Gen., 468 Mass. 478, 499 (2014).

"Accordingly, in order to balance these concerns, in addition to considering whether the subjects of an initiative share a common purpose, we have examined two more specific questions." Colpack, 489 Mass. at 815. We first ask whether "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." El Koussa, 489 Mass. at 828, quoting Weiner, 484 Mass. at 691. Second, we consider "whether the proposed initiative 'express[es] 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.'" Colpack, supra, quoting Hensley, 474 Mass. at 658.

Using this framework, we have determined that multiple provisions addressing different issues may nonetheless be related if they are part of "an integrated scheme whose various provisions serve [a] common purpose." Colpack, 489 Mass. at 818. Thus, in Hensley, we upheld a petition that laid out "a detailed plan to legalize marijuana (with limits) for adult use and to create a system that would license and regulate the businesses involved in the cultivation, testing, manufacture, distribution, and sale of marijuana and that would tax the retail sale of marijuana to consumers." Hensley, 474 Mass. at 658. The petition also allowed existing medical marijuana

treatment centers to obtain licenses for the recreational sale of marijuana. Id. We held that "[t]he inclusion of medical marijuana treatment centers as potential retailers in the commercial market is simply one piece of the proposed integrated scheme. The fact that the initiative's proponents might have chosen instead to prohibit medical marijuana treatment centers from participation in the retail market does not affect the coherence of the proposal as a unified statement of public policy that is a proper subject for a 'yes' or 'no' vote." Id. at 659. See Massachusetts Teachers Ass'n v. Secretary of the Commonwealth, 384 Mass. 209, 220 (1981) (concluding that various tax limitation and relief provisions were sufficiently related).

In contrast, we have rejected as unrelated initiatives that combine subject matters that are only related at a highly conceptual level and that have "no meaningful operational relationship." Carney, 447 Mass. at 220. In Carney, an initiative, titled "An Act to protect dogs," combined expansion of criminal sanctions against cruelty to animals with the abolition of parimutuel dog racing. We rejected "the aggregation of these two very different sets of laws into one petition," concluding that they would require voters to vote on two distinct policy questions and not one "uniform" proposal. Id. We likewise rejected as insufficiently related provisions that would allow a tax on those persons with an income of more

than $1 million to be spent on either education or transportation, as education and transportation were only connected on "the broadest conceptual level of public good." Anderson, 479 Mass. at 798. Similarly, we concluded that defining the wage and benefit structure of "app-based" rideshare drivers was "a substantively distinct policy issue" from "limiting the scope of third parties' tort recovery for injuries caused by app-based drivers." El Koussa, 489 Mass. at 836.

More specific guidance may also be provided by the two initiatives we considered in Oberlies, one of which we concluded contained related matters and one which did not. We concluded that the initiative requiring hospitals to adopt specific patient-to-nurse ratios and to file annual reports of all their financial assets contained provisions that presented "only a marginal relationship" to one another, the over-all purpose of hospital regulation being too broad a conception. Oberlies, 479 Mass. at 836. By comparison, the other initiative petition that would both limit the number of patients who could be assigned to a single registered nurse and prevent hospitals from reducing other staffing in response to this limit were related because the workforce reduction restriction was "triggered by the implementation of the [patient-to-nurse ratios]." Id. at 831-832. The workforce reduction restriction was operationally related because it "anticipat[ed] and address[ed] a potential

consequence of the nurse-patient staffing ratios," i.e., that hospitals economically burdened by the need to hire more nurses would lay off other healthcare workers in response. Id. at 832.

We further explored the operational relatedness requirement in Colpack. In that case, we examined a petition that proposed to increase the total number of licenses that any individual retailer of alcoholic beverages for off-premises consumption could hold and to allow the use of out-of-State drivers' licenses as identification for alcohol purchases. Colpack, 489 Mass. at 811-812. At the same time, the petition required that all sales of alcoholic beverages be made through face-to-face transactions and increased the punishment for violations of the liquor laws by basing fines on a retailer's gross receipts for all retail sales, rather than on gross receipts for sales of alcoholic beverages only. Id. at 812. The provisions requiring face-to-face transactions and increasing potential fines were related because they mitigated the "risk of increased sales to underage drinkers posed" by the increase in licenses granted and the wider pool of customers who could buy alcohol if out-of-State drivers' licenses were accepted. Id. at 819.

