PERKINS THOMPSON

Mailing Address
PO Box 426
Portland, ME 04112
Office 207.774.2635
Fax 207.871.8026

Physical Address
One Canal Plaza
Portland, ME 04101

www.perkinsthompson.com

MEMORANDUM

TO: Portland Charter Commission

FROM: Jim Katsiaficas, Emily Arvizu

DATE: June 17, 2022

RE: Proposed Charter Provisions Regarding Campaign Finance

At the June 8, 2022 Charter Commission meeting, Commissioner Buxton presented four amendments to the Clean Elections proposal that had emerged from workshop discussions. Of these, one would bar foreign contributions or expenditures on ballot question campaigns to curb their influence on elections, and another would bar corporations and individuals from contracting with the City within two years of making a campaign donation to a City election candidate. While the latter was withdrawn pending further consideration, it is addressed in the event of that further consideration.

Foreign Contributions or Expenditures on Ballot Question Campaigns

We have two sets of concerns regarding this proposal.

Home Rule Preemption. One concern is that State election law on campaign finance preempts the City's home rule authority to amend its charter to regulate campaign finance. As we know, Art. VIII, Part Second, Section 1 of Maine's Constitution authorizes municipalities "to alter or amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character." Local election laws in Title 30-A are in some instances preempted by the State election laws in Title 21-A, and this appears to be the case in the area of campaign finance regulation.

The opening provision of local election laws in Title 30-A M.R.S. states:

> ### §2501. Applicability of provisions
>
> Except as otherwise provided by this Title or by charter, the method of voting and the conduct of a municipal election are governed by Title 21-A.

With regard to campaign finance, the very next section of "this Title," Title 30-A, provides:

§2502. Campaign reports in municipal elections

1. Reports by candidates. A candidate for municipal office of a town or city with a population of 15,000 or more is governed by Title 21-A, sections 1001 to 1020-A, except that registrations and campaign finance reports must be filed with the municipal clerk instead of the Commission on Governmental Ethics and Election Practices. A town or city with a population of less than 15,000 may choose to be governed by Title 21-A, sections 1001 to 1020-A by vote of its legislative body at least 90 days before an election for office. A town or city that votes to adopt those provisions may revoke that decision, but it must do so at least 90 days before an election subject to those sections.

2. Municipal referenda campaigns. Municipal referenda campaigns in towns or cities with a population of 15,000 or more are governed by Title 21-A, chapter 13, subchapter 4. The registrations and reports of political action committees and ballot question committees must be filed with the municipal clerk. A town or city with a population of less than 15,000 may choose to be governed by Title 21-A, chapter 13, subchapter 4 by vote of its legislative body at least 90 days before a referendum election. A town or city that votes to adopt those provisions may revoke that decision, but it must do so at least 90 days before an election subject to that subchapter.

Thus, in Portland, with a population over 15,000, Title 21-A governs election candidate and referenda campaign registration and reports. The sections cited in 30-A M.R.S. §2502(1) also restrict contribution limits (for example, limiting individual contributions to municipal candidates to $500 and as of January 1, 2023, prohibiting business entity candidate contributions).

The sections cited in 30-A M.R.S. §2502(2) also address ballot question committee spending, but are silent as to regulation of foreign organization contributions to ballot question campaigns. Last year, the Maine Legislature attempted to amend Title 21-A, chapter 13, subchapter 4, by adding a new section that would have instituted a ban on foreign contributions and expenditures to ballot question campaigns, but the Governor vetoed that bill. Specifically, LD 194 provided that "[a] foreign national[1] may not make, directly or indirectly, a contribution or an expenditure to influence a referendum." It further prohibited any person from knowingly soliciting, accepting, or receiving such a contribution. In a letter to the Legislature explaining her reasoning for the veto, Governor Mills cited the bill's broad definition of "foreign national" which captured "dozens of businesses that we regard as very much part of the fabric of the Maine community. Entities with direct foreign investment employ thousands of Mainers."

