

ROBERT HERRMANN, LARS MIKKELSEN,  
JOSHUA REDSTONE, and  
GRAEME SEPHTON

Plaintiffs,

v.

ATTORNEY GENERAL AND SECRETARY OF STATE  
OF THE COMMONWEALTH OF MASSACHUSETTS,

Defendants.

Civil Action No.  
SJ-2022-

1

Amendments to the Massachusetts Constitution, as amended by art. 74 of the Amendments (“Amend. art. 48, II, § 3”).<sup>1</sup>

2. The Attorney General refused to certify Plaintiffs’ Petition on the stated ground that “the proposed law would violate the free speech rights afforded by the state constitution.”

3. The Attorney General’s determination is wrong. The Petition proposes contribution limits that are constitutional pursuant to art. 16 of the Massachusetts Declaration of Rights and under controlling Supreme Judicial Court and U.S. Supreme Court precedent. These limits are not “inconsistent with” “freedom of speech.” art. 48, The Initiative, II, § 2, of the Amendments to the Massachusetts Constitution (“Amend. art. 48, II, § 2).

4. There is no legal precedent, in any state or federal court, holding otherwise. Nor are there any controlling state or federal decisions holding that such limits violate the First Amendment of the federal constitution.

5. The Petition’s proposed limit on political contributions is closely drawn to the purpose of preventing *quid pro quo* corruption or the appearance of *quid pro corruption*.

---

<sup>1</sup> All references in this complaint to Amend. art. 48, II, § 3 refer to that section as amended by art. 74 of the Amendments to the Massachusetts Constitution.

6. The Supreme Court has consistently held that campaign finance limits that serve “the prevention of ‘*quid pro quo*’ corruption or its appearance,” *Federal Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1652 (2022), are permissible and constitutional.

7. Furthermore, restrictions on *contributions*, which the Petition proposes, are subject to a more deferential constitutional scrutiny than expenditure limits, which this Petition does not propose.

8. Plaintiffs therefore seek a declaratory judgment that the Attorney General erred in refusing to certify the Petition as consistent with Amend. art. 48.

9. The Attorney General has further indicated that Plaintiffs must submit signatures by December 2022 for a Petition that the Attorney General has ruled “inconsistent” with Amend. art. 48 and that Plaintiffs intend to submit to the general court in 2024. If Plaintiffs do not submit those signatures by December 2022, the Attorney General argues that the Petition would then be moot.

10. The Attorney General is again wrong. Amend. art. 48, II, § 3 does not require that signatures be submitted until the first Wednesday of December 2023. Plaintiffs seek to introduce the Petition in 2024, and therefore have until December 2023 to submit signatures.

11. The Attorney General’s position to the contrary is both inconsistent with the clear language and purpose of Amend. art. 48, and contrary to the balance

of equities for any petition submitted two years before it would appear on the ballot.

12. Plaintiffs therefore further seek a declaratory judgment that they are not required to deliver to the Secretary of the Commonwealth the “remainder of the required signatures,” as that phrase is used in Amend. art. 48, II, § 3, until the first Wednesday of December 2023.

### **PARTIES**

13. Plaintiff, Robert Herrmann, is a registered voter in Groton, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

14. Plaintiff, Lars Mikkelsen, is a registered voter in Arlington, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

15. Plaintiff, Joshua Redstone, is a registered voter in Cambridge, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

16. Plaintiff, Graeme Sephton, is a registered voter in Shutesbury, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

17. The Attorney General, who is sued only in her official capacity, has certain official duties under art. 48 of the Amendments to the Massachusetts Constitution.

18. The Secretary of State (the “Secretary”), who is sued only in his official capacity, has certain official duties under art. 48 of the Amendments to the Massachusetts Constitution.

### **JURISDICTION AND VENUE**

19. This Court has subject matter jurisdiction over this matter under:

A. G.L. c. 214, § 1, because this Court has original jurisdiction in all matters of equity cognizable under the general principles of equity jurisprudence; and

B. G.L. c. 231A, § 1, because it satisfies the requirements for a declaratory judgment action in that there are actual controversies between the Plaintiffs and the Attorney General as to whether (i) the Attorney General erred in refusing to certify the Petition as compliant with Amend. art. 48 and (ii) the Plaintiffs are to deliver the “remainder of the required signatures” required by Amend. art. 48, II, § 3, on or before the first Wednesday of December 2022 or December 2023.

20. This Court has statewide jurisdiction, and therefore has personal jurisdiction over the Attorney General and the Secretary.

21. As this Court has jurisdiction throughout the Commonwealth, venue as to the Plaintiffs is proper in this Court. G.L. c. 214, § 1, G.L. c. 231A, § 1, et seq.

### **STATEMENT OF FACTS**

#### **The Attorney General Erred in Refusing to Certify the Petition.**

22. In June 2022, Plaintiffs filed Initiative 22-01 with the Attorney General in accordance with Amend. art. 48. A true and accurate copy of the Petition is attached as Exhibit A.

