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Tel.: 617-495-1767

Chairman John Mahoney
Chairwoman Anne Gobi
Joint Committee on Election Laws
Massachusetts State House

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

September 27, 2017

Dear Chairman Mahoney and Chairwoman Gobi,

I write to you to express my opinion on two issues pertaining to the above-referenced bills currently before you. First, that U.S. Supreme Court constitutional precedent permits limits on contributions to “independent expenditure” PACs (super PACs), as provided in H.2082, and the limits on political spending by foreign-influenced corporations in the form of “independent expenditures,” electioneering communications, or contributions to super PACs, as provided in S.394, H.2081, and H.2904. Second, that I consider these bills to be valuable tools for protecting and preserving the integrity of state elections, including the Commonwealth’s, from the pervasive growth and corrosive influence of super PACs, and from the threat to the American ideal of self-government posed by foreign-influenced political spending.

Background

I am the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard University and Harvard Law School, where I have taught since 1968 and where my specialties include constitutional law and the U.S. Supreme Court.* I have prevailed in three-fifths of the many appellate cases I have argued (including 35 in the U.S. Supreme Court).

Constitutionality of limiting contributions to super PACs

Super PACs, a relatively recent development in campaign financing, are political committees that can accept unlimited contributions and make unlimited expenditures.

* Title and university affiliation included for identification purposes only.

With no limit on how much money they can accept or spend, super PACs have come to haunt not only our national elections,¹ but our state and local elections as well.²

As described below, I believe H.2082's \$5,000 limit on contributions to super PACs active in state and local elections is not only a common-sense solution, but is also consistent with U.S. Supreme Court precedent on the matter—including *Citizens United*.³

Supreme Court precedent distinguishes legal limits on *contributions* to political campaigns and committees from limits on *expenditures* (spending by candidates, individuals, or outside entities). Broadly speaking, limits on contributions (including contributions to political committees) are subject to less scrutiny under the First Amendment than limits on expenditures.⁴ As the Supreme Court explained in *Buckley v. Valeo*, writing a check to someone else to spend does not merit the full protection of “speech,” and poses heightened risks of corruption. Thus, the Supreme Court has upheld limits on contributions to political committees in general.⁵

These principles were not altered by *Citizens United v. FEC*,⁶ which concerned limits on *expenditures*, or by any subsequent Court cases. In fact, to be clear, I believe that the decision reached by the Supreme Court in *Citizens United* was correct—for the specific facts of that case (involving the release of a movie through video-on-demand). However, as I have written, the opinion in *Citizens United* did contain some very loose and misguided language (what lawyers call “dictum,” i.e., statements not necessary to the

¹ See Fredreka Schouten & Christopher Schnaars, “USA Today analysis: Rich Democrats surge past GOP in political giving,” USA TODAY, Aug. 30, 2016, <http://usat.ly/2cc0npZ>.

² See Matt Rocheleau, “Super PACs spent heavily during first statewide election,” BOSTON GLOBE, Mar. 27, 2015, <http://bit.ly/2xvjXrm>; see also Alex Roarty, “Super PACs’ Next Target: Local Elections,” THE ATLANTIC, May 18, 2015, <http://theatlantic.com/2cge7A1>; Theodore Schleifer, “Super PACs coming to a city near you,” CNN, May 19, 2015, <http://cnn.it/2bEtUHF>.

³ See Albert W. Alschuler, Laurence H. Tribe, Norman L. Eisen, & Richard W. Painter, *Why Limits on Contributions to Super PACs Should Survive Citizens United*, Univ. of Chicago Pub. L. Working Paper No. 626, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015462 (Aug. 9, 2017).

⁴ See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵ See *California Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182 (1981).

⁶ 558 U.S. 310 (2010).

court's decision) about independent expenditures and corruption—language that could easily mislead a lower court.⁷

And in fact, very shortly after the *Citizens United* decision was issued, a lower federal court in Washington, D.C., fell into this trap: In *SpeechNow.org v. FEC*,⁸ which was argued just days after the *Citizens United* decision, the U.S. Court of Appeals improperly extended *Citizens United* from the context of *expenditures* to the legally distinct context of *contributions*. This decision was incorrect. In *SpeechNow*, the D.C. Circuit reasoned that contributions made to a political committee could not possibly create the actuality or appearance of corruption, so long as the political committee only used its funds for independent expenditures.⁹ This departed from both *Buckley* and *Citizens United*, and improperly subjected contribution limits to the higher level of constitutional scrutiny that the Court currently applies to independent expenditures.¹⁰ In fact, the Supreme Court has specifically rejected the idea of judging the corrupting potential of a *contribution* based on how the money might ultimately be *used*.¹¹ And moreover, since *SpeechNow*, the D.C. Circuit's pronouncement that contributions to independent expenditure groups cannot corrupt or create the appearance of corruption has proven empirically wrong.¹²

⁷ See Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 Const. Comm. 463 (2015).

