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September 4, 2013

Nicholas J. Bokron
Terra Friedrichs
PO Box 74
Nahant, MA 01908

Re: Initiative Petition No. 13-01: Constitutional Amendment to Declare that
"Corporations are not people, money is not speech"

Dear Mr. Bokron and Ms. Friedrichs:

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 of this year.

I regret that we are unable to certify that the proposed constitutional amendment complies with the requirements of Article 48, the Initiative, Part 2, Sections 2 and 3. Section 2 states in pertinent part: "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 trial by jury; protection from unreasonable search . . . freedom of speech . . . and the right of peaceable assembly." As explained below, the proposed amendment is inconsistent with these rights, both because (1) the Supreme Judicial Court has recognized that corporations enjoy such rights and this amendment would take them away from corporations, and (2) the proposed amendment's grant of unfettered authority to the Legislature to regulate raising and spending money on political campaigns is inconsistent with the free speech and free association ("peaceable assembly") rights of citizens, as well as corporations and other entities such as labor unions.

Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards; it does not reflect any policy views the Attorney General may have on the merits of the proposed constitutional amendment. Below, we set forth the provisions of the proposed amendment and then explain why it cannot be certified under art. 48.

The proposed amendment provides as follows:



Section 1. Corporations are not people and may be regulated. The rights afforded to the human inhabitants of the Commonwealth, under this Constitution, are not applicable to corporations, limited liability companies or any other corporate entity. Any references to persons, citizens, inhabitants, subjects, men, people, individuals or like terms in this Constitution, are not to be construed in any way to be referring to a corporation, limited liability company or other corporate entities. Corporations, limited liability companies and any other corporate entity shall do business in this state under the regulation of laws passed by the legislature which shall set the rights of such entities to do business to promote the common good and strengthen the social compact of this Commonwealth.

Section 2. Money is not free speech and may be regulated. To protect our political process and the functioning of government to serve in the best interests of the citizens of the Commonwealth, money shall not be considered free speech. The legislature shall have the power to regulate the raising and spending of money and in-kind equivalents for any primary or election of a public official and for ballot measures. This shall include regulation of any advertising for or against any candidate in a primary or election for public office and any ballot measure.

Section 3. Nothing contained in this Amendment shall be construed to abridge the freedom of the press.

A. Section 1 and Corporations' Protections under the Declaration of Rights

First, many of the specific rights set forth in the Declaration of Rights that are excluded from the art. 48 initiative process, but that Section 1 of the proposed amendment would declare that corporations do not possess, have been recognized by the Supreme Judicial Court as applicable to corporations. These include:

1. Protection against takings of property without compensation. See Carney v. Attorney General, 451 Mass. 803, 806-07, 814-17 (2008) (analyzing whether Attorney General properly certified that initiative petition to ban dog racing was not excluded as resulting in an uncompensated "taking of property" in the form of two corporations' licenses to conduct dog racing); Yankee Atomic Elec. Co. v. Secretary of the Commonwealth, 403 Mass. 203 (1988) (analyzing whether Attorney General properly certified that initiative law banning generation of radioactive waste would not "take" property without compensation, despite utilities' claim that it would take their property rights in nuclear power plants); Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 554 (1942) (valid contract between Commonwealth and corporation "is 'property' within the protection of art. 10 of the Declaration of Rights"). See also M.B. Claff, Inc. v. Massachusetts Bay Transp. Authority, 59 Mass. App. Ct. 669 (2003) (plaintiff was entitled, under state and federal constitutional provisions requiring just

compensation for taking of private property, to interest on award of damages for taking, but plaintiff had not properly raised challenge to interest rate in this case), aff'd, 441 Mass. 596 (2004).