23. The Petition proposes to limit the amount individuals may contribute to political action committees (“PACs”) that make independent expenditures to advocate for or against particular candidates without cooperation or consultation with those candidates. Those committees are referred to here as Independent Expenditure PACs (“IEPs”), and are colloquially known as super PACs. The per annum limit for individual contributions to such committees would be \$5,000.

24. Amend. art. 48, II, § 2, “Excluded Matters,” provides, in relevant part, “[n]o 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: . . . freedom of speech . . . .”

25. It is the rule of this Court that the Attorney General should not refuse a petition “unless it is reasonably clear that a proposal contains an excluded matter.” *Associated Indus. of Massachusetts v. Attorney General*, 418 Mass. 279, 287 (1994). 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,” this Court has reflected, “[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).

26. Despite this Court’s instruction, on September 7, 2022, the Attorney General determined that the Petition would violate art. 16’s freedom of speech clause and refused to certify it as compliant with Amend. art. 48. The Attorney General’s letter to Plaintiffs denying certification is attached as Exhibit B.

27. The Attorney General based her determination upon the observation that “[c]ourts across the country have uniformly held that limits on contributions to independent expenditure PACs — like those at issue in this proposed law —

violate free speech protections.” Ex. B. She concluded that the Supreme Judicial Court would reach the same conclusion construing art. 16’s free speech clause. *Id.*

28. The Attorney General erred in excluding Initiative 22-01 under art. 16.

29. The Attorney General erred in concluding that the Supreme Judicial Court would hold that limits on contributions to IEPs are unconstitutional.

30. None of the courts referenced by the Attorney General have any jurisdiction over Massachusetts or Massachusetts law.

31. Federal law does not compel this Court to recognize any free-speech-related prohibition on limiting contributions to IEPs.

32. Though some lower federal courts have expanded and misconstrued Supreme Court precedent to bar regulation of contributions to IEPs, *see, e.g., SpeechNow v. Federal Election Comm’n*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc), *cert. denied on unrelated issue sub nom. Keating v. Federal Election Comm’n*, 562 U.S. 1003 (2010)<sup>2</sup> (extending *Citizens United v. Federal Election*

---

<sup>2</sup> In *SpeechNow*, the plaintiffs lost on an unrelated issue not relevant here, and they unsuccessfully petitioned for certiorari on that issue. The United States specifically decided *not* to seek certiorari on the question of whether contributions to IEPs violate the Constitution. *See* Ltr. from Attorney General Eric Holder to Sen. Harry Reid, June 16, 2010, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf> (explaining that Department of Justice decided not to seek certiorari, based in part on the belief that “the court of appeals’ decision will affect only a small subset of federally regulated contributions”).

*Comm’n*, 558 U.S. 310 (2010)), these lower court precedents, all of which are outside the First Circuit, do not bind this Court.

33. As a general matter, because the certification process requires only a determination of whether the petition would clearly violate “free speech” under the Massachusetts Constitution, this Court is not bound by any federal decisions in deciding this case.

34. To the extent the Court relies on the First Amendment of the United States Constitution in making that determination, this Court is bound by decisions of the United States Supreme Court in applying the First Amendment. However, the United States Supreme Court has never addressed the question of whether regulation of contributions to IEPs violate free speech protections.

35. Were the United States Supreme Court to consider the question, the Court would likely permit the regulation of contributions to IEPs under the First Amendment.

36. The Petition would limit contributions to IEPs in order to prevent *quid pro quo* corruption or the appearance of *quid pro quo* corruption.

37. Although the Supreme Court has held that independent *expenditures* do not give rise to corruption because such expenditures are not prearranged or coordinated with a candidate, *Citizens United*, 558 U.S. at 357, the Court has not said the same—or anything at all—about *contributions* to IEPs.

38. In fact, the Supreme Court has repeatedly upheld limits on contributions to entities other than candidates or candidate committees that may spend the funds on independent expenditures. *See McConnell v. Federal Election Comm’n*, 540 U.S. 93, 122-168 (2003) (upholding limits on contributions to political parties even though parties will use funds for independent expenditures, and explaining why large contributions are likely to create actual or apparent corruption “regardless of how those funds are ultimately used”); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 615-18 (1996) (opinion of Breyer, J.) (simultaneously invalidating limits on expenditures by parties, while upholding limits on contributions to parties); see also *California Med. Ass’n v. Federal Election Comm’n*, 453 U.S. 182, 184-85 (1981) (upholding limit on contributions to multicandidate political committees that, among other things, made independent expenditures). Furthermore, since *Citizens United*, the Court has twice summarily reaffirmed federal restrictions on contributions to political parties, even where the recipients of the prospective donations sought to spend the money without coordinating with a candidate or campaign. See *Republican Party of La. v. Federal Election Comm’n*, 219 F. Supp. 3d 86, 96-97 (D.D.C. 2016), *aff’d*, 137 S. Ct. 2178 (2017); *Republican Nat’l Comm. v. Federal Election Comm’n*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010), *aff’d*, 561 U.S. 1040 (2010).

