COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13361

ROBERT HERRMANN, LARS MIKKELSEN, JOSHUA REDSTONE, GRAEME SEPHTON, DAVID C. BAXTER, MARY BAINE CAMPBELL, CATHERINE BRUN-COTTAN, GEORGES BRUN-COTTAN, LEIGH CHINITZ, BETTINA NEUEFEIND, and LEO T. SPRECHER,

Plaintiffs/Appellants,

v.

ATTORNEY GENERAL AND SECRETARY OF THE COMMONWEALTH,

Defendants/Appellees.

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

Counsel listed on next page

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
rfein@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org

Attorneys for Plaintiffs-Appellants Robert Herrmann, Lars Mikkelsen, Joshua Redstone, and Graeme Sephton

Lawrence Lessig (#710593)
20 Amory St.
Brookline MA 02446
Tel.: (617) 935-3985
lessig@lessig.law

Thomas O. Bean (#548072)
Verrill Dana, LLP
One Federal Street—20th Floor
Boston, MA 02110
Tel.: (617) 309-2600
tbean@verrill-law.com

Attorneys for Plaintiffs-Appellants David C. Baxter, Mary Blaine Campbell, Catherine Brun-Cottan, Georges Brun-Cottan, Leigh Chinitz, Bettina Neuefeind, and Leo Sprecher

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

SUMMARY OF ARGUMENT

The Attorney General concedes that the plain text of art. 48 allows Plaintiffs[1] to proceed as they have done. However, she insists, unwritten requirements of art. 48, deriving from historical circumstances that no longer exist, trump its plain language. Her argument conflicts with art. 48's language, structure, and purpose. The consequence of her position would be to block any effective judicial review of the Attorney General's constitutional determinations.

On the merits, this Court's reasonable clarity standard requires that neither the Attorney General nor this Court prevent the voters from voting on the measure unless it is "reasonably clear" that the petition is unconstitutional. The Attorney General concedes that no Massachusetts or U.S. Supreme Court case forecloses the petition's contribution limit. Rather, the petition comports with art. 16 as interpreted by this Court, and the Massachusetts cases she cites do not support her position. Consequently, she relies almost entirely on non-binding cases from lower federal courts elsewhere in the country. These cases—or the Attorney General's conjecture about how a higher court might apply them—do not (and cannot) establish that it is "reasonably clear" that the petition would violate art. 16.

The Attorney General's prediction about the Supreme Court's likely view of regulating contributions to independent expenditure PACs is further weakened because such regulation *does* serve the compelling state interest in preventing quid pro quo corruption and its

[1] For convenience and consistency with the Attorney General's usage, this brief refers to Plaintiffs-Appellants as "Plaintiffs."

appearance. The Baxter Plaintiffs argue as well that consistent with the principles of originalism, the Supreme Court would permit the regulation of "dependence corruption," again making unlikely the Attorney General's prediction that the Supreme Court would find the Initiative is unconstitutional.

ARGUMENT

I. Plaintiffs need not collect signatures before the timeframe specified in art. 48.

Plaintiffs agree that the obligation to collect signatures to avoid mootness makes sense for petitions offered to the Attorney General in odd-numbered years. With no opportunity in such circumstances to prosecute an appeal in time to satisfy the plain language restrictions of art. 48, the exception to its rule—that a petition be certified *before* signatures are gathered—justifies an injunction to meet the purpose of art. 48: to enable citizens to participate in the legislative process.

But an obligation to collect signatures before certification when a petition is filed in an *even*-numbered year lacks support from either art. 48's language or the petition process's equities. Here, Plaintiffs have complied with the deadlines set forth in art. 48 and will meet all subsequent deadlines before introducing the petition into the January 2024 General Court.

Nothing in Massachusetts law justifies adding an extra and unnecessary burden on Plaintiffs before they may challenge the Attorney General's error. Imposing such a requirement would

effectively block judicial review of the Attorney General's constitutional determination.

A. Under the plain language of Article 48, Plaintiffs' complaint is not moot.

The Attorney General concedes that under art. 48's plain language, Plaintiffs' petition is not moot—even if she believes such a view "myopic[]." Def. Br. 23.

That concession (absent the myopia) is correct. Under art. 48, petitions must 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." Art. 48, II, § 3. Once certified, the petition must be presented to 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." *Id.*

Plaintiffs intend to introduce the petition to the legislature in January 2024. They have therefore met the first requirement by introducing the petition *before* the first Wednesday of August 2023. Plaintiffs are perfecting this appeal so they may present a certified petition to the Secretary by September 2023. Their complaint is therefore not moot.

