



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY  
ATTORNEY GENERAL

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

September 2, 2015

Nicholas J. Bokron  
P.O. Box 74  
Nahant, MA 01908

Re: Initiative Petition Nos. 15-03, 15-04, 15-13, 15-14, 15-15, 15-16

Dear Mr. Bokron:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petitions, which were 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 amendments comply with Article 48. This is a matter that the Legislature may address through a constitutional amendment, but that the Constitution does not allow through the initiative petition process. Please understand that our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed constitutional amendments. Indeed, the Office of the Attorney General joined an *amicus* brief in the Citizens United case and, since that case was decided in 2010, has urged the passage of a federal constitutional amendment to undo its unfortunate effects on our democratic process.

Below, we summarize the proposed amendments and then explain why they cannot be certified under 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 amendments are inconsistent with these rights because the first section of all six proposed amendments would impinge on these rights that the Supreme Judicial Court has recognized pertain to corporations, and the second section of two of the proposed amendments is inconsistent with the free speech rights of natural persons as well as other entities.

Although they vary in their text, the first sections of all six proposed amendments declare

that corporations are not people and may be regulated. They further declare that references to persons, citizens, inhabitants, subjects, men, women, people, individuals, or the like shall not be construed to refer to corporations, corporate entities, and artificial persons.<sup>1</sup> And they state that corporations, corporate entities, and artificial persons shall do business under laws passed by the state Legislature to promote the common good and strengthen the social compact of the Commonwealth.

With some variation, the second sections of Petitions 15-04, 15-14, 15-15, and 15-16 provide that the Legislature may regulate and set reasonable limits on political contributions and expenditures and shall require that permissible contributions and expenditures be publicly disclosed in advance of elections.<sup>2</sup> The second sections of Petitions 15-03 and 15-13 go further, declaring that money is not free speech and authorizing the Legislature, without any stated limitations, to regulate the raising and spending of money for any candidates and ballot measures, including money spent on advertising.

The third sections of all six proposed amendments declare that the amendments shall not be construed to abridge freedom of the press.

A. Petition Nos. 15-03, 15-04, 15-13, 15-14, 15-15, and 15-16;  
Corporations' Protections under the Declaration of Rights

Section 1 of all six of the petitions—in particular, the provision stating that the rights afforded to human beings under the constitution do not apply to corporate entities—would violate art. 48 by depriving corporations of many of the specific constitutional rights set forth therein as excluded matters. This conclusion is consistent with the Attorney General's 2013 decision not to certify Petition No. 13-01, which was substantially similar to these six petitions. This Office has been asked to reconsider the position it took in declining to certify Petition No. 13-01 and has reviewed the matter carefully. For the reasons set forth below, even after this close consideration, this Office must decline to certify these petitions.

First, many of the specific rights set forth in the Declaration of Rights that are excluded from the initiative process (and that Section 1 of all six proposed amendments 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 Commonwealth v. Boston Advertising Co., 188 Mass. 348, 352-353 (1905) (application of law prohibiting business from posting advertising sign on its property constituted a taking requiring compensation under art. 10); Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 554 (1942) (contract between Commonwealth and corporation “is ‘property’ within the protection of art. 10 of the Declaration of

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<sup>1</sup> Section 1 of Petitions 15-03, 15-04, and 15-15 include the term “artificial person.”

<sup>2</sup> Section 2 of Petitions 15-15 and 15-16 include a reference to late donations.

- Rights”). See also M.B. Claff, Inc. v. Massachusetts Bay Transp. Authority, 59 Mass. App. Ct. 669 (2003) (constitutional provisions requiring just compensation for taking of private property entitled plaintiff to interest on award of damages for taking), 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 motions to suppress 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) (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 terms appear to have been words of description, not limitation. 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. Indeed, the formal title of the entire Declaration of Rights is “A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts,” yet the Supreme Judicial Court has never suggested that the use of the term “inhabitants” means that the Declaration is strictly limited to natural persons (domiciled in Massachusetts), as the full title might suggest. Rather, as set forth above, the court has held that a number of the provisions of the Declaration of Rights do apply to corporations as well as to natural persons and has done so without pausing to inquire whether such corporations “inhabit” the Commonwealth.

We must decline the proponent’s request to restrict the phrase “of the individual” to a natural person only. The Supreme Judicial Court directs us to consider the historical context in determining the phrase’s meaning. The words of a constitutional amendment “‘are to be given their natural and obvious sense according to common and approved usage at the time of its adoption,’ although the historical context should not ‘control[ ] the plain meaning of the language.’” Schulman v. Att’y Gen., 447 Mass. 189, 191 (2006) (citations omitted). “A constitutional amendment should be interpreted in light of the conditions under which it was framed, the ends which it was designed to accomplish, the benefits which it was expected to confer and the evils which it was hoped to remedy.” Mazzone v. Att’y Gen., 432 Mass. 515, 526 (2000) (citations omitted).