39. Contributions to IEPs can constitute the “quid” in *quid pro quo* schemes.

40. Contributors to IEPs can communicate directly with candidates. There is a significant risk that major contributors to IEPs could and will discuss the “quid” and the “quo” with the candidate, even if the IEP staff do not. *See* Albert W. Alschuler, Laurence H. Tribe, Norman L. Eisen, & Richard W. Painter, *Why Limits on Contributions to Super PACs Should Survive Citizens United*, 86 *Fordham L. Rev.* 2299 (2018).

41. A candidate need not coordinate with IEPs to know which ones support his or her candidacy or oppose his or her opposition; if nothing else, that information could be legally provided by a contributor to such an IEP during a conversation that seeks a “quo” in exchange for such a contribution.

42. Candidates “often openly support and associate with” IEPs, for example by appearing at fundraising events. Bipartisan Policy Ctr., *Campaign Finance in the United States: Assessing an Era of Fundamental Change* 33 (2018).

43. Under current law, candidates easily can arrange for potential donors to contribute significant amounts of money to an IEP the candidate knows to support his or her candidacy (or oppose his or her opposition). That arrangement could include specific favors or official acts from the candidate in return for the contribution to the IEP, i.e., actual or apparent *quid pro quo* corruption.

44. Currently, there is no limit on contributions to IEPs in Massachusetts. Any person or corporation can contribute an unlimited amount of money to an IEP.

45. For example, during the 2021 Boston mayor's race, the legal contribution limit to a candidate's campaign was \$1,000 because that is the threshold at which the legislature has found a risk for corruption. *See* M.G.L. ch. 55, § 7A(a)(1). But during this same race, those same contributors were legally allowed to contribute an unlimited amount of money to IEPs that spent 100% of their money to support a single candidate. One donor contributed more than one million dollars to an IEP supporting a particular candidate; many others each donated around \$50,000 to another IEP supporting the opponent.

46. In recent election cycles, IEPs have played a significant role in election spending, and large contributions to IEPs have value to candidates. To be sure, for any given dollar amount, candidates might prefer contributions to their own campaigns. But since direct contributions are already limited by state law, *unlimited* contributions to supportive IEPs are far more valuable to candidates than smaller, limited direct contributions.

47. For these reasons, the potential for large contributions to IEPs also creates the appearance of *quid quo pro* corruption.

48. No Massachusetts court has ever addressed whether regulations of contributions to IEPs "violate art. 16's free speech protections."

49. As this Court has instructed, petitions are to be evaluated under Massachusetts law.

50. As the Attorney General acknowledged, “Massachusetts courts have not specifically weighed in on the constitutionality of laws limiting campaign contributions” to IEPs. Ex. B.

51. More specifically, no Massachusetts court has articulated any test under art. 16 for evaluating limitations on contributions to IEPs. This Court has identified a standard for evaluating limits on political speech. *Associated Industries*, 418 Mass. at 289 n.8; *cf. 1A Auto, Inc. v. Office of Campaign & Polit. Fin.*, 480 Mass. 423, 440 (2018) (declining to rule that art. 16 is more stringent than the First Amendment regarding a campaign finance limit). But as it has instructed, “[t]he identity of the standard does not, however, mean that this court’s conclusions on applying the compelling State interest standard will invariably be the same as those of the Supreme Court of the United States.” *Id.*

52. Under Massachusetts law, Plaintiffs could establish facts that would justify limits on contributions to IEPs.

53. Because (1) there is no binding federal precedent to the contrary, (2) there is no state authority to the contrary, (3) were the question presented to the United States Supreme Court, it would likely conclude that limiting the contributions to IEPs is permitted under the First Amendment, and (4) Plaintiffs

could therefore establish a compelling interest for limiting contributions to IEPs under state law, it is not “reasonably clear” under the standard articulated by this Court in *Associated Industries* that the proposed limits violate “free speech,” and the Attorney General erred in refusing to certify Initiative 22-01.

The Plain Language and Structure of Amend. art. 48  
Does Not Require the Plaintiffs to Deliver the  
“Remaining Required Signatures” Referred to in  
Part II, section 3, Until the First Wednesday in  
December 2023.

54. As with a minority of the initiative processes in constitutions across the nation, the Massachusetts Constitution specifies a preclearance process before proponents may gather signatures from the public for a proposed petition.

55. This preclearance procedure serves two important functions. First, it lowers the burden of the petition process by assuring proponents that their petition is qualified before they undertake the cost of gathering signatures. Second, it assures that petitions that are not appropriate are not circulated to the public with the imprimatur of the Commonwealth. The framers of Amend. art. 48 were eager to include the public in the law-making and constitution-amending process. But they were also anxious that inappropriate petitions not be used to destabilize the Commonwealth.

56. In establishing this preclearance procedure, Amend. art. 48 specifies the timing for both (1) when an initiative must be presented to the Attorney

General, and then after an initiative is certified, (2) when it may be filed with the Secretary of State.

57. The first sentence of Amend. art. 48, II, § 3, “Mode of Originating,” addresses the timing relevant to the Attorney General, and provides that:

[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, and if he shall certify [...] it may then be filed with the secretary of the commonwealth. (Emphasis added).