2. Right to jury trial. See Rosati v. Boston Pipe Covering, Inc., 434 Mass. 349, 350 (2001) (“the defendant was entitled to a trial by jury”).
3. Protection against unreasonable searches. See Commonwealth v. Krisco Corp., 421 Mass. 37 (1995) (affirming allowance of defendant corporation’s and its owner’s motions to suppress, under 4th Amendment and Mass. Const. art. 14, fruits of unlawful search).
4. Free speech and associational rights. See Associated Industries of Massachusetts v. Attorney General, 418 Mass. 279, 288-89 (1994) (law proposed by initiative petition “would burden both corporate expressive activity protected by art. 16 and corporate associational rights protected by art. 19 of the Declaration of Rights”); Cabaret Enterprises, Inc. v. Alcoholic Beverages Control Comm'n, 393 Mass. 13, 13-14 (1984) (in nude-dancing case, “revok[ing] the plaintiffs' all-alcoholic beverages licenses was unconstitutional under art. 16”); First Nat. Bank of Boston v. Attorney General, 362 Mass. 570, 586 (1972) (recognizing that corporations, like labor unions, had rights of freedom of speech, freedom of the press, and the right of the people to peaceably assemble, under arts. 16 and 19 of Declaration of Rights).

Second, although art 48 refers to the excluded rights as "rights of the individual," those appear to have been words of description, not limitation. We are unable to conclude that the phrase was intended to bar only those initiative petitions that were inconsistent with such rights insofar as they applied to individuals, and not those initiative petitions that were inconsistent with such rights insofar as they applied to other legal entities such as corporations. The text of art. 48 uses the phrase "rights of the individual" in a descriptive sense; had the phrase been intended as one of limitation, it would more likely have said "rights insofar as they apply to individuals," or words to that effect. We find nothing in the Debates in the Constitutional Convention of 1917-18, the record of the Constitutional Convention that drafted art. 48, indicating that there was any intention to restrict the scope of the protected rights, i.e., to protect them only insofar as they applied to individuals.

Consistent with this understanding, the Supreme Judicial Court has repeatedly assumed that the listed constitutional rights, insofar as they are possessed by corporations, cannot be abridged by initiative petition. See Carney, 451 Mass. at 806-07, 814-17 (analyzing whether Attorney General properly certified that initiative petition to ban dog racing was not excluded as resulting in an uncompensated “taking of property” in the form of two corporations’ licenses to conduct dog racing); Associated Industries of Massachusetts, 418 Mass. at 288-89) (law proposed by initiative petition “would burden both corporate expressive activity protected by art. 16 and corporate associational rights protected by art. 19 of the Declaration of Rights”); Yankee

Atomic Elec. Co., 403 Mass. 203 (analyzing whether Attorney General properly certified that initiative law banning generation of radioactive waste would not "take" property without compensation, despite utilities' claim that it would take their property rights in nuclear power plants).

Third and finally, we cannot agree with the proponents' suggestion that G.L. c. 155, § 3, already makes corporations' rights so completely subject to legislative regulation that corporations effectively have no state constitutional rights in the first place, making the proposed constitutional amendment consistent with and merely declaratory of existing law regarding corporate rights. General Laws c. 155, § 3, provides in pertinent part: "Every act of incorporation passed since March eleventh, eighteen hundred and thirty-one, shall be subject to amendment, alteration or repeal by the general court. All corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them." We find this argument unpersuasive, both because (1) the statute does not apply to all corporations or other entities that could claim rights under the Declaration of Rights; and (2) even where it applies, the statute has not been interpreted to deprive corporations of all state constitutional protections.

As a threshold matter, the statute has no effect on corporations organized under the laws of other states that may be doing business in, or wish to exercise their constitutional rights in, the Commonwealth. Those corporations have protections under the Declaration of Rights that the proposed constitutional amendment would destroy. Similarly, it is unclear whether G.L. c. 155, § 3, which by its terms applies only to "corporations," has any limiting effect on the rights of "limited liability companies or any other corporate entit[ies]." Such limited liability companies and other corporate entities thus may have protections under the Declaration of Rights that the proposed constitutional amendment would destroy.

In any event, even where it applies, G.L. c. 155, § 3, does not give the Legislature complete authority to alter the rights of corporations. The Legislature's power to alter corporate rights and duties under G.L. c. 155, § 3, and its statutory predecessors dating back to the 19th century, is not unlimited. Commonwealth v. Essex Co., 13 Gray (79 Mass.) 239, 253 (1859); see Opinion of the Justices, 261 Mass. 556, 595 (1927). The statute, and a related constitutional provision, Mass. Const. amend. art. 59,¹ "permit the amendment within a wide range of such corporate charters as are subject to them, at least to the extent of such amendments as will not defeat or substantially impair the object of the grant, or any rights which have vested under it." Opinion of the Justices, 322 Mass. 755, 762 (1948) (internal quotation omitted; emphasis added); see Opinion of the Justices, 323 Mass. 759, 762 (1948) (same). See also Opinion of the Justices, 334 Mass. 721, 736-37 (1956) (Legislature's powers under amend. art. 59 are not unlimited). "By virtue of the reserved right to amend and repeal charters of corporations, the General Court may change the terms of such a charter provided there is no violation of other constitutional

