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Chairman Barry Finegold
Chairman Daniel Ryan
Joint Committee on Election Laws
Massachusetts State House

RE: S.455, H.840, H.772
(An Act relative to political contributions)
S.454, S.482, H.839
(An Act to limit political spending by foreign-influenced corporations)

September 15, 2021

Dear Chairman Finegold and Chairman Ryan,

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 S.455, H.840, and H.772, and the limits on political spending by foreign-influenced corporations in the form of “independent expenditures,” electioneering communications, spending on ballot measure campaigns, or contributions to super PACs, as provided in S.454, S.482, and H.839. 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 Emeritus 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. With no limit on how

* Title and university affiliation included for identification purposes only.

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 a \$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*.

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.³ 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.⁴

These principles were not altered by *Citizens United v. Federal Election Commission*,⁵ 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 court’s decision) about independent expenditures and corruption—language that could easily mislead a lower court.⁶

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. Federal Election Commission*,⁷ 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.⁸ As set forth in a law review article that I co-authored with my colleagues Prof. Albert Alschuler of the University of Chicago Law School, Ambassador (ret.) Norman Eisen (former chief ethics counsel to President Barack Obama), and Prof. Richard Painter (former chief ethics counsel to President George W.

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 generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

⁴ See *California Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182 (1981).

⁵ 558 U.S. 310 (2010).

⁶ See Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 Const. Comm. 463 (2015).

⁷ 599 F.3d 686 (D.C. Cir. 2010) (en banc).

⁸ *Id.* at 694.

Bush), the *SpeechNow* decision was incorrectly decided at the time, and its flaws have only become more clear since then.⁹ *SpeechNow* 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. 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*.¹⁰ 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.¹¹

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. 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.”¹² The Supreme Court has

⁹ Albert W. Alschuler, Laurence H. Tribe, Norman Eisen, & Richard W. Painter, *Why Limits on Contributions Should Survive Citizens United*, 86 *Fordham L. Rev.* 2299 (Apr. 2018), <https://ir.lawnet.fordham.edu/flr/vol86/iss5/2/>; see also Albert W. Alschuler, *Limiting Political Contributions After McCutcheon, Citizens United, and SpeechNow*, 67 *Fla. L. Rev.* 389, 474-76 (2015).

¹⁰ 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*.

¹¹ For example, a federal grand jury indicted a sitting U.S. Senator for bribery for exactly this type of transaction, and a federal judge upheld the indictment as consistent with *Citizens United*, see *United States v. Menendez*, 132 F. Supp. 3d 635 (D.N.J. 2015), *appeal dismissed in part*, 3d Cir. (Dec. 12, 2015), although the jury later deadlocked and the judge dismissed some of the charges for insufficient evidence, see *United States v. Menendez*, No. CR 15-155, 2018 WL 526746, at *9 (D.N.J. Jan. 24, 2018). Relatedly, in 2011 the U.S. Court of Appeals for the Eleventh Circuit upheld a bribery conviction against Alabama Governor Don Siegelman where the bribe in question was given to a charitable organization that engaged only in issue advocacy. See *United States v. Siegelman*, 640 F.3d 1159, 1175 (11th Cir. 2011). The fact that a federal court found quid pro quo corruption from a contribution to a group that spends only on issue advocacy is striking because courts consider issue advocacy to pose no greater (and probably much less) risk of corruption than “independent” expenditures in candidate races.

¹² Letter from Att’y Gen. Eric H. Holder, Jr., to Sen. Harry Reid (June 16, 2010), <http://1.usa.gov/298RWaP>.

never considered the question.¹³ 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.¹⁴ 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.

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 the proposed bills, could have been upheld even by the Court that issued the *Citizens United* decision, and the replacement of Justices Scalia, Kennedy, and Ginsburg by Justices Gorsuch, Kavanaugh, and Barrett respectively 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.¹⁵ 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 entities.