The Attorney General contends that art. 48 should not be read as written. Instead, she insists "the text and history of Article 48 plainly contemplates" a requirement nowhere expressed in its text: "that petitioners will gather signatures in the same year in which they

submit the petition for Attorney General certification." Def. Br. 16. She argues that, when art. 48 was drafted, elections were held annually, so a submission to the Attorney General would always require signatures to be gathered in the same year in which the petition was submitted. Def. Br. 17, 19-21.

This argument is just wrong. Section 3 of art. 48 was last amended by art. 74 in 1944—twenty-four years after the state adopted biennial elections. And in any case, the Constitution must now be read as it now reads—with biennial elections.

That is the Attorney General's approach for *other* aspects of art. 48. For example, she explicitly states that she accepts petitions for certification in both even-numbered and odd-numbered years. So in principle, a petition could be certified over two years before it could appear on the biennial ballot. *See* "Initiative Petition Process, 2015–2016: An Overview for Interested Members of the Public," http://www.mass.gov/ago/government-resources/initiatives-and-other-ballot-questions/initiative-petition-process.html [https://perma.cc/PR4Y-BZC9], cited in *Dunn v. Attorney General*, 474 Mass. 675, 685 (2016). That two-year period conflicts with what the Attorney General claims art. 48 "contemplates": that "this process—from the initial petition's submission through the election—would take place within one (then annual) election cycle for proposed laws." Def. Br. 22. Yet the Attorney General (properly) accepts petitions in even-numbered years despite this two year delay. Indeed, she accepts petitions at any time and rules on any petition submitted before the first Wednesday of August of any year by the first week of September of that same year.

The Massachusetts Constitution is not constrained by what might have been originally contemplated. *See, e.g.*, *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 350 n.6 (2003) (Greaney, J., concurring); *see also, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (applying Fourteenth Amendment to sex-based discrimination even though its drafters apparently did not contemplate that); *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020) (applying Title VII to transgender discrimination even though drafters did not contemplate it). This is particularly true when the legal basis for that ostensible contemplation—annual elections—no longer exists.

Nothing in art. 48's text requires a petition to be submitted to the Attorney General in the same year that it will be submitted to the Secretary of the Commonwealth. Article 48 says nothing about *how early* a petition may be submitted to the Attorney General, only how late. Thus, Plaintiffs properly submitted their petition in June 2022, even though they intend to submit a certified petition to the Secretary after September 6, 2023. Plaintiffs filed early precisely to ensure that if the petition was not certified, there would be time to challenge that refusal.

B. No legitimate public purpose justifies imposing an extra-textual constraint on petitioners.

Article 48 requires petitioners to secure the signatures of ten qualified voters before submitting their petition to the Attorney General for review. Those signatures make the petition ripe for Attorney General review, and the Attorney General's rejection of the petition makes it ripe for judicial review.

The Attorney General has not provided statistics on the number of petitions submitted in even-numbered years. Plaintiffs are aware of no petition submitted in an even-numbered-year that was certified by the Attorney General and then presented to the Secretary of the Commonwealth to begin the gathering of signatures in that same year. Instead, in every case that Plaintiffs are aware of, petitioners submitted their petition in an even-numbered simply to secure the Attorney General's approval. That precedent is then relied upon by the same petitioners when they submit the identical language to the Attorney General in the following year. Though the Attorney General might well call this practice "gam[ing] the system," Def. Br. 29-30, or "pre-filing research and political strategy for a subsequent year's petition, or indeed for any other reason," *id.* 27, she (properly) allows petitioners to submit petitions in even-numbered years, and certifies some, without obligating petitioners to collect signatures that same year.

This case presents the question of when the Attorney General denies certification—a question this Court has not addressed. In *Lockhart v. Attorney General,* 390 Mass. 780 (1984), the petition was filed in an *odd*-numbered year, and proponents tried (but failed) to collect signatures after obtaining an injunction allowing them to do so. Here, Plaintiffs sought review of the Attorney General's refusal to certify a year before the petition must be presented to the Secretary. This Court could thus easily resolve the substantive question *before* Plaintiffs would be required to submit their petition to the Secretary and begin collecting signatures. A decision by this Court therefore would not be moot, and there is no reason, let alone anything in the text

or purpose of art. 48, that signatures must be gathered during the pendency of the appeal from an even-year determination.[2]

The Attorney General nonetheless seeks to impose on Plaintiffs an additional burden—not grounded in any constitutional or statutory text—to gather signatures on an uncertified petition before judicial review so as to demonstrate "the required public support." Def. Br. 24.

This is wrong. First, *where* in the initiative process is this "public support" "required"? Art. 48 does not require proponents to demonstrate public support when they submit a petition to the Attorney General. It simply requires them to show such support by the first Wednesday in December after they submit a certified petition to the Secretary. Further, no principle in Massachusetts law requires a litigant to prove its cause popular in order to have an allegedly erroneous ruling by a government official reviewed. Plaintiffs are here only because the Attorney General has wrongly refused to certify their petition. The sole question for this Court is whether that legal decision was correct—not whether the petition is popular.

