Constitutionality of L.D. 194, "An Act to Prohibit Contributions, Expenditures and Participation by Foreign Government-owned Entities to Influence Referenda; L. D. 479, "An Act to Ban Foreign Campaign Contributions and Expenditures in Maine Elections; and, L.D. 641, "An Act to Prohibit Contributions, Expenditures and Participation by Foreign Nationals to Influence Referenda."

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I. Introduction

L.D. 194, L.D. 479, and, L.D. 641 were all introduced in anticipation of the second initiative on the New England Clean Energy Connect (NECEC) project. The three bills present slightly different approaches to the same two objectives—First, preventing Hydro-Quebec (HQ) and its American affiliate, HQ Energy Services (US) Inc. (HQ US) from participating in any of the Maine voters 'consideration of the Initiative and, second, denying Maine voters—in their capacities as Electors—from receiving any HQ-originated messages relating to the Initiative. They would bar HQ from sending Initiative-related messages and prevent Maine Electors from receiving them.

For the reasons set forth below, each of the bills would violate both HQ's and the Maine Electors 'rights under the First Amendment to the United States Constitution and under comparable provisions of the Maine Constitution. They would also exceed the Legislature authority under Article IV, Part Third, Section 18 to determine the sources of information and the substance of the messages that Maine Electors may consider in the discharge of their duties Section 18 Electors.

II. Common Elements of and Distinctions between L.D. 194, L.D. 479, and, L.D. 641

L.D. 194, L.D. 479, and, L.D. 641 are all directed at foreign persons and entities. L.D. 194 is directed at "foreign government-owned entities"; L.D. 479 at "foreign nationals" and "foreign owners"; and, L.D. 641 "foreign nationals", to include individuals and foreign entities.

L.D 194 and L.D. 641 would prohibit "contributions" by or to the foreign entity for the purpose of participating in an initiative or referendum. Each bill would prohibit "expenditures" by foreign entities on ballot measures.

L.D. 194 and L.D. 641 would ban, not simply restrict or regulate, foreign entities from participating in any way in Maine voters 'consideration of an initiative or a referendum. L.D. 479

would place broad restrictions on its prohibition on "substantial assistance" which would work in tandem with its wide-ranging definition of "Design, produce or disseminate."

These prohibitions would not be limited to the foreign entities, themselves, but would also apply to anyone in the United States and the state of Maine in particular, and would bar them from assisting or cooperating with the foreign entity to that end.

L.D. 479 would impose the foreign entity prohibition entities who convey information to the public. By establishing a "due diligence" standard on these persons and entities, it would expose them to the civil and criminal sanctions provided under Title 21-A. (see discussion below).

L.D. 479 would not institute new penalties. By contrast, L.D. 194 and L.D. 641 would authorize fines of up to $100,000 per incident for a violati authorized for any "person" who violates their terms, including. HQ and HQ US and also for anyone else, including Maine citizens, as Electors.

The bills would not change the standing criminalization Chapter 13 of Title 21-A in its entirety. Therefore, a violation of the bills 'terms could expose the offender to criminal prosecution.

All these bills are alike in that the "Summary" for each simply recites the bill's terms—none states what purpose it would serve; that is, what state interest or interests support its enactment.

III. First Amendment Rights in General

The First Amendment provides that "Congress shall make no law…abridging the freedom of speech, or the press, or the right of the people to peaceably assemble, and, to petition the government for redress of grievances.**"** U.S. Const., 1st Am**.** The First Amendment applies to and binds the State of Maine through the Due Process Clause of the Fourteenth Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). The Declaration of Rights of the Maine Constitution contains the same protections. Maine Const., Art. I, §§ 4 (The Supreme Court views all these rights as interrelated, characterizing them as "cognate" rights. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

IV. First Amendment Rights—Political Speech

The Supreme Court has recognized different kinds of speech and has placed "political speech" at the "zenith" of the forms of speech the First Amendment protects. *Meyer v. Grant,* 486 U.S. 414, 425 (1988) (overturning Colorado restriction on initiative petition circulators).

Given the intentions they manifest and the communications they make possible, the Supreme Court has found contributions and expenditures to be forms of political speech.

McCutcheon v. Federal Election Commission, 572 U.S. 185, 218 (2014); *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976). The First Amendment right of freedom of association is closely tied to freedom of speech. *Buckley v. Valeo*, *Id*. at 25.

Efforts to regulate—not ban—political speech have been sustained where they are based on concerns about candidate corruption—*quid pro quo* arrangements—and the appearance of corruption. See, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 361 (2010).