58. The last sentence of Amend. art. 48, II, § 3, “Mode of Originating,” addresses the timing relevant to the Secretary of State, and 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. (Emphasis added).

59. Amend. art. 48, V, “Legislative Action on Proposed Laws,” § 1, as amended by art. 81, § 2, of the Amendments provides that:

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.

60. Consistent with this text, the Plaintiffs, as proponents of Initiative 22-01, filed a Petition with the Attorney General before the first Wednesday in August 2022 which, if certified, they intend to be introduced into the general court in 2024, and, if not enacted by the general court, submitted “to the people at the next state election,” in 2024.

61. Plaintiffs’ procedure is consistent with the plain text and structure of Amend. art. 48.

62. The first sentence of section 3 requires that proponents submit their initiative 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.”

63. “[T]he first Wednesday of the August before the assembling of the general court” of 2024 is August 2, 2023.

64. At least ten registered voters signed the Petition and filed it with the Attorney General in June 2022.

65. June 2022 is “not later than” August 2, 2023.

66. When certified, Plaintiffs intend to file their Initiative “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.”

67. “[T]he first Wednesday of the September before the assembling of the general court” of 2024 is September 6, 2023.

68. Plaintiffs are, in this very action, prosecuting the appeal of the Attorney General’s refusal to certify, so that they may have a certified Initiative to file with the Secretary “not earlier than” September 6, 2023.

69. Plaintiffs submitted this Petition to the Attorney General more than a year in advance of the assembling of the general court into which the Petition will be introduced, obviating any need to litigate this case in the compressed period between late 2023 and May 2024.

70. Consistent with the dual purposes of preclearance, the Massachusetts Constitution requires that a petition be certified before being filed with the Secretary and before the Secretary provides blanks for the collection of signatures.

71. To require signatures be collected before certification would conflict with the objective to lower the burden of collection.

72. To require signatures to be collected before certification would conflict with the objective to assure that only appropriate initiatives be carried to the public.

73. Because the Attorney General refused to certify Initiative 22-01, until her determination is reversed, Amend. art. 48 directs that the Secretary cannot accept proponents' petition, nor issue blanks to use to collect signatures.

74. Notwithstanding this plain text, the Attorney General has advised Plaintiffs that it is the Attorney General's practice, when declining to certify an initiative petition, to offer to enter a Stipulated Order with proponents allowing them to file petitions with the Secretary and to begin collecting signatures on blanks prepared by the Secretary.

75. The Attorney General has offered to enter such a Stipulated Order for the Plaintiffs.

76. Requiring Plaintiffs to participate in such a procedure is inconsistent with Amend. art. 48, especially so when the Attorney General has made a determination that the petition covers an alleged "Excluded Matter." It is likewise inconsistent with this Court's instruction for how Amend. art. 48 is to be construed.

77. One purpose manifest in the plain language of the Constitution is to avoid the circulation of petitions covering excluded matters, so as to avoid the initiative process becoming a means by which inappropriate petitions might be used to stir division within the Commonwealth. A requirement to collect signatures in order to appeal the Attorney General's determination that a matter is "Excluded" contravenes this objective.

78. A second purpose manifest in the plain language of the Constitution is to provide proponents with certainty about their initiative before they bear the burden of collecting signatures. A requirement to collect signatures simply to be able to appeal a contrary Attorney General's determination would impose undue burdens on proponents before they have certainty that their petition could appear on the ballot.

79. Plaintiffs intend to rely upon volunteers to gather the signatures necessary to place the Petition on the ballot.

80. Volunteers would be unlikely to devote the substantial energy necessary to gathering signatures in the face of the Attorney General's judgment that even if they were successful, the Petition could not appear on the ballot.

81. Likewise, political parties and non-profits would be unlikely to support a volunteer petition drive for a petition that has been ruled as "Excluded" under the initiative process.

82. Finally, a requirement to collect signatures in order to appeal the Attorney General's determination that a matter is "Excluded" is inconsistent with this Court's directive to "construe art. 48 in a manner 'mindful that art. 48 establishes a 'people's process.''" *See, e.g., Anderson v. Attorney General*, 479 Mass. 780, 785 (2018) (quoting *Bates v. Director of the Office of Campaign & Political Fin.*, 436 Mass. 144, 154 (2002) (quoting *Buckley v. Secretary of the Commonwealth*, 371 Mass. 195, 199 (1976))).

83. Apparently recognizing that the language of Amend. art. 48 does not compel her reading of Amend. art. 48, the Attorney General has made equitable arguments in prior cases to support her contention that the "remaining required signatures" are due in December of the year the Attorney General has ruled, regardless of whether the petition is intended for the following year's ballot, or the ballot two years hence. *See, e.g., Letter from the Office of the Attorney General to the Single Justice dated September 26, 2016, in PassMass Amendment, et al., v. Attorney General and Secretary of The Commonwealth*, No. SJ-2016-0374 (D.E. #5), attached hereto as Exhibit C. These arguments fail.

84. The Attorney General defends her process citing the interest in conserving judicial resources. But when there is a genuine legal question about an "Excluded Matter," the appropriate issue is in what context that question should be resolved. By filing their Petition in an even-numbered year, two years before the

Initiative would appear on the ballot, Plaintiffs have given this Court ample opportunity to consider the matter, rather than forcing a resolution within the context of an appeal briefed and decided on an expedited basis.