Second, without the legislature so directing, Massachusetts law does not require a party to effectively pay an extra price (beyond the

---

[2] *Dunn v. Attorney Gen.*, 474 Mass. 675 (Mass. 2016), is not to the contrary. That case reviewed the timing of a challenge to a petition filed in an odd-numbered year. The opinion described that timing as "typically done," and cited information from the Attorney General expressly indicating that petitions may be filed in even-numbered years as well. *Id.* at 685 (citing "Initiative Petition Process, 2015–2016: An Overview for Interested Members of the Public, http://www.mass.gov/ago/government-resources/initiatives-and-other-ballot-questions/initiative-petition-process.html" [https://perma.cc/PR4Y-BZC9]).

costs of litigation) simply to have a legal determination by a government official reviewed. As the Baxter Plaintiffs have demonstrated, the *extra* cost of securing signatures on an uncertified petition during an even-numbered year could easily approach $1 million.[3] Without instruction from the legislature, the courts cannot impose such a burden on a party challenging a legal determination by a government official.

Third, mandating that all petitioners satisfy this financial burden even when they have filed in an even-numbered year would inappropriately insulate this case and others challenging the Attorney General's decision from effective judicial review. The Attorney General's statistics do not reveal the number of petitions denied certification that ultimately collected signatures while challenging the Attorney General's denial. Def. Br. 25. But the ordinary petitioner—certainly the petitioner that art. 48's Framers intended to benefit—cannot typically bear that extra cost to challenge an erroneous decision by the Attorney General.

There is no basis to impose this additional requirement, neither written in nor "contemplated" by art. 48, as a precondition for judicial review. As with the signature requirement to present a petition to the General Court, the Convention could have imposed an additional signature requirement to permit review of the Attorney General's determination. It did not. Consequently, Plaintiffs do not bear any extra burden to demonstrate popular support as the price for determining

[3] See Pl. Br. 34 n.3, citing R.A. 178-80. "Extra" here means the costs of collecting signatures in an even-numbered year beyond the costs of collecting signatures for a certified petition in an odd-numbered year.

whether the Attorney General's legal conclusions were erroneous—especially when, as Plaintiffs have argued, the effect of such a rule would be to protect the Attorney General's judgment from effective review.

C. The complaint neither asks this Court for an advisory opinion nor is unripe.

The Attorney General's brief misunderstands the rule against advisory opinions and the obligations of ripeness. When she refused to certify the petition, the dispute over her decision became ripe for review. Her decision changed Plaintiffs' rights, denying them an opportunity to present their petition to the Secretary at any time. Plaintiffs were thus entitled to challenge her erroneous decision.

If this Court rules in favor of Plaintiffs' substantive claim, then Plaintiffs could present their certified petition to the Secretary and gather signatures, unencumbered by an imprimatur of unconstitutionality or futility, before the deadlines established in art. 48. That change in legal rights, occasioned by a decision of this Court, demonstrates that this Court's decision would not be "advisory." By contrast, in *Lockhart*, no matter what decision this Court made, petitioners could have had no chance to prosecute their petition because art. 48's deadline for collection of signatures would have passed.

The Attorney General claims a decision in this case "would essentially [be] an advisory opinion on the constitutionality of a proposed law that may never appear on the ballot for want of sufficient public support," Def. Br. 24, and that "any group of just ten would-be petitioners could 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 indeed for any other reason." Def. Br. 26-27.

But every time the Attorney General certifies a petition, there is a chance the petition "may never appear on the ballot." That fact is irrelevant to the Attorney General's refusal to certify *this* petition.

Moreover, it is untrue that, under Plaintiffs' approach, "any group of just 10 would-be petitioners could file petitions and secure constitutional rulings." The only "rulings" petitioners would be entitled to are rulings about whether the Attorney General wrongly refused certification. This is precisely (and only) the review that this Court mandated in *Horton v. Attorney General,* 269 Mass. 503, 507 (1930): "to determine whether a public officer is overstepping constitutional bounds."

Article 48 does expressly require that petitioners demonstrate increasing levels of commitment to support their petition over the life of the initiative process: first, ten signatures; after certification, three percent of the votes cast in the last gubernatorial election; then, if the legislature fails to enact their proposal, an additional one-half percent of the votes in the last gubernatorial election. But only ten signatures are required before a petition is certified. The Attorney General effectively argues for a new signature requirement, neither found in art. 48's text nor "contemplated" by its Framers: That to challenge a ruling by the Attorney General, petitioners must secure the signatures necessary to present their petition to the General Court—even where they seek judicial review *before* the signature-gathering period

commences. There is no basis for adding this requirement to the rules specified in art. 48.

