SJC-12413

1A AUTO, INC., & another,[1] *vs*. DIRECTOR OF THE OFFICE OF CAMPAIGN AND POLITICAL FINANCE.

Suffolk. March 6, 2018.—September 6, 2018

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Elections, Political contributions. *Constitutional Law*, Freedom of speech and press, Freedom of association, Equal protection of laws.

Civil action commenced in the Superior Court Department on February 24, 2015.

The case was heard by *Paul D. Wilson*, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

James Manley, of Arizona (*Gregory D. Cote* also present) for the plaintiffs.

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[1] 126 Self Storage, Inc.

Julia Kobick Assistant Attorney General (*William W. Porter* Assistant Attorney General, also present) for the defendant.

Ben T. Clements, M. Patrick Moore, Jr., Ryan P. McManus, John C. Bonifaz, Ronald A. Fein, & Shann M. Cleveland for Common Cause & another, amici curiae, submitted a brief.

GANTS, C.J. For more than a century, Massachusetts law, like Federal law, see 52 U.S.C. § 30118(a) (2012 & Supp. II), has prohibited business corporations from making contributions to political candidates or their campaigns. See St. 1907, c. 581. The plaintiffs here are business corporations who challenge Massachusetts's ban on corporate contributions, G. L. c. 55, § 8, claiming that it imposes an unconstitutional restraint on their rights to free speech and association. The corporations also claim that, because § 8 prohibits corporations from making contributions but does not also prohibit other entities—such as unions and nonprofit organizations—from doing so, it denies them their right to equal protection under the law. We affirm the Superior Court judge's grant of summary judgment in favor of the defendant, the director of the Office of Campaign and Political Finance (OCPF), on both claims.[2]

Background. 1. *Limits on corporate political spending*. Laws limiting the political spending of corporations have a long historical pedigree. The earliest

[2] We acknowledge the amicus brief submitted by Common Cause and Free Speech for People.

such laws emerged more than a century ago, as growing public concern over the influence of corporations in politics led to widespread calls for regulation. *Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 152 (2003) (*Beaumont*). See R.E. Mutch, Buying the Vote: A History of Campaign Finance Reform 16–17, 33, 43–44 (2014). In 1905, President Theodore Roosevelt urged Congress to take action, recommending a total ban on corporate political contributions in order to prevent "bribery and corruption in Federal elections." 40 Cong. Rec. S96 (Dec. 5, 1905). Congress responded in 1907 by enacting the Tillman Act, 34 Stat. 864 (1907), which prohibited "any corporation" from "mak[ing] a money contribution in connection with any election to any political office."

The same year that Congress enacted the Tillman Act, the Massachusetts Legislature enacted its own law prohibiting corporations from making campaign contributions. See St. 1907, c. 581, § 3.[3] Over the next few decades, the Legislature further refined this ban on corporate contributions, while integrating it into its broader efforts to combat corruption in State elections. See, e.g., St. 1913, c. 835, §§ 353, 356 ("Corrupt Practices" section of "An Act to codify the laws relative to primaries, caucuses and elections"); St. 1946, c. 537, § 10 ("An Act relative to corrupt practices, election

[3] The Massachusetts law initially prohibited only certain corporations from making campaign contributions, St. 1907, c. 581, § 3, but was soon amended to apply to all "business corporation[s] incorporated under the laws of[ ] or doing business in this commonwealth." St. 1908, c. 483, § 1.

inquests and violations of election laws"). In 2009, the Legislature extended the ban to apply not only to traditional business corporations but also to any "professional corporation, partnership, [or] limited liability company partnership." St. 2009, c. 28, § 33.

Massachusetts's current ban on corporate contributions, G. L. c. 55, § 8, prohibits business corporations and other profit-making entities from making contributions with respect to State or local candidates. It states, in relevant part:

> "[N]o business or professional corporation, partnership, [or] limited liability company partnership under the laws of or doing business in the commonwealth . . . shall directly or indirectly give, pay, expend or contribute[] any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party."

To understand what a business corporation may and may not do to support a political candidate under current Massachusetts law, we need to describe the different possible ways in which money can be used to support a political candidate's campaign. One way is to make contributions, in cash or things of value, directly to the candidate or to a committee organized on the candidate's behalf. See G. L. c. 55, § 1. A second way is to establish and pay the administrative expenses of a political action committee (PAC), which may then raise money from various sources, and use that money to

support a candidate's campaign. See G. L. c. 55, §§ 1, 5. A third way is to make contributions to a PAC. See G. L. c. 55, § 1. A fourth way is to make "independent expenditures," which are expenditures made to advocate for or against a candidate—for example by purchasing newspaper, radio, or television advertising praising the candidate or criticizing his or her opponent—that are not made in cooperation with or in consultation with any candidate. See *id*. A fifth way is to make contributions to independent expenditure PACs, sometimes called "super PACs," which, unlike ordinary PACs, may only make independent expenditures and may not contribute to candidates. See G. L. c. 55, § 18A(d). See also OCPF, Interpretive Bulletin, OCPF-IB-10-03 (Oct. 2010) (rev. Jan. 2015); OCPF, Campaign Finance Activity by Political Action Committees in Massachusetts, 2011 & 2012, at 12 (July 2013).

Under Massachusetts law, corporations may not make any contributions to a candidate or to a candidate's committee, may not establish or administer a PAC, and may not contribute to a PAC that is not an independent expenditure PAC. See Op. Atty. Gen. No. 10 (Nov. 6, 1980), in Rep. A.G., Pub. Doc. No. 12 at 118–120 (1981). See also OCPF, Advisory Opinion, OCPF-AO-00-05 (Apr. 21, 2000); OCPF, Advisory Opinion, OCPF-AO-98-18 (July 31, 1998). Corporations may, however, make unlimited "independent expenditures," subject to certain disclosure requirements. See G. L. c. 55, §§ 18A, 18C, 18G. They may also make unlimited contributions to independent expenditure PACs. See

970 Code Mass. Regs. § 2.17 (2018). See also OCPF, Interpretive Bulletin, OCPF-IB-10-03, *supra*.

To illustrate, if a Massachusetts corporation wants to support a certain John Hancock for Massachusetts governor, it may not contribute money directly to Hancock or to Hancock's campaign committee. Nor may it establish and administer a PAC to solicit contributions for Hancock, or contribute to a PAC that in turn makes campaign contributions to Hancock. The corporation may, however, spend as much money as it likes advocating on behalf of Hancock, as long as it does so independently from him and his campaign. For example, it may, on its own initiative and without coordinating with Hancock, pay for a television advertisement urging viewers to vote for Hancock. It may also contribute to an independent expenditure PAC, which, provided it does not coordinate with Hancock, may spend money promoting him to the public.

2. *The present action*. The plaintiffs in this case are two separate family-owned corporations doing business in Massachusetts. 1A Auto, Inc., is an automobile parts retailer in Pepperell. 126 Self Storage, Inc., operates a self-storage facility in Ashland. Under § 8, the plaintiffs are barred from making political contributions that they would otherwise choose to make.

The plaintiffs filed suit against the director of OCPF in his official capacity, seeking declaratory and injunctive relief against the continued enforcement of § 8. The plaintiffs alleged that, in banning corporate contributions, § 8 violates their free speech and

association rights guaranteed under the First Amendment to the United States Constitution and arts. 16 and 19 of the Massachusetts Declaration of Rights. The plaintiffs also alleged that § 8 violates their right to equal protection of the law under the Fourteenth Amendment to the United States Constitution and art. 1 of the Massachusetts Declaration of Rights, because it prohibits corporations from making political contributions without also prohibiting other entities, like unions and nonprofit organizations, from doing so.

The plaintiffs moved for a preliminary injunction against the enforcement of § 8. A Superior Court judge denied the motion, finding that the plaintiffs were unable to show a likelihood of success on the merits. Following discovery, the parties filed cross motions for summary judgment. Another Superior Court judge denied the plaintiffs' motion and granted OCPF's motion. As to the plaintiffs' free speech and association claim, the judge noted that in *Beaumont*, 539 U.S. at 154–155, 162–163, the United States Supreme Court rejected a constitutional challenge to the Federal ban on corporate contributions, holding that it was justified by the government's important interest in preventing corruption and the appearance of corruption. The judge concluded that, under that controlling precedent, § 8 was not unconstitutional under the First Amendment because its ban on corporate contributions is "closely drawn to serve the State's interest in preventing corruption or the appearance of corruption." He also concluded that arts. 16 and 19 of the Massachusetts Declaration of Rights grant a corporation no greater

rights to make political contributions than the First Amendment. As to the plaintiffs' equal protection claim, the judge concluded that, because the plaintiffs had failed to demonstrate that corporations and unions are similarly situated, § 8 did not violate the equal protection clause of the Fourteenth Amendment or its parallel in art. 1. The plaintiffs appealed from the judge's grant of summary judgment, and we allowed their application for direct appellate review.

Discussion. We review a decision to grant summary judgment de novo. See *Twomey* v. *Middleborough*, 468 Mass. 260, 267 (2014). "[W]here both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment is to enter" (citation omitted), in this case, the plaintiffs. *Id*.

1. *Free speech and association claim*. The corporations claim that § 8 violates their rights of free speech and association under both the First Amendment and arts. 16 and 19. In interpreting the United States Constitution, we are of course bound by the decisions of the United States Supreme Court, and we "can neither add to nor subtract from the mandates of the United States Constitution." *Commonwealth* v. *Cote*, 386 Mass. 354, 360–361 (1982), quoting *North Carolina* v. *Butler*, 441 U.S. 369, 376 (1979). We are, however, "free to interpret [S]tate constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Goodridge* v. *Department of Pub. Health*, 440 Mass. 309, 328 (2003), quoting *Arizona* v. *Evans*, 514

U.S. 1, 8 (1995). We must therefore first consider whether § 8 is constitutional under the First Amendment, as interpreted by the Supreme Court. If it is, we must then consider whether our Declaration of Rights is more protective of corporate contributions than the First Amendment and, if so, whether § 8 complies with that more protective constitutional standard.

a. *First Amendment*. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established in our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam). For this reason, "[t]he First Amendment affords the broadest protection to such political expression." *Id*. And because, in today's world, the communication of political views and opinions—whether by distributing pamphlets, or through mass media—almost inevitably costs money, see *id*. at 19, laws that limit political spending must be recognized as "operat[ing] in an area of the most fundamental First Amendment activities," *id*. at 14. At the same time, such limits are also an integral feature of campaign finance laws in this State and across the nation, designed to diminish the risk of government corruption, as well as the appearance of such corruption.

