COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13361

ROBERT HERRMANN, LARS MIKKELSEN, JOSHUA REDSTONE, GRAEME SEPHTON, DAVID C. BAXTER, MARY BAINE CAMPBELL, CATHERINE BRUN-COTTAN, GEORGES BRUN-COTTAN, LEIGH CHINITZ, BETTINA NEUEFEIND, and LEO T. SPRECHER,

Plaintiffs/Appellants,

v.

ATTORNEY GENERAL AND SECRETARY OF THE COMMONWEALTH,

Defendants/Appellees.

BRIEF OF PLAINTIFFS/APPELLANTS

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ISSUES PRESENTED

1. Where Appellants submitted an art. 48 ballot initiative petition to the Attorney General in June 2022, "before the [*January 2024*] assembling of the General Court into which" they intend it "to be introduced," may Appellants proceed (after certification of the petition by the Attorney General) to submit the petition to the Secretary of the Commonwealth on or after the first Wednesday of *September 2023*, and deliver the remainder of the required signatures to the Secretary of the Commonwealth by the first Wednesday of *December 2023*? Or, were Appellants required to submit the petition to the Secretary of the Commonwealth on or after the first Wednesday of *September 2022,* deliver the remainder of the required signatures by the first Wednesday of *December 2022,* and have the petition introduced in the January 2023 assembling of the General Court (more than a year and a half before the *November 2024* election in which the petition would be eligible to appear on the state ballot), despite the absence of any such requirement in the text of art. 48?
2. Is it "reasonably clear" that Appellants' initiative petition proposal to limit contributions to independent expenditure political action committees is inconsistent with the state constitutional right to freedom of speech, absent any binding court precedent on the question?

INTRODUCTION

The past decade has witnessed the emergence of a new kind of electioneering organization: the independent expenditure political action committee ("independent expenditure PAC"), also known as the Super PAC. Like other political committees, these organizations expressly advocate for the election or defeat of candidates for public office. They also fund a variety of other campaign activities and are often central to candidates' and parties' campaign spending plans. But unlike other political committees, which face strict dollar limits on the amounts that can be contributed by any one donor, in Massachusetts independent expenditure PACs may currently accept *unlimited* contributions from donors. As a result, a small cadre of extremely wealthy donors now make multi-million-dollar contributions that, for all intents and purposes, bankroll candidates' campaigns for office.

In June 2022, eighteen months before the convening of the 2024 General Court to which they intended the Secretary of State (the "Secretary") to transmit their petition, Appellants—two groups of voters who share the common objective of limiting contributions to independent expenditure PACs, albeit on different legal grounds—filed an initiative petition with the Attorney General. The petition proposed to limit contributions to independent expenditure PACs to $5,000 per year. When the Attorney General wrongly refused to certify the petition, Appellants filed this challenge.

In the proceedings before the single justice, Appellees sought to dismiss Appellants' claims as moot. The claims are not moot because Appellants have thus far abided, and intend to continue fully abiding,

by the time requirements set forth in art. 48, The Initiative, II, of the Amendments to the Massachusetts Constitution, as amended by art. 74 of the Amendments ("art. 48"). While other initiative proponents who submitted their petitions to the Attorney General later in the two-year election cycle may have been impelled to litigate on truncated schedules and try to collect signatures for as-yet uncertified petitions, nothing in art. 48 requires Appellants to follow such a schedule untethered from the requirements of art. 48 itself.

Furthermore, the proposed limitation on contributions to independent expenditure PACs is consistent with Massachusetts' state right of free speech under art. 16 of the Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution ("art. 16"). First, because the regulation of contributions to independent expenditure PACs is closely drawn to the purpose of preventing quid pro quo corruption or its appearance, which is a permissible ground for establishing campaign finance limits. *FEC v. Cruz*, 142 S. Ct. 1638, 1652 (2022). This is particularly true because contribution limits, which the petition proposes, are subject to a more deferential constitutional scrutiny than expenditure limits, which the petition does not propose. *1A Auto, Inc. v. Director of Office of Campaign & Pol. Fin.*, 480 Mass. 423, 428 (2018); *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). Second, because the United States Supreme Court would uphold the regulation of "dependence corruption," a "sufficiently important interest" the Court has not yet considered, but which, on grounds of originalism, it would affirm.

STATEMENT OF THE CASE

In June 2022, Appellants filed Initiative 22-01 with the Attorney General in accordance with art. 48. R.A. 11, 246. On September 7, 2022, the Attorney General issued a declination letter, asserting that the petition would violate art. 16's freedom of speech clause. *Id.* 35-36, 246.

Two petitioner groups filed separate complaints challenging the Attorney General's denial of certification on October 24, 2022. R.A. 6-46, 49-190. Each petitioner is a registered voter in Massachusetts. *Id.* 9, 51-52, 244-246. Each group put forth a distinct legal theory as to why the Attorney General's decision was in error. *Id.* 13-17, ¶¶ 28-47 and 56-61, ¶ 29-30. The Attorney General moved to dismiss both Complaints, asserting that they would become moot on December 5, 2022, because Appellants had not yet gathered the remainder of the required signatures. *Id.* 191.

Appellants opposed the motion and cross-moved to have the single justice reserve and report to the full Court both the issue of "mootness" and the issue of whether the Attorney General erred in declining to certify the petition. R.A. 217-219. The parties moved jointly to consolidate administratively the two cases. *Id.* at 213-215.

On December 2, 2022, the single justice granted the joint motion for administrative consolidation and reserved and reported both issues to the full court. R.A. 241-243. The cases have since been consolidated under the above caption and case number.

STATEMENT OF FACTS

In Massachusetts, individuals and entities may contribute no more than $1,000 to a candidate or candidate's committee and no more than $5,000 in aggregate to all political party committees of any one political party per year. G.L. c. 55, § 7A(a). However, individuals and entities may make unlimited contributions to an independent expenditure PAC, known colloquially as a Super PAC, R.A. 11, 53-54, defined as "a political committee or other entity that receives contributions to make independent expenditures." G.L. c. 55, § 18A(d); *see also id.* § 7A. Although an independent expenditure PAC may not coordinate with candidates, its contributors can communicate directly with candidates, and candidates know or can easily find out which independent expenditure PACs support them. R.A. 16, ¶¶ 42-43. Independent expenditure PACs play a significant role in election spending, and unlimited contributions to supportive independent expenditure PACs are far more valuable to candidates than the small direct contributions that are limited by state law. R.A. 17, ¶¶ 44-46.

Appellants' proposed petition would limit the amount individuals and entities may contribute to independent expenditure PACs to $5,000 per year. R.A. 11, 53.

SUMMARY OF ARGUMENT

Both issues before this Court should be resolved in the Appellants' favor.

1. Appellants' claims are not moot because they were not required to collect the remainder of the required signatures by the first Wednesday of December 2022. They filed their petition with the Attorney General in June 2022; the next available ballot upon which the petition could be placed, if necessary, is the ballot for the 2024 state election. (p. 23)

In order to introduce their petition to the general court in 2024 so that the petition may then, if necessary, be placed on the 2024 ballot, Appellants (1) presented their petition to the Attorney General in June 2022—fourteen months before the statutory deadline of "the first Wednesday of the August before the assembling of the General Court," art. 48, The Initiative, II, § 3, of the Amendments to the Massachusetts Constitution, as amended by art. 74 of the Amendments ("art. 48, II, § 3"); (2) are litigating the present challenge to the Attorney General's refusal to certify the petition so that they might obtain a final decision from this Court in sufficient time to (3) file the certified petition within the Secretary of the Commonwealth not earlier than the first Wednesday of the September before the assembly of the General Court and to (4) file the remainder of the required signatures no later than the first Wednesday of the following December—specifically, December 6, 2023. Art. 48, II, § 3. Because Appellants may meet every deadline

established by art. 48 in order to have the petition placed on the next and earliest ballot on which it might appear, their challenge is not moot. (pp. 24-37).

Nothing in the text or purpose of art. 48 requires Appellants to collect all remaining required signatures before they may be heard by this Court. To the contrary, the express language of art. 48 requires Appellants to obtain certification *before* the petition is presented to the Secretary of the Commonwealth and before signatures are to be collected. (pp. 37-40)

2. It is not "reasonably clear that [the] proposal contains an excluded matter," *Associated Indus. of Massachusetts v. Attorney General*, 418 Mass. 279, 287 (1994). (pp. 40-42).

First, the proposed contribution limit is closely drawn to prevent quid pro quo corruption and the appearance of quid pro quo corruption. This Court has held that contribution limits are held to a more deferential standard than expenditure limits and are constitutional when they advance the prevention of quid pro quo corruption or its appearance. *1A Auto*, 480 Mass. 423, 430, 436 (2018). The Supreme Court has consistently held the same. *See id.* at 429-430 (listing federal cases). (pp. 42-50).

Even if—as the Supreme Court has held—independent expenditures cannot give rise to quid pro quo corruption, *contributions* to a PAC that makes such expenditures can still constitute the "quid" in a quid pro quo corrupt transaction between donor and politician. A candidate might take a specific act in exchange for a contribution to an independent expenditure PAC that supports that candidate, which is

quid pro quo corruption even where the expenditure of that money by the PAC is not itself corrupt. And the current law—which authorizes *unlimited* contributions to independent expenditure PACs—creates an appearance of corruption that undermines the public's faith in their elected officials. (pp. 51-62).

Second, beyond "quid pro quo corruption," a majority of the Supreme Court would recognize "dependence corruption" as a "sufficiently important interest" under *Buckley*, and hence, affirm the regulation of contributions to independent expenditure PACs. (pp. 62-75.)

ARGUMENT

I. APPELLANTS' CLAIMS ARE NOT MOOT.

Article 48 sets a deadline by which petitions must be submitted to the Attorney General. It does not, however, require petitioners who submit their petition a year in advance of that deadline to have their petition transmitted by the Secretary to the assembly of the "next" General Court. Rather, it gives proponents the option to collect signatures and have the petition submitted to the General Court in either of the next two years. Appellants intend the Secretary to transmit their petition to the General Court assembling in January 2024, the year of the next state election. The Attorney General's argument that Appellants were required to submit the signatures in 2022 is contrary to the text of art. 48 and to the 1917-1918 Convention's purpose in enacting it.

A. Appellants' case did not become moot on December 5, 2022.

1. Appellants initiated a petition for the Secretary to present to the General Court in January 2024.

Section 3 of pt. II of art. 48 sets the deadline for filing initiative petitions with the Attorney General:

> [The] petition shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-general *not later than the first Wednesday of the August before the assembling of the general court* into which it is to be introduced . . . . Art. 48, II, § 3 (emphasis added).

The deadline for petitioners, such as the Appellants, who intend their petitions to be introduced to the January 2024 assembly of the General Court, to submit their petition to the Attorney General is August 2, 2023. This is the latest the petition may be filed; there is, however, no prohibition on filing it earlier.