Given these parameters, we have no difficulty concluding that the initiative here satisfies the relatedness requirement.

b. Application of the related subjects requirement. The initiative here would eliminate the existing wage structure in

tipped industries by changing laws that currently allow employers to pay certain employees less than minimum wage and fill the gap with tips but prevents the sharing of such tips with other employees who do receive the minimum wage. In its place, the proposed law requires employers to pay all their employees in the tipped industries the minimum wage without subsidizing such payment with customer tips. As all employees in tipped industries will eventually receive the minimum wage, separate and apart from tips, it further allows the sharing of such tips once all the employees are receiving the minimum wage, thus recognizing that they are participating in a shared economic enterprise. We conclude that the initiative proposes "an integrated scheme whose provisions serve [a] common purpose." Colpack, 489 Mass. at 818.

The provisions are also operationally related. The first provision ensures that employers pay all their employees the minimum wage without drawing on customer tips to do so, while the second provision changes the way tips are distributed in light of the fact that tipped and nontipped employees would now be paid the same minimum wage. Put differently, "there is a logical relationship" between the creation of a uniform minimum wage for both tipped and nontipped workers and the allowance of tip pooling among all workers in tipped industries. Colpack, 489 Mass. at 821 (logical and operational relationship existed

between expansion of alcohol sales licensing provisions and increased protection and enforcement measures to prevent underage alcohol consumption).

The relationship of the two provisions at issue here is close and comparable to the provisions we found related in Oberlies, Weiner, Colpack, and other cases. See Oberlies, 479 Mass. at 832 (nurse-to-patient ratio and restriction on workforce reduction in response to implementing this ratio); Weiner, 484 Mass. at 692 (various provisions lifting restrictions on liquor licenses and provisions implementing new age-verification requirements and increased funding for enforcement of liquor laws); Colpack, 489 Mass. at 818-819 (increase in liquor licenses and allowance of use of out-of-State drivers' licenses coupled with face-to-face transaction requirement and enhanced fines). The subject matter of each provision -- wages and tips -- is similar. See Dunn v. Attorney Gen., 474 Mass. 675, 682 (2016) (restrictions on certain farming practices related to restrictions on sales of products of those farming practices); Mazzone v. Attorney Gen., 432 Mass. 515, 528-529 (2000) (establishment of drug treatment fund, expansion of drug diversion program, and use of forfeited money to fund drug treatment all related subjects). There is also an obvious operational relationship between the two provisions, both under the existing law and the proposed initiative. See Oberlies,

supra (workforce restrictions operationally related to nurse-to-patient ratio because restrictions "dictate[] how nurse-to-patient ratios may be maintained" without compromising other staffing); Abdow, 468 Mass. at 501 (operational relationship existed between provisions redefining illegal gambling to include three forms of gaming that were currently legal and regulated by State Gaming Commission). The scope of activities encompassed by the relationship is even narrow, significantly more confined than the wider range of related policy decisions we allowed to proceed in the initiatives in Hensley and Massachusetts Teachers Ass'n. See Hensley, 474 Mass. at 658 (initiative proposed legalizing marijuana consumption, establishing licensing system for sale of marijuana, establishing excise tax, and altering existing medical marijuana laws); Massachusetts Teachers Ass'n, 384 Mass. at 220-221 (petition proposed range of tax policies, including new deduction, limit on local tax increases, and limits on local spending). Finally, the petition can in no way be said to "yoke together substantively distinct subjects unrelated to a consistent public policy." Colpack, supra at 818.

The plaintiffs argue that the petition does not comply with the relatedness requirement because the tip pooling provision might undermine what the plaintiffs perceive as the ostensible purpose of the minimum wage provision by reducing the amount of

tips that tipped employees stand to receive. There are a number of problems with this argument. First, it redefines the common purpose of the proposed law. The purpose of the law as derived from its provisions is not necessarily to increase compensation of tipped employees but to ensure that all employees in tipped industries are paid a minimum wage by their employers without such wages being subsidized by customer tips. The customer tips will then be available to supplement wages for all employees.