The Supreme Court has sharply distinguished "issue advocacy" from support of individual candidates or political parties ("express advocacy"). *Federal Election Commission v. Wisconsin Right to Life ,Inc*. 551 U.S. 449, 470 (2007). The political campaigns which may involve "issue advocacy" and ballot measures. *Cf., Federal Election Commission v. Wisconsin Right to Life, Inc.; First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

The Supreme Court has held that ballot measures involve "core political speech." *Meyer v. Grant,* 486 U.S. at 455. Moreover, the Court has observed that "[t]he risk of corruption perceived in cases involving candidate elections [citations omitted] is simply not present in a popular vote on a public issue." *Citizens Against Rent Control v. City of Berkeley,* 360 U.S. 290. 298 (1981); see also, *First National Bank of Boston v. Bellotti*, 435 U.S. at 787, n. 26.

In *Bellotti,* the question was whether conditions corporations 'participation in initiatives and referenda were constitutional. The Court struck down the Massachusetts 'statute observing that, "[t]he First Amendment, in particular, serves significant **societal** interests. The proper question, therefore, is **not** whether corporations 'have 'First Amendment rights and, if so, whether they are coextensive **the question must be** whether [the Massachusetts's statute] abridges expression that the First Amendment protects." *Id.* (emphases supplied). At a returned to this point saying, "[i]f the speakers were not corporations, no one would suggest that the State could silence their speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 779.

The *Bellotti* Court also considered the impact of the conditions the statute placed on the people of Massachusetts—those empowered under Massachusetts initiative and referendum amendments with the authority to enact or repeal laws Here, the Court was disdainful in rejecting the statute as "highly paternalistic" in "restrict[ing] what the people may hear." *Id.* at 792, n. 31.

Bellotti's emphasis on the broader societal interests comprehended by First Amendment rights—particularly, but not exclusively associated with Court precedent. Much earlier, the Court had said, "[b]ut it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First

Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating the press, speech, and religion. In this field, every person must be his own watchman for the truth, because the forefathers did not trust any government to separate the true and the false for us." *Thomas v. Collins*, 323 U.S. 316, 3 same point: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

From the foregoing, it should be apparent that whether L.D. 194, L.D. 479, and, L.D. 641 violate the First Amendment cannot turn on the identity of the speaker, HQ and HQ US or any message it may offer on the initiative. It must turn on the speech, itself, and the context in which it is offered—in this case, the people of Maine, as Electors, exercising their reclaimed sovereign authority to make the law.

Before closing this review of First Amendment law, it must be emphasized that the broad bans on contributions, expenditures, and, participation reach directly into the state of Maine and would purport to limit the rights of Maine citizens to associate, gather information, and, advocate in opposition to the initiative. In their broad and alm of sanctions they would impose, they exemplify the very kind of "paternalistic" legislation that the *Bellotti* Court condemned to constitutional invalidity.

V. Foreign Nationals and Entities and Fundamental Constitutional Rights

All the bills are premised on the assumption that HQ and HQ US. have no First Amendment rights and the Legislature may limit or prohibit their participation in an initiative vitally affecting their interests in whatever way and to whatever degree it wishes. This is a highly tenuous supposition.

There does not appear to be a controlling Supreme Court case which holds that foreign persons lawfully in the United States or foreign entities lawfully doing business in the United States have a First Amendment right to participate in initiatives and referenda where their vital interests are at stake. See, *e.g.*, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 362 (2010) (candidate elections; foreign national issue reserved).

At the same time, in several other contexts, the Supreme Court has recognized that foreign nationals have the benefit of constitutional protections. Notably, in *Bridges v. Wixon*, 326 U.S. 135 (1945), Justice Murphy made the following observation:

> But, once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth

> Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their privileges to all 'persons 'and guard against any encroachment on those rights by federal or state authority.

Id. at 161. In a subsequent decision, the Supreme Murphy's comment. *Kwang Hai Chew v. The Sir John Franklin*, 344 U.S. 590, 596, n. 5 (1953).

Bearing further on this point is the recognition that, its application of the "incorporation doctrine"—the legal principle that the Due Process Clause of the Fourteenth Amendment "incorporated" fundamental rights in the Bill of Rights, making them applicable to the states—the "cognate" rights of the First Amendment were among the first declared to be "fundamental." See, *e.g, Thornill v. Alabama*, 310 U.S. 88, 95, n. 7 (1940) (citing cases).

Moreover, the bills 'emphasis on this factor overlooks the Supreme Court's teaching in *First National Bank of Boston v. Bellotti* where the Court eschewed First Amendment restrictions on speech in initiatives based on the identity of the speaker and, instead, emphasized the speech at issue and the right of the people of Massachusetts to hear that speech and judge its worth for themselves. (see, discussion above).