Section 3 then provides that "if [the Attorney General] shall certify [the petition] . . . *it may then be filed* with the secretary of the commonwealth." Art. 48, II, § 3 (Emphasis added). The order of operation is clear from the text: proponents may file with the Secretary only *after* it is certified.

Section 3 then addresses when, after certification, a petition may be filed with the Secretary. It provides that:

> All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth *not earlier than the first Wednesday of the September before the assembling of the general court* into which they are to be introduced, and the remainder of the required signatures shall be filed *not later than the first Wednesday of the following December*. *Id.* (Emphasis added).

Appellants are thus required to file with their petition with the Secretary of the Commonwealth with its first ten signatures not earlier than September 6, 2023; they must then file "the remainder of the required signatures" not later than December 6, 2023.

Appellants met the first deadline. They submitted their petition to the Attorney General in June 2022—*before* August 2, 2023. Appellants now prosecute this appeal so that they may comply with the remaining deadlines by filing a certified petition with the Secretary on or after September 6, 2023, and then gathering the "remainder of the required signatures" to file with the Secretary by December 6, 2023, so the Secretary might transmit the petition to the General Court in January 2024. Art. 48, II, §§ 3, 4.

The Attorney General asks this Court to recognize a new requirement in Section 3, one neither in the text of that article nor in the purpose of the Convention in crafting it. According to the Attorney General,

> Article 48 contemplates a process by which initiative petition proponents must collect signatures immediately after the Attorney General's certification decision is handed down as a means of demonstrating popular support for a proposed law—not a drawn out, three-year-long process of signature collection. R.A. 195.

The Attorney General cites nothing in the text of art. 48 to support this remarkable proposition, and there is nothing. Indeed, art. 48 directs that a petition be presented to the Secretary (so that the Secretary may provide signature "blanks") *only after* the petition has been certified. Art. 48, II, § 3. It is the presentation to the Secretary of a certified petition that triggers the signature-gathering window and

determines the legislative session into which the petition will be introduced if it gathers the required signatures, not certification by the Attorney General. *Id.*

For petitions filed in an odd-numbered year, proponents must collect signatures during a three-month period of the same odd-numbered year. Because state elections occur only in even-numbered years, petitions submitted to the Attorney General in odd-numbered years must be introduced at the next legislative session (at the beginning of the following year) to enable that the initiative to appear on the ballot at the following November election.

However, petitions filed in even-numbered years, such as the Petition here, need not follow this condensed process. Pursuant to the clear language of art. 48, the petition may appear on the ballot at the next state election by being introduced either in the next legislative session at the start of the odd-numbered year or the one thereafter, at the start of the next even-numbered year. Art. 48, II, § 4; art. 48, V; art. 64, § 2, of the Amendments to the Massachusetts Constitution, as amend.

This gives petitioners two paths to the legislature and, if necessary, the ballot. Petitioners whose petitions are filed with and certified by the Attorney General in an even-numbered year may (A) submit their petitions to the Secretary not earlier than the first Wednesday of September of the same year, which will require them to submit the "remainder of the required signatures" to the Secretary by the first Wednesday of December of the same year, and have their petition transmitted to the legislature in January of the next year—still nearly two years before that petition might be placed on a ballot (the

following even-numbered year); or (B) opt not to submit the petition with the Secretary before the first Wednesday of the December after their submission to the Attorney General—by choice or as in this case, because the petitioners must first pursue an appeal to obtain a court order requiring the Attorney General to certify the petition. Under the express terms of art. 48, the petitioners may file the petition and first ten signatures with the Secretary not earlier than the first Wednesday of the following September (i.e., the ensuing odd-numbered year) and commence gathering the remainder of the required signatures to be submitted to the Secretary by the first Wednesday of December. Art. 48, II, § 3. In such a case, the petition would then be introduced into the legislative session commencing in January of the next even-numbered year after the initial submission to the Attorney General). Completion of either path will result in the petition being eligible for placement on the same, next available ballot.

Appellants' proposed schedule is perfectly consistent with the plain language and purpose of art. 48 for at least three reasons:

First, Section 3 plainly establishes that petitioners may seek the certification decision of the Attorney General well in advance of their gathering signatures. Section 3 specifies how *late* a submission might be made to the Attorney General, but does not specify how *early* it can be made. Art. 48, II, § 3. Had its drafters intended to establish a closed period during which a petition might be submitted to the Attorney General, they could have done so. Indeed, the drafters set a closed period for collecting "the remainder of the required signatures" by establishing the first Wednesday in September as the earliest date they

could file the petition with the Secretary and obtain blanks for signature collection and establishing the first Wednesday in December as the deadline for filing those signatures with the Secretary. *Id.* They did not choose this language for the clause governing submission of petitions to the Attorney General.

Second, the Convention established a petition preclearance process precisely to make it easier to frame an appropriate petition, and to give petitioners and the public confidence in the suitability of the proposed initiative before petitioners undertook the burden of gathering signatures. *See, e.g.*, *Debates in the Massachusetts Constitutional Convention* 1917-1918, 727-728 (Mr. Parker of Lancaster), 730 (Mr. Walker of Brookline), *available at* perma.cc/DD5D-A39R. By filing their petition with the Attorney General a year in advance of the deadline, petition proponents may accomplish these goals: If the Petition were denied, they would have adequate time to appeal; if it were granted, they might commence gathering signatures immediately or else rally support for the effort to gather signatures one year later.[1]

Third, Appellants' procedure secures to them the same benefit received by petitioners whose petition is certified: the opportunity to collect signatures without a legal cloud hanging over the petition. That was the objective of the Convention in establishing preclearance. This Court should read art. 48 consistently with that purpose.

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[1] This potential political gain is structurally like the gain they would have achieved had they chosen to introduce their petition into the General Court in 2023 and the petition then certified. In that case, they would have an extra year to campaign to ratify their petition. In this case, they have extra time to organize a petition movement.

2. Article 48 does not require immediate commencement of the signature-gathering period.

The language of art. 48 notwithstanding, the Attorney General maintains that Appellants' Complaints became moot on December 5, 2022, because Appellants failed to immediately commence gathering the remaining required signatures. R.A. 194-196. There is no language in the text of art. 48, or in the purpose of the Convention in crafting art. 48, supporting this argument.

First, contrary to the Attorney General's contention, Appellants do not seek (and their interpretation would not permit) "a drawn out, three-year-long process of signature collection." R.A. 195, As noted earlier, art. 48 limits the time during which signatures may be gathered to approximately three months. Art. 48, II, § 3. Appellants intend to commence that process on the first Wednesday in September 2023 and submit the remainder of the required signatures to the Secretary by the first Wednesday in December 2023. That is three months, not three years.

Second, absent an injunction, the language of Section 3 does not permit Appellants to gather signatures before their petition is certified. Section 3 provides that after a petition is certified it "may *then* be filed with the secretary of the commonwealth." Art. 48, II, § 3 (emphasis added). It does not authorize an as-yet-uncertified petition to be submitted to the Secretary, nor does it authorize the Secretary to provide petitioners "blanks for the use of subsequent signers" for such a petition. Everything in the process beyond the initial submission to the Attorney General is contingent upon the Attorney General's

certification. Only if she certifies—or if after a court challenge, she is ordered to certify—the petition does the process move forward.

This is precisely why Appellants submitted their petition to the Attorney General as early as they did. Appellants anticipated the possibility that, despite the detailed legal memoranda they submitted to the Attorney General explaining why the petition satisfies art. 48's requirements, the Attorney General might nonetheless decline to certify it. They filed their petition early to afford this Court time to resolve the constitutional question that would arise should the Attorney General erroneously fail to certify their petition. Assuming Appellants prevail on the merits before this Court, then, as Appellants have represented, R.A. 246, they would gather the remainder of the required signatures so that the Secretary may transmit the petition to the General Court in January 2024. *See* art. 48, II, § 4.

The Attorney General argues that "petitioners might well choose to file petitions … as part of pre-filing research and political strategy for a subsequent year's petition." R.A. 208. Yet this function is precisely what the Attorney General provides when she rules on a petition in even-numbered year. If a petition is approved in an even-numbered year, petitioners have no obligation to seek signatures that year. Instead, they are free to submit the same petition in the following year, and if unchanged, can count on the Attorney General's approval again. Appellants seek nothing more, save the opportunity to correct an erroneous ruling by the Attorney General well in advance of the obligation to present their petition to the Secretary.

Third, *Lockhart* v. *Attorney General*, 390 Mass. 780 (1984), is not to the contrary. In that case, petitioners filed their petition in the odd-numbered year. Accordingly, the petition would have to be introduced into the next General Court for the petition to be placed on the next statewide ballot. *Id.* at 780-781. By choosing to file in an odd-numbered year, the *Lockhart* petitioners accepted the risk that, if the Attorney General refused to certify their petition, they would need to obtain an injunction authorizing them to collect signatures to meet the "first Wednesday of the following December" deadline for delivery of the "remainder of the required signatures." Art. 48, II, § 3. They began collecting the requisite signatures but failed to collect enough, thus rendering their complaint moot. *Lockhart*, 390 Mass. at 782, 784. There was nothing this Court could have done to qualify their petition to be submitted in time to be presented to the General Court and if necessary, placed on the ballot. *See id*.

This case is fundamentally different. Appellants filed their petition in the summer of 2022, early enough to give them two possible schedules to be included on the 2024 ballot. A favorable decision by this Court, reversing the refusal of the Attorney General to certify Appellants' petition, will enable Appellants to present a certified petition to the Secretary in September 2023, collect signatures between September and December 2023, and have the certified petition transmitted to the General Court in January 2024. These facts distinguish this case from *Lockhart*, and demonstrate that this case was not rendered moot on December 5, 2022.

3. There is no basis to deviate from the plain language of art. 48 for any petition submitted, but not certified, in an even-numbered year.

Appellants acknowledge that the Attorney General has adopted a practice of agreeing to—and insisting upon—an injunction to require petitioners to collect signatures before the matter is heard by this Court when she denies certification of a petition. In light of *Lockhart*, that practice may be defended on pragmatic grounds—but *only* when a petition is submitted in the months before it is intended to be presented to the General Court.

While this Court has not addressed the question of the proper standard to be applied when seeking an injunction to deviate from the plain language of art. 48, traditionally and at the very least, issuance of a preliminary injunction requires consideration of three factors: "whether the party seeking the preliminary injunction is likely to succeed on the merits; whether irreparable harm will result from a denial of the injunction; and whether, in light of the moving party's likelihood of success on the merits, the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party." *Massachusetts Port Authority v. Turo Inc.*, 487 Mass 235, 239 (2021). "Where a party seeks to enjoin government action," a fourth factor is considered: whether "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the

public" (citation omitted). *Garcia v. Department of Hous. & Community Dev.*, 480 Mass. 736, 747 (2018).[2]

For petitions filed in odd-numbered years—the vast majority of petitions—a clear irreparable harm would result from the denial of an injunction. Without an injunction, petitioners would be deprived of the opportunity to collect the remaining signatures by the first Wednesday of December, foreclosing the possibility of the petition appearing on the ballot even if their challenge to denial of certification were successful.