⁸ 599 F.3d 686 (D.C. Cir. 2010).

⁹ *Id.* at 694.

¹⁰ See Albert W. Alschuler, *Limiting Political Contributions After McCutcheon*, *Citizens United, and SpeechNow*, 67 Fla. L. Rev. 389, 474-76 (2015).

¹¹ See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 155 (2003) (noting that “large soft-money contributions to national parties” had corrupting potential “*regardless of how those funds are ultimately used*”) (emphasis added). A different part of the *McConnell* decision was overruled by *Citizens United*.

¹² For example, the United States Department of Justice has indicted, and is now trying, Senator Robert Menendez (D-N.J.) on federal bribery charges stemming from political favors allegedly performed in exchange for (among other things) \$600,000 in contributions made to respondent Senate Majority PAC by Florida-based Dr. Salomon Melgen through his business, Vitreo-Retinal Consultants. According to the indictment, Dr. Melgen offered and gave, and Sen. Menendez solicited and accepted from Dr. Melgen, these contributions “in exchange for specific requested exercises” of Sen. Menendez’s official authority. See *United States v. Menendez*, Doc. No. 1, No. 15-CR-155 (D.N.J. Apr. 1, 2015), <http://1.usa.gov/28S0C3U> (indictment). A federal court has held that a donation to a super PAC can be a “thing of value” (quid) under 18 U.S.C. § 201, and rejected the argument that the First Amendment bars prosecution for bribery stemming from contributions to super PAC. See *United States v.*

Limiting contributions to independent expenditure PACs (super PACs) is entirely consistent with Supreme Court precedent. These contributions have no greater speech value, and hardly any less risk of corruption, than direct contributions to candidates.¹³ This is true even if the super PAC does not “coordinate” its advertising or other spending with the candidate, as a very large check to a super PAC is unquestionable of value to the supported candidate, and the contributor is free to discuss with the candidate exactly what s/he expects for the money.

Unfortunately, the U.S. Department of Justice decided not to appeal the *SpeechNow* decision to the Supreme Court, in large part on the theory that “the particularly limited nature of SpeechNow’s contribution and expenditure practices means that the court of appeals’ decision will affect only a small subset of federally regulated contributions.”¹⁴ The Supreme Court has never considered the question.¹⁵ Consequently, *SpeechNow* remains law in the D.C. Circuit for now.

Fortunately for Massachusetts, the D.C. Circuit has no jurisdiction over Massachusetts election law. And neither the Supreme Judicial Court, nor the U.S. Court of Appeals for the First Circuit, has decided this issue. Unfortunately, in 2010, without any court decision or indeed any challenge, the Office of Campaign and Political Finance issued an interpretive bulletin deciding that, in light of *SpeechNow*, Massachusetts’s then-extant limits on contributions to political committees could not be applied to independent expenditure-only PACs.¹⁶ The legislature’s revisions in Chapter 210 of the Acts of 2014 only muddied this question, with hardly any serious discussion of whether Massachusetts should eliminate limits on super PACs based on a court decision that does not apply in Massachusetts.

Menendez, 132 F. Supp. 3d 635 (D.N.J. 2015), *appeal dismissed in part*, 3d Cir. (Dec. 12, 2015). This case has been widely reported as illustrating the potential for quid pro quo corruption through super PAC contributions, thus reinforcing the public perception of quid pro quo corruption. *See, e.g.*, Matea Gold, Wash. Post, *Menendez indictment marks first big corruption case involving a super PAC*, Apr. 2, 2015, <http://wpo.st/e4oR0>.

¹³ *See id.*

¹⁴ Letter from Att’y Gen. Eric H. Holder, Jr., to Sen. Harry Reid (June 16, 2010), <http://1.usa.gov/298RWaP>.

¹⁵ Several other federal courts of appeals in other parts of the country, considering challenges to pre-*SpeechNow* laws, have followed the D.C. Circuit’s lead.

¹⁶ *See* Office of Campaign & Political Finance, *Independent Expenditure Political Action Committees*, Interpretive Bulletin OCPF-IB-10-03 (issued Oct. 26, 2010, revised Jan. 5, 2015).