Second, "[t]he provisions of an initiative petition need not be 'drafted with strict internal consistency'" to satisfy the relatedness requirement. Weiner, 484 Mass. at 694, quoting Mazzone, 432 Mass. at 528-529. Indeed, in Weiner and Colpack, we held that petitions that both loosened some restrictions on alcohol sales while strengthening other restrictions were related. See Colpack, 489 Mass. at 819 ("an initiative petition need not focus solely on loosening [or tightening] restrictions in order to meet the related subjects requirement of art. 48"). The same may be true here.

c. Logrolling. The plaintiffs contend that the initiative here constitutes prohibited "logrolling," that is, the practice of including popular unrelated provisions with unpopular ones to ensure the passage of those provisions that would not otherwise garner the necessary votes. Carney, 447 Mass. at 228-229 (discussing how delegates at constitutional convention spoke of

dangers of logrolling and denounced "the practice of 'hitching' alluring provisions at the beginning of an initiative petition and burying more controversial proposals farther down"). Here, however, the two provisions are related, and neither is concealed. We therefore discern no improper logrolling.

The plaintiffs make much of the fact that the Legislature has considered and ultimately not passed multiple bills that would have increased the cash wage for tipped employees and eliminated the tip credit. In particular, the plaintiffs frame the inclusion of the tip pooling provision as an improper effort to "sweeten the pot" for Massachusetts voters who might not otherwise vote to enact a stand-alone law eliminating the tip credit. This approach, according to the plaintiffs, follows the approach taken by legislators after multiple versions of the stand-alone bill failed in the Legislature: legislators in 2023 proposed a new version of the bill that paired the tip credit elimination with tip pooling. See Senate Bill No. 1188 (Jan. 19, 2023); House Bill No. 1872 (Jan. 19, 2023). The fact that the Legislature has failed to pass the same subjects contained in the initiative is, however, of no import. In fact, that is often the very purpose of an initiative. See Buckley v. Secretary of the Commonwealth, 371 Mass. 195, 199 (1976) ("[Article 48] was intended to provide both a check on legislative action and a means of circumventing an unresponsive

General Court. It presented to the people the direct opportunity to enact statutes regardless of legislative opposition"). Instead, for there to be logrolling in the initiative process, the so-called popular and unpopular items must be unrelated. See Carney, 447 Mass. at 221-222 (provision increasing punishment for animal cruelty added to unrelated provision seeking to ban parimutuel dog racing after stand-alone version of such ban was rejected by voters). See also Abdow, 468 Mass. at 502 (contrasting "hitching" of "very controversial" parimutuel dog racing ban to more popular criminal laws punishing animal cruelty in Carney with initiative that sought to ban parimutuel dog racing as one part of several antigambling provisions). We are particularly attentive when the "unpopular" item is concealed. See El Koussa, 489 Mass. at 838 (concealed, unrelated provision changing tort liability of app-based drivers). Here, as discussed supra, the provisions are closely related and share a well-defined common purpose related to ending the existing compensation system common to tipped industries.

Nor is either provision murky, unclear, or buried in such a way as to raise concerns about voter confusion. The petition consists of four printed pages and uses a relatively simple structure of gradually raising the minimum wage for a period of five years. Unlike the petition in El Koussa, the language of

both provisions is clear and their intended effect can be easily understood without needing to carefully parse statutory language. El Koussa, 489 Mass. at 838.

In sum, the petition clearly presents "a unified statement of public policy on which the voters can fairly vote 'yes' or 'no.'" Weiner, 484 Mass. at 695. It does not, as the plaintiffs contend, "place anyone 'in the untenable position of casting a single vote on two or more dissimilar subjects.'" Hensley, 474 Mass. at 659, quoting Abdow, 468 Mass. at 499.

3. Conclusion. The matter is remanded to the county court for entry of a judgment declaring that the Attorney General's certification of Initiative Petition 23-12 was in compliance with the requirements of art. 48.

So ordered.