In this case, however, neither the second, third, nor fourth factors favor an injunction that would obligate Appellants to evade the clear requirements of Section 3 by collecting signatures on an as-yet-uncertified petition by December 5, 2022.

Neither party will suffer irreparable harm absent an injunction. For Appellants, the burden of gathering signatures for an uncertified petition is greater than the burden for a certified petition. Appellants intend to rely upon volunteers to gather signatures. R.A. 66, ¶ 41(B)(1); R.A. 24, ¶ 79. Those volunteers would rightly be skeptical about devoting their time to a rejected-as-allegedly-unconstitutional petition. Similarly, even citizens who might otherwise be inclined to sign the petition may be reluctant to do so in the face of an Attorney General's erroneous ruling that it is unconstitutional. Further, even if Appellants could raise funds (notwithstanding the same problem that would effectively curtail volunteer recruitment—skepticism about donating money in support of a rejected-as-allegedly-constitutional petition) to

[2] Here, the injunction would allow and require signature collection prior to certification despite the directive of art. 48, and so consideration of the public interest may be appropriate.

hire paid-signature gatherers instead of volunteers, the cost of collecting signatures during an even-numbered year would be significantly greater than during an odd-numbered year. R.A. 66, ¶ 41(B)(4).[3]

If this Court reverses the decision of the Attorney General and orders certification, Appellants could and will then comply with the art. 48 deadlines for filing with the Secretary and collecting signatures. The Attorney General also suffers no harm. Indeed, the Attorney General's proposal would not serve the Convention's apparent purpose in requiring the preclearance of petitions. Under the Attorney General's preferred procedure, after declining certification, petitioners who file and are denied certification in an even-numbered year could seek an injunction allowing the collection of signatures and instructing the Secretary to provide blanks for all manner of nativist, demagogic, or similar petitions plainly excluded by the text of art. 48—even where no irreparable harm would come to the petitioners absent an injunction. Proponents could then travel about the state, canvassing voters and obtaining their signatures on official petition signature forms, bearing the Secretary's seal, for the most loathsome and repellent policies imaginable, all while the litigation was pending. This possibility defies

[3] The Baxter Appellants have submitted evidence regarding the cost of paid signature gathering. R.A. 178-180. The Herrmann Appellants have not alleged any capacity to hire paid signature gatherers or evidence regarding the costs of such. Although both sets of appellants are submitting this brief jointly in the interest of judicial efficiency, assertions regarding the costs of paid signature gathering are asserted solely by the Baxter Appellants.

the plain purpose in requiring preclearance and in excluding certain matters from the petition process.

Furthermore, the injunction will not promote and may harm the public interest. There is no need to place an as-yet-uncertified petition before the public, a full two years before it would appear on the 2024 ballot, when the public might instead be able to consider the post-appeal certified petition during the 2023 signature-gathering period.

And though the Attorney General has suggested that signatures must be gathered immediately to prevent staleness, *see* R.A. 195, this gets the argument backwards. Requiring Appellants to gather signatures in the 2022 signature-gathering period for the November 2024 election will increase, not reduce, the risk of stale initiatives.

Finally, no significant burden will fall upon the government or this Court if petitioners who file in even-numbered years are allowed to challenge denial of certification prior to collecting signatures. According to the Attorney General, relatively few denials of certification are appealed, and those that are appealed are filed in odd-numbered years. R.A. 207. The implication of the Attorney General's argument is that if the Court agrees with Appellants, the number of appeals to this Court would increase. These statistics are plainly not relevant to this case, as they all are from petitions filed in odd-numbered years. Appellants acknowledge that in such cases, injunctions to enable petitioners to gather signatures while their appeals pended were proper. The Appellants' case is plainly different. The Attorney General has offered no statistics about petitions similarly situated to Appellants' petition. Appellants are unaware of any.

Even assuming there were comparable cases, the Appellants should not be required to bear an unnecessary extra burden in gathering signatures, solely to reduce the number of appeals to this Court. By "extra burden," Appellants mean a burden beyond the ordinary burden in gathering signatures. Although every petition must gather sufficient signatures in order to qualify for presentation to the general court, ordinarily that process is supported by a certification by the Attorney General. In cases in which certification has been denied, however, the burden of gathering signatures is significantly greater. Appellants intend to rely upon volunteers to gather signatures. But to make the point clear, assume *dubitante* that they intended to rely exclusively upon paid signature gatherers.[4] As the Baxter Appellants' expert has testified, the cost of gathering signatures during an even-numbered year would be twice the cost during the odd-numbered year immediately preceding an election—almost $1 million. R.A. 180. That extra cost is the "extra burden" of forcing Appellants to gather signatures during the pendency of an appeal.

Moreover, the Attorney General declined certification pursuant to a letter issued the first Wednesday of September 2022. Even if Appellants had been able to immediately draft and file a complaint, it still would have taken time to obtain, sign, and have the court agree to an injunction that would have allowed Appellants to obtain signature blanks from the Secretary, costing them valuable time during the already brief signature gathering period. Appellants need not lose this

[4] *See* R.A. 232 n.3 regarding the distinction between the Baxter Appellants and the Herrmann Appellants with respect to assertions regarding paid signature gatherers.

time. By pursuing this appeal, they may obtain a ruling from this Court in time to collect signatures during the full three-month 2023 signature-gathering period.

And because very few petitions are filed in even-numbered years, placing this unnecessary burden on Appellants will not greatly increase the number of potential pre-signature-gathering appeals this Court might hear. If the rule specified in art. 48 unduly burdens the Court—and there is no evidence that it does or will—then the legislature may address that burden. But there is no basis for this Court to adopt a rule contrary to the text of art. 48 that blocks the ability of most ordinary citizens to challenge an Attorney General's ruling, while leaving the courts open to the wealthy or financially interested.

B. Filing signatures with the Secretary is not a precondition to this Court's adjudicating the merits of Appellants' challenge.

The Attorney General maintains that Appellants are required to submit signatures to the Secretary before this Court can consider their appeal, so as "to demonstrate that the proposed law has the level of public support to justify the Court's intervention." R.A. 195. This argument, too, has no basis in law.

1. This Court has previously adjudicated challenges to the Attorney General's denial of certification before signature collection.

In at least two cases, this Court has adjudicated the merits of the Attorney General's denial of certification of a petition ***without*** petitioners submitting signatures to the Secretary before adjudication. In *Slama* v. *Attorney General*, initiative proponents filed a complaint

challenging the Attorney General's denial of certification within weeks after the denial. 384 Mass. 620, 621 (1981).

The case was filed, argued, and decided by this Court in September and October 1981, even though Appellants had not collected ***any*** signatures. *Id.* The Court entered an order on the merits of petitioners' challenge on October 19, 1981—six weeks *before* the deadline for submission of signatures—remanding the case to the county court "where judgment is to be entered declaring that the initiative petition 11/81 is a specific appropriation measure and thus prohibited by Mass. Const. Art. Amend. 48, Init. Pt. 2, s 2." *Id.* Collection of signatures was not a prerequisite to this Court adjudicating the *Slama* plaintiffs' challenge to the Attorney General's determination.

Two years later, the plaintiffs in *Paisner* v. *Attorney General* similarly filed their challenge within weeks after the Attorney General denied certification. 390 Mass. 593, 595-596 (1983). *Paisner* was argued on November 9, 1983, four weeks before the deadline for Appellants to submit signatures. *Id.* at 593. That the Court held oral argument while Appellants were still gathering signatures again negates the suggestion that the collection of signatures is a prerequisite to this Court's review.

2. This Court would not render an advisory opinion by ruling on the merits of Appellants' challenge before the Appellants file signatures with the Secretary.

The Attorney General characterizes as "live appeal[s]" only those challenges to her rulings that come with enough signatures to qualify for the ballot. R.A. 207. Requiring those signatures, she suggests, would

avoid this Court "deciding these constitutional questions in a vacuum," and avoid "expend[ing] judicial resources resolving hypothetical constitutional questions and issuing advisory opinions." R.A. 208.

But submission of signatures does not provide context to a legal dispute. That context is fully revealed by the refusal of the Attorney General to certify a petition. The question on appeal is whether that decision was correct. The signatures will not assist this Court in deciding that question.

The Convention that adopted art. 48 could have imposed a requirement that petitions the Attorney General finds do not comply with art. 48 must nonetheless gather signatures before the judgment of the Attorney General might be challenged. It did not, and such a rule is plainly inconsistent with the Convention's purpose.

One example from the history of the Convention confirms this conflict. The Convention considered a fully refundable $100 deposit for a petition, proposed by Mr. Allan G. Buttrick of Lancaster. *Debates in the Massachusetts Constitutional Convention* 1917-1918, 847-853, *available at* perma.cc/DD5D-A39R. Even though that deposit would be refunded upon the gathering of signatures, that burden was thought improper for what this Court has called the "people's process," *see Abdow* v. *Attorney Gen.*, 468 Mass. 478, 499 (2014). *A fortiori* for a rule that would impose an extra burden on petitioners who sought to challenge an erroneous ruling of the Attorney General: If the *interest* on $100 for three months was too great, certainly imposing an additional burden that can realistically be satisfied only at a cost many times higher would be wildly excessive.

Finally, there is nothing "hypothetical," R.A. 208, about the question Appellants raise, and nothing "advisory," *id.*, about this Court deciding those questions. Appellants ask a concrete legal question: was it "reasonably clear" that their initiative petition "contains an excluded matter," specifically free speech under art. 16? *See Associated Indus. of Massachusetts v. Attorney General*, 418 Mass. 279, 287 (1994). If this Court agrees with Appellants that it was not "reasonably clear," and that the Attorney General therefore erred in refusing to certify the petition, that conclusion plainly affects the legal rights of Appellants: it would entitle the Appellants to file their petition with the Secretary and obtain petition "blanks" after September 6, 2023, so that they might gather and file signatures by December 6, 2023. Without this Court's ruling, Appellants would have no opportunity to have the Secretary present their petition presented to the General Court in January 2024. That difference plainly renders this dispute real and consequential, not hypothetical and advisory.

II. APPELLANTS' PROPOSED PETITION IS NOT INCONSISTENT WITH FREEDOM OF SPEECH UNDER ART. 16.

A. The Attorney General may not reject a petition unless it is "reasonably clear" that it contains an excluded matter.

Article 48, II, § 2, provides in relevant part that "[n]o proposition inconsistent with any one of the following rights of the individual . . . shall be the subject of an initiative or referendum petition," including freedom of speech under art. 16.