Political contributions from corporations are prohibited not only under Massachusetts law, G. L. c. 55, § 8, but also under Federal law, 52 U.S.C. § 30118(a), as well as under the laws of twenty-one other States.[4] See

[4] See Alaska Stat. § 15.13.074(f); Arizona Rev. Stat. § 16-916(A); Ark. Code Ann. § 7-6-203; Colo. Rev. Stat. § 1-45-103.7;

National Conference of State Legislatures, State Limits on Contributions to Candidates, 2017–2018 Election Cycle (June 27,2017). In *Beaumont*, 539 U.S. at 149, the Supreme Court rejected a constitutional challenge to the Federal ban, which prohibits corporations from making contributions to candidates running for Federal office. In doing so, the Court relied on the longstanding distinction—first articulated in *Buckley*, 424 U.S. at 19–21—between laws that limit independent expenditures and laws that limit contributions. As the Court stated, independent expenditure limits are subject to strict scrutiny, whereas contribution limits are reviewed under a less rigorous standard, and will be upheld as long as they are "'closely drawn' to match a 'sufficiently important interest.'" *Beaumont*, 539 U.S. at 162, quoting *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 387–388 (2000). This is because, as the Court first explained in *Buckley*, contribution limits encroach to a lesser extent on First Amendment interests than independent expenditure limits: whereas independent expenditures are themselves a form of political expression, lying "at the core . . . of the First Amendment freedoms," *Buckley*, 424 U.S. at 39, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968), a

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Conn. Gen. Stat. § 9-613; Iowa Code § 68A.503; Ky. Rev. Stat. Ann. §§ 121.025, 121.035; Mich. Comp. Laws § 169.254; Minn. Stat. § 211B.15; Mo. Const. art. VIII, § 23.3(3)(a); Mont. Code Ann. § 13-35-227; N.C. Gen. Stat. Ann. § 163A-1430; N.D. Cent. Code § 16.1-08.1-03.5; Ohio Rev. Code Ann. § 3599.03; Okla. Stat. tit. 21, § 187.2; 25 Pa. Cons. Stat. § 3253; R.I. Gen. Laws § 17-25-10.1(h); Tex. Elec. Code Ann. § 253.094; W. Va. Code § 3-8-8; Wis. Stat. § 11.1112; Wyo. Stat. Ann. § 22-25-102.

contribution is merely "a general expression of support for the candidate and his views, [which] does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21. "[C]ontributions may result in political expression if spent by a candidate . . . to present views to the voters, [but] the transformation of contributions into political debate involves speech by someone other than the contributor." *Id*. Thus, although limits on independent expenditures "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *id*. at 19, limits on contributions "entail[] only a marginal restriction upon the contributor's ability to engage in free communication." *Id*. at 20–21.

This core distinction between independent expenditures and contributions has become a "basic premise" of the Court's jurisprudence concerning campaign finance laws. *Beaumont*, 539 U.S. at 161. Indeed, in the four decades since *Buckley* was decided, the Court has declared unconstitutional almost every independent expenditure limit that has come before it. See, e.g., *Colorado Republican Fed. Campaign Comm.* v. *Federal Election Comm'n*, 518 U.S. 604, 608 (1996) (Federal limit on independent expenditures by political parties); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (Federal ban on corporate independent expenditures as applied to nonprofit corporation); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) (Federal limit on independent

expenditures by political committees); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 795 (1978) (Massachusetts's ban on corporate independent expenditures in connection with initiative petition). In contrast, the Court has upheld most contribution limits. See, e.g., *Nixon*, 528 U.S. at 381–382 (Missouri's contribution limits); *California Med. Ass'n* v. *Federal Election Comm'n*, 453 U.S. 182, 184–185 (1981) (Federal limit on contributions to multicandidate political committees). Cf. *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 447, 465 (2001) (*Colorado Republican*) (upholding Federal coordinated expenditure limits by analogy to contribution limits).[5]

The Court in *Beaumont*, 539 U.S. at 161, recognizing that contributions, unlike independent expenditures, "lie closer to the edges than to the core of political expression," held that the Federal ban on corporate contributions was subject only to "relatively complaisant review under the First Amendment." Applying this standard of review, the Court concluded that the Federal ban served four important government interests: First, the ban operated to "preven[t] corruption [and] the appearance of corruption." *Id*. at 154, quoting *National Conservative Political Action*

[5] One notable exception to this pattern was the Court's decision in *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 654–655 (1990), where the Court upheld a Michigan statute prohibiting corporations from making independent expenditures in connection with State elections. The Court later overruled this decision in *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 365 (2010).

Comm., 470 U.S. at 496–497. Second, prohibiting corporations from making contributions to candidates also protected the interests of dissenting shareholders who did not support the same candidates. *Beaumont*, *supra*. Third, a ban on corporate contributions would prevent individuals from using corporations as vehicles to circumvent valid limits on individual contributions. *Id*. at 155. And fourth, the ban served to "counter . . . the misuse of corporate advantages," combatting not only quid pro quo corruption but also the risk that corporations, with their unique ability to accumulate wealth, would thereby wield "undue influence [over] an officeholder's judgment." *Id*. at 155–156, quoting *Colorado Republican*, 533 U.S. at 440–441. Having concluded that the ban served sufficiently important interests, the Court also concluded that the ban was "closely drawn" to meet those interests, noting that it was not "a complete ban" on corporate political expression, because Federal law still permitted corporations to participate in the electoral process by establishing, administering, and soliciting contributions through a PAC. *Beaumont*, *supra* at 162–163.

Even though the Supreme Court declared in *Beaumont*, *id*. at 163, that an absolute ban on corporate contributions is constitutional under the First Amendment, the plaintiffs urge us nevertheless to rule that § 8 violates that amendment. "We are not free," however, "to construe the First Amendment as creating constitutional protection broader than that established by the Supreme Court." *Matter of Roche*, 381 Mass. 624, 631 n.8 (1980). It is a well-established

principle that, where a Supreme Court precedent "has direct application in a case," lower courts must follow that precedent, even if it were "to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Although the landscape of campaign finance law has changed significantly since *Beaumont*—most notably because of the Supreme Court's decision in *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310 (2010)—*Beaumont* remains "the law of the land until the Supreme Court decides otherwise," and we are bound to follow it. *Commonwealth* v. *Runyan*, 456 Mass. 230, 234 (2010), overruled on another ground, *Commonwealth* v. *Reyes*, 464 Mass. 245, 256 (2013).

In *Citizens United*, 558 U.S. at 365, the Court declared unconstitutional a Federal law that banned corporations from making independent expenditures, emphasizing that, under the First Amendment, the government may not restrict speech "on the basis of the speaker's corporate identity." Applying strict scrutiny, *id.* at 340, the Court concluded that the law was unconstitutional because it did not serve a sufficiently compelling interest. *Id*. at 365. In doing so, the Court overruled earlier decisions where it had taken a broader view of the government interests that could support restrictions on corporate political spending. *Id*. at 365–366. The Court declared that the only sufficiently compelling interest that could justify a restriction on political spending was the government's interest in preventing corruption or the appearance of

corruption.[6] See *id*. at 356–362. Moreover, the Court defined corruption narrowly, limiting it to "quid pro quo corruption"—that is, the exchange of "dollars for political favors"—and rejected the view that corruption could also take the form of disproportionate influence over or access to elected officials. *Id*. at 359, quoting

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[6] As earlier stated, in *Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 154–156 (2003), the Court identified four important government interests that supported the ban on corporate political contributions. In *Citizens United*, 558 U.S. at 361–362, the Court repudiated two of these interests, declaring that the government could not restrict corporate political spending in order to protect dissenting shareholders, or in order to combat the distorting influence that corporations, with their accumulated wealth, could wield over the political process, *id*. at 348, quoting *Austin*, 494 U.S. at 660. See *Citizens United*, 558 U.S. at 348–356. The Court reaffirmed, however, that the government may restrict corporate political spending in furtherance of its interest in preventing corruption or the appearance of corruption. *Id*. at 356–357. The Court did not speak of the fourth important government interest identified in *Beaumont*—that is, the government's interest in preventing individuals from circumventing valid limits on individual contributions by funneling the contributions through a corporation. *Beaumont*, 539 U.S. at 155. We do not interpret the Court's silence as a repudiation of this important government interest, especially where it is so closely related to the government interest in preventing corruption and the appearance of corruption. See *Ognibene* v. *Parkes*, 671 F.3d 174, 195 n.21 (2d Cir.), cert. denied, 567 U.S. 935 (2012) ("*Citizens United* . . . does not disturb the validity of the anti-circumvention interest"); *Thalheimer* v. *San Diego*, 645 F.3d 1109, 1124–1125 (9th Cir. 2011) ("[T]he anti-circumvention interest is part of the familiar anti-corruption rationale. . . . [N]othing in the explicit holdings or broad reasoning of *Citizens United* . . . invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions"). Cf. *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 218–221 (2014) (plurality opinion) (government has interest in preventing circumvention of contribution limits).

National Conservative Political Action Comm., 470 U.S. at 497.

The Court in *Citizens United* did not, however, overrule its decision in *Beaumont*. Indeed, the majority opinion did not even cite *Beaumont*. Moreover, *Citizens United* left much of the reasoning in *Beaumont* undisturbed. In *Citizens United*, 558 U.S. at 345, 356–359, the Court reaffirmed the key distinction between contributions and independent expenditures, emphasizing that contributions present a special risk of quid pro quo corruption because, unlike independent expenditures, they are coordinated with candidates. See *id*. at 357. For that reason, the Court recognized that contribution limits are "an accepted means to prevent quid pro quo corruption." *Id*. at 359. The Court also made clear that its analysis in *Citizens United* was specific to independent expenditure limits; it specifically did not "reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." *Id*. See *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 196–197 (2014) (plurality opinion) (reiterating different standards of review for contribution limits and independent expenditure limits).

To our knowledge, every Federal circuit court that has considered a constitutional challenge to laws banning corporate contributions since *Citizens United* has applied the controlling precedent in *Beaumont* and concluded that the laws were constitutional under the First Amendment. See, e.g., *Iowa Right to Life Comm., Inc.* v. *Tooker*, 717 F.3d 576, 601 (8th Cir. 2013), cert. denied, 572 U.S. 1046 (2014); *Minnesota Citizens*

Concerned for Life, Inc. v. *Swanson*, 692 F.3d 864, 877–880 (8th Cir. 2012); *United States* v. *Danielczyk*, 683 F.3d 611, 615–619 (4th Cir. 2012), cert. denied, 568 U.S. 1193 (2013); *Ognibene* v. *Parkes*, 671 F.3d 174, 194–197 (2d Cir. 2011), cert. denied, 567 U.S. 935 (2012); *Thalheimer* v. *San Diego*, 645 F.3d 1109, 1124–1126 (9th Cir. 2011). Cf. *Wagner* v. *Federal Election Comm'n*, 793 F.3d 1, 5–32 (D.C. Cir. 2015), cert. denied sub nom. *Miller* v. *Federal Election Comm'n*, 136 S. Ct. 895 (2016) (upholding ban on contributions by government contractors); *Yamada* v. *Snipes*, 786 F.3d 1182, 1204–1207 (9th Cir. 2015), cert. denied sub nom. *Yamada* v. *Shoda*, 136 S. Ct. 569 (2015) (same); *Green Party of Conn.* v. *Garfield*, 616 F.3d 189, 198–205 (2d Cir. 2010) (same).

The plaintiffs contend that, even if we recognize *Beaumont* as controlling precedent (which we do), and apply its "closely drawn" standard of review (which we will), we should nonetheless conclude that § 8 violates their First Amendment rights. In support of this contention, the plaintiffs proffer two arguments.

