Chairman John Mahoney, john.mahoney@mahouse.gov
Chairwoman Anne Gobi, anne.gobi@masenate.gov
Joint Committee on Election Laws

RE: S.394, H.2081, H.2082, and H.2904

September 27, 2017

Dear Chairman Mahoney and Chairwoman Gobi,

I am the Legal Director of Free Speech For People, a national non-partisan non-profit organization that works to renew our democracy and to limit the influence of money in our elections. I write in support of two sets of bills now before the Joint Committee on Election Laws: S.394, H.2081, and H.2904, pertaining to political spending by foreign-influenced corporations, and H.2082, pertaining to contributions to independent expenditure PACs.

1. Political spending by foreign-influenced corporations (S.394, H.2081, H.2904)

The 2016 election showed that foreign interference in our elections is a serious problem. The recent news that at least one Russian company bought political ads on Facebook shows one way that foreign interests can use corporations to influence elections. But Facebook is not the only way that foreign interests can use American companies to influence U.S. elections. This bill would close a major loophole.

Under well-established federal law, upheld by the U.S. Supreme Court, it is illegal for a foreign government, business, or individual to spend money to influence federal, state, or local elections.[1] However, *no* law prevents a foreign interest from using a U.S.-based corporation to accomplish the same goal. Until recently, this was not a problem, either at the federal level or in states like Massachusetts, because they banned corporate political spending entirely. But the U.S. Supreme Court's 2010 *Citizens United* decision, which invalidated laws, including in Massachusetts, that banned corporate political spending.[2]

That created a loophole for foreign interests to acquire stakes in U.S. corporations, such as a company incorporated in Delaware, and then use that leverage to influence or control the corporation's political activity, including both direct

[1] 52 U.S.C. § 30121; Bluman v. Federal Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd,* 132 S. Ct. 1087 (2012).
[2] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

spending and contributions to super PACs. The Supreme Court indicated in *Citizens United* that it was aware of this problem and its decision would not prevent a law that was designed to address this problem,[3] yet it has been now seven years and neither Congress nor the beleaguered Federal Election Commission have done anything. However, Massachusetts does not need to wait for federal action to protect its state and local elections from foreign influence.

These bills would amend chapter 55 to ban independent expenditures, electioneering communications, or contributions to independent expenditure PACs by a "foreign-influenced corporation." This term is defined as a corporation of which 5% of the equity is owned by a single foreign owner, or 20% of the equity is owned by multiple foreign owners. These thresholds reflect levels of ownership that are high enough to influence corporate governance. The bill also requires corporations that do spend money in elections to certify that they are *not* foreign-influenced. Furthermore, the bill also expands an existing disclaimer requirement for political advertisements paid for by entities, such as independent expenditure PACs, that accept contributions from others. Under current law, these entities must list or recite their top five contributors in the advertisement.[4] The bill requires that the entity also either obtain certifications from the top five contributors that they are not foreign-influenced corporations, or else include an additional disclaimer.

The 2016 election showed us that the threat of foreign influence in elections is real. These bills would plug the loophole that *Citizens United* created for corporations partly or wholly owned by foreign interests.

2. Limits on contributions to independent expenditure PACs (H.2082)

Independent expenditure PACs, also known as super PACs, are political committees that make only independent expenditures. Under current law, there are absolutely no limits on contributions to these committees. This creates some unfortunate, illogical, and harmful effects. For example, it is illegal for a wealthy donor to contribute a penny more than $1,000 to a candidate for governor, because the General Court has determined that contributions above that amount pose an unacceptable risk of corruption or the appearance of corruption.[5] Yet that same wealthy donor may contribute $100,000, or $1 million, or $10 million, to the candidate's super PAC.

This is a recent problem. Until 2010, Massachusetts limited contributions to all political committees except ballot question committees. In 2014, the first statewide election since contribution limits to independent expenditure PACs were

[3] *See id.* at 362.
[4] 55 M.G.L. § 18G.
[5] 55 M.G.L. § 7A.

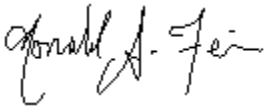
eliminated, OCPF reported that super PACs and other independent groups spent $20.4 million—twice the amount spent in 2010. Most of that came from just two super PACs.[6]

This problem was self-inflicted. Some people believe that the Supreme Court's decisions, including *Citizens United*, ban limits on contributions to independent expenditure PACs. But, as explained in more detail in written testimony submitted to the committee by Professor Laurence Tribe of Harvard Law School, that is incorrect. It is true that some federal courts of appeals, in other parts of the country, have interpreted *Citizens United* to require this result, on the theory that contributions to independent expenditure committees cannot possibly cause corruption. But, as Professor Tribe explains, the reasoning of those decisions is incorrect and would likely not prevail at the U.S. Supreme Court. Indeed, right now in federal court in New Jersey, a U.S. Senator is on trial for alleged bribery based on an alleged "quid pro quo" exchange where part of the "quid" was a contribution to a super PAC supporting the candidate.[7] In any event, no court with jurisdiction over Massachusetts—neither the Supreme Judicial Court nor any federal court—has ever adopted this reasoning.

This bill amends chapter 55 to impose a contribution limit of $5,000 from any individual to a super PAC. This is identical to the limits on contributions to political party committees, and five times the limit on contributions to candidate committees.[8] It is more than enough to enable contributors to support their favored candidates without posing an unacceptable risk of corruption.

If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,



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[6] Office of Campaign & Political Finance, *Super PACs and independent groups spent $20.4 million in 2014*, Mar. 27, 2015, http://files.ocpf.us/pdf/releases/2015IEPACstudy.pdf.

[7] *See* Amber Phillips, *Everything you need to know about Sen. Robert Menendez's corruption trial*, Wash. Post, Sept. 5, 2017, http://wapo.st/2eMAFbf.

[8] *See* 55 M.G.L. §§ 7A(a)(1)-(2).