The Attorney General should not refuse a petition "unless it is

reasonably clear that a proposal contains an excluded matter." *Associated Industries*, 418 Mass. at 287. As this Court has determined, it is not "reasonably clear" when "facts might show that what appeared on the limited factual record to be at least constitutionally questionable was in fact a permissible subject of a referendum." *Id.* at 286. Where such "possibilities exist, [the Court's] role is not to prevent the people from voting on the proposal." *Id.* (citing *Yankee Atomic Elec. Co. v. Secretary of the Commonwealth*, 402 Mass. 750, 760 n.9 (1988) ("*Yankee Atomic Elec. Co. I*")). Thus, at this stage, any close questions regarding a petition's constitutionality must be resolved in its favor.

Because this case is a pre-enactment review of the Attorney General's refusal to certify the proposed petition, the only question before this Court is whether the petition is "inconsistent" with the enumerated rights "as they exist under the Massachusetts Declaration of Rights" and not "as they exist under the Federal Constitution." *Associated Industries*, 418 Mass. at 283-284; *see also* art. 48, II, § 2.

In construing Article 16, this Court considers First Amendment jurisprudence to be persuasive, though not controlling. *Associated Industries*, 418 Mass. at 284; *Opinion of the Justices*, 418 Mass. 1201, 1212 (1994). This Court has specifically looked to Supreme Court jurisprudence on issues related to campaign finance laws. When analyzing the constitutionality of a challenged law, this Court will "first consider whether [it] is constitutional under the First Amendment, as interpreted by the Supreme Court. If it is, [the Court] must then consider whether our Declaration of Rights is more protective . . . and, if so, whether [the law] complies with that more protective standard." *1A*

Auto, Inc. v. Director of Office of Campaign & Pol. Fin., 480 Mass. 423, 428 (2018). The court "[h]istorically . . . ha[s] interpreted the protections of free speech and association under our Declaration of Rights to be 'comparable to those guarantees by the First Amendment.'" *Id.* at 440 (quoting *Opinion of the Justices*, 418 Mass. at 1212). Therefore, although at this stage the Court need ask only whether the proposed petition is inconsistent with art. 16, consideration of Supreme Court jurisprudence is instructive to this inquiry.

B. No court has ever held that Massachusetts law forbids the regulation of contributions to independent expenditure PACs.

As the Attorney General observed, "Massachusetts courts have not specifically weighed in on the constitutionality of laws limiting campaign contributions" to independent expenditure PACs. R.A. 36. This alone should be sufficient to establish that it is not "reasonably clear" that the petition contains an excluded matter. Moreover, just three years ago, this Court expressly upheld a significant restriction on political contributions. *1A Auto*, 480 Mass. at 440. Recognizing the distinction between regulations of expenditures and contributions, this Court observed that "contribution limits are reviewed under a less rigorous standard and will be upheld as long as they are 'closely drawn to match a sufficiently important interest,'" specifically the interest of preventing quid pro quo corruption and its appearance. *Id*. at 429 (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)). The proposed petition is analogous; it proposes a contribution limit to serve the state's interest in preventing quid pro quo corruption and its appearance. The Court's decision in *1A Auto* at the very least demonstrates that it is not

"reasonably clear" that the petition is "inconsistent" with art. 16.

C. The United States Supreme Court has never held that the First Amendment forbids the regulation of contributions to independent expenditure PACs.

The Attorney General based her refusal to certify the petition upon a prediction about how the United States Supreme Court and therefore this Court would treat regulations of contributions to independent expenditure PACs. R.A. 79. The Attorney General's prediction is unsupported by either Supreme Court or this Court's precedent.

1. The U.S. Supreme Court permits contribution limits to prevent quid pro quo corruption.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court considered First Amendment challenges to expenditure and contribution limits in the Federal Election Campaign Act (FECA), which regulates the financing of campaigns for federal office. *See* 52 U.S.C. § 30101 *et seq*. (formerly codified at 2 U.S.C. § 431 *et seq*.). By restricting "large financial contributions" to candidates and closely affiliated groups, Congress sought "to limit the actuality and appearance of corruption resulting from" such contributions. *Buckley*, 424 U.S. at 25-26.

The Supreme Court held that laws regulating corruption were a "sufficiently important interest" to justify restrictions of political speech. *Buckley*, 424 U.S. at 25; *see also Davis v. FEC*, 554 U.S. 724, 737 (2008); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985). Later cases have come to limit that "corruption" to "quid pro quo corruption" and the appearance of quid pro

quo corruption. *See, e.g.*, *FEC v. Cruz*, 142 S. Ct. 1638, 1652 (2022) ("This Court has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance.").

Turning from the public interest (preventing corruption) to the types of limits allowed, the Supreme Court distinguishes between limits on *expenditures* and limits on *contributions*. Expenditure limits are subject to the "exacting scrutiny" that governs restrictions on "political expression." *Buckley*, 424 U.S. at 44-45. Such limits directly restrict election-related communications and thus "heavily burden[] core First Amendment expression." *Id.* at 48. By contrast, a *contribution* limit "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20.

"This core distinction between independent expenditures and contributions has become a 'basic premise' of the Court's jurisprudence concerning campaign finance laws." *1A Auto*, 480 Mass. at 430 (quoting *Beaumont*, 539 U.S. at 161). Since *Buckley*, "the [Supreme] Court has declared unconstitutional almost every independent expenditure limit that has come before it," but has "[i]n contrast . . . upheld most contribution limits." *1A Auto,* 480 Mass. at 430; *see also FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441-442 (2001) (noting same dichotomy).

In subsequent decisions, the Supreme Court upheld related limits on the amount of money donors may contribute to various political entities. The Court upheld provisions restricting contributions to multicandidate political committees and limiting coordinated party

expenditures that function like contributions. *See California Med. Ass'n v. FEC*, 453 U.S. 182, 184-185 (1981); *Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 464-465. It also upheld limits on contribution of "soft money" to political parties—that is, contributions the parties use to engage in issue advertising and other activities that may benefit candidates without expressly advocating their election. *See McConnell v. FEC*, 540 U.S. 93, 122-126 (2003). The Court reasoned that such limits not only block contributions that can corrupt and create the appearance of corruption; the limits also prevent candidates and donors from "circumvent[ing] FECA's limitations" on direct contributions to federal candidates. *Id.* at 126; *see also Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017) (summarily reaffirming this holding); *Republican Nat'l Comm. v. FEC*, 561 U.S. 1040 (2010) (same).

Because contributions to independent expenditure PACs can similarly corrupt and create the appearance of corruption and provide an avenue for circumventing limits on direct contributions to candidates, under this line of precedent, the Supreme Court is likely to uphold limits on such contributions under the First Amendment.

2. Independent expenditure PACs were created by a mistaken lower federal court decision that does not apply in Massachusetts.

In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court invalidated a federal statute that forbade corporations from making political *expenditures* close to elections. *Id.* at 318-319. Reiterating that expenditures are "political speech," the Supreme Court reasoned that "[t]he anticorruption interest is not sufficient" to restrict such expenditures. *Id.* at 329, 357. "[I]ndependent expenditures," the

Supreme Court further stated, "do not give rise to corruption or the appearance of corruption." *Id.* at 357. At the same time, the Supreme Court distinguished the case law governing political *contributions*, noting that it had "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." *Id.*; *see also id.* at 345, 361 (stressing that expenditures are different from contributions and that *Citizens United* dealt only with expenditures).

Shortly after *Citizens United,* the U.S. Court of Appeals for the D.C. Circuit decided *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied on unrelated issue sub nom. Keating v. FEC*, 562 U.S. 1003 (2010), where a political committee challenged the limit that a federal statute imposed on contributions it could receive. Relying on *Citizens United*, the organization argued that the monetary limit violated the First Amendment as applied to its activities because it engaged only in independent electoral advocacy.

The D.C. Circuit agreed. The court of appeals recognized that *Citizens United* dealt only with a ban on campaign *expenditures*, not any contribution limit. But it reasoned that "because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696.

The United States declined to seek review of *SpeechNow* in the Supreme Court. In a letter explaining its decision, the U.S. Attorney General predicted that the court's ruling would "affect only a small

subset of federally regulated contributions." Letter from Eric Holder, Attorney Gen., to Harry Reid, Senate Majority Leader (June 16, 2010), *available at* perma.cc/G9KL-MHMS.[5]

In July 2010, one month after *SpeechNow*, the Federal Election Commission issued an advisory opinion announcing that, in light of *SpeechNow*, it would no longer enforce a contribution limit against "independent expenditure-only political committee[s]." Federal Elec. Comm'n, Advisory Op. 2011-12, at 3. This was the birth of the "Super PAC." *See* Renée Loth, *The birth of the super PAC*, Boston Globe (November 23, 2015), *available at* bit.ly/3WW6Wz2. Five months later—before the Supreme Court or any court in Massachusetts considered the issue—the state Office of Campaign and Political Finance (OCPF) preemptively issued a similar advisory allowing independent expenditure committees to receive unlimited individual and corporate contributions. OCPF, Interpretive Bulletin OCPF-IB-10-03 (Oct. 26, 2010).[6]

Several other lower federal courts and one state supreme court have relied upon *SpeechNow* and its reasoning to prohibit restrictions on contributions to independent expenditure PACs. *See, e.g., New York*

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[5] The plaintiffs in *SpeechNow* asked the Supreme Court to review a distinct portion of the D.C. Circuit's decision upholding certain disclosure requirements. The Court denied certiorari. *Keating v. FEC*, 562 U.S. 1003 (2010).

[6] In 2014, the legislature revised chapter 55 to establish disclosure requirements for the newly created category of "independent expenditure PAC," but removed contribution limits applicable to that category. An Act Relative to Campaign Finance Disclosure and Transparency, 2014 Mass. Acts 210 (H.B. 4366).

Progress & Protection PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013); *Wisconsin Right to Life State Pol. Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Alaska Pub. Offices Comm'n v. Patrick*, 494 P.3d 53 (Alaska Sep. 3, 2021). The First Circuit has not considered the question, and it has not come before this Court.

3. Independent expenditure PACs now dominate spending in many elections.

At the federal level, *SpeechNow* has triggered a "shift to Super PACs as a dominant form of political activity." Bipartisan Policy Ctr., *Campaign Finance in the United States: Assessing an Era of Fundamental Change* 38 (2018), *available at* perma.cc/VT43-QJSW. This "is perhaps the most dramatic development in the campaign finance system in recent election cycles." *Id.* From 2010 to 2022, the number of active independent expenditure PACs increased from 83 to 2,462, with contributions rising more than forty-fold, from $63 million to $2.7 billion. *Super PACs*, OpenSecrets.org, *available at* perma.cc/TR5X-ATX9 (2010 numbers); *Super PACs*, OpenSecrets.org, *available at* perma.cc/9QBJ-6CA4 (2022 numbers).