First, they argue that § 8 does not advance a sufficiently important interest, because OCPF has failed to demonstrate that the ban on corporate political contributions is necessary to prevent quid pro [sic] corruption or the appearance of quid pro quo corruption. They contend that, to demonstrate the constitutionality of such a ban, OCPF would need to present evidence of corporate contributions leading to quid pro quo corruption in Massachusetts. But imposing such an evidentiary burden on OCPF would be both unrealistic and unnecessary.

It would be unrealistic because corporate political contributions have been banned under Massachusetts law for over a century. Cf. *Wagner*, 793 F.3d at 14 ("Of course, we would not expect to find—and we cannot demand—continuing evidence of large-scale quid pro quo corruption or coercion involving federal contractor contributions [where] such contributions have been banned since 1940"). We cannot demand that OCPF provide evidence of what would happen in a "counterfactual world" where § 8 does not exist. *McCutcheon*, 572 U.S. at 219 (plurality opinion). See *Colorado Republican*, 533 U.S. at 457 (recognizing "difficulty of mustering evidence to support long-enforced statutes" because "there is no recent experience" without them). Cf. *Burson* v. *Freeman*, 504 U.S. 191, 208 (1992) (plurality opinion) ("The fact that these laws have been in effect for a long period of time . . . makes it difficult" to demonstrate "what would happen without them"). All we can ask is "whether experience under the present law confirms a serious threat of abuse." *McCutcheon*, *supra*, quoting *Colorado Republican*, *supra*.

And here, experience confirms that, if corporate contributions were allowed, there would be a serious threat of quid pro quo corruption. In *Buckley*, 424 U.S. at 27, the Supreme Court noted that, although actual instances of quid pro quo corruption can be difficult to detect, "the deeply disturbing" political scandals of the 1970s "demonstrate[d] that the problem is not an illusory one." Sadly, the risk of quid pro quo corruption is no less illusory in Massachusetts. In just the last decade, several Massachusetts politicians have been

convicted of crimes stemming from bribery schemes intended to benefit corporations. See, e.g., *United States* v. *McDonough*, 727 F.3d 143, 147 (1st Cir. 2013), cert. denied, 571 U.S. 1177 (2014); *United States* v. *Turner*, 684 F.3d 244, 246 (1st Cir.), cert. denied, 568 U.S. 1018 (2012); *United States* v. *Wilkerson*, 675 F.3d 120, 121 (1st Cir. 2012). In addition, the record here shows that OCPF has prosecuted several cases involving corporations that sought to circumvent § 8 by making contributions through individual employees, who were later reimbursed with corporate funds. Such schemes indicate that, if not for § 8, the inverse also would be possible, with individuals circumventing the limits on their own political contributions "by diverting money through . . . corporation[s]." *Beaumont*, 539 U.S. at 155. See *id*. ("experience 'demonstrates how candidates, donors, and parties test the limits of the current law, and . . . how contribution limits would be eroded if inducement to circumvent them were enhanced'" [citation omitted]).[7]

It would also be unrealistic for a court to require the Legislature to wait for evidence of widespread quid pro quo corruption resulting from corporate

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[7] Under G. L. c. 55, an individual may not contribute more than (1) a total of $1,000 per year to a candidate or candidate's committee, (2) an aggregate of $5,000 per year to a political party or political committees associated with such party, and (3) $500 per year to a political action committee (PAC), other than an independent expenditure PAC. G. L. c. 55, § 7A(a)(1)–(3); 970 Code Mass. Regs. § 1.04(12) (2018). There is no limitation on the amount that may be contributed to an independent expenditure PAC. See 970 Code Mass. Regs. § 2.17(4) (2018).

contributions before taking steps to prevent such corruption. "There is no reason to require the [L]egislature to experience the very problem it fears before taking appropriate prophylactic measures." *Ognibene*, 671 F.3d at 188.

Apart from being unrealistic, requiring OCPF to provide recent examples of quid pro corruption resulting from corporate contributions is also unnecessary because we need not insist on evidence of *actual* corruption when the government also has an important interest in preventing the *appearance* of corruption. See *id*. ("[T]o require evidence of actual scandals for contribution limits would conflate the interest in preventing actual corruption with the separate interest in preventing apparent corruption"). See also *Buckley*, 424 U.S. at 27 ("the impact of the appearance of corruption" is "[o]f almost equal concern as the danger of actual quid pro quo arrangements"). It requires "no great leap of reasoning" for us to infer that a ban on corporate contributions would counter at least the appearance of quid pro quo corruption. *Green Party of Conn*., 616 F.3d at 200. If corporate contributions were permitted, every time a political decision was made that helped or hurt a corporation's interests, members of the public might wonder if the corporation's political contributions—or lack thereof—played a role in the decision.

Both history and common sense have demonstrated that, when corporations make contributions to political candidates, there is a risk of corruption, both actual and perceived. See *Florida Bar* v. *Went For It,*

Inc., 515 U.S. 618, 628 (1995), quoting *Burson*, 504 U.S. at 211 (speech restrictions can be justified "based solely on history, consensus, and 'simple common sense'" [citation omitted]). We conclude that § 8 advances the "sufficiently important interest" in preventing quid pro quo corruption and its appearance, and in preventing the circumvention of individual contribution limits through corporations.

The plaintiffs' second argument is that, even if § 8 does advance those important interests, it is not closely drawn for that purpose. The plaintiffs claim that § 8 is at once both overinclusive and underinclusive. It is overinclusive, they contend, because it is an outright ban on corporate contributions, when there are other, less restrictive options—such as a contribution ceiling, or disclosure requirements—that could also further those important interests. The Supreme Court rejected a similar argument in *Beaumont*, 539 U.S. at 162–163, concluding that the equally comprehensive Federal ban on corporate contributions was nevertheless closely drawn.

The plaintiffs seek to distinguish this case from *Beaumont*, arguing that in *Beaumont*, *id*. at 163, the Court was able to reach this conclusion only because Federal law "allow[s] corporations 'to establish and pay the administrative expenses of [PACs]'" (citation omitted), whereas under Massachusetts law corporations are prohibited from doing so. The plaintiffs contend that, in *Beaumont*, the Court required as an "essential constitutional minimum" that corporations be allowed to establish and administer a PAC. But in *Beaumont*,

supra at 162–163, the Court noted the existence of a corporate-controlled "PAC option," not to suggest that it was a constitutionally mandated minimum, but rather to illustrate that corporations still had meaningful opportunities to participate in the political process.

Importantly, *Beaumont* was decided seven years before *Citizens United*, when Federal law still prohibited corporations from making independent expenditures. See *Beaumont*, *supra*. at 149. In *Beaumont*, the Court singled out the PAC option because, at that time, it was one of the most important outlets for corporate speech. What the Court emphasized was that, because such outlets existed, the ban on corporate contributions was not "a complete ban" on all political expression by corporations. *Id*. at 162.

Here, similarly, § 8 is not "a complete ban" on corporate political expression. *Beaumont*, *supra*. Although Massachusetts law does not permit corporations to establish and administer a PAC, it has, since *Citizens United*, permitted corporations to engage in a significant form of political expression that was not allowed when *Beaumont* was decided—that is, to make unlimited independent expenditures as well as unlimited contributions to independent expenditure PACs. See G. L. c. 55, §§ 18A, 18C, 18G. See also St. 2014, c. 210, §§ 4, 20–21, 25 (amending G. L. c. 55, §§ 1, 18A, 18C, 18G). And predictably, OCPF records indicate that independent expenditures in connection with State elections have risen sharply since the ban was lifted. See OCPF Reports, Post Election 2016, at 2 (2016) (independent expenditures in 2016 State election approximately

fifty per cent higher than in 2012 State election). Where corporations in Massachusetts are free to spend as much money as they would like independently advocating for their preferred candidates, or to contribute to an independent expenditure PAC, we cannot conclude that § 8 denies corporations the opportunity meaningfully to participate in the political process. See *Thalheimer*, 645 F.3d at 1125 ("[the] ability to directly contribute $500 to a candidate pales in significance to [the contributor's] ability to make unlimited independent expenditures . . . supporting or opposing candidates").

Nor are we persuaded that § 8 must be invalidated because the government has the less restrictive option of regulating through disclosure requirements. In *Buckley*, 424 U.S. at 28, the Court defended Federal contribution limits against similar arguments, concluding that "Congress was surely entitled to conclude that disclosure was only a partial measure," and that contribution limits were "a necessary legislative concomitant to deal with the reality or appearance of corruption." Here, too, the Legislature was entitled to conclude that disclosure on its own would be insufficient to meet the government's anticorruption interest.

Having argued that § 8 is not closely drawn, and is therefore unconstitutional, because it restricts too much speech, the plaintiffs also argue that it is not closely drawn, and is therefore unconstitutional, because it restricts too little. They contend that § 8 is underinclusive, because, unlike the Federal law upheld in *Beaumont*, 539 U.S. at 157, which barred both

corporations and unions from making contributions, § 8 applies to corporations but not to unions. The plaintiffs suggest that, because § 8 does not also regulate unions, it is a "discriminatory contribution ban[ ]" that regulates only certain speakers and thereby impermissibly restricts speech based on viewpoint. See *Citizens United*, 558 U.S. at 340 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content").

As the Supreme Court has recognized, "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668 (2015). The government is not required to regulate speech to the constitutionally permitted maximum; "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Id*., quoting *R.A.V.* v. *St. Paul*, 505 U.S. 377, 387 (1992). See *Wagner*, 793 F.3d at 29 ("a regulation is not fatally underinclusive . . . simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective" [citation omitted]). Rather, we consider whether a restriction on speech is underinclusive only to the extent that such underinclusiveness "reveal[s] that a law does not actually advance" a sufficiently important interest, *Williams-Yulee*, *supra*, citing *Smith* v. *Daily Mail Publ. Co.*, 443 U.S. 97, 104–105 (1979), or "raise[s] 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Williams-Yulee*, *supra*, quoting *Brown* v.

Entertainment Merchants Ass'n, 564 U.S. 786, 802 (2011). We have already concluded that § 8 advances an important anticorruption interest. Thus, § 8 cannot violate the First Amendment for underinclusiveness unless the failure to include other entities within its scope demonstrates that preventing corruption and the appearance of corruption is a mere pretext for the prohibition against political contributions, and that its true purpose is to silence the political speech of business corporations, professional corporations, partnerships, and limited liability partnerships, while favoring the political viewpoints of those entities that fall outside its scope.

