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Senator Barry Finegold, Chair
Representative John Lawn, Chair
Joint Committee on Election Laws
The 191st General Court of the Commonwealth of Massachusetts

STATEMENT IN SUPPORT OF S.394 AND H.642

Dear Senator Finegold and Representative Lawn:

I write in support of S.394 and H.642. These bills would limit contributions to “independent expenditure groups” or “super PACs” to \$5000 per calendar year. I focus particularly on concerns these bills might be unconstitutional.

The constitutional concern stems primarily from a decision of the United States Court of Appeals for the District of Columbia Circuit—*SpeechNow.org v. FEC*, 599 F.3d 686 (2010). In this decision, the D.C. Circuit did indeed hold that contributions to super PACs may not be limited. The Federal Election Commission acquiesced in the D.C. Circuit’s decision, ceasing its enforcement of federal limits on contributions to super PACs. The Massachusetts Office of Campaign and Political Finance then followed the FEC’s lead. In Interpretive Bulletin OCPF-IB-10-03 (Oct. 26, 2010), the Office wrote, “We agree with the FEC that . . . independent expenditure-only committees may raise unlimited contributions from individuals, political committees, and corporations.”

The Massachusetts ruling and the D.C. Circuit decision that prompted it have created a strange system of campaign financing. Today, although a wealthy person may not donate \$1001 dollars to a Massachusetts candidate, he may give \$1 million to a super PAC whose only mission is to support this candidate. The state’s limit on contributions to candidates no longer restricts how much people can give to electoral efforts; it simply requires them to send their contributions to less responsible and more destructive speakers. Super PACs have been called “the attack dogs and provocateurs of modern politics.” The candidates they support need not take responsibility for what they say, and these groups usually disappear once an election is over. The attack ads they produce contribute to cynicism about politics, a cynicism that runs especially deep among young people. To be sure, the negative character of super PAC campaigning provides no reason to suppress it, but it’s unfortunate that Massachusetts now has a system of campaign financing that actively channels funds toward less responsible speech.

Just how negative is super PAC campaigning? In the 2014 gubernatorial election in Massachusetts, super PACs favoring the Republican candidate Charlie Baker spent \$3,861,749 urging voters to support him while they spent \$7,140,466 (*1.8 times as much*) opposing the Democratic candidate, Martha Coakley. Super PACs favoring Coakley spent \$122,907 urging voters to support her, while they spent \$6,378,000 (*51 times as much*) opposing Baker. Massachusetts Office of Campaign and Political Finance, Super PACs and Independent Groups Spent \$20.4 Million in 2014, Mar. 27, 2015, <http://files.ocpf.us/pdf/releases/2015IEPACstudy.pdf>.

The amount spent by these super PACs dwarfed the amounts spent by the candidates themselves. Coakley's campaign reported expenditures of \$3.9 million and \$2 million in in-kind contributions, while Baker's reported expenditures of \$5.6 million and \$1.2 million in in-kind contributions. *Id.*; see also Massachusetts Office of Campaign and Political Finance, *Most Independent Expenditure "Super" PAC Spending Supported the Incumbent Governor in 2018*, Feb. 27, 2019, <https://www.ocpf.us/Home/PressRoom> (noting that Governor Baker received \$6,628,000 in super PAC support in 2018 while his Democratic opponent received none, but failing to indicate how much of Governor Baker's super PAC support was spent on negative campaigning).

No sane legislator would vote in favor of this regime of campaign financing, and no legislator ever has. Massachusetts has this regime because the United States Court of Appeals for the District of Columbia Circuit held that the First Amendment requires it. Yet the thought that the Constitution requires it looks strange too. The Supreme Court held 43 years ago that contributions to candidates can be limited to prevent corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). According to the D.C. Circuit, however, legislatures may not forbid \$10 million contributions to super PAC because these contributions do not create even an appearance of corruption.

SpeechNow was wrongly decided, and I believe that the Supreme Court is likely to say so if a way can be found to present the issue to the Court. The Court has never had an opportunity to address the question.

The Justice Department did not seek review of *SpeechNow*. In a statement that belongs on a historic list of wrong predictions, Attorney General Holder explained that the decision would "affect only a small subset of federally regulated contributions." Letter from Attorney General Eric H. Holder, Jr. to Senate Majority Leader Harry Reid, July 10, 2010, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf>. Several federal courts of appeals have approved the *SpeechNow* decision, but these courts do not include the court whose jurisdiction includes Massachusetts, the U.S. Court of Appeals for the First Circuit. Like the First Circuit, the Supreme Judicial Court of Massachusetts has not addressed the issue.

In a law review article, some co-authors and I explain at length why *SpeechNow* was wrongly decided. My co-authors are Laurence H. Tribe, the Carl M. Loeb University Professor and Professor of Constitutional Law at the Harvard Law School; Norman L. Eisen, a Senior Fellow at the Brookings Institution (formerly the ethics "czar" of the Obama White House); and Richard W. Painter, the S. Walter Richey Professor at the University of Minnesota Law School

(formerly the ethics “czar” of the George W. Bush White House). See Alschuler et al., *Why Limits on Contributions to Super PACS Should Survive* *Citizens United*, 86 *FORDHAM L. REV.* 2299 (2018).

As noted in our article, not even the *SpeechNow* opinion maintained that the regime of campaign finance it created was desirable or defensible. Instead, the D.C. Circuit argued that a single sentence of the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), compelled its result. The Court wrote in *Citizens United*, “[I]ndependent expenditures . . . do not give rise to corruption or the appearance of corruption,” and the D.C. Circuit declared, “In light of the Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”

Our article shows that, contrary to the D.C. Circuit’s reasoning, contributions to super PACs can corrupt even when expenditures by these groups do not. Moreover, the statement that the D.C. Circuit took as its premise was dictum, a nonbinding aside. We note several indications that the Supreme Court did not mean this statement to be taken in the way the D.C. Circuit took it.

For 43 years, the Supreme Court has distinguished between contribution limits, which it usually upholds, and expenditure limits, which it invariably strikes down. Reviewing the five distinctions drawn by the Court between contributions and expenditures, we show that contributions to super PACs cannot reasonably be distinguished from the contributions to candidates whose limitation the Court upheld.

The ultimate question posed by the Supreme Court’s campaign-finance decisions is whether super PAC contributions create a sufficient appearance of corruption to justify their limitation. Our article describes opinion polls, the views of Washington insiders, and the statements of candidates of both parties in the 2016 Presidential election. It shows that *SpeechNow* has sharpened class divisions and helped to tear America apart.

I have attached a copy of our article to the email transmitting this letter.

Do not hesitate to contact me at 207-829-3963 or a-alschuler@law.northwestern.edu if I can be of further assistance. Enacting S.394 or H.642 could give the Supreme Court an opportunity to rule on an important, unsettled question of constitutional law. Resolving this question correctly would greatly improve our democracy.

Sincerely yours,



cc: Thomas Mahoney, Legislative Aide to Senator Finegold
Emily Izzo, Chief of Staff