Finally, the Attorney General argues that reviewing her decision would conflict with this Court's "longstanding practice of avoiding reaching constitutional issues unnecessarily." Def. Br. 24. But necessity is not a measure of popularity. It is a measure of whether rights would be affected by this Court's ruling. Plainly they would: Plaintiffs cannot advance their petition unless this Court rules in their favor on the merits of the case. It is therefore not "unnecessary" for this Court to resolve the questions presented.

D. The policy of the Convention plainly supports the procedure adopted by Plaintiffs.

The Convention added the obligation of the Attorney General to determine whether a petition involved an excluded matter as an afterthought. *Yankee Atomic Elec. Co. v. Secretary of the Commonwealth*, 402 Mass. 750, 757 (1988). Before that change, the Attorney General's review was quite simple. Adding the obligation to determine whether a petition was inconsistent with certain individual rights complicated the review. And as this Court's jurisprudence about art. 48 has developed, many questions (not all clear in advance) might bar certification of a petition.

For example, this Court has developed a careful and complex jurisprudence for determining whether a petition contains subjects "which are related or which are mutually dependent" under art. 48, II, section 3. *See, e.g.*, *Anderson v. Attorney General*, 479 Mass. 780 (2018). Indeed, this Court has recently acknowledged the tension in its own

opinions, adding even more uncertainty to the process of proposing an initiative for inclusion on the ballot. *El Koussa v. Attorney General*, 489 Mass. 823, 837 n.11 (2022) ("whether the mutual dependence requirement is separate from or subsumed within the relatedness requirement [is] an issue that has not been definitively resolved by this court").

Given this uncertainty, this Court should not raise the cost of review and render the Attorney General's judgment insulated from meaningful review. The plain language reading of art. 48 would reduce the cost of any uncertainty, by simplifying the process of review. The Attorney General already permits petitioners to seek review of their petition in even-numbered years. That accommodation is valuable to the end of simplifying the petition process—even though, as far as Plaintiffs are aware, no petition certified by the Attorney General in an even-numbered year has ever been presented to the General Court in the following year. Likewise, the opportunity to challenge decisions by the Attorney General denying certification, without the extra burden of unnecessarily gathering signatures, would also simplify the petition process. That objective comports with art. 48's language and purpose. By contrast, an implied rule forcing petitioners to bear an extraordinary burden simply to challenge the Attorney General's determination is consistent with neither art. 48's text nor the Convention's purpose.

These considerations confirm the wisdom of following art. 48's plain language. The procedure may involve more opportunities for review by this Court, if the Attorney General erroneously denies

certification. Yet the persistence of error by government officials cannot justify denying meaningful review.

E. There is no basis for delaying resolution of this dispute.

In the alternative, the Attorney General suggests that this Court defer reviewing her erroneous decision until Plaintiffs have collected signatures. This argument demonstrates both the error in the Attorney General's principal argument, and the injustice in a rule that imposes on some petitioners a substantially higher burden than others.

First, if the Attorney General is correct that this issue is moot, and that, as she argues, the rule of mootness is "absolute," Def. Br. 15, there could be no basis for delaying consideration of this appeal. But if the issue is *not* moot, it should be decided by this Court, now.

Second, while the burden of gathering signatures in an odd-numbered year is less than in an even-numbered year, the burden of gathering signatures for a petition deemed unconstitutional is still significantly greater than for a petitioned deemed constitutional. Plaintiffs are prosecuting this challenge so they can present to the public a petition that would, if signatures were collected, be considered by the legislature and, if not enacted, present on the 2024 ballot. That can only be achieved if this Court rules on whether the Attorney General was correct.

II. The Attorney General's predictions about how the U.S. Supreme Court might rule in a hypothetical case do not make it "reasonably clear" that the petition violates freedom of speech when no Massachusetts or Supreme Court case forecloses it.

In denying certification, the Attorney General observed that "Massachusetts courts have not specifically weighed in on the constitutionality of laws limiting campaign contributions [to independent expenditure PACs]." R.A. 36, 253. The Attorney General also observed that her determination "looks at inconsistency with rights under [the] *state* constitution, not the federal constitution." *Id.* (emphasis in original).

That should end the matter. Certification is required unless it is "reasonably clear" that the proposal is unconstitutional. *Associated Indus. of Massachusetts v. Attorney General*, 418 Mass. 279, 287 (1994). Any doubts must be resolved in favor of putting the petition before the voters. *See id.* at 286, 290-91 (a petition appearing to be "at least constitutionally questionable" on pre-enactment record may, on full post-enactment review, prove to be "in fact . . . permissible," and concluding that, without full factual record, it was premature to declare petition unconstitutional); *Yankee Atomic Elec. Co. v. Secretary of the Commonwealth*, 403 Mass. 203, 211 (1988) ("art. 48 is to be construed to support the people's prerogative to initiate and adopt laws").