85. The Attorney General defends her process on the grounds that it will avoid opinions that might turn out to be advisory if the Plaintiffs ultimately fail to collect the requisite signatures. Ex. C. Even assuming that interest could justify a reasonable bond to assure that signatures on a petition this Court ruled was *not* excluded would, in fact, be collected, it cannot possibly justify imposing the enormous financial burden of having to carry out an expedited signature collection process a full year before the signatures are required to be collected by law simply to secure a right to challenge the Attorney General's ruling. In no other context of Massachusetts law does a plaintiff have to expend substantial resources simply to preserve their right to appeal a legal determination of the Attorney General. Such a burden certainly makes no sense in the context of the "people's process" that this Court has described Amend. art. 48 to be. *Anderson*, 479 Mass. at 785.

86. Justices of this Court have recognized that the precise question raised by this complaint — whether signatures on a petition filed in an even-numbered year, two years before it could appear on the ballot, must be collected before a decision of the Attorney General could be appealed — is unresolved.

87. In response to the parties' written submissions including the Attorney General's letter cited above in *PassMass Amendment*, Justice Lenk, sitting as single justice, observed: "[t]he defendants suggest in their letter dated September 26, 2016, the plaintiffs are not entitled to a ruling on the merits of their claim challenging the certification decision unless and until they first gather sufficient signatures to put the petition on the ballot."

88. Justice Lenk then wrote: "That may or may not be correct; I leave that to be decided if and when the plaintiffs choose to pursue that route." *See* J. Lenk's Memorandum of Decision in *PassMass Amendment, et al. v. Attorney General and Secretary of the Commonwealth*, SJ-2016-0374, D.E. #8, a true and accurate copy of which is attached hereto as Exhibit D, at 3-4.

89. While other justices sitting as a single justice have entered orders (apparently in the form proposed by the Attorney General) dismissing as moot cases brought by pro se plaintiffs for failure to deliver signatures to the Secretary by the first Wednesday in December, so far as Plaintiffs' counsel have been able to determine, all of those orders appear to have been entered in cases where the plaintiff was represented pro se; none were accompanied by a reasoned opinion analyzing the text of Amend. art. 48; and none were based on the record presented here. *See, e.g., Bokron, et al. v. Attorney General and Secretary of the*

*Commonwealth*, SJ-2020-0613, D.E. #5; and *Bokron, et al. v. Attorney General and Secretary of the Commonwealth*, SJ-2017-0326, D.E. #9.

90. Whatever the merits of the Attorney General’s equitable arguments, they cannot stand in the face of the plain language of Amend. art. 48.

91. Amend. art. 48 gives proponents the choice of the year during the two-year cycle for ballot initiatives to have an initiative submitted to the general court.

92. Plaintiffs have chosen the general court that will convene in 2024.

93. Based upon that choice, and the plain language of Amend. Art. 48, Plaintiffs must submit a certified petition to the Secretary “not earlier than the first Wednesday of the September before the assembling of the general court.” That Wednesday is September 6, 2023.

94. To have a certified petition to submit on or after September 6, 2023, Plaintiffs submitted to the Attorney General their proposed initiative “not later than the first Wednesday of the August before the assembling of the general court.” That Wednesday is August 2, 2023.

95. Plaintiffs submitted their Initiative to the Attorney General before that date, in June 2022.

96. As the language of Amend. art. 48 directs, Plaintiffs are not authorized to collect signatures before they file a “certified petition” with the Secretary.

97. Plaintiffs are prosecuting this appeal so that they may have a “certified petition” to file with the Secretary on or after September 6, 2023.

**COUNT I**  
**(Declaratory Relief)**

47. Plaintiffs restate and reallege the allegations of the paragraphs set forth above as if restated and realleged herein.

48. There is an actual controversy between Plaintiffs and the Attorney General as to whether the Attorney General erred in denying certification of the Petition on the basis that it violated “freedom of speech.” This controversy will be terminated by this Court’s determination of whether the Attorney General erred.

49. For the reasons set forth above, the Attorney General did err.

WHEREFORE, Plaintiffs request the relief set forth below:

**COUNT II**  
**(Declaratory Relief)**

50. Plaintiffs restate and reallege the allegations of the paragraphs set forth above as if restated and realleged herein.

51. There is an actual controversy between the Plaintiffs and the Attorney General as to whether Plaintiffs must file “the remaining required signatures” with the Secretary by the first Wednesday in December 2022 or December 2023, and thus whether the Petition and/or this action will be moot if the Plaintiffs do not deliver the signatures by the first Wednesday in December 2022. This controversy will be terminated by the Court’s ruling on this issue.

52. As outlined above, because Plaintiffs filed their Petition and the Attorney General declined to certify it in an even-numbered year, Amend. art. 48 does not require the Plaintiffs to deliver the signatures to the Secretary until December 2023.

