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November 22, 2013

Peter Sacks, Assistant Attorney General
State Solicitor
Office of the Attorney General
One Ashburton Place
Boston, MA 01742

Re: Initiative Petition No. 13-01

Dear Peter:

I am writing with respect to your letter dated September 4, 2013 addressed to the proponents of Initiative Petition No. 13-01, "Constitutional Amendment to Declare That Corporations Are Not People and Money is Not Speech" (the full text of the Initiative is attached). As set forth in that letter, you declined to certify the Initiative pursuant to the Attorney General's responsibilities under Article 48, The Initiative, Part 2. While there is much in your letter that we at Free Speech For People take issue with, I am writing in particular with regard to one particular area of your analysis that we believe to be clearly erroneous.

Among the reasons for your failure to certify the Initiative, you assert that Article 48's exclusion from the Initiative process of certain "rights of the individual" applies to initiatives that would define the rights, privileges and duties of corporate entities. Despite the remarkable clarity of the term "individual," a legal term that virtually never includes corporations, you assert that you "are unable to conclude" that the phrase excludes corporations, and that the phrase reflects "words of description, not limitation." Further, you reach the following conclusion with respect to the intention of the drafters of Article 48:

> 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.

Respectfully, I ask that you reconsider these conclusions, among other aspects of your analysis. It is clear from the plain language and the intention of the framers of Article 48 as set forth in the Debates in the Constitutional Convention of 1917-18 (the "Debates") that the phrase "rights of the individual" indeed reflects words of limitation, and that corporations and other legal entities defined and

created by the democratic process under state law were never intended to be included in the phrase.

The Plain Language

As the United States Supreme Court recently put it:

> As a noun, 'individual' ordinarily means '[a] human being, a person.' 7 Oxford English Dictionary 880 (2d ed. 1989); see also, e.g., Random House Dictionary of the English Language 974 (2d ed. 1987) ('a person'); Webster's Third New International Dictionary 1152 (1986) ('a particular person') (hereinafter Webster's). After all, that is how we use the word in everyday parlance.

Mohammad v. Palestinian Authority, No. 11-88, Slip. Op. (holding that Torture Victim Protection Act's use of the term 'individual' referred only to 'natural persons.')

As the Supreme Court states, unless the context is extraordinarily clear and explicit to the contrary, the term 'individual' refers to human beings as distinct from corporations and like entities. *Mohammad v. Palestinian Authority* ("Evidencing that common usage, this Court routinely uses 'individual' to denote a natural person, and in particular to distinguish between a natural person and a corporation.") The Court explained that federal statutes likewise routinely distinguish between an "'individual' and an organizational entity of some kind." *Id*.

Massachusetts law is no different. Our statutes are replete with the specific distinction between "individual" and "corporation." *See e.g.* Mass. Gen. Laws c. 266, § 92 (referring to "any corporation, joint stock association, partnership or individual."); Mass. Gen. Laws c. 111, § 127N (referring to any "individual, trust or corporation…") *See also Commonwealth v. Campbell*, 415 Mass. 697, 698 and n. 3 (1993) (rejecting Commonwealth's argument that the term "individual" in Chapter 266, §92 includes corporations.); *Swartz v. Department of Banking and Insurance,* 376 Mass. 593, 599 (1978) (FIPA exclusion "is for artificial legal *entities* or *organizations* which are not to be protected by the FIPA. *Individuals*, on the contrary--whether employees, professionals, or in business for themselves--are to have their privacy protected by the Act.")

In light of the overwhelmingly common use of the word "individual" to exclude "corporation," it would require substantial evidence indeed of a contrary intent or meaning to read "corporations" into the careful phrasing of Article 48's exclusion of matters concerning "the rights of the individual." Not only is that evidence entirely lacking, the evidence is exactly contrary to your conclusion. In fact, the debates at the Constitutional Convention that adopted that language supports the much more natural reading of the phrase "rights of the individual" to exclude corporations. The strongest evidence from the Debates is that the term

"individual" was used specifically to ensure that the people would retain the right to define by the initiative process the powers, rights, duties and responsibilities of corporations.