In sum, dollar limits on contributions to super PACs are constitutional under Supreme Court precedent. Furthermore, I believe that such limits, including those established by H.2082, could have been upheld even by the Court that issued the *Citizens United* decision, and the replacement of Justice Scalia by Justice Gorsuch does not alter this. The U.S. Supreme Court has upheld limits on contributions to political action committees in the past, did not address such limits in *Citizens United*, and has never created a special loophole or exception for super PACs.

Constitutionality of regulating political spending by foreign-influenced corporations

Regulating political spending by corporations with significant foreign ownership is consistent with the Constitution and Supreme Court precedent. Indeed, concern about potential foreign influence over our democratic politics is written into the Constitution itself.¹⁷ And while the Supreme Court has held that the First Amendment prohibits limits on independent expenditures *in general*, it has made an important exception for spending by foreign nationals.

Federal law already prohibits foreign nationals—a category defined by federal law to include foreign governments, corporations incorporated or with their principal place of business in foreign countries, and individuals who are not U.S. citizens or lawful permanent residents—from spending money on federal, state, or local elections.¹⁸ In the 2012 decision *Bluman v. Federal Election Commission*, the Supreme Court upheld this law against a post-*Citizens United* constitutional challenge, confirming the federal government’s ability to ban independent expenditures by foreign nationals.¹⁹ As the lower court opinion in that case (which the Supreme Court affirmed) explained, the legal rationale for restricting political spending by foreign nationals is that “foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”²⁰

¹⁷ See U.S. Const. art. I, § 9, cl. 8 (prohibiting federal officials from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”).

¹⁸ 52 U.S.C. § 30121(a).

¹⁹ *Bluman v. Fed. Election Comm’n*, 132 S. Ct. 1087 (2012).

²⁰ *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012). Despite this quotation’s reference to “foreign citizens,” the *Bluman* decision later noted that the federal statute specifically does *not* define lawful permanent residents as “foreign nationals” subject to the political spending prohibition. See *id.* at 292. Since the ordinance uses the exact same definition of “foreign national” as does the federal law, lawful permanent residents would not be affected in the slightest.

The Supreme Court's decision in *Citizens United* created a loophole through which foreign nationals can circumvent this ban using the corporate form. Yet if foreign nationals do not have a constitutional right to spend money to influence federal, state, or local elections, then they do not have a constitutional right to use the corporate form to do what they could not do directly.²¹

This is not only an issue of corporations that are majority-owned by foreign nationals. As I told the federal House of Representatives Committee on the Judiciary shortly after the *Citizens United* decision, the same Supreme Court that decided *Citizens United* would probably have upheld a law limiting political advertising by corporations with five percent of equity held by foreign nationals.²² Indeed, the reasoning behind the *Bluman* decision suggests this limit could apply to corporations with *any* equity held by foreign nationals.

Unfortunately, neither Congress nor the beleaguered Federal Election Commission are in any position to lead this fight. As I wrote in the *Boston Globe* earlier this week, the 2016 election and the federal government's failure to act shows why Massachusetts needs to close the foreign corporate political spending loophole.²³ I believe Massachusetts's interest in self-government provides a comparable and constitutionally sufficient ground to support regulating independent expenditures, and contributions to super PACs, by what the bill terms "foreign-influenced corporations." As such, I believe it to be constitutional under the Court's *Citizens United* and *Bluman* decisions and a reasonable complement to existing federal law.

Conclusion

I applaud the Massachusetts legislature, and the Joint Committee on Election Laws, for its leadership on issues so critical to the health of our democracy, and I thank you for sparking an admirable effort to guard our political systems from the dangers posed by super PACs and foreign corporate spending. I am confident that the U.S. Supreme Court would uphold both a limit on contributions to super PACs, and a ban on

²¹ See Ellen Weintraub, "Taking on *Citizens United*," Mar. 30, 2016, THE NEW YORK TIMES, <http://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html>.

²² Laurence H. Tribe, "Citizens United v. Federal Election Commission: How Congress Should Respond," Testimony to U.S. House of Representatives, Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties 7 (Feb. 3, 2010), https://judiciary.house.gov/_files/hearings/pdf/Tribe100203.pdf.

²³ See Laurence H. Tribe & Ron Fein, "How Massachusetts can fight foreign influence in our elections," BOSTON GLOBE, Sept. 26, 2017, <http://bit.ly/2fOULSH>.

foreign-influenced corporations' independent expenditures, electioneering communications, or contributions to super PACs.

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

Sincerely,

Laurence H. Tribe

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