The proposed amendment directs the Council to "enact a prohibition on ballot question contributions or expenditures from any entity that is substantially under foreign influence, including any entity owned by a foreign government and any entity with substantial foreign ownership." The amendment does not go on to specifically define what constitutes "substantially under foreign influence" or "foreign" but it seems likely that many of the businesses that would

[1] LD 194 defined "foreign national" as a foreign government and "a firm, partnership, corporation, association, organization or other entity with respect to which a foreign government holds, owns, controls or otherwise has direct or indirect beneficial ownership of 10% or more of the total equity, outstanding voting shares, membership units or other applicable ownership interests."

have been subject to the LD 194 prohibitions would be subject to those proposed here. Because the Legislature and Governor have already considered a prohibition on contributions and expenditures by these foreign entities and have rejected such a prohibition, and because City of Portland local elections are governed by Title 21-A pursuant to 30-A M.R.S. §2502, the proposed amendment would likely be found to be preempted by State law. State law regulates referendum campaign spending and does so to the exclusion of municipal home rule authority to regulate foreign contributions to elections.

Constitutionality. Another concern is that the federal constitution has been interpreted to prohibit bans and restrictions on contributions to ballot question campaigns.

Federal case law distinguishes between contributions for the purposes of candidate advocacy and of issue advocacy, and the Supreme Court has upheld the constitutionality of bans on foreign contributions to candidate elections.[2] In a three-judge district court opinion summarily affirmed by the Supreme Court, now-Justice Kavanaugh explained that, under their interpretation of the precursor to the Act's current ban on contributions by foreign nationals[3], the statute "does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues . . . It restrains them only from a certain form of expressive activity closely tied to the voting process – providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate." *Bluman v. FEC*, 800 F.Supp.2d 281, 290 (D.D.C. 2011), *aff'd*, 565 U.S. 1104, 132 S.Ct. 1087 (2012). Prohibitions on contributions for candidate advocacy survive constitutional challenge because they serve the governmental interest of preventing the "corruption of elected representatives through the creation of political debts." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 787 n. 26 (1978). As a general matter, the Supreme Court has left open "the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process." *Citizens United v. FEC*, 558 U.S. 310, 362 (2010).

While it seems clear that a ban on contributions by foreign nationals for the purposes of candidate advocacy would withstand constitutional challenge, it is doubtful that a similar ban on contributions for issue advocacy is constitutional.

The *Bluman* decision did not address the issue of whether Congress could prohibit foreign national contributions on issue advocacy, but it does suggest that Congress's exercise of restraint in limiting the ban to only candidate advocacy contributions may be the result of "conclud[ing] that the risk of undue foreign influence is greater in the context of candidate elections than it is in the case of ballot initiatives." *Bluman*, 800 F.Supp.2d at 291. In the *Bellotti* decision, the Supreme Court commented that there is "no comparable problem" of potential corruption of elected officials in the context of corporate speech on public issues. *Bellotti*, 435 U.S. at 787 n. 26. Where "the legislature's suppression of speech suggests an attempt to give one side of a debatable public

[2] With respect to state and local elections, the Ninth Circuit has applied the holding of *Bluman* to a ban of contributions by foreign nationals in state and local elections, citing "Congress's broad power to regulate foreign affairs and condition immigration." *United States v. Singh*, 979 F.3d 697, 710 (9th Cir. 2020).

[3] While the decision dealt only with foreign national individuals, the Court was clear that "[o]ur holding means, of course, that foreign corporations are likewise barred from making contributions and expenditures prohibited by 2 U.S.C. § 441e(a)." *Bluman*, 800 F.Supp.2d at 292 n.4.

question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id*. at 785-86. Governor Mills came to a similar conclusion when she voted the above-described LD 194, describing the bill as "offensive to the democratic process, which depends on a free and unfettered exchange of ideas, information, and opinion. Such limitations on what the Supreme Court has called 'core political speech' are also highly suspect as a constitutional matter, and Governor Mills observed that "If L.D. 194 were to become law, I question whether it could survive constitutional challenge."