By 2018, independent expenditure PACs had spent nearly $3 billion on federal elections. Ian Vandewalker, *Since* Citizens United*, a Decade of Super PACs*, Brennan Ctr. for Justice (Jan. 14, 2020), perma.cc/J5VM-4KPL. Furthermore, according to the Congressional Research Service, "relatively few donors provide Super PAC funding." R. Sam Garrett, Cong. Research Serv., *Super PACs in Federal Elections: Overview and Issues for Congress* 15 (2016). Between 2016 and 2020, two-thirds of all independent expenditure PAC funding came from donors who each gave more than $1 million. *See* Vandewalker, *supra*.

The same issues have arisen in Massachusetts. Consider the 2021 Boston mayor's race, where the legal contribution limit (i.e., the threshold at which the legislature has found a risk of corruption) for a contribution to a candidate was $1,000. *See* G.L. c. 55, § 7A(a)(1). Notwithstanding this $1,000 limit, one donor (legally) contributed over one *million* dollars to an independent expenditure PAC that spent 100% of its money supporting a particular candidate.[7] Meanwhile, the independent expenditure PAC supporting that candidate's opponent received multiple $50,000 contributions (fifty times the limit for a direct contribution) and many just under.[8]

4. A prediction on the basis of an erroneous non-binding lower court opinions is not a reason to refuse the petition.

As set forth in more detail below, *SpeechNow* is an erroneous application of federal law to the question of contributions to independent expenditure PACs. But even setting that aside, the Attorney General was wrong to rely upon lower federal court rulings not binding in Massachusetts to block an Initiative that raises a question that neither the Supreme Court nor this Court has ever resolved. As this Court explained in *Associated Industries*:

> The initiative and referendum provisions of the Constitution of the Commonwealth were adopted to permit the people to participate directly in the legislative process. An expanded

[7] *See* OCPF, *81065 Real Progress Boston Independent Expenditure Political Action Committee*, *available at* perma.cc/9V7B-ELQ2. The donor in question is James Davis.

[8] *See* OCPF, 81057 Boston Turnout Project Independent Expenditure Political Action Committee, available at perma.cc/5H4P-GXWK.

> view of the Attorney General's authority to bar ballot access is not warranted. "[O]n reviewing all of the debate concerning the Attorney General's certification responsibilities, it is fair to say that the [Massachusetts Constitutional Convention of 1917-1918] was relying on that official to ferret out obviously improper initiative petitions." The initiative proposal is not "obviously improper" simply because it would place some restrictions on free speech, free press, or the right of peaceable assembly. 418 Mass. at 291 (quoting *Yankee Atomic Elec. Co. I*, 402 Mass. at 757-758) (alterations in original).

Without a holding by either this Court or the United States Supreme Court, the Attorney General should have certified the petition, pursuant to "'the firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws,'" *Associated Industries*, 418 Mass. at 287 (quoting *Yankee Atomic Elec. Co. v. Secretary of the Commonwealth*, 403 Mass. 203, 211 (1988)).

D. The proposed petition would establish a constitutional limit on contributions to independent expenditure PACs to prevent corruption and the appearance of corruption.

The proposed contribution limit is "closely drawn" to prevent quid pro quo corruption or the appearance thereof. *See McCutcheon v. FEC*, 572 U.S. 185, 197, 207-208 (2014) (reiterating this standard); *see also 1A Auto*, 480 Mass. at 429-433. The Attorney General therefore erred in rejecting the petition.

1. Contrary to *SpeechNow*, contributions to independent expenditure PACs can corrupt and create the appearance of quid pro quo corruption.[9]

The Attorney General's declination letter relied on *SpeechNow* in determining that the proposed petition would violate art. 16.[10] R.A. 36. But *SpeechNow*'s reasoning is fallacious. As the U.S. Supreme Court recognizes, even when an organization's spending does not corrupt, a contribution to the organization can still be part of a quid pro quo transaction or create the appearance of quid pro quo corruption.

In *SpeechNow*, the D.C. Circuit asserted that *Citizens United* dictates, "as a matter of law," that Congress may not limit contributions to committees that make only independent expenditures. 599 F.3d at 696. The court of appeals reasoned: "[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *Id.*

But the D.C. Circuit—and the Attorney General in relying on that ruling—has overlooked that contributions to an independent

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[9] The Herrmann Appellants rely on this section as to the petition's constitutionality.

[10] The Attorney General also cited two additional federal circuit cases that reached the same conclusion. R.A. 36. Those circuit courts also relied upon *SpeechNow* and its erroneous analysis of *Citizens United*. *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013); *Wisconsin Right to Life State Pol. Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011). Neither ruling is binding on Massachusetts.

expenditure PAC, like contributions to other "third parties" made by a donor at the behest of a politician, may be part of quid pro quo corruption and create the appearance of quid pro quo corruption.

1. Bribery law—both in general and in the specific context of campaign contributions—makes clear that donations to actors other than candidates or organizations under their control can give rise to quid pro quo corruption. Even when the recipient of a donation is independent and incorruptible, the donation can corrupt an actor who is interested in seeing the organization funded and successful—and who may be willing to grant favors in return.

For instance, a politician "who agreed to vote in favor of widget subsidies in exchange for a widget maker's donation to the Red Cross" would be guilty of bribery even if he had no connection to the Red Cross or role in determining how the organization spent the funds. Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2310 (2018). Even though the Red Cross's expenditures would be virtuous, the widget maker's contribution would be corrupt. *Id.*

Federal and state bribery laws have long incorporated that commonsense insight. Precisely because a payment can corrupt even when it is directed to an entity the bribed official does not control, the Massachusetts bribery statute forbids a state official from corruptly seeking "anything of value for himself *or for any other person or entity,*" in exchange for official value. G.L. c. 268A, § 2(b) (emphasis added); *see also* 18 U.S.C. § 201(b)(2) (also forbidding a public official from corruptly seeking "anything of value personally or for any other person

or entity" in exchange for official action). In *Commonwealth v. Borans*, this Court emphasized that a public official need not "[p]ersonally receive anything of value" in a bribery scheme and that it is sufficient that they seek "something of value on behalf of another" in exchange for official action. 379 Mass. 117, 143-144 (1979); *accord United States v. Brewster*, 506 F.2d 62, 68-69 (D.C. Cir. 1974) (emphasizing the import of the "any other person or entity" coverage in federal bribery statute).

Bribery through donations to autonomous third-party entities is not merely a hypothetical concern. Affirming the conviction of a former governor, the Eleventh Circuit has recognized that soliciting a donation to an issue-advocacy foundation can violate the bribery statute, even though donations to such organizations "do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does." *United States v. Siegelman*, 640 F.3d 1159, 1169 n.13 (11th Cir. 2011); *see also, e.g.*, *United States v. Gross*, No. 15-cr-769, 2017 WL 4685111, at *42 (S.D.N.Y. Oct. 18, 2017) (bribery under related statute through donation to a church). And this Court has recognized that soliciting campaign contributions for a third party also can violate the bribery statute. *See Borans*, 379 Mass. at 128, 143-144 (affirming conviction of a city purchasing agent for, in part, facilitating acceptance of bids in exchange for the bidder contributing to the mayor's campaign).

Indeed, prosecutors have repeatedly charged individuals with bribery arising from donations to independent expenditure PACs themselves. In 2020, insurance magnate Greg Lindberg was convicted of "orchestrating a bribery scheme involving independent expenditure

accounts and improper campaign contributions." Press Release, U.S. Dep't of Justice, *Federal Jury Convicts Founder and Chairman of a Multinational Investment Company and a Company Consultant of Public Corruption and Bribery Charges* (Mar. 5, 2020), perma.cc/38BH-JD4V. Lindberg funneled $1.5 million to an independent-expenditure committee he created for the purpose of bribing a North Carolina insurance commissioner to replace an official investigating Lindberg's company. Ian Vandewalker, *10 Years of Super PACs Show Courts Were Wrong on Corruption Risks*, Brennan Ctr. for Justice (Mar. 25, 2020), perma.cc/4DJN-DSKT.[11]

In 2015, the federal government prosecuted a sitting U.S. Senator and a donor for an alleged bribery scheme involving a $300,000 contribution to an independent expenditure PAC supporting the Senator's reelection. *See United States v. Menendez*, 132 F. Supp. 3d 635, 640 (D.N.J. 2015). The case resulted in a hung jury, but the court did not question the validity of the federal prosecutors' theory that contributions to independent expenditure PACs can corrupt.

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[11] Lindberg was caught on tape telling the commissioner, "I think the play here is to create an independent-expenditure committee for your reelection specifically, with the goal of raising $2 million or something." Ames Alexander, *Watch Secretly Recorded Videos from the Bribery Sting that Targeted Durham Billionaire*, Charlotte Observer 00:16-30 (Mar. 10, 2020), *available at* perma.cc/4SSH-WMNA (quotation transcribed from first video posted in article). Lindberg emphasized that "the beauty of" such a committee is that it can receive "unlimited" donations. *Id.* 00:35-45. He also suggested that the commissioner get someone he trusted to run the committee, such as his brother. *Id.* 00:58-01:18.

If the D.C. Circuit and, by extension, the Massachusetts Attorney General, were right that "contributions to groups that make only independent expenditures . . . cannot corrupt or create the appearance of corruption," *SpeechNow*, 599 F.3d at 694, these prosecutions would all have been illegitimate. The quid pro quo corruption the government alleged would be factually and legally impossible. Put another way, under the Attorney General's view, it is possible for a Massachusetts politician to be bribed by agreeing to official action in exchange for contractors or lobbyists contributing to his favorite *charity* (even though the charity's spending is noncorrupt), but it is legally impossible for that same politician to be bribed by agreeing to official action in exchange for contractors or lobbyists contributing to his favorite *political committee* (precisely *because* the political committee's spending is noncorrupt).

2. The Supreme Court's campaign finance precedents underscore the impropriety of the leap from the proposition that independent *expenditures* do not corrupt to the conclusion that *contributions* to independent-expenditure-only organizations cannot corrupt. In *McConnell*, the Supreme Court upheld limits on donations of "soft money"—contributions to political parties for activities, including issue advertising, that were *not* spent in coordination with particular candidates. *See* 540 U.S. at 122-124, 131, 152 & n.48, 155, 168. The Court recognized that soft-money contributions "create[d] a significant risk of actual and apparent corruption." *Id.* at 168. "[F]ederal officeholders were well aware of the identities of the donors" who contributed large amounts of soft money to parties. *Id.* at 147. And

given the "close ties" between parties and the parties' candidates, *id.* at 161, the activities funded by soft money "confer[red] substantial benefits on federal candidates," *id.* at 168. Parties, therefore, could serve as "intermediaries" between big donors seeking "to create debt on the part of officeholders" and candidates seeking "to increase their prospects of election." *Id.* at 146. Crucially, the Court explained, because of the "close connection and alignment of interests" between officeholders and parties, "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used*." *Id*. at 155 (emphasis added).