If no Massachusetts court has determined a contestable question, and if (as here) the U.S. Supreme Court has not determined that question either, then it cannot be "reasonably clear" that the petition is unconstitutional.

Lacking any Massachusetts or U.S. Supreme Court authority, the Attorney General denied certification based upon her *prediction* of how either Court would rule, if the question were presented on a full record. Her prediction, which derives entirely from out-of-circuit lower federal court decisions that do not bind Massachusetts, cannot make it "reasonably clear" that the petition violates art. 16.

Plaintiffs agree that there is a speech *interest* in contributing to an independent expenditure PAC. And in *1A Auto, Inc. v. Director of Off. of Campaign & Pol. Fin.*, 480 Mass 423, 426 (2018), this Court noted in passing that under current Massachusetts law, corporations were allowed to make unlimited contributions to independent expenditure PACs. But this Court did not hold that this ability was constitutionally *guaranteed*, as it did when referring to the right to make unlimited expenditures. *Compare id.* at 426 *with id.* at 458-59. And the question of limits on contributions to independent expenditure PACs was not before this Court.

This Court should decide this matter based upon its actual decisions and those of the U.S. Supreme Court. Neither Court has held that regulations of contributions to independent expenditure PACs are unconstitutional. Furthermore, the Attorney General's conjecture about how the U.S. Supreme Court *might* analyze this question ignores the very real possibility that the Supreme Court would not follow those lower court decisions, because (1) limiting contributions to independent expenditure PACs helps prevent "quid pro quo corruption" or its appearance, and (2) (per the Baxter Plaintiffs) arguments grounded in originalism would lead a compound majority on the United States

Supreme Court to uphold the regulation of contributions to independent expenditure PACs.

A. No Massachusetts case prohibits contribution limits on independent expenditure PACs or relies on an argument that would necessarily render such limits unconstitutional under art. 16.

The Attorney General insists that this Court's task "is purely a State constitutional one." Def. Br. 35 (quoting *Associated Indus.*, 418 Mass. at 285). Plaintiffs agree. *See also Associated Indus.*, 418 Mass. at 285 (this Court "need not attempt to resolve the uncertainty of the constitutionality of the proposed law under the First Amendment"). Plaintiffs also agree that First Amendment jurisprudence can be persuasive, though is not controlling. *See* Pl. Br. 41; Def. Br. 35-36; *1A Auto,* 480 Mass. at 440.

No Massachusetts case supports the Attorney General's argument that the petition is so clearly unconstitutional that it cannot be put before the voters. None of the cases the Attorney General cites establish otherwise. Indeed, they suggest the opposite: that this Court has consistently upheld contribution limits to prevent corruption or its appearance under both the First Amendment and art. 16.

1. The Attorney General mischaracterizes *1A Auto*'s passing reference to independent expenditure PACs.

The Attorney General mischaracterizes this Court's passing reference to unlimited contributions to independent expenditure PACs in *1A Auto*. Def. Br. 36. To demonstrate that the state law prohibiting corporate contributions to candidates was "not 'a complete ban' on

corporate political expression," this Court provided examples of other avenues of expression available to corporations at the time, including "unlimited independent expenditures as well as unlimited contributions to independent expenditure PACs." *1A Auto*, 480 Mass. at 425-26, 437. The Attorney General notes that this Court deemed such contributions a "significant form of political expression." Def. Br. 36 (quoting *id.* at 437).

But the Attorney General proves too much. Contributions to candidates *also* constitute a "significant form of political expression"—yet they may be limited to prevent corruption. The mere (and uncontested) fact that contributions constitute a form of expression, and therefore donors have some speech *interest* in making contributions, is just the beginning of the analysis. *See Associated Indus.*, 418 Mass. at 288-89, 291 (noting that petition limiting certain forms of political spending "would burden . . . expressive activity protected by art. 16," but an "initiative proposal is not 'obviously improper' simply because it would place some restrictions on free speech," if these restrictions are justified "by a compelling State interest in the imposition of the restriction"). The ultimate question is whether the limits are closely drawn to "the government's interest in preventing corruption or the appearance of corruption." *1A Auto*, 480 Mass. at 432.

Nothing in *1A Auto* supports the Attorney General's unfounded claim that, because contributions to independent expenditure PACs were a form of unregulated political expression when *1A Auto* was decided, that any future limitation on those contributions would be unconstitutional. Indeed, *1A Auto* itself rejected a strikingly similar

argument. There, the challengers argued that Massachusetts' restriction on corporate contributions to candidates was unconstitutional despite *FEC v. Beaumont*, 539 U.S. 146 (2003), which upheld a federal law limiting corporate contributions to candidates. They tried to distinguish *Beaumont* because there the Supreme Court had given, as an example of other authorized avenues of corporate political spending, federal law permitting corporations to establish their own political action committees, which are not permitted in Massachusetts. *See 1A Auto*, 480 Mass. at 436 (citing *Beaumont*, 539 U.S. at 163).

