COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. SJC-13361

ROBERT HERRMANN, et al.

Plaintiffs-Appellants

v.

ATTORNEY GENERAL AND SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS,

Defendant-Appellees

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

BRIEF OF AMICUS CURIAE FISCAL ALLIANCE FOUNDATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 17(c)(1), amicus curiae Fiscal Alliance Foundation (the “Foundation”) states that it is 26 U.S.C. § 501(c)(3) not-for-profit organization and has no parent corporation. Further, as a not-for-profit organization, the Foundation has not issued stock to the public.

INTEREST OF AMICUS CURIAE

Amicus curiae Fiscal Alliance Foundation (the "Foundation") is a Boston-based 501(c)(3) non-partisan, non-profit organization. The Foundation primarily engages in the conduct of educational programs designed to increase public awareness about the public benefits to be derived from greater fiscal responsibility, transparency, and accountability in government.

In furtherance of its above mission, the Foundation has a particular focus, expertise, and interest in the proper interpretation and implementation of campaign finance laws, including those administered by the Massachusetts Office of Campaign and Political Finance. For these reasons, the Foundation believes that its views may be of assistance to the Court, and files this brief in response to the Court's amicus announcement.[1]

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[1] No party or party's counsel nor any other individual or entity, aside from amicus and its counsel, authored this brief in whole or in part, or made any monetary contribution to its preparation or submission. Neither amicus nor its counsel has ever represented any party to this appeal on similar issues, or has been either a party or counsel to a party in a proceeding or transaction that is at issue in this appeal.

ISSUE PRESENTED

Did the Attorney General correctly conclude that the proposed initiative petition 22-01 ("Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs") (the "Petition") does not qualify for certification under Article 48 of the Amendments to the Massachusetts Constitution?

ARGUMENT

I. The Petition is Moot for the Procedural Reasons Articulated by the Attorney General, and Would Also Impermissibly Establish an Ex Post Facto Law.

The Foundation concurs with the Attorney General's position with respect to the procedural infirmities of the Petition with respect to Article 48. AGO Brief, at 13-32.

In addition, the Foundation observes that the Petition would on its face create an ex post facto law, and thereby violate Article 24 of the Declaration of Rights. Article 24 states: "Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."

The petition proposes amending G.L. c. 55, § 7A, the violation of which is a criminal offense. Per G.L. c. 55, § 7, "Violation of any provision of this section or section seven A shall be punished by imprisonment for not more than six months or by a fine of not more than five hundred dollars." *See Calder v. Bull*, 3 Dall. 386, 390 (1798) (prohibiting as violating the federal ex post facto clause "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action."); *Santiago v. Commonwealth*, 428 Mass. 39, 41 (1998) (federal and state ex post facto clauses are interpreted identically).

Section 4 of the Petition is unambiguous about when the petition will take effect if passed by the voters: "**This act shall take effect on January 1, 2024**." Yet the petitioners are clear that their intent is for the petition to appear on the statewide ballot for the "*November 2024* election" — eleven months *after* the petition's expressly stated effective date. Petitioners' Brief, at 16 (emphasis in original). This is the definition of an ex post facto law, as articulated by *Calder* and numerous cases of the Court.[2]

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[2] Nor is the effective date subject to a "perfecting amendment" under Article 48, as that option is available only in the limited circumstances of a post-submission amendment to a petition that "does not materially change the substance of the measure." Art. 48. The date on which a statute purports to criminalize previously lawful behavior is

In short, petitioners are demanding the right to put before the voters of the Commonwealth a petition to amend the General Laws in a manner that directly and on its face violates the ex post facto clauses of both the United States Constitution and the Massachusetts Declaration of Rights.

Combined with the other procedural and substantive failures of the Petition, as addressed in her brief and below, the Attorney General properly declined to certify the Petition.

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without question a foundational substantive point, not an excusable typographical error. *Cf. Assoc. Indust. of Mass. v. Att'y Gen.*, 418 Mass. 279, 293 (1994) (allowing perfecting amendment to cure a "typographical" error).

II. The Attorney General Properly Declined to Certify the Petition, Because the Petition Would Restrict Individual Free Speech Rights in Contravention of Article 48.