The Supreme Court reaffirmed that holding just four years after *Citizens United*. *See McCutcheon*, 572 U.S. at 197-198, 209 n.6 (stressing that "*McConnell*'s holding about 'soft money'" was unaffected by its ruling). And in *Republican Party of Louisiana*, which the Court summarily affirmed in 2017, a three-judge federal court recognized that contributions to political parties can corrupt even when the parties' expenditures do not. "[T]he inducement occasioning the prospect of indebtedness on the part of a federal officeholder is not the *spending* of soft money by the political party. The inducement instead comes from the *contribution* of soft money to the party in the first place." 219 F. Supp. 3d at 97 (emphases in original).

Exactly the same logic applies here. It does not matter whether independent expenditure PACs' *expenditures* give rise to a risk of corruption. The question instead is whether mega-*contributions* to these organizations give rise to corruption or the appearance of corruption.

See McCutcheon, 572 U.S. at 191 (citing *Buckley*, 424 U.S. at 26-27). We now turn to that question and show that of course they do.

2. The petition's proposed limit on contributions to independent expenditure PACs is a valid means of preventing corruption.

Just like the limits on contributions to candidates and parties the Supreme Court upheld in *Buckley* and subsequent cases, the petition's proposed limit on contributions to independent expenditure PACs "protect[s] against corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 191.

1. Many independent expenditure PACs have become alter egos of candidates' campaigns themselves—raising the same prospects of indebtedness and corruption that direct contributions present. This is most obviously true for independent expenditure PACs that spend the money they receive to promote a single candidate. Many of these independent expenditure PACs are run by "former staff of candidates who understand what will help the candidate and make expenditures intended to help the candidate, such as funding events about more general issues that feature the candidate." U.S. Gov't Accountability Office, GAO-20-66R *Campaign Finance: Federal Framework, Agency Roles and Responsibilities, and Perspectives* 52 (2020). Indeed, such independent expenditure PACs conduct "a wide array of activities typically the province of the candidates"—including "provid[ing] rapid response to charges against their candidate" and "build[ing] lists of persuadable voters." Bipartisan Policy Center, *supra*, at 39. Candidates also "often openly support and associate with" such organizations, appearing at their fundraising events and the like. *Id.* at 33.

Independent expenditure PACs that promote multiple candidates of the same party similarly function as alter egos for parties. Take, for instance, the federal Senate Leadership Fund. Headed by a former chief of staff to Senator Mitch McConnell, its stated goal is "to build a Republican Senate Majority." Senate Leadership Fund, *available at* perma.cc/ZK7A-3NF4. Multi-million-dollar contributions to such an organization plainly benefit the candidates the independent expenditure PAC supports. The same is true with respect to the Senate Leadership Fund's Democratic counterpart, the Senate Majority PAC, *available at* perma.cc/3EV9-PLKT. Indeed, such independent expenditure PACs "perform many of the functions that parties did in the heyday of 'soft money,'" Bipartisan Policy Ctr., *supra*, at 33—before Congress acted and the Supreme Court held in *McConnell* that soft-money contributions were subject to regulation, *see* 540 U.S. at 154-156.

Donor activity with respect to independent expenditure PACs confirms that FECA's limit on contributions to such organizations—like the "soft money" contribution limits the Supreme Court upheld in *McConnell* and *Republican Party of Louisiana*—is necessary to prevent the limits on contributions to candidates that the Court upheld in *Buckley* from being "functionally meaningless." Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1684 (2012). A small handful of exceptionally wealthy people not only contribute the maximum permissible amount to candidates; they donate huge amounts of money to independent expenditure PACs supporting those same candidates. *See*, e.g., OCPF, *81065 Real Progress Boston Independent Expenditure Political Action Committee*, *available at* perma.cc/9V7B-ELQ2. Between

2010 and 2018, at the federal level, eleven donors gave a total of $1 billion to independent expenditure PACs. Michelle Ye Hee Lee, *Eleven Donors Have Plowed $1 Billion into Super PACs Since They Were Created*, Wash. Post (Oct. 26, 2018), *available at* perma.cc/XX8V-FY2K. Those donors each gave between $38 million and $287 million. *Id.* And donations like these often play a "central" role in candidates' ability to run for office. Zeke J. Miller, *Republicans Vie for 2016 Support from Casino Magnate*, Time (Mar. 24, 2014), *available at* perma.cc/AJ4C-UFDK; *see also, e.g.*, Nicholas Confessore & Jim Rutenberg, *PACs' Aid Allows Romney's Rivals to Extend Race*, N.Y. Times (Jan. 12, 2012), *available at* bit.ly/3vqNizw (describing how candidates rely on independent expenditure PAC donations from "wealthy individuals" to "prop up" their campaigns).

To bring the analysis full circle: under this Court's (and the U.S. Supreme Court's) precedent, Massachusetts may prohibit a donor from contributing more than $1,000 to candidate Mary Jones because larger contributions would risk actual or apparent corruption. But Massachusetts law now allows the same donor to give $10 *million* to an independent expenditure PAC that is dedicated exclusively to Jones's election, that is run by Jones's former campaign manager, and that solicits the check at a fundraiser headlined by Jones herself. According to the Attorney General, neither the Massachusetts legislature nor its voters can elect to restrict such a massive contribution because it does not raise any risk of corruption *at all*. That cannot be right.

2. Lest there be any doubt, the corruptive force of independent expenditure PAC donations has been widely acknowledged by public

officials and candidates themselves and documented in actual criminal prosecutions.

In the course of the 2016 campaign, then-candidate Donald Trump decried independent expenditure PACs as "[v]ery corrupt." Alschuler et al., *supra*, at 2339. He continued: "There is total control of the candidates . . . . I know it so well because I was on both sides of it . . . ." *Id.* Senator Lindsey Graham made a similar observation in 2015, stating that "basically 50 people are running the whole show." *Id.* at 2341. As the late Senator John McCain put it, independent expenditure PACs have "made a contribution limit a joke." *Id.*; *see also id.* (Senator Angus King: "[W]e can look around the world where oligarchs control the government, and we're allowing that to happen here.").

Actual bribery prosecutions involving independent expenditure PAC contributions illustrate what these government officials openly admit: independent expenditure PAC contributions can—and do—facilitate quid pro quo arrangements. *See supra* at 52-54 (discussing examples). Of course, such bribery prosecutions capture "only the most blatant and specific attempts" to corrupt candidates and public officials. *Buckley*, 424 U.S. at 28.

While these examples of actual or apparent quid pro quo corruption are instructive, they are not necessary for the certification of the proposed petition. Nor is it critical that much of the data arises at the federal level, where large campaign spending trends often first emerge. First, "[i]t would . . . be unrealistic for a court to require the Legislature to wait for evidence of widespread quid pro quo corruption . . . before taking steps to prevent such corruption. 'There is

no reason to require the [L]egislature to experience the very problem it fears before taking appropriate prophylactic measures.'" *1A Auto*, 480 Mass. at 435 (quoting *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011)) (third alteration in original).

Second, neither the Attorney General nor this Court "need . . . insist on evidence of *actual* corruption when the government also has an important interest in preventing the *appearance* of corruption." *1A Auto*, 480 Mass. at 435. This Court, in *1A Auto*, noted that "[i]f corporate contributions were permitted, every time a political decision was made that helped or hurt a corporation's interests, members of the public might wonder if the corporation's political contributions—or lack thereof—played a role in the decision." *Id.* The same is true for the current system: as political decisions are being made, individuals and corporations are free to make unlimited contributions to independent expenditure PACs while coordinating and communicating with the candidates that benefit from these independent expenditure PACs; giving the appearance that those contributions sway decisions that affect the contributors. Indeed, in a public opinion survey released by the New York University School of Law, nearly 70% of respondents believed that unlimited contributions to independent expenditure PACs will lead to corruption, and only 15% disagreed.[12]

But the very fact that there are examples of quid pro quo corruption arising from contributions to independent expenditure PACs underscores the legitimacy of the present petition, which provides the

[12] *See* Brennan Center, National Survey: Super PACs, Corruption, and Democracy, Apr. 24, 2012, *available at* perma.cc/SV6W-HN25.

people of Massachusetts with the opportunity to determine that contributions to all political committees should be limited to safeguard the integrity of our electoral system. That determination is more than enough to justify the "marginal restriction," *id.* at 20, that the petition would impose on the ability of donors to express their electoral views.

Therefore, under existing United States Supreme Court case law, the Initiative would be constitutional.[13]

III. *BUCKLEY'S* "SUFFICIENTLY IMPORTANT INTEREST" WOULD NOT BE LIMITED TO QUID PRO QUO CORRUPTION ALONE.

The Herrmann Appellants maintain that contributions to independent political action committees can be regulated as a means of regulating quid pro quo corruption. *See supra* Part II.

The Baxter Appellants agree with this argument. And in addition, if alone, the Baxter Appellants also submit that the United States Supreme Court would recognize a distinct form of corruption—"dependence corruption"—as also constituting a "sufficiently important interest" under the *Buckley* standard. *Buckley,* 424 U.S. at 25. Specifically, Appellants submit that at least two Justices would apply principles of originalism to uphold the Initiative, thereby constituting a majority to affirm the power of the citizens of Massachusetts to limit contributions to independent expenditure PACs. These arguments show that limiting contributions to Super PACs is "at least constitutionally questionable," and thereby, "a permissible subject of a referendum."

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[13] This concludes the Herrmann Appellants' argument regarding the Petition's constitutionality.

Associated Industries, 418 Mass. at 286.

A. An originalist would uphold the power to regulate institutional as well as quid pro quo corruption.

As this Court recognizes, "originalism" has become the dominant interpretive methodology of the United States Supreme Court. *See generally* William Baude, *Is Originalism Our Law?,* 115 Colum. L. Rev. 2349 (2015). Its emergence in turn has led the Court to reconsider long-established precedents. Last term, for example, the Court reversed a 50-year-old ruling about abortion based on arguments grounded in originalism. *See Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228, 2246-2254 (2022). A decade and a half before that, the Court reversed its long-standing interpretation of the Second Amendment based on arguments not previously made and grounded in originalism. *See D.C. v. Heller,* 554 U.S. 570, 623-624 (2008).

In the instant case, two arguments grounded in originalism would yield the conclusion that contributions to independent expenditure PACs can be limited. Together they evince the significant likelihood that a majority of the Court would uphold Appellants' Initiative under the First Amendment—reinforcing Appellants' claim that it was improper for the Attorney General to refuse certification on the basis of a predicted Supreme Court opinion.

1. Under Justice Thomas's approach, the Constitution does not prohibit limits on political contributions duly enacted by the legislature or by the people.