We find nothing in the Debates in the Constitutional Convention of 1917-18 indicating any intention to restrict the scope of the protected rights or to protect them only insofar as they applied to individuals. Furthermore, we cannot determine that the compromise language of art. 48 indicated the framers' intent to narrow the rights excluded from art. 48 petitions only to rights of natural persons. The initial proposed text of art. 48 precluded more broadly any initiative petition "annulling, abrogating or repealing the provisions of the Declaration of Rights," but was subsequently narrowed to the existing language excluding initiative petitions that are inconsistent with "the following rights of the individual." Nothing in the debates, however, shows that the drafters distinguished between the rights of natural persons and artificial entities in reaching this compromise.

Third, it is not apparent that the Constitution uses the term "individual" to refer only to natural persons but not to corporations. Many of the rights set forth in the Declaration of Rights—although expressly conferred only on "men," "inhabitants," "individuals," "citizens," "persons," or "subjects"—are widely understood to apply equally to corporations. As but one example, art. 10 of the Declaration of Rights provides that "[w]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," but the Supreme Judicial Court long ago held that Article 10 prohibits the taking of a business's property for public use without compensation. See Connecticut River Co. v. Franklin County Com'rs, 127 Mass. 50, 52, 57 (1879) (expressly applying to corporations the Article 10 requirement of payment of compensation when property "of any individual" is taken for public use); Commonwealth v. Boston Advertising Co., 188 Mass. 348, 352-353 (1905) (law prohibiting advertising signs on a business's private property "obnoxious to the provisions of our Constitution. Declaration of Rights, art. 10"). Therefore, "rights of the individual," as used in art. 48, is not limited to human individuals, just as the rights of the individual as that term is used elsewhere in the Declaration of Rights are not limited to the rights of human individuals.

Fourth, several SJC cases have assumed that art. 48's excluded matters pertain to corporations and other non-individuals. See, e.g., Abdow v. Attorney General, 468 Mass. 478, 482 (2014) (casino license applicants and possible applicants potentially affected by proposed law include MGM Springfield and Mashpee Wampanoag Tribe); Carney v. Attorney General, 451 Mass. 803, 806-07 (2008) (greyhound racetrack operators potentially affected by proposed law include Massasoit Greyhound Association, Inc., and Taunton Dog Track, Inc.); Associated Indus. of Massachusetts v. Attorney General, 418 Mass. 279, 283 (1994) (considering whether proposed law restricting use of corporate funds to influence ballot questions would impermissibly infringe on freedom of the press, free speech, and right to peaceably assemble). Although the SJC has not expressly held that the excluded matters in art. 48 apply to rights of corporations as well as to rights of individuals, it is notable that neither the Court nor any party has thought it relevant to raise a possible distinction in any of these cases.

Fifth, the SJC has conclusively held that certain non-human entities possess rights of free speech, liberty of the press, and peaceable assembly that may not be abridged by an art. 48 initiative petition. In Bowe v. Secretary of the Commonwealth, the SJC held that an initiative

petition that would restrict the political activities of labor unions was “inconsistent with the right of the individual as declared in the declaration of rights.” 320 Mass. 230, 249 (1946) (internal quotations omitted). In so holding, the SJC explained that individuals often must “organize into parties, and even into what are called ‘pressure groups’ for the purpose of advancing causes in which they believe.” Id. at 252. The Court thus applied the art. 48 exclusion to initiative petitions that would have restricted rights of associations of individuals, such as labor unions. Id. at 251-252. Although the rights of corporations were not at issue in Bowe, the SJC remarked that liberty of the press “is enjoyed, not only by individuals, but also by associations of individuals such as labor unions... and even by corporations.” Id. at 251. Applying Bowe, it is evident that art. 48 excludes initiative petitions that would place restrictions on the rights of entities, not merely those that place restrictions on natural persons.

For all these reasons, due to the operation of Section 1 of each of these six petitions, we are unable to certify that the petitions contain only subjects that are not excluded from the popular initiative, as required by Article 48, the Initiative, Part 2, Sections 2 and 3.

B. Petition Nos. 15-03 and 15-13; Free Speech and Associational Rights of Individuals and Other Entities

The amendments proposed by Petition Nos. 15-03 and 15-13 are also excluded from the initiative process because Section 2 in each of them is inconsistent with free speech and associational rights under the Declaration of Rights. Both proposed amendments declare that “money is not free speech,” “money shall not be considered free speech,” and that “[t]he Massachusetts General Court 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.” These provisions are inconsistent with the art. 16 free speech rights and the 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, 320 Mass. at 249-52. 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.

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, 362 Mass. at 586. 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 Indus, 418 Mass. at 288-89, 291; 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). These proposed amendments, however, seem to allow the Legislature to enact laws restricting individual, labor union, and corporate expenditures on political campaigns without having to meet the "compelling interest/narrowly tailored" standard. And the proposed amendments seem to allow the Legislature to enact laws that restrict 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 only 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 Petitions 15-03, 15-04, 15-13, 15-14, 15-15, and 15-16 as meeting the requirements of art. 48.

Very truly yours,



Juliana deHaan Rice  
Deputy Chief, Government Bureau  
617-963-2583

cc: William Francis Galvin, Secretary of the Commonwealth