There is nothing in the record suggesting that the Legislature acted with this impermissible intent. Without citing any legislative history, the plaintiffs appear to claim that the true legislative purpose in enacting § 8 and its subsequent amendments was to favor labor unions at the expense of corporations. But there is no evidence to support this claim. Unions are not the only entities excluded from the scope of § 8; nonprofit corporations and unincorporated trade associations are also not included. If the Legislature intended § 8 to accomplish viewpoint discrimination against businesses, one would certainly have expected it to include trade associations within its prohibition. Here, the Legislature has an important interest in preventing corruption and its appearance, which it seeks to advance through § 8. The fact that § 8 focuses on corruption stemming from corporate contributions—

"rather than every conceivable instance" of corruption—does not call this into doubt. *Ognibene*, 671 F.3d at 191. See, e.g., *Wagner*, 793 F.3d at 32 (Federal law banning contributions from individual government contractors but not from other entities or individuals with government contracts is not "fatally underinclusive"); *Ognibene*, *supra* at 191–192 (municipal law limiting contributions from individuals or entities "doing business" with government but not from certain labor organizations is not underinclusive). After all, the Legislature "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee*, 135 S. Ct. at 1668. We decline to declare § 8 fatally underinclusive merely "because it might have gone farther than it did." *Buckley*, 424 U.S. at 105, quoting *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929).[8]

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[8] Justice Kafker's concurrence takes issue with our discussion of underinclusiveness, apparently because we fail to adequately address issues that he concedes we "[u]ltimately . . . cannot base our decision on." *Post* at ___. The concurrence faults us for failing "to explore the complexities of Supreme Court case law regarding differential treatment of business corporations in the context of direct contributions," *post* at ___, and in particular faults us for failing to discuss the Supreme Court's decision in *Austin*, 494 U.S. at 652, *post* at ___.

The reason we do not rely on *Austin* is quite simple: *Austin* has been overruled. In *Citizens United*, 558 U.S. at 365, the Supreme Court expressly stated: "*Austin* should be and now is overruled." The concurrence seems to think that there is some uncertainty on this front, contending that—because it is "far from clear" whether the reasoning in *Austin* may still be relied on, *post* at ___—we must take *Austin* into account. But if the Supreme Court had intended to overrule only certain portions of *Austin*, it

For all of these reasons, we conclude that § 8 is constitutional under the First Amendment.

b. *Arts. 16 and 19 of the Massachusetts Declaration of Rights*. Having concluded that § 8 is constitutional under the First Amendment of the United States

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would have done so. In fact, in *Citizens United*, 558 U.S. at 365–366, the Court specifically overruled only portions of its decision in *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93 (2003), but overruled *Austin* without any such qualification. It may very well be that some of the reasoning in *Austin*—a case about independent expenditure limits—remains viable in the context of contribution limits, as the concurrence suggests. *Post* at ___. But to say so would be speculative, and we decline to base our decision on speculation.

Rather than rely on a precedent that has been expressly overruled, we follow the approach that the Supreme Court has taken more recently, in *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668–1670 (2015), when analyzing underinclusiveness under the First Amendment. Again, because the First Amendment does not require the government to restrict as much speech as it permissibly can, we consider whether a restriction is underinclusive only to the extent that it raises doubts about whether the restriction does in fact advance a sufficiently important interest or indicates that the government is acting with an impermissible purpose. *Id*. at 1668. The concurrence seems to take the view that the "differential treatment" of corporations and unions, *post* at ___, may render § 8 impermissibly underinclusive. But "differential treatment" on its own does not render a law unconstitutional under the First Amendment. See, e.g., *Wagner* v. *Federal Election Comm'n*, 793 F.3d 1, 32 (D.C. Cir. 2015), cert. denied, *Miller* v. *Federal Election Comm'n*, 136 S. Ct. 895 (2016); *Ognibene*, 671 F.3d at 191–192. The question is whether the exclusion of entities such as unions, nonprofit corporations, and unincorporated trade associations from its scope suggests that § 8 does not advance a legitimate anticorruption interest, but instead serves the illegitimate purpose of discriminating against the viewpoints of corporations. For the reasons already stated, we conclude that it does not.

Constitution, we must now consider whether it is also constitutional under arts. 16 and 19 of the Massachusetts Declaration of Rights.[9] As earlier stated, as the final arbiter regarding the interpretation of our State constitution, this Court has "the inherent authority" to declare that our State Constitution affords broader protection to individual rights than does the United States Constitution. *Libertarian Ass'n of Mass.* v. *Secretary of the Commonwealth*, 462 Mass. 538, 558 (2012). This does not mean, however, that we must "exercise [that authority] at every turn." *Id*. at 559. Historically, we have interpreted the protections of free speech and association under our Declaration of Rights to be "comparable to those guaranteed by the First Amendment." *Opinion of the Justices*, 418 Mass. 1201, 1212 (1994). We see no reason to conclude that art. 16 or 19 gives corporations greater rights of political participation than they enjoy under the First Amendment to the United States Constitution. We therefore conclude that § 8 is constitutional under arts. 16 and 19 of the Massachusetts Declaration of Rights.

2. *Equal protection claim*. The plaintiffs claim that § 8 violates their rights to equal protection for the same reasons they claim that § 8 was underinclusive under the First Amendment: because it prohibits corporations from making contributions, while allowing

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[9] Article 16 of the Massachusetts Declaration of Rights provides, in relevant part, that "[t]he right of free speech shall not be abridged." Article 19 provides that "[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good."

unions and nonprofit organizations to do so. But this time, the plaintiffs seek to avail themselves of a more rigorous standard of review, contending that—although under the First Amendment, § 8 need only be "closely drawn" to advance a "sufficiently important interest," *Beaumont*, 539 U.S. at 162—under equal protection principles, it is subject to strict scrutiny, and therefore must be "narrowly tailored" to serve a "compelling interest." See *Citizens United*, 558 U.S. at 340. In essence, the plaintiffs seek, by reframing their First Amendment challenge, to effect an end run around the Supreme Court's well-established distinction between independent expenditure limits, which trigger strict scrutiny, and contribution limits, which do not.

In *Wagner*, 793 F.3d at 32, the United States Court of Appeals for the District of Columbia Circuit rejected precisely this kind of "doctrinal gambit." The court there considered a comparable equal protection claim in a case where individual Federal government contractors challenged the constitutionality of a Federal law that barred them from making Federal campaign contributions while they negotiate or perform Federal contracts. *Id*. at 3, 32–33. After rejecting the plaintiffs' First Amendment challenge, the court addressed the plaintiffs' claim that the Federal law violated their rights under the equal protection clause of the Fifth Amendment because it applied to individual government contractors but not to other, "similarly situated persons," such as regular government employees. *Id.* at 32. The court declined to apply strict scrutiny to the Federal law, explaining:

> "Although the Court has on occasion applied strict scrutiny in examining equal protection challenges in cases involving First Amendment rights, it has done so only when a First Amendment analysis would itself have required such scrutiny. There is consequently no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protection principles. . . . This will not be the first. . . .
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> "[A]lthough equal protection analysis focuses upon the validity of the classification rather than the speech restriction, 'the critical questions asked are the same.' We believe that the same level of scrutiny . . . is therefore appropriate in both contexts. . . .
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> "[I]n a case like this one, in which there is no doubt that the interests invoked in support of the challenged legislative classification are legitimate, and no doubt that the classification was designed to vindicate those interests rather than disfavor a particular speaker or viewpoint, the challengers 'can fare no better under the Equal Protection Clause than under the First Amendment itself'" (footnote and citations omitted).

Id. at 32–33.

We adopt the court's reasoning here. For equal protection purposes, strict scrutiny is warranted only where a law implicates a suspect class or burdens a fundamental right. See *Goodridge*, 440 Mass. at 330. Corporations are not a suspect class. And, although the

rights to free speech and association are fundamental, see *Buckley*, 424 U.S. at 14, the Supreme Court has already explicitly stated that, because contributions "lie closer to the edges than to the core of political expression," contribution limits do not sufficiently burden those rights to warrant strict scrutiny. *Beaumont*, 539 U.S. at 161. See *Buckley*, *supra* at 25. Thus, where the challenged law is a limit on contributions, as here, and where that law does not implicate a suspect class, we follow the Supreme Court's precedents and apply the familiar "closely drawn" standard, regardless of whether the challenge sounds under the First Amendment or under equal protection principles. And, under this standard, we conclude that § 8 is constitutional under equal protection principles, for the same reasons that it is constitutional under the First Amendment.[10]

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[10] Because it is not necessary to our decision, we do not decide whether business corporations and the other profit-making entities within the scope of § 8 are similarly situated to or treated differently from other entities, such as unions or nonprofit organizations, that are outside its scope. See *Matter of Corliss*, 424 Mass. 1005, 1006 (1997) ("One indispensable element of a valid equal protection claim is that individuals who are similarly situated have been treated differently"). We note that, under current Massachusetts law, it is not clear to what extent unions and nonprofit organizations are free to make political contributions.

This is because, separate from its ban on corporate contributions, G. L. c. 55 also regulates certain kinds of organizations known as "political committees." As defined in G. L. c. 55, § 1, a "political committee" includes any "organization or other group of persons . . . which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate, or candidates. . . ." If, under this broad definition, a union or nonprofit organization that makes even a nominal political

contribution is considered a political committee, such entities effectively would be prohibited from making any contribution because, once characterized as a political committee, they would be required not only to meet burdensome disclosure requirements, but also to dedicate their resources exclusively to their political purpose, meaning that they could no longer serve their intended purposes as a union or nonprofit organization. See 970 Code Mass. Regs. § 2.06(6)(b) (2018) ("No political committee . . . may pay or expend money or anything of value unless such transaction will enhance the political future of the candidate or principle on whose behalf the committee was organized").

In 1988, OCPF issued guidance in the form of an interpretive bulletin, explaining that a nonpolitical organization—that is, an organization that does not solicit or receive funds for any political purpose—will not be considered a political committee as long as it does not make "more than incidental" political expenditures, defined as those "exceed[ing], in the aggregate, . . . either $15,000 or 10 percent of [the] organization's gross revenues . . . , whichever is less" (emphasis omitted). OCPF, Interpretive Bulletin, OCPF-IB-88-01 (Sep. 1988) (rev. May 9, 2014). Thus, under OCPF's interpretation, a union or nonprofit organization can spend up to $15,000 or ten per cent of its gross revenues, whichever is less, without triggering the regulations applicable to political committees.

An administrative bulletin, as opposed to a regulation that has benefited from the full rulemaking process, with opportunity for notice and comment, see G. L. c. 55, §§ 2–3, is entitled to substantial deference but it is not a promulgated regulation that carries the force of law. See *Global NAPs, Inc.* v. *Awiszus*, 457 Mass. 489, 496–497 (2010) ("although [administrative agency's guidelines] are entitled to substantial deference, they do not carry the force of law"). The question whether OCPF's interpretive bulletin accurately interprets c. 55 has not, to our knowledge, been addressed in a court of law. Because it is not necessary to our decision, because it was not addressed by the judge or briefed by the parties, and because a ruling would have substantial consequence on entities that are not parties to this action, we decline to address it here.

We therefore conclude that § 8 does not violate the equal protection clause of the Fourteenth Amendment. Nor does it violate the plaintiffs' entitlement to equal protection under art. 1. See *Dickerson* v. *Attorney Gen.*, 396 Mass. 740, 743 (1986) ("For the purpose of equal protection analysis, our standard of review under . . . the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution").

Conclusion. For the reasons stated, the order denying the plaintiffs' motion for summary judgment and allowing OCPF's cross-motion for summary judgment is affirmed.

So ordered.