Justice Clarence Thomas has advanced the most fundamental originalist rethinking of First Amendment doctrine. In *McKee v. Cosby*,

139 S. Ct. 675 (2019), Thomas called on the Court to revisit *New York Times v. Sullivan*, 376 U.S. 254 (1964), and to apply an originalist methodology to the question *Sullivan* resolved. *Sullivan*, Thomas insisted, was a "policy-driven decision[] masquerading as constitutional law." 139 S. Ct. at 676 (Thomas, J., dissenting). Instead of such policy making, Thomas challenged the Court to determine "the original meaning of the First and Fourteenth Amendments." *Id.*; *See also Coral Ridge Ministries Media, Inc., v. Southern Poverty Law Center*, 142 S. Ct. 2453 (2022) (opinion dissenting from denial of certiorari) (slip op., at 3) (arguing for reconsideration of *Sullivan); Berisha* v. *Lawson*, 141 S. Ct. 2424, 2425 (2021) (opinion dissenting from denial of certiorari) ("lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine").

Biden v. Knight First Amendment Institute at Columbia University states Justice Thomas' principle most cleanly:

> [R]egulations that might affect speech are valid if they would have been permissible at the time of the founding. 141 S. Ct. 1220, 1223-1224 (2021) (Thomas, J., concurring),

Under this approach, the Initiative would be plainly constitutional. Even assuming the regulation of "contributions" would have been considered the regulation of "speech," the original conception of the First Amendment permitted speech regulation if two conditions were satisfied: first, that the regulation was passed by a legislature, and second, that the regulation advanced "the public good." *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 256, 313-314 (2017). No doubt, a legislature or the public could mistake the "public good" or fail to act according to "general purposes." But as

Justice Thomas has argued, no court at the founding would have presumed to question a plausible claim to advance the public good. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584 (2020) (Thomas, J., concurring) ("[T]here is no evidence from the founding indicating that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare") (citations omitted). *Accord* Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 1 *The Papers of James Madison: Retirement Series* 500, 501 (David B. Mattern et al. eds., 2009) (stating that questions "of mere expediency or policy" are not amenable to judicial resolution). There is no evidence, as Campbell describes, "that the Founders actually supported the judicial protection of retained natural rights, either directly or through a narrow construal of governmental power." Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 Const. Comment. 85, 104 (2017). Rather, history "shows that they preserved retained natural rights principally through constitutional structure, giving legislators, not judges, nearly complete responsibility for determining their proper scope." *Id.*; *see also* Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 333 (1996) ("[A] national bill of rights would have [no] great practical value."); *id.* at 335 ("Madison did not expect the adoption of amendments to free judges to act vigorously in defense of rights."); Hortensius [George Hay], *An Essay on the Liberty of the Press* 38 (Philadelphia, Aurora 1799) (First Amendment would "amount precisely to the privilege of publishing, *as far as the legislative power shall say*, the public good requires.") (emphasis added); *see generally* Jud

Campbell, *Judicial Review and the Enumeration of Rights*, 15 Geo. J. L. & Pub. Pol'y 569 (2017).

Under this standard, an Initiative to limit contributions to independent expenditure PACs would plainly advance a public purpose. As James Madison said about the federal republic, the aim of representative democracy is to secure legislatures "dependent on the People alone," where by "the People," he said he meant, "not the rich, more than the poor." *The Federalist* No. 52 (Madison), No. 57 (Madison). Unlimited independent expenditure PACs defeat that intended dependence, both by giving non-state residents a voice in the politics of the Commonwealth, *see Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (Kavanaugh, J.), *aff'd*, 565 U.S. 1104 (2012) (upholding restrictions on non-citizens' participation in the political process), and by giving "the rich, more than the poor" influence over the decisions of Massachusetts representatives because of the financial dependence of representatives upon their contributions to independent expenditure PACs. Aiming to secure an appropriate dependence of representatives "on the People [of Massachusetts] alone" is thus a public-regarding reason plainly permissible under the original meaning of the First Amendment.

2. Under a moderate originalism, the regulation of independent expenditure PACs would also be sustained.

So far, Justice Thomas is alone—though still one vote—in his originalist interpretation of the First Amendment. Yet even under a more moderate First Amendment originalism, independent expenditure PACs could be regulated.

As many have recognized, originalism is both a theory of meaning and a theory of judicial restraint. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. Chi. L. Rev. 269, 269-270 (2017) (noting that the two commitments of originalists are the "Fixation Thesis," which imbues words with a fixed meaning, and the "Constraint Principle," which restricts constitutional practice and interpretation). As a theory of meaning, originalism asks what the ordinary accepted public meaning of the words of the Constitution was. As a theory of restraint, it insists that courts have no power to restrict the actions of democratic legislatures unless those acts conflict with the original meaning of the Constitution. The originalist looks to the Framers' understanding of the Constitution, as evinced through the public meaning of the words they used, *both* (1) to give content to the meaning of its words, *and* (2) to constrain the doctrine the Court has adopted to give the Constitution effect. "[T]he main danger in judicial interpretation of the Constitution," Justice Scalia warned, "is that the judges will mistake their own predilections for the law." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989). "Non-originalism . . . plays precisely to this weakness"; originalism avoids it. *Id.*

Such a risk of improper judicial discretion is plainly created by the *Buckley* standard. *Buckley* pegged the scope of the government's power to regulate political speech upon "corruption and the appearance of corruption." *Buckley*, 424 U. S. at 25-27. Yet as Justice Stephen Breyer argued in his dissent in *McCutcheon,* there are many conceptions of "corruption." 572 U.S. at 235-245 (Breyer, J., dissenting). Thus, depending upon which conception is adopted, different regulations

would be constitutional. The Court's selection of a particular conception of "corruption" would directly implicate substantive political values. The Court's choice among competing conceptions would thus be a choice about the result.

Recognizing this fact, a moderate originalism would seek to limit judicial discretion, by using the framing conception of corruption to determine the scope of "corruption" within the *Buckley* standard. If an influence would have been deemed "corrupt" by the framers, a moderate originalism would allow the regulation of that corruption today.

This was the approach of Justice Scalia in *Michael H. v. Gerald D.,* 491 U.S. 110 (1989) (plurality opinion) (interpreting the scope of "due process"). Recognizing the wide range of behavior that might be thought to implicate "due process," Scalia sought to narrow judicial discretion, by tying the conception of "due process" to the most "specific level at which a relevant tradition . . . can be identified." *Id.* at 127 n.6. This was not because such an approach limned the original meaning of "due process." It was instead to limit the freedom of judges—to avoid giving judges the power to "dictate rather than discern" the scope of a legislature's power. *Id.* That same motivation explains the Court's decision in *Dobbs*, which also applied a technique designed to minimize the scope of judicial discretion.

A moderate originalist would apply the same methodology to interpret "corruption" in the *Buckley* standard. In the face of the many conceptions of "corruption," a moderate originalist would avoid an approach that was inappropriately "judge-empowering," *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111, 2129 (2022),

and instead link the scope of the "corruption" to the conception of "corruption" used by the Framers. As with "due process" in *Michael H.*, this is not because that is the best or only way to read the term "corruption," but because it is the clearest way to constrain the policy discretion of judges.

a) The dominant conception of "corruption" for the framers was institutional, not individual corruption.

The framers of our Constitution were focused intensely on the problem of "corruption." *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 352 (2009). Yet their conception of "corruption" was different from ours. While they certainly understood—and took steps against—individual, or quid pro quo corruption, they were much more aggressively focused upon the corruption of institutions, especially the representative institutions they intended to establish. No doubt, the Framers were focused upon both individual and institutional corruption. But between the two, they were focused upon institutional corruption more.

This was the conclusion of the uncontroverted evidence submitted in a similar proceeding in Alaska in 2021. *Alaska Pub. Offices Comm'n v. Patrick,* 494 P.3d 53 (Alaska Sep. 3, 2021), *cert. denied*, 142 S. Ct. 779 (2022). In that case, the trial court asked for testimony about the original understanding of "corruption." *Patrick v. Interior Voters,* No. 3AN-18-05726CI (Nov. 4, 2019), *available at* perma.cc/YLW2-KHRJ. Stanford Professor Jack Rakove, one of America's leading scholars of the framing period, testified at length that the historical evidence conclusively established that the Framers were focused on at least three

types of corruption: quid pro quo corruption, institutional corruption, and societal corruption. Respondents' Excerpts of Record, Supreme Court of Alaska, S-17649 (2020), at R.A. 129-133. Among the three, as Professor Rakove testified, institutional corruption was the most important. *Id.* at 145.

For instance, as Rakove testified, it was common for the Framers to remark the "corruption" of the British Parliament. R.A. at 130-133, 145-146. Yet that "corruption" was not evinced by any bribery engaged in by Members of Parliament. It was instead the consequence of an improper influence of the Crown within Parliament. The House of Commons was to be representative of the People of Britain. But the system of selecting representatives from "rotten" and "pocket" boroughs[14] was viewed by the Framers as "corrupt." It was "corrupt" because those Representatives were effectively dependent on the Crown, not the people. As "[t]he [royal] government or some local aristocrat or member of the gentry," Professor Rakove explained, would essentially control the electoral outcome, "the improper influence was that the Crown was essentially creating a dependency with those representatives who were in the Parliament." R.A. at 132.[15]

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[14] Rotten or pocket boroughs are "constituencies where either the government or [a] local aristocrat or . . . member of the gentry had a kind of dominant personal interest, so they could easily sway or influence or control the electorate." R.A. at 132.

[15] This same sense of "dependence" appears explicitly in the Massachusetts Constitution. Art. 13 describes "As the public good requires that the governor should not be under the undue influence of any of the members of the general court by a dependence on them for his support . . . ." That concern led the drafters to require the Governor

Professor Rakove's conclusions are confirmed by familiar historical sources. In a study submitted to the United States Supreme Court, researchers found that when the Framers spoke of "corruption," they were speaking overwhelmingly of institutional, rather than individual, corruption.[16] This conclusion is confirmed by the focus on structural independence throughout the Constitution's design. The Ineligibility Clause prevents anyone from serving simultaneously in Congress and the executive branch. U.S. Const. art. I § 6. This assures that legislators will be dependent on the people, not the President, and therefore "preserv[es] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption." 1 *The Records of the Federal Convention of 1787* at 386 (Max Farrand ed., 1911) (hereinafter *Farrand's Records*). Similarly, the requirement that legislators live in the state they represent, per George Mason, prohibits "[r]ich men of neighbouring States" from using "means of corruption in some particular district" to "get into the public Councils after having failed in their own State." 2 *Farrand's Records* at 218. Avoiding these incentives to institutional, or dependence, corruption was the objective of much in the design of the

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to "have an honorable stated salary"—to avoid an improper dependence. Part II, c. 2, § 1, art. 13, of the Constitution of the Commonwealth.

[16] *See* Brief for Constitutional Accountability Center as Amicus Curiae Supporting FEC, *McCutcheon v. FEC*, 572 U.S. 185 (2014) (12-536) (56% of uses identified discussed corruption of institutions, not individuals; 69% of "improper dependence" references were references to an entity, not individual), *available at* perma.cc/6KLW-7DB8. *See also* Database of Framing References to Corruption, *available at* perma.cc/YG4C-GTC5.