WHEREFORE, Plaintiffs request the relief set forth below:

### **PRAYERS FOR RELIEF**

Plaintiffs respectfully request this Court enter judgment:

A. On Count I, declaring that the Attorney General erred in refusing to certify the Petition as compliant with Amend. art. 48, and that the Petition complies with Amend. art. 48;

B. On Count II, declaring that the Plaintiffs are not required to deliver the “remaining required signatures” required by Amend. art. 48 to the Secretary before the first Wednesday of December 2023; and

C. On both Counts, granting the Plaintiffs such other relief as may be appropriate and just.

Respectfully Submitted,

ROBERT HERRMANN,  
LARS MIKKELSEN,  
JOSHUA REDSTONE,  
GRAEME SEPHTON

Dated: October 24, 2022

By their attorneys,

/s/ Courtney Hostetler

Courtney Hostetler (#683307)

Ronald A. Fein (#657930)

John C. Bonifaz (#562478)

Ben T. Clements (#555802)

FREE SPEECH FOR PEOPLE

1320 Centre St. #405

Newton, MA 02459

Tel.: (617) 249-3015

[chostetler@freespeechforpeople.org](mailto:chostetler@freespeechforpeople.org)

[rfein@freespeechforpeople.org](mailto:rfein@freespeechforpeople.org)

[jbbonifaz@freespeechforpeople.org](mailto:jbbonifaz@freespeechforpeople.org)

[bclements@freespeechforpeople.org](mailto:bclements@freespeechforpeople.org)

## EXHIBIT A

# Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs

*Be it enacted by the People, and by their authority:*

**SECTION 1:** This act may be referred to and cited as the "End Super PACs Act."

**SECTION 2:** Subsection (a) of section 7A of chapter 55 of the General Laws is hereby amended by striking out paragraph (3) and inserting in place thereof the following paragraph:


(3) An individual may in addition make campaign contributions to any political committee not specified in paragraph (1), (2), (4) or (5); 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.

**SECTION 3:** Subsection (a) of section 7A of chapter 55 of the General Laws is hereby further amended by adding the following paragraph:

(5) An individual may in addition make campaign contributions to any independent expenditure PAC as defined in section 18A; provided, however, that the aggregate of campaign contributions to any one such independent expenditure PAC shall not exceed in any one calendar year the sum of five thousand dollars.

**SECTION 4:** This act shall take effect on January 1, 2024.

*Initials*

1. 	5. _____	9. _____	13. _____	17. _____
2. _____	6. _____	10. _____	14. _____	18. _____
3. _____	7. _____	11. _____	15. _____	19. _____
4. _____	8. _____	12. _____	16. _____	20. _____

## EXHIBIT B



MAURA HEALEY  
ATTORNEY GENERAL

# THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

TEL: (617) 727-2200  
[www.mass.gov/ago](http://www.mass.gov/ago)

September 7, 2022

Thomas O. Bean  
Verrill Dana LLP  
One Federal Street, 20th Floor  
Boston, MA 02110

Re: Initiative Petition No. 22-01: Initiative Petition for a Law Relative to Limiting  
Political Contributions to Independent Expenditure PACs

Dear Mr. Bean:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August this year. I regret that we are unable to certify that the proposed law complies with Article 48. Our decision, as with all decisions on certification of initiative petitions, is based solely on Article 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed laws.

Below, we describe the proposed law and then explain why we are unable to certify that the petition is consistent with the right to free speech embodied in Article 16 of the Declaration of Rights.

### Description of Petition

This proposed law would impose a \$5,000 per-calendar-year limit on campaign contributions made by an individual to a political committee or entity that makes independent expenditures to advocate for or against particular candidates without cooperation or consultation with those candidates. This proposed law would go into effect on January 1, 2024.

### The Petition is Inconsistent with the Rights of Free Speech

Article 48, the Initiative, Part 2, Section 2 provides, in pertinent part, that "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," including the freedom of speech. As explained below, the proposed law is inconsistent with these rights



protected by the state constitution because it would impinge on the freedom of speech. *Associated Indus. of Massachusetts v. Att'y General*, 418 Mass. 279, 283-84, (1994) (noting that Article 48 looks at inconsistency with rights under state constitution, not the federal constitution).

Article 16 of the Massachusetts Declaration of Rights provides, in relevant part, that the "right of free speech shall not be abridged." Courts in Massachusetts interpret Article 16's protections as being coextensive with, or broader than, the First Amendment to the United States Constitution. Courts across the country have uniformly held that limits on contributions to independent expenditure PACs – like those at issue in this proposed law – violate free speech protections. See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010); *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).

Although Massachusetts courts have not specifically weighed in on the constitutionality of laws limiting campaign contributions made by an individual to a political committee or entity that makes independent expenditures to advocate for or against particular candidates without cooperation or consultation with those candidates, where the Supreme Judicial Court has recognized that courts in the Commonwealth interpreted the protections of free speech under the Declaration of Rights to be "comparable to those guaranteed by the First Amendment," *Opinion of the Justices*, 418 Mass. 1201, 1212 (1994), it is clear that this proposed law would violate the free speech rights afforded by the state constitution.