This Court flatly rejected this reasoning: "[T]he [Supreme] Court noted the existence of a corporate-controlled 'PAC option,' not to suggest that it was a constitutionally mandated minimum, but rather to illustrate that corporations still had meaningful opportunities to participate in the political process." *1A Auto*, 480 Mass. at 436.

The same is true here. In *1A Auto*, this Court referred to unlimited contributions *not* as a constitutionally mandated minimum, but as an example of one way that corporations "still had meaningful opportunities to participate in the political process." *Id.*

The petition does not foreclose all meaningful opportunities for political speech. The restriction upheld in *1A Auto*—a complete *ban* on corporate contributions to candidates—is a far greater restriction on the political expression of corporations than the proposed limit here. In *1A Auto*, the Court reasoned that the law was valid because it was not a "'complete ban' on corporate political expression,'" where other avenues remained open. *Id.* So *a fortiori*, a much narrower restriction—a $5,000

cap on contributions to independent expenditure PACs—is valid where it leaves open ample other avenues of political expression, including: (1) unlimited independent expenditures, (2) contributions to independent expenditure PACs up to $5,000 per year, and, (3) for people and non-corporate entities, direct contributions to candidates.

Chief Justice Budd's *1A Auto* concurrence *supports* contribution limits. *Cf.* Def. Br. 42. That concurrence acknowledged that "entities have a First Amendment right to make unlimited independent expenditures." *1A Auto*, 480 Mass. at 449. Again, the Attorney General proves too much. Candidates *also* have a First Amendment right to make unlimited expenditures—yet *monetary contributions to* candidates may be limited (despite their political expression aspect) because they "present a special risk of quid pro quo corruption." *Id.* at 433. Just because the *recipient* of a contribution may make unlimited *expenditures* does not mean that any *donor* has a constitutional right to make unlimited *contributions*.

2. The other Massachusetts cases the Attorney General cites are inapposite.

Bowe v. Secretary of the Commonwealth, 320 Mass. 230 (1946), as the Attorney General concedes, involved expenditures, not contributions. *See* Def. Br. 33 (acknowledging that petition in *Bowe* "barred labor union from *expending funds* to favor or oppose a political candidate") (emphasis added); *see also Bowe*, 320 Mass. at 252 (stressing that petition left labor unions "[d]eprived of the right to pay any sum of money for the rental of a hall in which to hold a public rally or debate, or for printing or circulating pamphlets, or for advertising in

newspapers, or for buying radio time"—all classic expenditures). The petition here does not limit expenditures, only contributions.

Opinion of the Justices, 418 Mass. 1201 (1994), involved a bill that would have placed an *aggregate* limit on total contributions that candidates can receive. But the petition here places no aggregate limit on total contributions that an independent expenditure PAC could receive, nor that a donor could contribute.

B. The proposed contribution limit serves the compelling state interest in preventing quid pro quo corruption and its appearance.

The lack of any precedent from this Court or the U.S. Supreme Court invalidating limits on contributions to independent expenditure PACs should be dispositive under the "reasonably clear" standard. Furthermore, the Herrmann Plaintiffs' analysis relies on precedent of this Court and the Supreme Court, which the Attorney General largely ignores, in demonstrating that the contribution limit would help prevent quid pro quo corruption and its appearance. Instead, the Attorney General asks this Court to determine that nonbinding, out-of-circuit lower federal court cases that say nothing about art. 16 (and, as Plaintiffs have argued without substantive response from the Attorney General, misconstrue the First Amendment) somehow dictate the result under art. 16 with reasonable clarity.

As discussed in Plaintiffs' opening brief, the wellspring of these cases—*SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)—rests on a flawed syllogism purporting to derive from *Citizens United v. FEC*, 558 U.S. 310 (2010). *SpeechNow* held that since money *spent by* an independent expenditure PAC cannot corrupt (e.g., because the PAC's

media buyer does not coordinate advertising or other spending with the candidate's campaign plans), therefore money *contributed to* such a PAC cannot be part of a quid pro quo transaction. *See id.* at 694-95; Pl. Br. 46, 51. The other lower federal court cases cited by the Attorney General, Def. Br. 39-41, just repeat this syllogism.

But nothing prevents *contributors* from "coordinating" quid (money) and quo (official acts) with candidates. That creates significant risk that contributors and candidates can reach corrupt quid pro quo agreements, even if they never discuss campaign advertisements. Contributions to a PAC that makes such expenditures (just like contributions to *any* third party, even charities) can still constitute the quid in a quid pro quo corrupt transaction. *See* Pl. Br. 51-55.