BUDD, J. (concurring). I agree with the court's holding. However, I write separately to describe more broadly the interest in "limit[ing] 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large . . . financial contributions' to particular candidates." *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 207 (2014) (plurality opinion), quoting *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976). In Massachusetts, this interest is rooted in the Declaration of Rights of the Constitution of the Commonwealth and supports the Commonwealth's statutory scheme of campaign contribution regulation as a whole. Under art. 5 of the Declaration of Rights, the Commonwealth has a constitutional

interest in ensuring that its elected representatives are "substitutes and agents" of the people who act only in their interest.

1. Role of a representative under the Constitution of the Commonwealth. A basic principle of our Constitution (and of a republican form of government) is that representatives are to be chosen by the people to represent them and their interests. See Part II of the Constitution of the Commonwealth. The people, through the Constitution, established a legislative department comprised of legislators who are elected by the qualified voters inhabiting the districts that they represent. See *id*. at c. 1, §§ 2, 3. The people also established an executive power exercised by the Governor. *Id*. at c. 2. "The Governor is emphatically the Representative of the whole People, being chosen not by one Town or County, but by the People at large." An Address of the Convention for Framing a new Constitution for the State of Massachusetts Bay, to their Constituents, 13 (1780).

The Declaration of Rights further clarifies that the relationship between representatives and the people is an agency relationship. Art. 5 provides as a *right*:

> "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."

See *Opinion of the Justices*, 160 Mass. 586, 594 (1894) (opinion of Holmes, J.) ("confidence is put in [the Legislature] as an agent . . . of its principal[, the people]").

The core of the relationship between an agent and his or her principal is a duty of loyalty that the former owes the latter: the law "demands that the agent shall work with an eye single to the interest of his principal. It prohibits him from receiving any compensation but his commission, and forbids him from acting adversely to his principal, either for himself or for others." *McKinley* v. *Williams*, 74 F. 94, 95 (8th Cir. 1896). See *Attorney Gen.* v. *Henry*, 262 Mass. 127, 132 (1928). Under art. 5, all governmental officials in the Commonwealth, as agents of the people, are bound to "work with an eye single to the interests" of their principal, the public.[1] *McKinley*, *supra* at 95.

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[1] Article 5 of the Massachusetts Declaration of Rights may recognize two valid principals whose interests a representative may advance: a representative's constituents and the people of the Commonwealth at large. That the Constitution may intend representatives to be agents of both is clarified by theories of representation debated at the time that the 1780 Constitution was drafted.

In the Eighteenth Century, members of the British Parliament, once elected, were generally considered not to be agents of their constituencies, but representatives of the entire nation. William Blackstone explained that "every member, though chosen by one particular district, when elected and returned serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the *common* wealth" (emphasis in original). 1 W. Blackstone, Commentaries *155. Arthur Onslow, who served as the Speaker of the House of Commons from 1728–1761, explained that "every Member is equally a Representative of the *whole* (within which, by our

2. *Campaigns for elected office*. Over the past century, the cost of running a feasible campaign for elected office, even for local positions, has increased dramatically. See Deeley, Campaign Finance Reform, 36 Harv. J. on Legis. 547, 550–551 (1999); R. Luce, Legislative Principles, The History and Theory of Lawmaking by Representative Government, 423–425

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particular constitution, is included a Representative, not only of those who are electors, but of all the other subjects of the Crown of Great Britain at home, and in every part of the British empire, except the Peers of Great Britain) has, as I understand, been the constant notion and language of Parliament." J. Hatsell, Precedents of Proceedings in the House of Commons 47, note (1781). This theory of Representation justified Parliament's imposition of taxes and other laws on the colonies before the American Revolution. R. Luce, Legislative Principles, The History and Theory of Lawmaking by Representative Government 438 (1930) (Luce). Under the theory, a "British subject in Massachusetts Bay or Virginia was represented in Parliament just as much as if he were living in London. The accident of voting or not voting had nothing to do with the question." *Id*.

Massachusetts revolutionaries, such as Otis and the Adamses, rejected this theory, *id*.; art. 5 expresses that rejection. Although the article certainly does not eliminate a representative's responsibilities to the entire Commonwealth of Massachusetts, I believe the Massachusetts Constitution does require representatives to balance this responsibility with a consideration of and duty to advance the best interests (and perhaps expressed needs) of his or her constituents. See art. 5. See also art. 19 of the Massachusetts Declaration of Rights (people have right to instruct representatives); Bresler, Rediscovering the Right to Instruct Legislators, 26 New Eng. L. Rev. 355, 360 (1991). Contrast arts. 5 and 19 with, for example, the French Constitution of 1795, which stated: "The members of the legislative body are not representatives of the departments which have elected them, but of the whole nation, and no specific instruction shall be given them." Luce, *supra* at 445.

(1930). Most officials rely on campaign contributions to raise revenue in order to run a campaign. This system of financing generates a discrete category of principals, that is, a donor class,[2] separate and distinct from "the people." See art. 5; *Bates* v. *Director of Office of Campaign & Political Fin.*, 436 Mass. 144, 165–166 (2002). Thus, the campaign finance system has created incentives for representatives to act not simply with the interests of the public in mind, but instead with an eye toward balancing the interests of the donors and the public, which may at times be divergent.[3]

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[2] Donors making donations of one hundred dollars or more in the period before the 1996 election made up less than one per cent of the Commonwealth's eligible voters. *Bates* v. *Office of Campaign & Political Fin.*, 436 Mass. 144, 165 n.28 (2002). The corporate plaintiffs in this case, of course, cannot be considered qualified voters at all. See art. 3 of the Amendments to the Constitution of the Commonwealth, as amended (setting forth voter qualifications). See also art. 8 of the Declaration of Rights (establishing elections as primary form of representative accountability).

[3] Take, for example, the comment of a congressman in 2017, who, in reference to a bill being considered in Congress, commented to members of the press: "My donors are basically saying, 'Get it done or don't ever call me again.'" GOP Lawmakers: Donors are pushing me to get tax reform done, The Hill (Nov. 7, 2017). See Here's one White House hopeful who wants to get big money out of politics, Reuters (April 18, 2015) (statement of Senator Lindsey Graham) ("We've got to figure out a way to fix this mess, because basically 50 people are running the whole show"); Michele Bachmann: The Newsmax Interview, Newsmax (June 26, 2011) (statement of Congresswoman Michele Bachmann) (describing "the corrupt paradigm that has become Washington, D.C., whereby votes continually are bought rather than representatives voting the will of their constituents. . . . That's the voice that's been missing at the table in Washington, D.C.—the people's voice

3. *General Laws c. 55*. The prohibition on corporate campaign contributions set forth in G. L. c. 55, § 8, is one part of a broader scheme of statutes limiting and regulating campaign contributions set forth in that chapter. We have long held that some rights established by the Constitution may contemplate "suitable and reasonable regulations, not calculated to defeat or impair [that] right[,] . . . but rather to facilitate and secure the exercise of the right." *Capen* v. *Foster*, 12 Pick. 485, 492 (1832). Article 5 guarantees the people a right to a republic in which their representatives are their substitutes and agents. To the extent that the lack of campaign finance regulation results in a system of government where representatives are increasingly forced to "work with an eye [not] single to the interest" of the public, *McKinley*, 74 F. at 95, campaign finance regulation and the limits on campaign contributions set forth in G. L. c. 55 may be appropriate to preserve the representative democracy contemplated by the framers of the Constitution ratified by the people of the Commonwealth in 1780.[4]

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has been missing"); In Political Money Game, the Year of Big Loopholes, N.Y. Times (Dec. 26, 1996) (statement of Congressman Barney Frank) ("We are the only people in the world required by law to take large amounts of money from strangers and then act as if it has no effect on our behavior").

[4] Cf. *United States* v. *International Union United Auto., Aircraft and Agric. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 577–578 (1957), quoting 86 Cong. Rec. 2720 (statement of U.S. Senator in support of limits on campaign contributions) ("We all know that money is the chief source of corruption. We all know that large contributions to political campaigns . . . put the

The prevention of criminal bribery alone does not sufficiently identify the Commonwealth's interest in its campaign contribution regulatory scheme. "[L]aws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action." *Wagner* v. *Federal Election Comm'n*, 793 F.3d 1, 15 (D.C. Cir. 2015), cert. denied sub nom. *Miller* v. *Federal Election Comm'n*, 136 S. Ct. 895 (2016), quoting *Buckley*, 424 U.S. at 27–28. Thus, I believe that the Commonwealth's campaign finance regulation may be justified not only to prevent corruption in the form of criminal bribery or the appearance of criminal bribery, but also to prevent the appearance of corruption by preserving the agency relationship between representatives and the people set forth under art. 5.[5]

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political party under obligation to the large contributors, who demand pay in the way of legislation").

Even assuming that voters, as principals, may consent to a representative that has a clearly disclosed conflict of interest by electing such an individual, see 1 S. Livermore, A Treatise on the Law of Principal and Agent 33 (1818) (principals responsible for "consequences of making . . . [a deficient agency] appointment"), voters would need a choice in order to consent. If the nature of the problem is systemic, without regulation, voters are deprived of the ability to choose a candidate that does not have such a conflict and may typically be faced with a monopoly of choices that do not work with an eye single to their interests and the interests of the Commonwealth. See *id*. at 25 (without consent of principal there can be no appointment of agent; there must be "serious and free use of [the consent] power[ ]"). See also *Bates*, 436 Mass. at 165 n.28 (discussing frequency of uncontested elections).

[5] "[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his

The statute at issue in this case facilitates and helps secure the agency relationship between the people and their representatives as principals and agents, to take a step in the direction of preserving the constitutional directive that when elected officials act, their primary motivations are the interests of their principals, i.e., their constituents and the Commonwealth.[6]

The statutory scheme of G. L. c. 55, which provides for the disclosure and regulation of campaign contributions, is derivative of principles in the Massachusetts Constitution regarding the structure of our representative democracy and rights of its people. However,

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allies, or the political access such support may afford. 'Ingratiation and access . . . are not corruption.'" *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 192 (2014) (plurality opinion), quoting *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 360 (2010). Of course, agents of corporations such as the plaintiffs may meet with policymakers to express their legitimate ideas and concerns regarding legislation. This freedom of expression helps policymakers refine and solidify what they believe is good policy. However, the principal-agency relationship set forth in art. 5 is broken not when a legislator is grateful to his supporters or because of access, but when an elected official takes actions that he otherwise would not have because he feels obligated to advance the interests of his donors in particular, not his constituents or the Commonwealth has a whole.