This discussion of First Amendment law is in no way intended to suggest that HQ and HQ US could not also assert other constitutional rights including Equal Protection and Due Process. The bills would also transgress those rights and others.

VI. Nature of Maine's Initiative and Referendum Process

In 1909, the Maine voters amended the Maine Constitution by adding Article IV. Part Third, Section 18 (Initiative) and Section 19 (Referendum), along with related implementing provisions. See, Maine Const., art. IV, Pt. 3d, §§ 18-22.

The Law Court has said that by these amendments, "the people reserved to themselves the power to propose laws and to enact or reject the same at the polls independent of the legislature… *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 230 (1948) "[i]n short, sovereign, which is the people, has taken back, subject to the terms and limitations of the amendment, a power which the people vested in th *Id.* at 230-231. Subject to those amendments, the people's power to enact laws is "absolute and all embracing." *Town of Warren v. Norwood,* 138 Me. 180, 192-193 (1941); see also, *Opinion of the Justices*, 623 A.2d 1258, 1262 (Me. 1993).

Nothing in Article IV, Part Third, Section 18 suggests or implies that the Maine Legislature possesses any authority to limit information that Maine E initiative or from whom they may receive that information. Indeed, the Legislature's exercise of

such censorial power would be inimical to the purpose of the initiative and referendum processes which were born of a fundamental and widespread popular distrust of the Legislature. To that end, the role of the Maine Legislature in any initiative is lim Section 18 along with implementing statutes lawfully enacted pursuant to Section 18's authority.

There can be no question that when the people exercise their lawmaking power in deciding an initiative, they, as Electors, and not the Legislature, are the sovereign. Thus, any person who may be affected by the legislation must appeal to—that is, petition—the Maine Electors. Given this constitutional reality, it would appear inarguable that each of these bills, if enacted, would also deny HQ and HQ US their rights to petition the government under the First Amendment and under Article I, Section 15 of the Maine Constitution.

VII. A Word on *Bluman v. Federal Election Commission*

In support of the bills 'constitutionality, the proponents have relied on *Bluman v. Federal Election Commission*, 800 F. Supp.2d 281 (D.D.C. 2011). *The Bluman* case involved challenges by two foreign nationals to federal election laws that barred them from donating to political candidates and to political parties and to make expenditures for and against political candidates. *Id.* at 282-283. Their claims were decided by a three-judge court with then-Judge Kavanaugh writing the opinion.

Shortly into the opinion, Judge Kavanaugh made it clear to "issue advocacy." On this point, he said, "[The federal statute at issue] does **not** bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate." *Id.* at 284-285.

Further on in the opinion, the Court said, this:

> Notably, [2 USC] § 441e(a) as we interpret it, *see supra* pp. 284–85, 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. *See First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 788 n. 26, (1978) ("speak[ing] on issues of general public interest" is a " quite different context" from "participation in a political campaign for election to public office").

Id. at 290.

The *Bluman* Court upheld Section 441e(a)'s ban on the foreign national plaintiffs ' participation in candidate and party politics. At the cl the foreign national plaintiffs 'concern that the decision might be read to bar them from participating in "issue advocacy." Commenting on this concern, the Court said:

> "[Plaintiffs] similarly express concern that Congress might bar them from issue advocacy and speaking out on issues of public policy. Our holding does not address such questions, **and our holding should not be read to support such bans**."

Id. at 292 (emphasis supplied). Notwithstanding this express disclaimer, that is precisely the interpretation of *Bluman* that some of the bills 'proponents are asserting. As is evident from the foregoing excerpts, *Bluman* is not authority that for the proposition that these bills are constitutional. To the contrary, *Bluman* may more fairly read as supporting the conclusion that they are not constitutional.

VIII. **Summary**

Each of the bills at issue would ban HQ and HQ US from participating in Maine Electors ' consideration of the impending Initiative. Support for or opposition to an initiative constitutes "issue advocacy" protected by the First Amendment and related provisions of the Maine Constitution. Advocacy for or against initiatives implicates the right of the speaker as well as the listener—that is, principally, the Maine Electors. The United States Supreme Court has not recognized any state interest that would justify prohibiting or curbing issue advocacy either from the standpoint of the speaker or that of the listener. The bills would make the Maine Legislature the judge of the information that the Maine Electors, in their sovereign capacity as lawmakers, may consider and from whom they may receive that information—a power that the Maine Legislature does not possess. Finally, by banning HQ and HQ US from participating in an initiative that implicates their vital interests, the bills would deny them their right to petition the government under the United States and Maine Constitutions.

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