August 31, 2022

Maura Healey, Esq.
Attorney General
1 Ashburton Place
Boston, MA 02108

Re: Comments of the Fiscal Alliance Foundation on Initiative Petition 22-01

Dear Attorney General Healy:

The Fiscal Alliance Foundation is pleased to provide comments in response to the solicitation of the Attorney General regarding whether the proposed initiative petition 22-01 ("Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs") (the "Petition") meets the criteria for certification under Article 48 of the Amendments to the Massachusetts Constitution. For the reasons below, it does not. The Fiscal Alliance Foundation is a 501(c)(3) non-partisan, non-profit organization whose mission is to increase public awareness about the public benefits to be derived from greater fiscal responsibility, transparency, and accountability in government.

The Petition cannot be certified as a matter of law because it violates the prohibited matters clause of Article 48 of the Amendments to the Massachusetts Constitution. That clause provides that "no proposition inconsistent with any one of the following rights of the individual . . . shall be subject of an initiative or referendum petition: . . . freedom of speech . . . ." Under Article 16 of the Constitution (as amended by Article 77 of the Amendments), "The right of free speech shall not be abridged."

As present, there is no restriction on the amount of campaign contributions that an individual may make to an independent expenditure PAC (as that term is defined in G.L. c. 55, § 18A). Section 3 of the Petition would impose such a limit on the amount "[a]n individual" may donate to an independent expenditure PAC, of "five thousand dollars" in any one calendar year. This limitation is inconsistent with the free speech rights of individuals under Article 16.

In *Associated Industries of Massachusetts v. Attorney General*, the Supreme Judicial Court held that where "it is reasonably clear that a proposal contains an excluded matter," a petition cannot be certified for the ballot. 418 Mass. 279, 225-26 (1994). In that case, the Court agreed that the initiative petition in question – which would have "materially restrict[ed] the use of corporate funds to support or to oppose a ballot question," was a "restriction [that] operates at the very heart of the right of free speech, limiting the means of communicating ideas on a political question presented to the people for their expression of opinion." *Id.* at 287-88.

The *AIM* Court nonetheless concluded that a petition containing a potentially excluded matter could be certified if it was "impossible to rule whether, if adopted, the proposal would deny rights protected by the Declaration of Rights." *Id*. at 291. The Court held that the challenged petition in *AIM* was certifiable under that standard, since "[t]he likely position of the Supreme Court of the United States on the significant constitutional issue before us is not clear," *id.* at 284, and because "there may be a compelling state interest in [the proposed] restriction" that was not evident in the limited record before the Court. *Id*. at 289.

Neither of the *AIM* exceptions is available here, since it is indisputable that the Petition if passed would deny individual rights protected by the Declaration of Rights.

First, the precedent of the United States Supreme Court is clear: not only are independent expenditures constitutionally protected speech, but their amount cannot be limited by law. In *Buckley v. Valeo*, the Supreme Court found unconstitutional the federal statutory limits on individual independent expenditures, holding that "[w]hile the [statute's] independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression." 424 U.S. 1, 47-48 (1976). Three decades later, the Court in *Citizens United*, the Supreme Court was equally unambiguous in striking down the cognate independent expenditure limits for non-individuals:

> The rule that *political speech cannot be limited based on a speaker's wealth* is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity. . . . All speakers, *including individuals* and the media, use money amassed from the economic marketplace to fund their [political] speech. *The First Amendment protects the resulting speech* . . . .
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> *Citizens United v. FEC*, 558 U.S. 310, 350-51 (2010) (emphases supplied).

As the Supreme Judicial Court recognized in *1A Auto, Inc.* "[h]istorically, we have interpreted the protections of free speech and association under our Declaration of Rights to be comparable to those guaranteed by the First Amendment." *1A Auto, Inc. v. Director of the Office of Campaign & Political Fin.*, 480 Mass. 423, 440 (2018) (internal citations omitted). While the SJC has "the inherent authority to declare that our State Constitution affords *broader* protection to individual rights than does the United States Constitution," *id.* (emphasis supplied), the Petition here would intentionally *restrict* individual free speech rights protected by the First Amendment, not expand them. There is no basis to assert that the Petition, unambiguously unconstitutional under the First Amendment, *Buckley*, and *Citizens United*, is nonetheless "consistent" with the protections of individual free speech rights under Article 16.

Second, the Supreme Court has recognized only one interest sufficiently compelling to outweigh the First Amendment interests implicated by contributions for political speech:

preventing corruption or the appearance of corruption. *See Davis v. FEC*, 554 U.S. 724, 740-42 (2008); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) ("[we] held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.") *See also McCutcheon v. FEC*, 572 U.S. 185, 227 (2014) (reconfirming that preventing corruption or the appearance thereof is the "only governmental interest this Court [has] accepted as legitimate").

It is dispositive that in both *Buckley* and *Citizens United*, the Supreme Court expressly held that the government has *no* anti-corruption interest in limiting independent expenditures. *See supra Buckley*, 424 U.S. at 47-48; *Citizens United*, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").[1] Where independent expenditures do not corrupt or give the appearance of corruption as a matter of law, there is by definition *no* anti-corruption interest — much less a compelling interest — in laws like the Petition, which would intentionally cap contributions to independent expenditure organizations.[2] There is no reasonable contention that the Supreme Court's position on this matter is in any way unclear.

In short, the Petition proposes to limit the amount an individual may contribute to an independent expenditure PAC. This not only directly implicates, but would be "inconsistent with," an individual's freedom of speech rights under both the Declaration of Rights and the United States Constitution. The Attorney General's certification responsibilities under Article 48 are to "ferret out obviously improper initiative petitions. *Yankee Atomic Elec. Co. v. Secretary of Commonwealth*, 402 Mass. 750, 757 (1988). As the Petition unambiguously violates the prohibited matters clause of Article 48, it is "obviously improper," and cannot lawfully be certified.

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[1] Ironically, in reaching this conclusion the Supreme Court also expressly decided the very issue left open in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) — the same open issue from the same case that led the SJC in *AIM* to suggest that the Supreme Court's position was "not clear".

[2] To the extent proponents contend there is a distinction between independent expenditures and contributions to independent expenditure entities, this distinction has already been considered and rejected. In *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (2010), the D.C. Circuit held that following *Citizens United*, the federal statutory contribution limits on individual donations to independent expenditure committees "violate the First Amendment by preventing [individual] plaintiffs from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits." Given the opportunity to grant certiorari to correct this holding, the Supreme Court declined. *Keating v. FEC*, 562 U.S. 1003 (2010). Moreover, in 2019, the D.C. Circuit granted summary affirmance to the FEC, rejecting a collateral action brought with the intent of overruling *Speechnow.org* (*Lieu v. FEC*, 2019 U.S. App. Lexis 29880 (Oct. 3, 2019)). Finding that the merits were "so clear as to warrant summary action" in an unpublished decision, the court ruled that "the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited. . . ." Notably, the Supreme Court *once again* denied certiorari, *Lieu v. FEC*, 141 S. Ct. 814 (2020).

The Fiscal Alliance Foundation appreciates the opportunity to submit these comments. Please do not hesitate to contact us if we can provide further clarity or insight on the positions we have provided.

Sincerely,

Danielle Webb
Chair, Fiscal Alliance Foundation

Cc (by email): Julie Green, Esq., Assistant Attorney General
Professor Lawrence Lessig