[6] I agree with the court that it is not necessary to address, in the context of this case, whether the Office of Campaign and Political Finance (OCPF)'s Interpretive Bulletin OCPF-IB-88-01 (Sept. 1988, rev. May 9, 2014) accurately interprets G. L. c. 55. *Ante* at note 10. I note, however, the current guidance appears to permit nonpolitical nonprofit organizations to contribute as much as $15,000 in one year directly to a single candidate. OCPF Interpretive Bulletin, *supra* at 4. I believe that when OCPF interprets G. L. c. 55, it should do so in light of art. 5.

any encroachment on the rights of the plaintiffs under the First Amendment to the United States Constitution, even one that occurs by operation of the State Constitution, must be supported by a "sufficiently important interest."[7] *McCutcheon*, 572 U.S. at 197 (plurality opinion), quoting *Buckley*, 424 U.S. at 25. The Commonwealth's interests in facilitating and securing the art. 5 right to representatives who are "substitutes and agents" of the people is "a sufficiently important concern" and "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, *supra* at 27, quoting *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973). The Commonwealth may limit the serious burden that, in many instances, campaign contributions impose on the agency relationship between the public and their representatives because that burdened agency relationship highlights "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates." *McCutcheon*, 572 U.S. at 207 (plurality opinion), quoting *Buckley*, 424 U.S. at 27.[8] Indeed, the interest

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[7] However, principles similar to those contained in art. 5 may be implicit in the United States Constitution. See Brown & Martin, Rhetoric and Reality: Testing the Harm of Campaign Spending, 90 N.Y.U. L. Rev. 1066, 1071–1076 (2015).

[8] Additionally, the Supreme Court has increasingly recognized that the Federal Constitution's grant of broad autonomy to States to structure their governments and adopt rules that make electoral democracy functional:

concerns the form and character of our representative democracy itself.

Corporations such as 1A Auto, Inc., and 126 Self Storage, Inc., have free speech rights to educate and inform public discussion about issues of concern to them. See *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 342 (2010); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 795 (1978). Both entities have a First Amendment right to make unlimited independent expenditures throughout the Commonwealth to influence directly the thoughts and opinions of the voters and the public at large. *Citizens United*, *supra* at 365–366. See G. L. c. 55, § 18A; 970 Code Mass. Regs. §§ 1.04(12) n.1, 2.17 (2018). However, that right does

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> "Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments. . . . Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. . . . More specifically, 'the Framers of the [Federal] Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'"

Shelby County, Ala. v. *Holder*, 570 U.S. 529, 543 (2013), quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461–462 (1991). As in voting rights cases rooted in the First Amendment, perhaps in the regulation of campaign finance, to preserve the proper function of our democratic institutions, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role[;] . . . 'as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992), quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974).

not extend so far as to provide funds directly to candidates that cause those candidates to "work with an eye [not] single to the interest" of the people. *McKinley*, 74 F. at 95.[9]

6. *Conclusion*. In Thoughts on Government (1776), John Adams explained:

> "The principal difficulty lies, and the greatest care should be employed, in constituting this representative assembly. It should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this assembly to do strict justice at all times, it should be an equal representation, or, in other words, equal interests among the people should have equal interests in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections. Such regulations, however, may be better made in times of greater tranquility than the present; and they will spring up themselves naturally, when all the powers of government come to be in the hands of the people's friends. At present, it will be safest to proceed in all established modes, to which the people have been familiarized by habit."

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[9] Furthermore, "it may be that, in some circumstances, 'large independent expenditures pose [some of] the same dangers . . . as do large contributions.'" *Federal Election Comm'n* v. *Wisconsin Right To Life, Inc*., 551 U.S. 449, 478 (2007) (opinion of Roberts, C.J.), quoting *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976). See also *Buckley*, *supra* at 46 ("independent advocacy . . . *does not presently appear* to pose dangers . . . comparable to those identified with large campaign contributions" [emphasis added]).

These principles support the court's conclusion in this case.

KAFKER, J. (concurring). I write separately because the court does not adequately address the issue whether the law prohibiting corporate contributions is impermissibly underinclusive under the First Amendment for failing to prohibit contributions by other entities. In *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 665–666 (1990), the United States Supreme Court held that treating corporations and nonprofits differently from unions in the context of independent expenditures was constitutionally permissible. The Supreme Court has since overruled *Austin*, see *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 365 (2010), and it remains unclear whether, and to what extent, the reasoning relied on in *Austin* and other cases focusing on the aggregation of capital and its effect on politics may still apply in the context of direct campaign contributions.[1]

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[1] The court, in addressing this concurrence, attempts to minimize the issue of differential treatment. Here, however, "[t]he underinclusiveness of the statute is self-evident." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 793 (1978). General Laws, c. 55, § 8, purports to target corruption and the appearance of corruption but, in application, singles out a subset of entities for regulation. Although the court attempts to dismiss the significance of such differential treatment, "[i]n the First Amendment context, fit matters." *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 218 (2014) (plurality opinion). It is not enough for the government to advance a compelling interest—we must still assess "the fit between the stated governmental objective and the means

In my view, in the post-*Citizens United* world, the Supreme Court clearly still emphasizes the importance of preventing quid pro quo corruption or the appearance of such corruption in the context of direct contributions, see *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 206–208 (2014) (plurality opinion), and also defers to evenhanded legislative regulation in this area. See *Buckley* v. *Valeo*, 424 U.S. 1, 31 (1976) (per curiam). A uniform ban on contributions from business corporations, nonprofits, and unions to prevent corruption or the appearance of corruption

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selected to achieve that objective." *Id*. at 199. Yet, nowhere does the court explain why regulating corporations differently from other organizations is closely drawn to the State's interest in preventing corruption. The reasons provided by the majority apply equally to unions and nonprofits. As discussed, the rationales that would have most obviously supported this disparate treatment were articulated in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 665–666 (1990).

The court states that it does not bother to examine *Austin* for the "simple" reason that *Austin* has been overruled. Yet, the court conveniently fails to mention that *Austin*, not *Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146 (2003), remains the *only* Supreme Court case to squarely address the issue of disparate corporate treatment in the area of political finance. Looking solely at the court's opinion, one might assume that *Beaumont* addressed a statutory scheme mirroring to our own. It did not. *Beaumont*, *supra* at 154, involved a direct contribution ban that applied uniformly to unions and corporations. *Austin*, *supra*, however, examined a campaign finance statute that regulated corporations differently from unions. Precisely because *Austin* was overruled, it is all the more important to closely examine the Supreme Court's jurisprudence to determine whether differential treatment of business corporations may still be permissible in the area of campaign contributions, or if it has been foreclosed by *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 365 (2010).

would thus appear to be constitutional under existing precedent. See *Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 157–159 (2003).

The Supreme Court has, however, rejected treating business corporations differently simply based on the substantial aggregations of wealth amassed by corporations or the advantages of the corporate structure, at least in the context of independent expenditures. See *Citizens United*, 558 U.S. at 350–351. I assume at least some of the same reasoning would apply to contributions as well, although this is less clear. Campaign finance restrictions that stem from a desire to even the political playing field by reducing corporate power would certainly be impermissible. *McCutcheon*, 572 U.S. at 207 (plurality opinion) ("it is not an acceptable governmental objective to level the playing field" [quotations and citation omitted]). The Supreme Court also vigilantly protects against viewpoint discrimination. See *Citizens United*, *supra* at 340. Differential treatment of business corporations from other entities must then be closely drawn to the permissible State interest in preventing quid pro quo corruption and the appearance of quid pro quo corruption, rather that these impermissible State interests. Separating out legitimate concerns about corruption from the apparently illegitimate concerns discussed in *Austin* to justify differential treatment, however, remains difficult.

In the instant case, the Superior Court judge provided relevant context to the enactment of

Massachusetts's first campaign finance law and the possible motivation behind its passage. As he explained:

> "While [laws banning federal officers from requesting, giving, or receiving political contributions from other officers or employees] made it more 'difficult and risky' to 'shake down' government officials to help finance political campaigns, the laws also increased office-seekers' reliance on wealthy corporations and individuals for campaign contributions, which created its own set of problems. . . . During the 1904 presidential race, Republican candidate Theodore Roosevelt was accused of accepting large donations from corporations that expected special treatment if he was elected. . . . Although Roosevelt denied these assertions and won the election, he was mindful of the accusations and, in 1905, during his first address to Congress, he took aim at corporations, recommending a ban on all corporate contributions, to prevent 'bribery and corruption in Federal elections.' . . . President Roosevelt asserted that 'both the National and the several State Legislatures' should 'forbid any officer of a corporation from using the money of the corporation in or about any election,' in order to 'effective[ly] . . . stop[ ] the evils aimed at in corrupt practices acts.' . . . Congress answered President Roosevelt's call in 1907 with the enactment of the Tillman Act, which banned corporations from 'mak[ing] a money contribution in connection with any election to any political office.' . . .

> "During the same year that Congress passed the Tillman Act, the Massachusetts Legislature enacted a state law banning certain corporations from 'pay[ing] or contribut[ing] in order to aid, promote, or prevent the nomination or election of any person to public office, or in order to aid, promote or antagonize the interests of any political party, or to influence or affect the vote on any question submitted to the voters.' . . . Thereafter, in 1908, the Legislature passed 'An Act to prohibit the making of political contributions by business corporations,' which extended the ban to all 'business corporation[s] incorporated under the laws of, or doing business in this commonwealth'" (citations omitted).

Given the age of the Massachusetts statute and its apparent origins in a nationwide push against the influence of big business in politics, it is difficult to discern whether the basis for the statute's differential treatment of business corporations rests on grounds considered legitimate, illegitimate, or a combination of both. It is my sense that it reflects some of the same combination of reasons articulated in *Austin*. The question then becomes whether a statute singling out business corporations for a ban on direct campaign contributions for such a combination of reasons remains permissible. I ultimately concur in the judgment because it is not clear to me how much of the reasoning of *Austin* and other Supreme Court cases such as *Beaumont* and *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982) (*NRWC*), remain good law and how deferential the Supreme Court

will be in the future to legislative choices regarding concerns about corruption even when they combine with disfavored considerations toward business corporations.

I believe the court's opinion does not adequately address the issue of underinclusion. The court focuses primarily on concerns about quid pro quo corruption stemming from business corporations to conclude that a ban on business corporation contributions is constitutionally permissible. Ante at ___-___. See *Beaumont*, 539 U.S. at 163. The ultimate issue, however, is not simply whether contributions by business corporations may be limited due to concerns about quid pro quo corruption or the appearance of such corruption, but whether a statutory scheme that bans such contributions while simultaneously permitting contributions by other organizations, including well-endowed nonprofit corporations and unions, is closely drawn to the State's interest in preventing corruption and its appearance.

To justify treating business corporations differently from unions and well-endowed nonprofits, including single issue advocacy entities that are intensely involved in political campaigns, the court cites selective examples of corporate bribery scandals in Massachusetts. See *ante* at ___. Most of the examples, however, involve personal payments put directly into the pockets of elected officials rather than election-related activity or campaign contributions. The court also notes that the record includes several instances of corporate campaign finance violations, but

one could just as easily provide selective examples of union and nonprofit violations. Indeed, based simply on the record before us, unions and nonprofits have also sought to circumvent campaign finance laws. In 2013, a union political action committee (PAC) failed to disclose $178,000 in expenditures in violation of State disclosure requirements. In 2014, the American Federation of Teachers transferred money to a PAC through a nonprofit organization, which then made independent expenditures in the Boston mayoral race, in order to illegally disguise the source of the contributions. The same year, the Office of Campaign and Political Finance investigated another union PAC that had failed to accurately report independent expenditures and direct contributions made to candidates. Would these few examples sufficiently justify a prohibition on direct contributions by unions or nonprofits, but not business corporations? Of course not. But under the court's reasoning, a few such anecdotes appear sufficient to uphold such a statutory scheme.