The Attorney General does not engage with the Supreme Court and Massachusetts cases that consistently have upheld contribution limits, including after *Citizens United,* and involving third-party recipients that spend money without coordination, *see* Pl. Br. 43-45, 55-56; bribery law recognizing that donations to third parties, including political committees outside candidate control, can form the unlawful "quid" in a quid pro quo transaction, *see* Pl. Br. 52-53; evidence of state and federal criminal quid pro quo bribery cases involving contributions to third-party recipients, including to an independent expenditure PAC, *see* Pl. Br. 53-55; demonstration of the value that candidates place on large contributions to independent expenditure PACs, rendering such contributions plausible as "quid," *see* Pl. Br. 57-59; or evidence of the *appearance* of quid pro quo corruption, *see* Pl. Br. 59-62.

Instead, the Attorney General relies on a series of 2010-13 lower federal court cases, all decided before the practical rise of independent expenditure PACs. Since 2013, facts on the ground have changed the relative value that contributions to independent expenditure PACs have to candidates, created new and serious risk of quid pro quo corruption, and created the appearance of quid pro quo corruption. *See* Pl. Br. 57-59; *cf. 1A Auto*, 480 Mass. at 435 ("[W]e need not insist on evidence of *actual* corruption when the government also has an important interest in preventing the *appearance* of corruption.") (emphases in original).

The Attorney General wrongly characterizes Plaintiffs' arguments as a discussion of the "policy merits of [Plaintiffs'] proposed law." Def. Br. 34. But the petition's relationship to "the 'sufficiently important interest' in preventing quid pro quo corruption and its appearance, and in preventing the circumvention of individual contribution limits," *1A Auto*, 480 Mass. at 436, is not "policy merits"—it is the central constitutional question.

The Attorney General also wrongly asserts that Plaintiffs' argument is based on "conjecture about what a future U.S. Supreme Court might do." Def. Br. 41. But this Court and the Supreme Court have repeatedly confirmed that "contribution limits are 'an accepted means to prevent quid pro quo corruption.'" *1A Auto*, 480 Mass. at 433 (quoting *Citizens United*, 558 U.S. at 359)). In contrast, the Attorney General's argument rests almost entirely on decisions of lower federal courts, which cannot bind this Court unless and until they are affirmed by the U.S. Supreme Court. Thus, the party relying on conjectures

about a future U.S. Supreme Court is not the Herrmann Plaintiffs—it is the Attorney General.

C. Originalism supports the regulation of independent expenditure PACs

The Attorney General cites a line of authority, beginning with *SpeechNow*, that concludes that the First Amendment bars the regulation of contributions to independent expenditure PACs. Def. Br. 38-40.

In *none* of those cases did the parties defending the regulation invoke arguments grounded in originalism.

That fact is fundamental to this Court's judgment about whether the First Amendment would be held to bar the regulation of independent expenditure PACs. The Attorney General based her decision upon a prediction. That prediction was that the Supreme Court would follow the decisions of these lower courts to conclude that contributions to independent expenditure PACs could not be limited because of the First Amendment.

But the Supreme Court is different from these lower courts in one critical way: Over the past decade, the Supreme Court has become dominated by Justices who purport to follow principles of originalism. Therefore, in predicting how the Supreme Court would resolve a question that it has not yet addressed, it is essential that this Court consider how those originalists would answer an argument grounded in originalism.

The Baxter Plaintiffs have offered two reasons to believe that originalists on the Supreme Court would conclude that the First Amendment does not bar the regulation of contributions to independent

expenditure PACs: First, following Justice Thomas, that the First Amendment as originally understood would plainly permit the regulation of contributions to independent expenditure PACs. Pl. Br. 63-66. Second, applying the standard announced in *Buckley v. Valeo,* 424 U.S. 1 (1976), in a manner consistent with originalist principles, that the "corruption" that might be targeted by campaign finance regulations would include "dependence corruption" as well as "quid pro quo corruption." Pl. Br. 66-74. *Cf. 1A Auto*, 480 Mass. at 443-48 (Budd, C.J., concurring) (describing principal-agency relationship similar to "dependence corruption" framework).

The Baxter Plaintiffs have advanced this argument not because they believe that this Court must adopt principles of originalism in interpreting "freedom of speech": While federal law binds this Court, the particular judicial philosophies of individual justices do not.

Nor have the Baxter Plaintiffs advanced this argument because they are asking this Court to conclude that these arguments of originalism would certainly be accepted by or acted upon by the originalists on the Supreme Court: No doubt, those Justices may or may not apply their principles consistently.

Instead, the Baxter Plaintiffs believe that these arguments are relevant to the decision of this Court because they demonstrate that it is not clear that the Supreme Court would adopt the reasoning of the lower courts that have banned the regulation of contributions to independent expenditure PACs. Or more pointedly, they demonstrate that if the originalist Justices applied their principles consistently, then a

compound majority of the Supreme Court would uphold the regulation of contributions to independent expenditure PACs.