¹ Amendment art. 59 provides: "Every charter, franchise or act of incorporation shall forever remain subject to revocation and amendment."

guarantees. The constitutional provisions prohibiting the taking of property without compensation, or without due process of law, stand firm against impairment by such amendment and repeal.” Opinion of the Justices, 300 Mass. 607, 612 (1938). In sum, neither G.L. c. 155, § 3, nor amend. art. 59, empowers the Legislature to limit corporations’ rights to such an extent that the constitutional amendment proposed by Petition No. 13-01 would not further deprive corporations of protections under the Declaration of Rights.

B. Section 2 and the Free Speech and Associational Rights of Individuals, Labor Unions, and Corporations under the Declaration of Rights

The amendment proposed by Petition No. 13-01 is also excluded from the initiative process because its Section 2 is inconsistent with free speech and associational rights under the Declaration of Rights. Section 2 declares that “money shall not be considered free speech” and that “[t]he legislature shall have the power to regulate the raising and spending of money and in-kind equivalents for any primary or election of a public official and for ballot measures.” This provision is inconsistent with the art. 16 free speech and art. 19 free associational rights of individuals and groups such as labor unions, and the Supreme Judicial Court has held that a proposed law prohibiting union expenditures on political campaigns was excluded from the art. 48 initiative process. Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 249-52 (1946). As the Bowe court stated,

Individuals seldom impress their views upon the electorate without organization. They have a right to organize into parties, and even into what are called ‘pressure groups,’ for the purpose of advancing causes in which they believe. They have a right to engage in printing and circulating their views, and in advocating their cause in public assemblies and over the radio. All this costs money, and if all use of money were to be denied them the result would be to abridge even to the vanishing point any effective freedom of speech, liberty of the press, and right of peaceable assembly.

Bowe, 320 Mass. at 252.

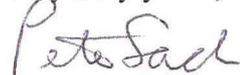
The court has also recognized that corporations, like labor unions (and individuals), have rights of freedom of speech and freedom of assembly and association under arts. 16 and 19 of Declaration of Rights. First Nat. Bank of Boston v. Attorney General, 362 Mass. 570, 586 (1972). The court has further held that a law restricting corporations’ expenditures on ballot questions would be consistent with art. 16 free speech guarantees and art. 19 free association guarantees only if the law were “justified by a compelling State interest” and were “narrowly tailored” to achieve that interest. Associated Industries of Massachusetts v. Attorney General, 418 Mass. 279, 288-89, 291 (1994); see also First Nat. Bank of Boston, 362 Mass. at 590 (same).

The Legislature certainly has the power to regulate contributions to and expenditures on political campaigns, and it has exercised that power in G.L. c. 55, the Commonwealth’s campaign finance laws. Those laws must, and presumptively do, satisfy standards such as those stated above and in Opinion of the Justices, 418 Mass. 1201, 1207, 1212 (1994) (citing standards

set forth in Buckley v. Valeo, 424 U.S. 1 (1976), for evaluating constitutionality of contribution and expenditure limitations). This proposed amendment would appear to allow the Legislature to enact laws that restricted individual, labor union, and corporate expenditures on political campaigns without having to meet the “compelling interest/narrowly tailored” standard. And the proposed amendment would appear to allow the Legislature to enact laws that restricted political contributions without meeting the requirement—recognized under the First Amendment in Buckley, 424 U.S. at 26, and presumably applicable under art. 16 as well--that such limits are permissible if “the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.” Conferring complete power on the Legislature to regulate political contributions and expenditures would lessen these art.16 protections and would thus be “inconsistent with” art. 16.

For the foregoing reasons, we are unable to certify Petition 13-01 as meeting the requirements of art. 48.

Very truly yours,



Peter Sacks
State Solicitor
617-963-2064

cc: William Francis Galvin, Secretary of the Commonwealth