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.¹⁶ 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.¹⁷ As explained by the lower court opinion in that case, written

¹³ 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. In *Lieu v. Fed. Election Comm'n*, No. 19-5072, 2019 WL 5394632 (D.C. Cir. Oct. 3, 2019), *cert. denied*, 141 S. Ct. 814 (2020), in which I was involved, Members of Congress challenged the Federal Election Commission's refusal to enforce existing law in reliance on *SpeechNow*; the Court denied certiorari, possibly for procedural reasons.

¹⁴ 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).

¹⁵ 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").

¹⁶ 52 U.S.C. § 30121(a).

¹⁷ *Bluman v. Fed. Election Comm'n*, 565 U.S. 1104 (2012) (mem.).

by then-Circuit Judge Brett Kavanaugh and affirmed by the Supreme Court, 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.”¹⁸

The Supreme Court’s decision in *Citizens United* created a loophole through which foreign investors can circumvent this ban using the corporate form. Yet if foreign investors 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 indirectly what they could not do directly.¹⁹ This logic applies to a foreign investor that is located within the United States, but it is even stronger when applied to the types of foreign entities (sovereign wealth funds, banks, private equity funds, and insurance conglomerates) that tend to own large stakes in U.S. corporations, which are almost always located abroad. In the recent case *Agency for International Development v. Alliance for Open Society*, the Supreme Court held that foreign entities located abroad have *no* rights under the First Amendment to the U.S. Constitution.²⁰

This is not only an issue of corporations that are majority-owned by foreign investors. 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 a considerably smaller percent of equity held by foreign investors.²¹ Indeed, the reasoning behind the *Bluman* decision suggests this limit could apply to corporations with *any* equity held by foreign investors.

Unfortunately, neither Congress nor the beleaguered Federal Election Commission are in any position to lead this fight. As I wrote in the *Boston Globe* in 2017, the 2016 election and the federal government’s failure to act shows why Massachusetts needs to close the foreign corporate political spending loophole.²² 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*, *Bluman*, and *Agency for International Development* decisions, and a reasonable complement to existing federal law.

¹⁸ *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (3-judge court), *aff’d mem.*, 565 U.S. 1104 (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 bills use the exact same definition of “foreign national” as does the federal law, lawful permanent residents would not be affected in the slightest.

¹⁹ *See* Ellen Weintraub, “Taking on *Citizens United*,” Mar. 30, 2016, N.Y. TIMES, <https://nyti.ms/1qhmpKB>.

²⁰ *Agency for Int’l Development v. Alliance for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082, 2087 (2020).

²¹ 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.

²² *See* Laurence H. Tribe & Ron Fein, “How Massachusetts can fight foreign influence in our elections,” BOSTON GLOBE, Sept. 26, 2017, <http://bit.ly/2fOULSH>.

Similar logic applies to the bill's prohibition on spending by foreign-influenced corporations in ballot measure elections. In most cases, current precedent bars limits on contributions, or corporate spending, in ballot measure elections.²³ The underlying principle is that, unlike candidate elections, ballot measure elections do not present the risk of *corruption* since there is no candidate to be corrupted. However, the courts have not considered the role of foreign influence in ballot measure elections,²⁴ and the general rule is likely to admit exceptions. It seems nearly unimaginable, for instance, that a court would invalidate a law banning foreign governments from spending money to influence ballot questions. The same would likely apply to foreign investors themselves. Proceeding by the same logic discussed earlier, if a foreign investor cannot spend its own money to influence a ballot measure election, then it ought not be able to do so through a corporation.

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 foreign-influenced corporations' independent expenditures, electioneering communications, expenditures on ballot measure campaigns, or contributions to super PACs or ballot question committees.

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

Sincerely,



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²³ See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

²⁴ *Bluman* specifically noted that its holding “does not address such questions” because ballot measure campaigns were not at issue in that case. See 800 F. Supp. 2d at 292.