The court further references a "long historical pedigree" of laws restricting the electoral participation of corporations. But the court fails to mention that laws restricting union participation in the electoral process enjoy a long-standing pedigree as well for many of the same reasons. See *United States* v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 570–584 (1957) (*UAW*) (providing detailed history of Federal campaign finance laws as they apply to unions and the concerns that led to their enactment); *NRWC*, 459 U.S. at 208–209. But see

Citizens United, 558 U.S. at 363 (characterizing *UAW* as providing a "flawed historical account of campaign finance laws"). Indeed, many States ban direct contributions from both corporations and unions,[2] while only a handful of States ban contributions from corporations alone.[3]

Rather than focusing on selective examples of campaign finance violations, I believe it is necessary to explore the complexities of Supreme Court case law regarding differential treatment of business corporations in the context of direct contributions, something the court has not done.

The appropriate level of scrutiny for evaluating a campaign finance law turns on the "importance of the political activity at issue to effective speech or political association" (quotations and citation omitted). *Beaumont*, 539 U.S. at 161. Restrictions on direct contributions "lie closer to the edges" of political speech than restrictions on independent expenditures. *Id*. Thus, while laws restricting independent expenditures

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[2] See Alaska Stat. § 15.13.074(f); Ariz. Rev. Stat. § 16-916(a); Ark. Const. art. 19, § 28; Colo. Const. art. XXVIII, § 3; Conn. Gen. Stat. §§ 9-601, 9-613, 9-614; Mich. Comp. Laws § 169.254; Mo. Const. art. VIII, § 23.1; Mont. Code Ann. § 13-35-227; N.C. Gen. Stat. Ann. § 163A-1430; N.D. Cent. Code §§ 16.1-08.1-01; 16.1-08.1-03.3, 16.1-08.1-.03.5(1); Ohio Rev. Code Ann. § 3599.03; Okla. Stat. tit. 21, § 187.2; 25 Pa. Cons. Stat. § 3253; R.I. Gen. Laws. § 17-25-10.1; Tex. Elec. Code Ann. § 253.094; Wis. Stat. § 11.1112; Wyo. Stat. Ann. § 22-25-102(a).

[3] See Iowa Code §§ 68A.102(17), 68A.503(1); Ky. Rev. Stat. Ann. §§ [sic]121.025; Minn. Stat. § 211B.15; W. Va. Code § 3-8-8.

receive strict scrutiny, laws restricting direct contributions need only be "closely drawn" to a sufficiently important government interest. See *Buckley*, 424 U.S. at 24–25; *McCutcheon*, 572 U.S. at 197 (plurality opinion). Although campaign finance jurisprudence is in a "state of flux" post-*Citizens United*, the long-standing distinction between independent expenditures and direct contributions in this regard remains good law. See *Green Party of Conn.* v. *Garfield*, 616 F.3d 189, 199 (2d Cir. 2010); *McCutcheon*, *supra* at 196–199 (plurality opinion).

When evaluating laws that restrict direct contributions, as here, courts must determine (1) whether the government has advanced a sufficiently important interest; and (2) whether the law is "closely drawn" to achieve that interest. See *Buckley*, 424 U.S. at 23–25; *McCutcheon*, 572 U.S. at 196–199 (plurality opinion). A law is not closely drawn to a stated interest if it is impermissibly over or underinclusive. See, e.g., *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 793 (1978) ("the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by [the law at issue]").

There is no doubt that the government has a sufficiently important interest in preventing corruption and the appearance of corruption and that direct contributions to political candidates implicate that

important interest.[4] See *McCutcheon*, 572 U.S. at 206–207 (plurality opinion); *Citizens United*, 558 U.S. at 356. Further, statutes that categorically or evenhandedly ban large contributions from organizations remain constitutional under existing Supreme Court precedent. See *Beaumont*, 539 U.S. at 163. The difficult

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[4] The permissible interest in preventing corruption is more precisely an interest in preventing quid pro quo corruption. See *McCutcheon*, 572 U.S. 185, 207 (2014) (plurality opinion) ("Congress may target only a specific type of corruption—'quid pro quo' corruption"). Quid pro quo corruption "captures the notion of a direct exchange of an official act for money. . . . 'The hallmark of corruption is the financial quid pro quo: dollars for political favors.' " *Id*. at 1441 (plurality opinion), quoting *Federal Election Comm'n* v. *National Conservative Political Action Comm*., 470 U.S. 480, 497 (1985). See *Buckley* v. *Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam) ("To the extent that large contributions are given to secure a political quid quo pro from current and potential office holders, the integrity of our system of representative democracy is undermined").

As mentioned, the State also has a compelling interest in limiting "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *McCutcheon*, 572 U.S. at 207 (plurality opinion), quoting *Buckley*, 424 U.S. at 27. See *Buckley*, *supra*, quoting *United States Civil Serv. Comm.* v. *National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973) ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent' "). Such an appearance of corruption "erode[s] . . . public confidence in the electoral process." *Federal Election Comm'n* v. *National Right to Work Comm*., 459 U.S. 197, 208 (1982). Both corruption and the appearance of corruption "directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.' " *Id*., quoting *UAW*, 352 U.S. at 570.

issue is differential treatment, when corruption, or the risk of corruption, stems from multiple sources, but only one of which is regulated. The analysis of how "closely drawn" the law is to the State's interest in preventing corruption and its appearance requires cognizance of the breadth of that interest. That interest applies to corruption by unions and nonprofits as well as business corporations.

The primary support for differential treatment of business corporations in the area of political finance appears in *Austin*, 494 U.S. at 654, an independent expenditure case. There, the Supreme Court was asked to consider the constitutionality of a Michigan law that prohibited nonmedia corporations from using general treasury funds for independent expenditures in State elections, but did not prohibit unions from doing so. *Id*. at 655, 666. The plaintiff in *Austin* argued that there was no compelling interest to justify treating corporations differently from unions. See *id*. at 659–660. The Supreme Court held that the law was closely drawn to two compelling government interests, both of which have since been rejected in *Citizens United*.

First, the Supreme Court in *Austin*, 494 U.S. at 660, articulated a government interest in addressing the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." The Supreme Court reasoned that unions and individuals alike lacked the "significant state-conferred advantages of the corporate structure" that

enhances a corporation's ability to amass wealth. *Id*. at 665. Thus, the State had a compelling interest in "counterbalanc[ing] those advantages unique to the corporate form," to which the law was narrowly tailored. *Id*. This rationale was rejected outright in *Citizens United*, 558 U.S. at 351, where it was characterized as an interest in equalizing speech among different groups, something that had already been rejected in *Buckley*, 424 U.S. at 48 (no compelling interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections").

Austin, 494 U.S. at 665–666, also articulated a government interest in protecting dissenting corporate shareholders from financially supporting the corporation's political activities. Unlike a corporate shareholder, a union member who disagrees with the union's political activities may remain in the organization without being forced to contribute to such activities. *Id*. Thus, according to the Supreme Court in *Austin*, 494 U.S. at 666, "funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." The Supreme Court in *Citizens United*, 558 U.S. at 361–362, rejected this rationale as well, holding that "procedures of corporate democracy" (citation omitted) were the appropriate avenue for relief for dissenting shareholders, and that such a rationale would "allow the Government to ban the political speech even of media corporations," *id*. at 361. Further, the Supreme Court determined that the appropriate remedy for any such interest would be to

"consider and explore other regulatory mechanisms," not to restrict corporate speech. *Id*. at 362. Perhaps most importantly, the Supreme Court has also expressly stated that "[n]o matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates' " (quotations and citation omitted). *McCutcheon*, 572 U.S. at 207 (plurality opinion).

Thus, *Citizens United* overruled the rationales from *Austin* that would have most obviously supported disparate treatment among business corporations, nonprofits, and unions, at least in the context of independent expenditures.[5] The question then remains whether the Supreme Court would extrapolate this reasoning into the area of political contributions, where quid pro quo corruption and the appearance of

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[5] The Supreme Court has also articulated a permissible government interest in anticircumvention. The court here relies on examples in the record of corporate campaign finance violations as indicative that § 8 is necessary as an anticircumvention measure. See *ante* at ___. The court's reliance on anticircumvention is also questionable for two reasons. First, the continued validity of the anticircumvention rationale as a separate compelling government interest remains unclear after *McCutcheon*. See *McCutcheon* 572 U.S. at 211 (plurality opinion) (stating that prevention of corruption and appearance of corruption is "only" legitimate government interest for restricting campaign finances, while skeptically referring to "*Buckley*'s circumvention theory"). Second, to the extent it still is a valid interest, the court fails to indicate why individuals are more likely to attempt to circumvent individual contribution limits through a corporation than through a nonprofit or a union, and I discern nothing in the case law to suggest this.

such corruption are directly implicated and remain important concerns. See *Buckley*, 424 U.S. at 26–27. In determining whether such extrapolation will occur, we must also consider another set of Supreme Court cases. Although these cases involved challenges to a Federal statute that banned contributions from for-profit corporations, nonprofit corporations, and unions in a similar manner, the Supreme Court did include language focused on the specific concerns raised by corporations, including some of the same type of reasoning from *Austin* that was disavowed in *Citizens United*, at least in the context of independent expenditures.

In *Beaumont*, for example, a nonprofit corporation, North Carolina Right to Life, Inc., challenged the constitutionality of the Federal ban on direct contributions. In upholding the law, the Supreme Court emphasized "the 'special characteristics of the corporate structure' that threaten the integrity of the political process," *Beaumont*, 539 U.S. at 153, quoting *NRWC*, 459 U.S. at 209, and "the public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form," *Beaumont*, *supra* at 154, quoting *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500–501 (1985) (*NCPAC*). In so doing, the Supreme Court connected these war chests to the objective of preventing corruption or the appearance of corruption. *Beaumont* was not discussed in *Citizens United*, thereby raising the question whether the rationales rejected in the context of independent expenditures may still be

viable in the context of direct contributions when connected to concerns about corruption.

Indeed, in *NRWC*, another case involving direct contribution restrictions and the uniform Federal ban, the Supreme Court reiterated that "'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process'" from corruption. See *NRWC*, 459 U.S. at 210, quoting *California Med. Ass'n* v. *Federal Election Comm'n*, 453 U.S. 182, 201 (1982). See also *Beaumont*, 539 U.S. at 154–155 (discussing "war-chest corruption"); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1989) (discussing "concern over the corrosive influence of concentrated corporate wealth"); *NCPAC*, 470 U.S. at 500–501 ("compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funneled through the corporate form"). The majority in *Citizens United* distinguished *NRWC* by stating that the law at issue in *NRWC* involved restrictions on direct contributions, "which, unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption." See *Citizens United*, 558 U.S. at 358–359.