The Attorney General properly declined to certify the Petition as a matter of law because it violates the excluded matters clause of Article 48 of the Amendments to the Massachusetts Constitution. That clause provides that "[n]o proposition inconsistent with any one of the following rights *of the individual* . . . shall be subject of an initiative or referendum petition: . . . freedom of speech . . . ." (emphasis supplied). Under Article 16 of the Declaration of Rights (as amended by Article 77 of the Amendments), "[t]he 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, and therefore prohibited as the subject of an initiative petition under Article 48.

In *Associated Industries of Massachusetts v. Attorney General* ("*AIM*"), 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, 287 (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 "[t]here 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.

A. The Supreme Court's Position on the Free Speech Constitutional Issue is Clear.

First, notwithstanding the petitioner's efforts to parse legal distinctions where none exist, the precedents of the United States Supreme Court are clear: not only are independent expenditures constitutionally protected speech, but absent an anti-corruption basis, 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, 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* . . . .

Citizens United v. FEC, 558 U.S. 310, 350-51 (2010) (emphases supplied).

As this 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). And the Court in *1A Auto, Inc.* confirmed that making "unlimited independent expenditures as well as unlimited contributions to independent expenditure PACs" constitutes "a significant form of political expression," *id.* at 436-37.

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.* at 440 (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.

B. There is No Compelling State Interest in the Petition's Proposed Restriction on Individual Speech.

Second, as to whether there is "a compelling State interest in [the proposed] restriction" at issue here (*AIM*, 418 Mass. at 289), it is dispositive that 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”).

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.”).[3] 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.

Petitioners nonetheless theorize that a compelling state interest could exist, based on finely parsing the distinctions between

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[3] Ironically, in reaching this conclusion the United States 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 this Court in *AIM* to suggest that the Supreme Court’s position was “not clear”.

independent expenditures and contributions to independent expenditure entities. Petitioners' Brief, at 45-50. Yet such an analysis has already been considered and rejected by numerous courts, in a litany that the Attorney General accurately describes in her brief as a "uniform chorus of federal decisions." AGO Brief, at 38-41.[4]

Of particular relevance is *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (2010). There, 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." *Id.* Although Petitioners expend considerable effort in asserting that this decision was "mistaken" (Petitioners' Brief, at 45), there is no dispute that given the express opportunity to correct this holding, the United States

[4] In addition to the seven cases from six different circuits cited by the Attorney General, other cases reaching the same conclusion include *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), *General Majority PAC v. Aichele*, No.1:14-cv-332, 2014 WL 3955079 (M.D. Penn. 2014), and *Michigan Chamber of Commerce v. Land*, 725 F. Supp. 2d 665 (W.D. Mich. 2010).

Supreme Court denied certiorari. *Keating v. FEC*, 562 U.S. 1003 (2010).

Nor was this the Supreme Court's last word on the matter. In 2019, the D.C. Circuit a granted summary affirmance to the Federal Election Commission in rejecting a collateral action brought with the intent of overruling *Speechnow.org* (*Lieu v. FEC*, No. 19-5072, 2019 U.S. App. Lexis 29880 (D.C. Cir. Oct. 3, 2019)). Finding that the merits were "so clear as to warrant summary action" in an unpublished decision, the D.C. Circuit ruled that "the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited. . . ." Notably, the United States Supreme Court *once again* denied certiorari, *Lieu v. FEC*, 141 S. Ct. 814 (2020).

In short, while petitioners may disagree with these holdings, there is no reasonable contention that the United States Supreme Court's position on this matter is in any way unclear, or that an inchoate compelling state interest in restricting free speech exists beyond those already identified by this Court and the United States Supreme Court.

CONCLUSION

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 excluded matters clause of Article 48, it is "obviously improper," and could not lawfully be certified. For the foregoing reasons, the decision of the Attorney General denying certification should be affirmed.

Respectfully Submitted,
FISCAL ALLIANCE FOUNDATION
By its attorney,

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Date: January 31, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I certify that this brief complies with the rules pertaining to the filing of an amicus brief, including, but not limited to, Rules 16(a)(5-11) and (k) and Rule 20(a)(2)(C), (D), and (F). The document was composed in Microsoft Word 365 in 14-point proportionally spaced Times New Roman, and contains 1,971 non-excluded words.

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Thaddeus Heuer

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13, I, Thaddeus Heuer, hereby certify that on January 31, 2023, I caused a true and correct copies of the within amicus brief of the Fiscal Alliance Foundation to be served by electronic filing on counsel of record for all parties in *Herrmann v. Attorney General*, SJC-13361.

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