The Debates

In the Constitutional Convention of 1917-18, the former Speaker of the House and leader of the Initiative proposal, Joseph Walker, laid out very clearly the purpose of the Initiative:

> The principle of the initiative and referendum in its purity means that the people of this Commonwealth may have such laws and may have such a Constitution as they see fit themselves to adopt…. It means that this government shall be brought back to the real control of the people of the Commonwealth.

(Debates at 22).

The reason why the Initiative was necessary, according to Walker, was that that the government was "fast becoming a plutocracy," and an "invisible government" led by large corporations was replacing government of the people. Walker pointed to examples in other states:

> Was not the great State of California in the actual control of a railroad corporation for years and years until they got hold of the initiative and referendum under the impetus of the progressive movement and unhorsed that railroad from its control of the California Legislature?

(Debates at 22).

Another Convention delegate supporting the Initiative referenced "the enormous disparity in the distribution of wealth" and reinforced this point in language that is not out of place today:

> [There is] a belief that the machinery of legislation has been used to make and to enhance the vast fortunes which we find in this country, and to the fact that those who have been unable, by influence or other means, to appeal to the Legislature have suffered; that their own, — things that are rightfully theirs, — have been taken from them, not by one legislative act but by a course of legislation, by a policy which has been adopted at the instigation and under the influence of those who have property rights. There exists a belief that special privileges and special favors have been granted to those who have had the influence to get them; a belief that much of our legislation has been framed by lobbyists in their own offices or by skilled and trained lawyers in the offices of the corporations or the offices of the attorneys themselves, and that that legislation has been directed not to promoting the general public welfare of all the people alike, but has been for the purpose of

> promoting the interests of those who stood behind, — secretly stood behind, — the measures and the legislators who put them through.

(Debates at 45).

Another delegate cited the "far-reaching judgment" of Abraham Lincoln, quoting him as recognizing that "corporations have been enthroned, and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working on the prejudices of the people until all wealth is aggregated in a few hands, and the republic is destroyed." (Debates at 223).

Speaker Walker and others supporting the Initiative repeatedly cited the problem of the "great and powerful corporations" (Debates at 237). They argued that the Initiative would permit the people to correct erroneous judicial decisions that had favored corporate privilege at the expense of the individuals, pointing to decisions invalidating the workers compensation and other progressive laws. The very purpose of the Initiative was to correct this erroneous "liberty" of industries with the original purpose of the Declaration of Rights and self-government, the liberty of the individual:

> In the name of liberty they seek to create, or to permit our industries to create, a state of industrial slavery, and that is the kind of liberty that they seek to protect by preventing the people from appealing from the Legislature by the constitutional initiative and referendum … Is it that kind of <u>liberty of the individual</u> that our forefathers sought to protect by the Constitution? Mr. Chairman, that was not the purpose of our forefathers.

(Debates at 26) (emphasis added)

The remedy for this "an autocracy of wealth," and "plutocracy," as Walker and other Convention delegates called the problem, was the Initiative process.

When the exclusion of matters concerning the Declaration of Rights was first proposed at the Convention, the language did not include the phrase "rights of the individual." Instead, the proposed language for the relevant excluded matter was closer to the broad reading that your letter now seeks to give to the very different language that was enacted. The first proposed exclusion pertaining to the Declaration of Rights stated: "Provided, however, that no amendment annulling, abrogating or repealing the provisions of the Declaration of Rights shall be the subject of an initiative or executive petition." (Debates at 731, 738-39).

This broad language was decisively rejected by the Convention.

In leading the effort against the exclusion as worded (ie, without reference to "rights of the individual"), Walker again cited the problem of judicial misinterpretation of Constitutional rights to favor corporate interests, and the

importance of the Initiative to enable the people to correct such misinterpretation. "[I]t may be necessary," he argued, "in order to make such laws [workers compensation, for example] constitutional to amend the Declaration of Rights as interpreted by the court." (Debates at 738) (emphasis added).