For this reason, the Attorney General's Office is unable to certify that Petition No. 22-01 complies with Article 48.

Very truly yours,



Anne Sterman  
Deputy Chief, Government Bureau  
617-963-2524

cc: William Francis Galvin, Secretary of the Commonwealth

## EXHIBIT C



MAURA HEALEY  
ATTORNEY GENERAL

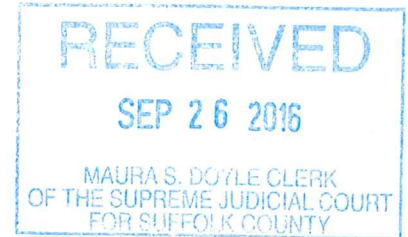
THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL  
ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

TEL: (617) 727-2200  
[www.mass.gov/ago](http://www.mass.gov/ago)

September 26, 2016

**BY HAND & EMAIL**

Hon. Barbara A. Lenk  
Supreme Judicial Court for Suffolk County  
John Adams Courthouse  
One Pemberton Square, Suite 1-300  
Boston, MA 02108-1707



Re: *PassMass Amendment, Nick Bokron & Terra Friedrichs v. Attorney General and Secretary of The Commonwealth*, No. SJ-2016-0374

Dear Justice Lenk:

During the telephonic hearing on Friday, September 23, Your Honor asked why the interests of efficiency would not support having the full Court decide legal challenges to decisions by the Attorney General not to certify Amend. Article 48 initiative petitions, even when those petitions have not gathered sufficient signatures to remain viable under the constitutional process. I am writing to provide a fuller answer to Your Honor's question than I was able to do during the hearing.

First, adopting such a rule would likely increase requests for adjudication of constitutional matters in the abstract, unsupported by a viable Article 48 petition. During each two-year election cycle going back to 1999, the Attorney General has declined to certify up to ten petitions, and usually one or two legal challenges have been perfected (with 2015 being the exception to this rule):<sup>1</sup>

<u>Year</u>	<u>Petitions Received</u>	<u>Not Certified</u>	<u>Challenges</u>
2015	35	10	4
2013	33	5	1
2011	31	8	1
2009	30	5	0
2007	13	0	1
2005	16	1	2
2003	14	3	0
2001	27	9	1
1999	33	5	1

<sup>1</sup> These numbers are approximate, as some petitions may have been withdrawn or may be duplicates.



As is evident, relatively few of the non-certified petitions went on to gain sufficient signatures and culminate in a live appeal of the Attorney General's determination. If petitioners were able to secure judicial review of the Attorney General's decision not to certify petitions without having to satisfy the signature gathering requirement of Article 48, the full Court could easily receive ten or more additional Article 48 challenges in each two-year cycle (including a smaller number of additional challenges in even-numbered years).

Moreover, would-be petitioners might well choose to file petitions and secure constitutional rulings—in effect, advisory opinions—from the Court as part of pre-filing research and political strategy for a subsequent year's petition, or for some other reason. Indeed, this may be the petitioner's plan for this petition, in light of his admission during Friday's hearing that he is aware that the necessary signatures will not be gathered this year. Hearing and deciding these constitutional questions in a vacuum would waste judicial resources, lead to the unnecessary adjudication of hypothetical controversies that have no immediate impact on any party, and involve the Court in the strategic political calculations of potential Article 48 petitioners.

Your Honor further asked if the mootness exception of “capable of repetition, yet evading review” would apply to the petitioners' complaint. I strongly disagree that it would. This exception has been applied where structural systemic attributes preclude meaningful judicial review before mootness. *Wolf v. Comm'r of Public Welfare*, 367 Mass. 293, 295 (1975) (replacement of delayed benefit check mooted plaintiff's claim for injunction governing such replacement). This is not the case with Article 48 petitions, as the full Court has specifically held. *See Lockhart v. Attorney General*, 390 Mass. 780, 785 (1984) (declining to review challenge to Attorney General's decision not to certify an initiative petition that had become moot upon the petitioners' failure to gather the necessary signatures). The Court noted that, should the constitutional issues raised by the Attorney General's decision not to certify the petition reappear, “they need not evade review before they become moot.” *Id*

No inherent characteristic of the initiative petition process precludes the timely gathering of sufficient signatures before review may be had. The repeated inability of a particular petitioner to do so does not support a departure from the principle that courts will not decide moot controversies, particularly moot constitutional controversies. *See Matter of Sturz*, 410 Mass. 58, 60 (1991) (noting court's particular hesitancy to decide constitutional questions that become moot). Moreover, it is not the passage of time that moots these cases, but rather the inability of petitioners to secure the necessary demonstration of popular support for their petition to allow its presentation to the general electorate. *Contrast Wolf*, 367 Mass. at 298 (court may adjudicate claim mooted by the “mere passage of time during the appeal process”). In other words, the constitutional validity of certifying (or not) a proposed law that gathers insufficient support to go on the ballot—and thus will never be enacted—remains a moot question, no matter how many times a petitioner attempts to place the measure on the ballot. Thus, while Article 48 petitioners are required to gather signatures under strict constitutional timelines, those requirements do not create a “capable of repetition, yet evading review” exception to the

mootness doctrine.<sup>2</sup> Imposing such an exception in this situation would require the overruling of *Lockhart* and may—as noted above—result in a deluge of unnecessary constitutional litigation.