Constitution.

This evidence establishes that if the term "corruption" were interpreted to include the dominant usages at the time of the framing, it would include both quid pro quo corruption and dependence corruption. Put differently, if the First Amendment permits the restriction of political speech to address "corruption," and the term "corruption" is given a meaning that is historically sensitive to its usage at the framing, the First Amendment would permit regulations targeting both quid pro quo corruption *and* dependence corruption.

b) The People of Massachusetts could reasonably conclude that independent expenditure PACs corrupt the institutions of representative democracy.

Independent expenditure PACs may accept unlimited contributions from any American citizen, union, or corporation, regardless of whether they are from Massachusetts or not. As their influence with Massachusetts grows, politicians become increasingly dependent upon these independent expenditure PACs, to either support their campaigns or oppose their opponent's. In the period 2011 through 2020, 92% of contributions to independent expenditure PACs were of $5,000 or more; 54% was from out of state entities; less than 5% came from Massachusetts residents contributing less than $5,000. Data provided by OpenSecrets, *available at* perma.cc/T339-US3U.

The People of Massachusetts could reasonably conclude that this growing dependence on out-of-staters, as well as the wealthiest within the state, corrupts representative democracy in Massachusetts. A "representative assembly," as John Adams, the architect of the

Massachusetts' Constitution, described:

> should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them. That it may be the interest of this assembly to do strict justice at all times, it should be an equal representation, or, in other words, equal interests among the people should have equal interests in it. John Adams, *Thoughts on Government* 195 (1776).

Independent expenditure PACs corrupt this "equal representation" in two obvious ways: First, as with the contributions of non-citizens banned in *Bluman*, 800 F. Supp. 2d at 288 (holding that the government "has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens . . . over the U.S. political process"), contributions of out-of-state citizens and political action committees weaken the dependence of Massachusetts legislators upon the "equal interests" of Massachusetts citizens. Second, citizens could view contributions by the super wealthy from within Massachusetts as creating a dependence contrary to the "equal interests among the people." Adams, *Thoughts* at 195. In both cases, the corruption is the improper dependence, not any particular inequality in speech.

Thus, under a moderate originalism, the citizens of Massachusetts could seek to constrain this improper dependence by regulating contributions to independent expenditure PACs. That improper dependence would be one kind of "corruption" under the *Buckley* standard. It would authorize regulations aiming to secure an intended, or proper dependence.

B. *Associated Industries* requires the Attorney General approve an Initiative whose constitutionality "could be" established.

Neither this Court nor the United States Supreme Court has expressly addressed whether contributions to independent expenditure PACs may be restricted. Appellants have argued that both under existing law and under the law as the Supreme Court would develop it, the Initiative would be constitutional. Yet with both arguments, that conclusion ultimately depends upon the careful weighing of constitutional interests, including establishing that the Initiative was narrowly tailored to the legitimate ends Appellants argue the Supreme Court would identify.

Such weighing, however, is not appropriate at this stage of the Initiative process. Instead, as in *Associated Industries*, it is enough to identify the interests that might be established, in order to satisfy the requirement of art. 48 that an Initiative not be "inconsistent" with "freedom of speech." In *Associated Industries,* though this Court acknowledged that the ultimate constitutionality of the measure would depend upon the state showing a "compelling State interest in the imposition of the restriction," 418 Mass. at 226, the Court observed that because there "*may be* a compelling State interest," *id*. at 227 (emphasis added), it was appropriate to allow the people a chance to vote. That interest had not been shown, but that failure did not doom the Initiative. A limited factual record was "inherent in the certification process."

> Just because the Attorney General is unable, on the record, to demonstrate a compelling State interest …, it does not

> mean that such an interest does not exist or could not be shown on a full record. *Id.*

The same is true in the instant case. While the United States Supreme Court has not yet addressed the question, the Baxter Appellants maintain that a "sufficiently important interest" in restricting "dependence corruption" "could … [be] shown on a full record." *Id*. It was therefore inappropriate at this stage of the Initiative process for the Attorney General to refuse to certify the Initiative.

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CONCLUSION

For the foregoing reasons, the Court should declare that the Attorney General erred in refusing to certify the petition as compliant with art. 48; that the petition complies with art. 48; and that the Appellants are not required to deliver the "remainder of the required signatures" required by art. 48 to the Secretary until the first Wednesday of December 2023.

Respectfully submitted,

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ADDENDUM TABLE OF CONTENTS

Massachusetts Constitutional Provisions

Part the Second, c. 2, § 1, art. 13.

ART. XIII. Salary of governor; salaries of justices of supreme judicial court.

As the public good requires that the governor should not be under the undue influence of any of the members of the general court by a dependence on them for his support, that he should in all cases, act with freedom for the benefit of the public, that he should not have his attention necessarily diverted from that object to his private concerns — and that he should maintain the dignity of the commonwealth in the character of its chief magistrate, it is necessary that he should have an honorable stated salary, of a fixed and permanent value, amply sufficient for those purposes, and established by standing laws: and it shall be among the first acts of the general court, after the commencement of this constitution, to establish such salary by law accordingly.

Permanent and honorable salaries shall also be established by law for the justices of the supreme judicial court.

And if it shall be found that any of the salaries aforesaid, so established, are insufficient, they shall, from time to time be enlarged as the general court shall judge proper.

For further provision as to salaries of judges, see Part the First, Art. XXIX.

Art. 16 of the Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution

ART. XVI. Liberty of the press; free speech.

The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Annulled and superseded by Amendments, Art. LXXVII.

Art. 48, The Initiative, II, of the Amendments to the Massachusetts Constitution, as amended by art. 74 of the Amendment

SECTION 2. *Excluded Matters.* — No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or 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.

Neither the eighteenth amendment of the constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

SECTION 3. *Mode of Originating.* — Such petition shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-general not later than the first Wednesday of the August before the assembling of the general court into which it is to be introduced, and if he shall certify that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either 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 biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a fair, concise summary, as determined by the attorney-general, of the proposed measure as such summary will appear on the ballot together with the names and residences of the first ten signers. All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth not earlier than the first Wednesday of the September before the assembling of the general court into which they are to be introduced, and the

Art. 48, The Initiative, V, of the Amendments to the Massachusetts Constitution, as amended by art. 74 of the Amendment

V. Legislative Action on Proposed Laws.

SECTION 1. *Legislative Procedure.* — If an initiative petition for a law is introduced into the general court, signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election, a vote shall be taken by yeas and nays in both houses before the first Wednesday of May upon the enactment of such law in the form in which it stands in such petition. If the general court fails to enact such law before the first Wednesday of May, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following June nor later than the first Wednesday of the following July, a number of signatures of qualified voters equal in number to not less than one half of one per cent of the entire vote cast for governor at the preceding biennial state election, in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of May aforesaid, then the secretary of the commonwealth shall submit such proposed law to the people at the next state election. If it shall be approved by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on

Art. 64 of the Amendments to the Massachusetts Constitution, as amended by art. 82.

SECTION 2. The general court shall assemble every year on the first Wednesday in January.

Massachusetts Statutes

G.L. ch. 55, §7A(a)

55:7A. Campaign contributions to candidates from individuals; limitation; contributions from legislative and executive agents; contributions from gaming licensee

Section 7A. (a)(1) An individual may make campaign contributions to candidates or candidates' committees. The aggregate of all such contributions for the benefit of any 1 candidate and that candidate's committee shall not exceed the sum of $1,000 in a calendar year; provided, however, that the aggregate of contributions by an individual for the benefit of any 1 candidate and the candidate's committee seeking election to the office of state senator or state representative in a state election who previously, in the same calendar year, sought election to the office of state senator or state representative in a special election, shall not exceed the sum of $1,000 during the period beginning on the first day of January and ending on the day of the special election and an additional $1,000 during the period that begins on the day after the special election and ends on the last day of December following the special election.

(2) An individual may in addition make campaign contributions for the benefit of elected political committees or non-elected political committees organized on behalf of a political party; provided, however, that the aggregate of such campaign contributions for the benefit of the political committees of any one political party shall not exceed in any one calendar year the sum of five thousand dollars.

(3) An individual may in addition make campaign contributions to any political committee not specified in paragraph (1), (2) or (4); provided, however, that the aggregate of such campaign contributions to any one such political committee shall not exceed in any one calendar year the sum of five hundred dollars.

(4) An individual may in addition make contributions without limitation to ballot question committees.

G.L. ch. 55, §18A(d)

(d) For purposes of this section, an "independent expenditure PAC" shall be a political committee or other entity that receives contributions to make independent expenditures. An independent expenditure PAC shall organize in accordance with section 5 and file reports in accordance with the schedules in subsections (a) and (b) to disclose expenditures. The reports shall, in addition to disclosing expenditures, disclose contributions received and all campaign finance information required to be disclosed by other political action committees as listed in section 18. The reporting period for the first report filed by an independent expenditure PAC shall commence on the day the independent expenditure PAC was organized and shall be complete through the date of the expenditures disclosed in the report. The reporting period for the next report shall commence on the date following the last date included in the previous report and shall be complete through the date of the expenditures disclosed. An independent expenditure PAC shall also file a year-end report by January 20 of each year the independent expenditure PAC remains in existence and shall file a final report on dissolution. The reporting period for the year-end report shall be cumulative for the calendar year, commencing on January 1 and ending on December 31 of each calendar year. The director shall adopt regulations regarding independent expenditure PACs.

G.L. ch. 268A, §2(b)

(b) Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility, or

(2) being influenced to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the commonwealth or on a state, county or municipal agency, or

(3) being induced to do or omit to do any acts in violation of his official duty; or

Federal Statute

18 U.S.C. § 201(b)(2)

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath

or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1119; amended Pub.L. 91–405, Title II, § 204(d) (1), Sept. 22, 1970, 84 Stat. 853; Pub.L. 99–646, § 46(a)–(*l*), Nov. 10, 1986, 100 Stat. 3601–3604; Pub.L. 103–322, Title XXXIII, §§ 330011(b), 330016(2)(D), Sept. 13, 1994, 108 Stat. 2144, 2148.)

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(13) (addendum); Mass. R. App. 16(e) (references to the record); Mass. R. App. 18 (appendix to briefs); Mass. R. App. P. 20 (form of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction). I further certify that the foregoing brief complies with the applicable length limitations in Mass. R. App. 20, as modified by this Court's December 19, 2022, Order granting Appellants' leave to file an initial brief not exceeding 16,000 words, because it is produced in the proportionally spaced font Century Schoolbook, font size 14, produced in Microsoft Word 2210, and contains 15,223 words.

/s/ *Thomas O. Bean*
Thomas O. Bean

CERTIFICATE OF SERVICE

I, Thomas O. Bean, hereby certify that on this 3rd day of January 2023, I caused a true copy of the foregoing Brief of Appellants to be served by email on the following counsel for the Defendants:

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