Despite Walker's argument, the broad exclusion as proposed was adopted by a single vote. In moving for reconsideration, Walker made clear why such an exclusion would defeat the very purpose of the Initiative:

> The point is this, that if we vote for a law and the Supreme Judicial Court decides that it is unconstitutional, it becomes necessary to amend the Constitution in order that we may have that law. That is why we wish the constitutional initiative. Now, Mr. President, the laws in which we are most interested are commonly known as social welfare legislation, — legislation to protect the health, the safety, the general welfare of the individuals who make up the masses of our community; to protect men and women in industry, to protect children; and it is those law's that are declared unconstitutional frequently in other States and in this State, Workmen's compensation laws, laws affecting the hours of labor, laws protecting the health, laws to prevent industries being carried on in tenement-houses, — it is that kind of legislation that we wish and it is that kind of legislation that frequently is declared unconstitutional. And, Mr. President, every time such a law is declared unconstitutional it is declared unconstitutional because it is against or interferes with liberty and property, and it is liberty and property that are protected in our Declaration of Rights.

(Debates at 739).

The former Governor of Massachusetts, David Walsh of Fitchburg, joined Walker in opposing the exclusion of matters pertaining to the Declaration of Rights, noting the distinction between "individual selfishness" and "organized selfishness." "In the past," Governor Walsh argued, "governments have had to battle against the evil influences of individual selfishness, but we have discovered in the last sixty years the development in our State and Nation of organized human selfishness, great organizations, financial, social and political, more powerful, and even richer than the very State itself." (Debates at 946-47).

These views carried the day, and the exclusion was stricken from the Initiative on the next vote of the Convention.

Later in the Convention, the exclusion was offered once again. Again, there was no reference to "rights of the individual." Instead, the proposed language provided: "No amendment of the Constitution annulling, abrogating or repealing any of the provisions of the Declaration of Rights, or inconsistent therewith, shall be proposed by an initiative petition." (Debates at 992).

Once again, Walker took to the floor to oppose the exclusion and to make clear that the Initiative was intended to enable social welfare legislation that had been blocked by corporate interests and the courts. The "whole social welfare program is in danger if this amendment goes through," he argued. The Convention agreed and voted to defeat that version of the Declaration of Rights exclusion amendment.

Only then was new excluded matter language finally offered that contained the phrase "rights of the individual." (Debates at 995-96). John Merriam of Framingham offered the following amendment to the Initiative language:

> 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.

(Debate at 1000.)

As Merriam described the reason for this new language, he focused on "natural" rights that "we all have." By "natural rights," Merriam was referring to the language of the Declaration of Rights itself concerning "people" and human rights: "All people are born free and equal and have certain natural, essential and unalienable rights." *See Amendments Art. CVI, amending Art. I, Part the First of the Constitution of the Commonwealth of Massachusetts, Declaration of Rights*.

"These are individual rights," Merriam explained. "The majority should respect them." (Debates at 1000-01) (emphasis added). Walker and others who had so adamantly opposed the previous version of this exclusion recognized this critical distinction between "individual rights" and those rights found by the Courts to favor corporate interests. He did not think the exclusion was necessary, but he was not overly troubled by it: "I suppose, Mr. President, this is a part of the Bill of Rights which no set of petitioners ever would think of questioning." (Debates at 1001). Only then, with the Convention clear about the meaning of "rights of the individual," was the amendment adopted.

Thus, the plain meaning of the words, the context of the adoption of the Initiative to the Massachusetts Constitution, and the debates at the Constitutional Convention make plain that the phrase "rights of the individual" was intended to distinguish between human rights and corporate privileges, between natural rights with which people are born and judicial interpretations of the Declaration of Rights to apply to corporate entities.

The Supreme Judicial Court Has Not Decided This Question

In your letter of September 4, you assert that the Supreme Judicial Court has "assumed that the listed constitutional rights, insofar as they are possessed by corporations, cannot be abridged by initiative possession," and you cite certain cases for that proposition. A fair reading of the cases, however, does not support the conclusion that the Supreme Judicial Court has ever addressed the question.