Thank you for your consideration of these points.

Very truly yours,



Juliana deHaan Rice  
Assistant Attorney General  
(617) 963-2583

cc: Nicholas Bokron (by email and first-class mail)  
Terra Friedrichs (by first-class mail)

---

<sup>2</sup> And, notably, this Court has held that, for petitions that *do* collect the required number of signatures, this Court can and will adjudicate the propriety of certification even after such a law is placed on the ballot, meaning that the passage of time does not defeat this Court's review. *See Sears v. Treasurer and Receiver General*, 327 Mass. 310, 326-327 (1951).

## EXHIBIT D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO. SJ-2016-374

PASSMASSAMENDMENT - NICK BOKRON & TERRA FRIEDRICHS

v.

ATTORNEY GENERAL AND SECRETARY OF THE COMMONWEALTH

MEMORANDUM OF DECISION

I have considered all of the written submissions to date and the helpful oral arguments that were made by both sides last week. I decline to issue a preliminary injunction in the form requested by the plaintiffs.

This is the fourth consecutive year that the plaintiffs have filed the identical initiative petition, and each time the Attorney General has declined to certify it as a proper matter for the ballot under amend. art. 48 of the Massachusetts Constitution. In each of the three previous years, the plaintiffs commenced an action like this in the county court challenging the Attorney General's decision not to certify, and each time, as is typical in these cases, the parties voluntarily agreed to the terms of an order that allowed the plaintiffs, while the action remained pending, to continue with the

signature-gathering process as if the petition had been certified. Each year, however, the plaintiffs failed to collect a sufficient number of signatures to move the petition forward, and their action was therefore dismissed as moot.

This year, unlike in the previous years, the parties have been unable to agree on the terms of an order. The plaintiffs ask me to issue an order identical to last year's order, essentially compelling the Attorney General to summarize the petition, and the Secretary to print blank signature forms for the plaintiffs to use, as if the petition had been certified. The Attorney General and Secretary have no legal obligation under the Constitution or statutes to do this for petitions that have not been certified. They appear to have done so voluntarily in the past, for this petition and other petitions, as a practical matter and as an accommodation to petitioners so that the petitioners can move forward with their petitions while their court challenge to the Attorney General's certification decision is pending. The parties have not directed me to any decision in which the defendants have been compelled to submit to such an order over their opposition. Moreover, the defendants have offered in this case to agree to an order voluntarily again this year with one additional condition, i.e., that before the local and State officials are put to the burden

of certifying and counting signatures, the plaintiffs be required to submit an affidavit averring a good faith belief that they have collected a sufficient number of signatures. That does not seem unreasonable to ask for in light of the history involved here, and for the reasons set forth in the defendants' supporting affidavit and other materials. I am mindful of the plaintiffs' claim that they are a small organization with limited resources. Nevertheless, they are not entitled as a matter of right, either under the Constitution or by statute, to proceed on the same terms that the defendants agreed to in the previous years, and I will not compel the defendants in these circumstances to allow them to do so.

If the parties cannot agree on the terms of an order that would allow the petition to go forward for signature-gathering at this time, the plaintiffs can proceed with their legal challenge to the Attorney General's refusal to certify their petition. I am not aware of any obligation on their part to accept the defendants' terms and proceed to the next step of the petition process while their action remains pending. The defendants suggest in their letter dated September 26, 2016, that the plaintiffs are not entitled to a ruling on the merits of their claim challenging the certification decision unless and until they first gather sufficient signatures to put the

petition on the ballot. That may or may not be correct; I leave that to be decided if and when the plaintiffs choose to pursue that route.

If the plaintiffs do choose to press forward with the litigation at this time, they shall have thirty days to amend their complaint to allege sufficient facts to ensure that it would withstand a motion to dismiss for failure to state a claim on which relief can be granted. See Mass. R. Civ. P. 12 (b) (6). See also Iannachino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008). The complaint as presently written does not allege the contents of the initiative petition, the Attorney General's reasons for declining to certify the petition, or any reasons why the plaintiffs claim that the Attorney General's refusal to certify was improper. I would ask the Attorney General, in the spirit of cooperation, to provide the plaintiffs with two or three examples of proper complaints in cases like this, if the plaintiffs request them. After an amended complaint is filed, the defendants will have an opportunity to respond, and I will be in a position to decide whether the case ought to be reported to the full court; either way, the case will proceed expeditiously.

Alternatively, if the parties wish to, and are able to, agree on terms for a court order allowing the petition to

proceed to the signature-gathering phase now, while the case remains pending and further action is stayed, as they have done in the past years, they continue to be free to do so, and I will entertain their joint request for such an order. The plaintiffs should let the clerk know as soon as practicable how they wish to proceed - with their legal challenge to the certification decision or with an order that is mutually acceptable to both sides.



---

Barbara A. Lenk  
Associate Justice

Dated: September 27, 2016