



THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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Re: Petition No. 26-03: An Act to Limit Artificial-Person Powers

Dear Mr. Henderson:

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 it due to the operation of Article 48, Part II, Section 2, Paragraph 3, which excludes initiative petitions that are "inconsistent with ... freedom of speech ... and the right of peaceable assembly."

Description of Petition

The proposed law would limit the powers of corporations, limited liability companies, limited partnerships, and nonprofit corporations by barring them from engaging in election activity and ballot-question activity. Election activity is defined by the proposed law as any contribution or payment of money or anything of value to support or oppose a candidate for public office, a political committee, or a political party. Ballot-question activity is defined by the proposed law as any contribution or payment of money or anything of value to favor or oppose a specific question or questions submitted to voters.

The proposed law would limit the powers of corporations, limited liability companies, limited partnerships, and nonprofit corporations by amending those sections of Chapters 109, 156B, 156C, 156D, and 180 of the General Laws specifying the powers held by these entities. The amendments would (1) exclude election activity and ballot-question activity from the lawful powers of these entities, (2) state that any act by these entities that constitutes election activity or ballot-question activity has no legal force or effect, and (3) void any provision of the entities'



articles of incorporation, bylaws, or other organizational documents that gives the entities the power to engage in election activity or ballot-question activity.

The proposed law would allow political committees organized as non-profit corporations to engage in election activity and ballot-question activity, but only if the political committee exists only for those purposes. The proposed law also excludes from election activity and ballot-question activity news stories, commentaries or editorials distributed through broadcasting stations or publications unless the broadcasting station or publication is owned by a candidate for public office, a political committee, or a political party.

The proposed law would go into effect on July 1, 2029.

The Petition Is Inconsistent with the Rights of Free Speech and Peaceable Assembly

Article 48, Part II, 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 and the right of peaceable assembly. As explained below, the proposed law impinges on these rights protected by the state constitution. *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. The U.S. Supreme Court and the Supreme Judicial Court have defined the parameters for corporate¹ spending on elections and ballot questions through a series of decisions over the last several decades. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (federal law banning corporations from making independent expenditures declared unconstitutional); *1A Auto, Inc. v. Director of Office of Campaign and Political Finance*, 480 Mass. 423 (2018) (corporations may “make unlimited ‘independent expenditures,’ subject to certain disclosure requirements”).

The Supreme Judicial Court has established that corporations organized under the laws of Massachusetts possess the right under Article 16 to make expenditures toward ballot questions, constitutional amendments, and other questions submitted to the voters, at least insofar as the matter materially affects the property, business, or assets of the corporation, and the right to make unlimited independent expenditures on elections, subject to certain disclosure requirements. *See First Nat’l Bank of Boston v. Bellotti*, 362 Mass. 570 (1972) (“*Bellotti I*”); *First Nat’l Bank v. Bellotti*, 371 Mass. 773 (1977), rev’d on other grounds, 435 U.S. 765 (1978); *1A Auto, Inc. v. Director of Office of Campaign and Political Finance*, 480 Mass. 423 (2018).

Because the law proposed by this petition would restrict the use of corporate funds to

¹ The term corporate or corporation is used in this letter to refer to the artificial persons to which the proposed law would apply. The analysis in the letter applies equally to corporations and the other forms of artificial persons to which the proposed law applies (*i.e.*, limited partnerships, limited liability companies).

support or oppose any ballot question posed to the voters or any political candidate running for public office, it necessarily burdens the Article 16 right recognized in the above-cited Massachusetts cases. As a result, strict scrutiny applies. *Bellotti I*, 362 Mass. at 590; *Associated Indus. of Massachusetts*, 418 Mass. at 288-289 & n.8. To survive strict scrutiny, the proposed law must be narrowly tailored to achieve a compelling government interest. See *Massachusetts Coalition for the Homeless v. City of Fall River*, 486 Mass. 437, 443 (2020) (law not narrowly tailored unless “it chooses the least restrictive means to further the articulated interest”); *Associated Indus. of Massachusetts*, 418 Mass. at 290 (to satisfy strict scrutiny, “law [must be] . . . drawn narrowly enough to avoid certain unnecessary restrictions on constitutionally protected freedoms”).

Article 19 of the Declaration of Rights provides that “[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.” The Supreme Judicial Court has recognized that restrictions on corporate political expenditures infringe on corporate associational rights protected under Article 19. See, e.g., *Associated Industries of Massachusetts*, 418 Mass. at 288-289 (“It is clear that the proposed law imposes a limitation on the right of a corporation to use its funds to speak out in favor of or in opposition to a ballot question that materially affects it.... [I]t would burden ... corporate associational rights protected by art. 19 of the Declaration of Rights.”). As with the Article 16 analysis, laws that burden Article 19 rights are subject to strict scrutiny. See *id.* at 288-289 & n.8.

A detailed strict scrutiny analysis is not necessary as the proposed law makes no attempt to fit within the strictures established by these decisions. Rather, the proposed law seeks to avoid any rights-based analysis by limiting the powers granted to a corporation under the General Laws. By revoking the power of a corporation to engage in political speech or the power of an individual to associate with others in order to engage in political speech, the proposed law limits or eliminates free speech and peaceable assembly. The effect of the petition is that, in order to continue to operate, corporations must relinquish their existing rights to engage in election activity and ballot-question activity protected by Articles 16 and 19 of the Massachusetts Constitution. The proposed law thus conditions a corporation’s right to operate on relinquishing constitutional rights, thereby infringing on the right to free speech and the right to peaceable assembly.

For these reasons, the Attorney General’s Office is unable to certify that Petition No. 26-03 complies with Article 48.

Very truly yours,



Anne Sterman
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cc: William Francis Galvin, Secretary of the Commonwealth