Moreover, the Federal Elections Committee has turned down foreign corporation ballot question spending challenges. Recently, the FEC dismissed allegations that certain foreign corporations had violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by making contributions for the purposes of opposing a Montana ballot initiative. In the dismissal, the FEC explained that, due to the Act's definition of "election", "spending relating only to ballot initiatives is generally outside the purview of the Act because such spending is not 'in connection' with elections."

With respect to the proposed amendment, there are a number of outstanding questions. It is not entirely clear whether a court would recognize the foreign entities subject to the ban as holding First Amendment rights. Because the terms are not defined in the amendment, it is not certain that the subjected entities are "foreign" for First Amendment purposes. It is also not clear that the activities subject to the proposed ban fall within the category of activity that the Supreme Court has recognized as justifiably denied to foreign nationals. As explained in the *Bluman* decision, Supreme Court case law has often upheld the denial of certain rights and privileges to foreign citizens, "draw[ing] a fairly clear line: The government may exclude foreign citizens from activities 'intimately related to the process of democratic self-government.'" *Bluman*, 800 F.Supp.2d at 287 (collecting cases). *Bluman* seems to suggest, however, that spending money to advocate views on public issues may not be considered participation in democratic self-government. *Id*. at 290.

In summary, it is not clear whether the proposed amendment would survive constitutional challenge, but it seems likely that it would not due in part to its lack of defined terms and due to the strong First Amendment protections afforded speech pertaining to issue advocacy.

Limitation on Contracts to Local Candidate Donors

Home Rule Preemption. State law also regulates candidate contributions and does so to the exclusion of municipal home rule authority to set different campaign limits, and so the limitation on contracts to local candidate donors may well be beyond the ability of the City to add to the Charter. Pursuant to 30-A M.R.S. § 2502, provided above, municipal elections in Portland are governed by 21-A M.R.S. §§ 1001 to 1020-A, Campaign Reports and Finances. Section 1015 establishes limitations on contributions and expenditures by individuals, party committees, PACs, and business entities. An individual may not make a contribution of more than $500 for a candidate for municipal office. § 1015(1). Because the Legislature has set the contribution limit at $500 for individuals and municipal elections are governed by that provision, a charter revision establishing another limit would conflict with State law.

Constitutionality. The proposed amendment placing limitations on City contracts to donors may also face constitutional challenge due to the low contribution limits and the lack of ability to adjust those limits. "[C]ontribution limits . . . implicate fundamental First Amendment interests, namely, the freedoms of political expression and political association." *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (internal quotation marks omitted). Such limits "are permissible as long as the Government demonstrates that the limits are 'closely drawn' to match a sufficiently important interest", one of which is preventing corruption or the appearance of corruption. *Id*. at 247 (internal quotation marks omitted). However, "that rationale does not simply mean 'the lower the limit the better.' . . . [C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id*. at 248-49.

The Court has flagged a couple of "danger signs" of when contribution limits may violate the First Amendment. *Thompson v. Hebdon*, 140 S.Ct. 348, 350 (2019). The first so-called danger sign is when a limit is "substantially lower than the limits we have previously upheld." *Id*. (noting that the lowest contribution limit the Court had upheld at that time was over $1600 in 2019 dollars). Another danger sign is when the "contribution limit is not adjusted for inflation." *Id*. at 351. This is because a "failure to index limits means that limits which are already suspiciously low will almost inevitably become too low over time." *Id*. (quoting *Randall*, 548 U.S. at 261). Where such danger signs are present, the Court looks to whether there is any special justification warranting the low limit. *Id*.

Here, the proposed amendment essentially establishes a contribution limit potentially as low as $250 over a two-year period by foreclosing the donor from receiving financial gain from City contracts of a certain value within two years of having made the donation. While this arguably serves the compelling interest of preventing corruption or the appearance of corruption, the very low limit and the failure to index the limit would make this provision unlikely to pass constitutional muster, absent some special justification.