First, in *Carney v. Attorney General*, 451 Mass. 803, the Supreme Judicial Court agreed that the Attorney General's certification of the ballot initiative concerning dog racing was proper. There was no question in the case about "constitutional rights, insofar as they are possessed by corporations." Every one of the plaintiffs was an individual, not a corporation. In *Carney,* these individuals claimed that their property rights would be deprived by the initiative, and thus that the Attorney General should not have certified the initiative. The Court disagreed with the individuals' assertion of constitutional rights, noting that dog racing is heavily regulated, and that "because of the nature of the business[, it] can be abolished at any time that the Legislature may deem proper for the safeguarding and protection of the public welfare." 451 Mass. at 817, quoting *Topsfield v. State Racing Comm'n*, 324 Mass. 309, 315 (1949) and citing cases. In any event, as the case concerned individuals not corporations, nothing about *Carney* addressed the question of whether an initiative could correct judicial application of Constitutional rights to corporate entities.

Similarly, in *Associated Industries of Massachusetts v. Attorney General*, 418 Mass. 279 (1994), the Supreme Judicial Court did not find any abridgement of the Declaration of Rights, and agreed that the certification of the ballot initiative was proper. The Court took due note of the complicated landscape of case law concerning the application of freedom of speech principles to corporate expenditures in ballot initiatives. Given the lack of information that would should show whether or not in specific circumstances, the Declaration of Rights would be violated, the Court applied "the firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws." 418 Mass. at 287-291. Thus, there was no cause to even consider the meaning of the phrase "rights of the individual," let alone hold that the exclusion included rights claimed by corporations.

Finally, the third case you cite concerning the Supreme Judicial Court's application of the Declaration of Rights exclusion is *Yankee Atomic Electric Co. v. Secretary of the Commonwealth*, 403 Mass. 203 (1988). In *Yankee Atomic*, however, the Court did not consider the question of whether corporations as corporations were included in the meaning of the phrase in Article 48 "rights of the individual." In fact, the Court replaced that phrase with an ellipses. *See* 402 Mass. at 752-53 ("Among the matters excluded from the initiative are propositions "inconsistent with . . . the right to receive compensation for private property

appropriated to public use.") And once again, the Court applied the principle that it is better to let the people vote on the Initiative and address possible Constitutional claims if and when they later might arise. The Court again affirmed the Attorney General's certification of the ballot initiative. *Yankee Atomic Electric Co. v. Secretary of the Commonwealth*, 403 Mass. 203, 209 and n. 7 (1988)

I am not aware of a single case in which the Supreme Judicial Court has squarely considered or addressed the question of the applicability of the Declaration of Rights exclusion in Initiatives concerning the scope of corporate powers and duties, or claims of corporations as corporations to constitutional rights. In each of the cases you cited, any assumptions that were made on the way to determining that the people should have a chance to vote on the Initiative are hardly grounds for the blanket conclusion you have reached about the inclusion of corporations as holders of the "rights of the individual."

Particularly at this time when, in the Commonwealth and in the nation, a great debate is ongoing about the power of corporations and the assertion of Constitutional rights by corporations, as in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), I would respectfully ask you to reconsider the conclusions set forth in your letter of September 4.

Massachusetts has joined fifteen other states and 500 cities and towns in calling for a federal Constitutional amendment that will overturn the *Citizens United* holding. Respected lawyers, scholars and judges across the country have joined in the condemnation of using corporate rights in our Constitution to disable public interest laws. I believe that Attorney General Coakley has been a leader in these efforts, and has strongly supported the work to overturn *Citizens United* and to free the people once again to determine the scope of corporate rights and responsibilities. This debate should not be foreclosed in Massachusetts if there is a sufficient will of the people to bring the question to the ballot by initiative. An unduly broad reading of Article 48's excluded matters, particularly in the absence of guidance from the Supreme Judicial Court, threatens to do just that.

Thank you, and please let me know if we can provide additional information for your consideration.

Sincerely yours,

Jeffrey D. Clements

cc: Attorney General Martha Coakley

Initiative No. 13-01, Proposed Amendments to Massachusetts Constitution

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.