This fact demonstrates again why this Court should not accept the prediction of the Attorney General that lower federal court decisions banning the regulation of independent expenditure PACs would be adopted by the United States Supreme Court. Without that prediction, the only question for this Court is whether its own jurisprudence would be more protective of free speech interests than the Supreme Court's.

To answer that question, following the reasoning in *1A Auto*, this Court would need to weigh the interest of contributors to independent expenditure PACs—to have the freedom to contribute more than $5,000 a year—against the interests of the citizens of Massachusetts—to restrict both quid pro quo corruption and dependence corruption. *See 1A Auto,* 480 Mass. at 428.

Yet again, that weighing is plainly inappropriate in the context of this Complaint. Under the standard articulated in *Associated Indus.*, 418 Mass. at 287—whether it is "reasonably clear" that the petition is "inconsistent" with "freedom of speech"—the only question for this Court is whether "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 (not "reasonably clear" when "facts might show…"). Certainly, at the very least, Plaintiffs have established that "facts might show" the initiative is constitutional. Thus, at this stage, it was plainly wrong for the Attorney General to deny the legislature and voters the opportunity to vote on the initiative.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court declare that they are not required to deliver the "remainder of the required signatures" required by art. 48 to the Secretary until the First Wednesday of December 2023, and that the Attorney General erred in refusing to certify the petition as compliant with art. 48; and order the Attorney General to certify the petition.

Respectfully Submitted,

/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
rfein@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org

Attorneys for Plaintiffs-Appellants Robert Herrmann, Lars Mikkelsen, Joshua Redstone, and Graeme Sephton

Respectfully Submitted,

/s/ Lawrence Lessig
Lawrence Lessig (#710593)
20 Amory St.
Brookline MA 02446
Tel.: (617) 935-3985
lessig@lessig.law

Thomas O. Bean (#548072)
Verrill Dana, LLP
One Federal Street—20th Floor
Boston, MA 02110
Tel.: (617) 309-2600
tbean@verrill-law.com

Attorneys for Plaintiffs-Appellants David C. Baxter, Mary Blaine Campbell, Catherine Brun-Cottan, Georges Brun-Cottan, Leigh Chinitz, Bettina Neuefeind, and Leo Sprecher

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(13) (addendum); Mass. R. App. 16(e) (references to the record); Mass. R. App. 18 (appendix to briefs); Mass. R. App. P. 20 (form of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction). I further certify that the foregoing brief complies with the applicable length limitations in Mass. R. App. 20, as modified by this Court's December 19, 2022, Order granting Plaintiffs-Appellants' leave to file a reply brief not exceeding 7,000 words, because it is produced in the proportionally spaced font Century Schoolbook, font size 14, produced in Microsoft Word version 16.69.1, and contains 6, 309 words.

/s/ Ronald A. Fein
Ronald A. Fein

ADDENDUM TABLE OF CONTENTS

Massachusetts Constitutional Provisions

Art. 16 of the Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution

Article XVI. The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Art. 48, The Initiative, II, of the Amendments to the Massachusetts Constitution, as amended by art. 74 of the Amendments to the Massachusetts Constitution

II. Initiative Petitions

Section 1. Contents. An initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure, which is proposed by the petition.

Section 2. Excluded Matters. - No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the eighteenth amendment of the constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

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: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

Section 3. Mode of Originating. - Such 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 that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a fair, concise summary, as determined by the attorney-general, of the proposed measure as such summary will appear on the ballot together with the names and

residences of the first ten signers. 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.

Section 4. Transmission to the General Court. - If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall, upon the assembling of the general court, transmit it to the clerk of the house of representatives, and the proposed measure shall then be deemed to be introduced and pending.

Art. 74, section 1, of the Amendments to the Massachusetts Constitution

Section 1. Article XLVIII of the amendments to the constitution is hereby amended by striking out section three, under the heading "THE INITIATIVE. III. *Initiative Petitions.* ", and inserting in place thereof the following: -

Section 3. *Mode of Originating.* - Such 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 that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers,

and shall print at the top of each blank a fair, concise summary, as determined by the attorney-general, of the proposed measure as such summary will appear on the ballot together with the names and residences of the first ten signers. 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.

CERTIFICATE OF SERVICE

I, Ronald A. Fein, hereby certify that on this 31st day of January 2023, I caused a true copy of the foregoing Reply Brief of Plaintiffs-Appellants to be served by email on the following counsel for the Defendants:

Anne Sterman
Adam Hornstine
Assistant Attorneys General
Office of the Attorney General
One Ashburton Place
Boston MA 02108

/s/ Ronald A. Fein
Ronald A. Fein