These cases also exhibit deference to legislative judgments about how best to target corruption in the arena of direct contributions, at least when confronting evenhanded bans on contributions, *Buckley*, 424 U.S. at 31 ("a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions"). See *NRWC*, 459 U.S. at 209–210 ("The

statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation" and "we accept Congress's judgment"). See also *Beaumont*, 539 U.S. at 155, quoting *NRWC*, *supra* at 209–210 ("our cases on campaign finance regulation represent respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation' "); *Buckley*, 424 U.S. at 28 ("Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions"). But this statute is at least arguably not "evenhanded" as it treats business corporations differently from nonprofits and unions for the purposes of preventing corruption.

How the Supreme Court will harmonize these cases with *Citizens United* remains unclear. Considerations about the amassing of wealth and the corporate structure seem to be handled differently depending on the context. It may be that contributions and concerns about quid pro quo corruption, or its appearance, allow in these considerations but independent expenditures, and the speech they entail, do not. This remains to be seen.

The court, here, does not confront the complexities of differential treatment in the case law. Indeed, the court has avoided any discussion of *Austin*, except in two footnotes. See *ante* at notes 5 and 8. Upon an examination of the jurisprudence, it is far from clear

whether the reasoning of *Austin* will allow distinctions among business corporations, nonprofits, and unions, and if so, how.

Ultimately, however, we cannot base our decision on speculation over whether the Supreme Court will extend its reasoning in *Citizens United* into the contribution case law and hold that singling out business corporations for differential treatment based on reasoning in *Austin* is impermissible. As the Supreme Court itself has stated:

> "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. *Felton*, 521 U.S. 203, 237 (1997), quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc*., 490 U.S. 477, 484 (1989). Federal courts have continued to apply the existing jurisprudence on direct contribution restrictions, rather than attempting to anticipate possible changes from what the Supreme Court has said in the context of independent expenditures. See, e.g., *Iowa Right to Life Comm., Inc.* v. *Tooker*, 717 F.3d 576, 602–603 (8th Cir. 2013), cert. denied, 572 U.S. 1046 (2014) (applying *Austin*'s equal protection clause analysis to uphold law banning corporate

contributions but permitting union contributions); *Minnesota Citizens Concerned for Life, Inc.* v. *Swanson*, 692 F.3d 864, 879 (8th Cir. 2012) (applying *Beaumont*, as well as *Austin* insofar as it was not explicitly overruled in *Citizens United*, to review denial of preliminary injunction sought against statute that bans corporation contributions but not union contributions); *Ognibene* v. *Parkes*, 671 F.3d 174, 184 (2d Cir. 2012) ("Since the Supreme Court preserved the distinction between expenditures and contributions, there is no basis for Appellants' attempt to broaden *Citizens United*"). Supreme Court "decisions remain binding precedent until [that court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016), quoting *Hohn* v. *United States*, 524 U.S. 236, 252–253 (1998). For this reason, I concur in the judgment, as the Supreme Court has not yet extended its holding in *Citizens United* to restrictions on direct contributions.

**Supreme Judicial Court for the
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Dated: October 11, 2017

James M. Manley, Pro Hac Vice Attorney
Goldwater Institute
500 East Coronado Road
Phoenix, AZ 85004

RE: No. DAR-25548

126 SELF STORAGE INC & another
vs.
MICHAEL SULLIVAN

Suffolk Superior Court No. 1584CV00494
A.C. No. 2017-P-0946

NOTICE OF ALLOWANCE OF APPLICATION FOR DIRECT APPELLATE REVIEW

Notice is hereby given that on October 11, 2017, the above-captioned Application for Direct Appellate Review was allowed.

Francis V. Kenneally, Clerk

To: Gregory D. Cote, Esquire
Aditya Dynar, Pro Hac Vice Attorney
James M. Manley, Pro Hac Vice Attorney
William W. Porter, A.A.G.
Julia Kobick, A.A.G.

SUMMARY JUDGMENT MASS R. CIV. P. 56	**Trial Court of Massachusetts The Superior Court** [SEAL]
DOCKET NUMBER 1584CV00494	Michael Joseph Donovan, Clerk of Court
CASE NAME 1A Auto Inc et al vs. Michael Sullivan Dir	COURT NAME & ADDRESS Suffolk County Superior Court – Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108
JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Sullivan Dir, Michael	
JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S) 1A Auto Inc 126 Self Storage Inc	

This action came before the Court, Hon. Paul D Wilson, presiding, upon Motion for Summary Judgment of the Defendant named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.

It is ORDERED, ADJUDGED and DECLARED

That Plaintiffs' Motion for Summary Judgment is DENIED and the Cross-Motion for Summary Judgment brought by Defendant Michael J. Sullivan, Director of the Office of Campaign and Political Finance is ALLOWED.

DATE JUDGMENT ENTERED	~~CLERK OF COURTS~~/ASST. CLERK
04/05/2017	X /s/ Steven J Masse

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. CV 15-00494-E

1A AUTO, INC. & another[1]

vs.

MICHAEL SULLIVAN[2]

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

This case involves the validity of G. L. c. 55, § 8 ("Section 8"), which bans corporations from making monetary contributions to candidates, political parties, and political committees. The plaintiffs, 1A Auto, Inc. and 126 Self Storage, Inc., two corporations doing business in Massachusetts, brought this case for declaratory and injunctive relief against Michael J. Sullivan, the Director of the Office of Campaign and Political Finance (the "OCPF"), seeking to invalidate Section 8's contribution ban on constitutional grounds. This matter is currently before me on the parties' Cross-Motions for Summary Judgment.

To find for the Plaintiffs, I would have to ignore binding and directly applicable United States Supreme Court precedent. To do that is beyond my power.

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[1] 126 Self Storage, Inc.

[2] Director, the Office of Campaign and Political Finance

Therefore, the Plaintiffs' Motion for Summary Judgment (Paper #14) will be ***DENIED*** and the OCPF's Cross-Motion for Summary Judgment (Paper #15) will be ***ALLOWED***.

BACKGROUND

I. Statutory and Regulatory Background

Campaign finance reform has long been of interest to the public, as well as to the federal and state legislatures. The first real attempt at such reforms on the federal level can be traced back to the Naval Appropriations Bill of 1867, which prohibited federal officers and government employees from requesting political contributions from individuals working in navy yards.[3] In 1876, Congress included a provision in the appropriations legislation for the coming year that extended this prohibition to all administrative officers not appointed by the President, preventing these officers from "requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or any other thing of value for political purposes." Appropriations Bill of 1876, 19 Stat. 169 (1877). Less than ten years later, Congress passed the

[3] Specifically, this law stated: "And be it further enacted, That no officer or employee of the government shall require or request any workingman in any navy yard to contribute or pay any money for political purposes, nor shall any workingman be removed or discharged for political opinion; and any officer or employee of the government who shall offend against the provisions of this section shall be dismissed from the service of the United States."

Pendelton Civil Service Reform Act, which created the civil service system and prohibited the solicitation of political contributions from government employees.[4] 22 Stat. 403, ch. 27, § 14 (1883).

While these laws made it more "difficult and risky" to "shake down" government officials to help finance political campaigns, the laws also increased office-seekers' reliance on wealthy corporations and individuals for campaign contributions, which created its own set of problems. Steven G. Koven, *Responsible Governance: A Case Study Approach* (New York: M.E. Sharpe 2008), p. 59. During the 1904 presidential race, Republican candidate Theodore Roosevelt was accused of accepting large donations from corporations that expected special treatment if he was elected. See Jasper B. Shannon, *Money and Politics* (New York: Random House, 1959), p. 36. Although Roosevelt denied these assertions and won the election, he was mindful of the accusations and, in 1905, during his first address to Congress, he took aim at corporations, recommending a ban on all corporate contributions, to prevent "bribery and corruption in Federal elections." 40 Cong. Rec. 96 (Dec. 5, 1905). President Roosevelt asserted that "both the National and the several State

[4] In particular, Section 14 of the Pendelton Act stated: "That no officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever." 22 Stat. 403, ch. 27, § 14.

Legislatures" should "forbid any officer of a corporation from using the money of the corporation in or about any election," in order to "effective[ly] . . . stop[ ] the evils aimed at in corrupt practices acts." *Id.* Congress answered President Roosevelt's call in 1907 with the enactment of the Tillman Act, which banned corporations from "mak[ing] a money contribution in connection with any election to any political office." 34 Stat. 864, ch. 420 (1907).

During the same year that Congress passed the Tillman Act, the Massachusetts Legislature enacted a state law banning certain corporations from "pay[ing] or contribut[ing] in order to aid, promote, or prevent the nomination or election of any person to public office, or in order to aid, promote or antagonize the interests of any political party, or to influence or affect the vote on any question submitted to the voters." St. 1907, c. 581, § 3. Thereafter, in 1908, the Legislature passed "An Act to Prohibit the Making of Political Contributions by Business Corporations," which extended the ban to all "business corporation[s] incorporated under the laws of, or doing business in this commonwealth." St. 1908, c. 483, § 1.

In the ensuing century, the ban on corporate contributions has been an essential part of the Legislature's efforts to prevent corruption in Massachusetts elections. See, e.g., St. 1913, c. 835, §§ 353, 356, and 503 (re-codifying laws passed in 1907 and 1908 into "Corrupt Practices" section of "Act to Codify the Laws Relative to Primaries, Caucuses and Elections"); St. 1946, c. 537, § 10 (replacing G. L. c. 55, enacted in 1932,

entitled "Corrupt Practices and Election Inquests" with new G. L. c. 55, as part of "Act Relative to Corrupt Practices, Election Inquests and Violations of Election Laws"). In 2009, the Legislature extended the contribution ban to newer forms of corporate entities, applying it not just to traditional business corporations but to any "business or professional corporation, partnership, [or] limited liability company partnership" doing business in Massachusetts. St. 2009, c. 28, § 33.

The Commonwealth's current corporate contribution ban, found in Section 8, states, in relevant part, that:

> [N]o business or professional corporation, partnership, [or] limited liability company partnership under the laws of or doing business in the commonwealth . . . shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party.

G. L. c. 55, § 8. Massachusetts is far from the only state to ban corporate contributions.[5] The Federal Election Campaign Act also contains a similar prohibition.[6]

In 1980, the OCPF requested the Attorney General's opinion "concerning the extent to which business corporations. . . . [could] become involved in Massachusetts political activities." *Mass. Atty, Gen. Op. No. 10*, 1980 WL 119563, at *1 (Nov. 6, 1980). In response, the Attorney General concluded Section 8 "interdicts any corporate expenditure or contribution of anything of value specifically to promote or oppose a candidate for state, county, or local political office." *Id.* at *5. In reaching this conclusion, the Attorney General noted there were other ways (aside from direct money contributions) for corporations to become involved in political activity. First, because Section 8 does not restrict political activity by individuals associated with corporations, but, instead, only political activity of the corporation itself, the Attorney General stated corporate officers and employees could make campaign contributions, volunteer their non-work time to support political candidates, and solicit support for candidates from

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[5] See Alaska Stat. § 15.13.074; Ariz. Rev. Stat. § 16-919(A); Colo. Rev. Stat. § 1-45-103.7; Conn. Gen. Stat. §§ [sic] 9613; Iowa Code § 68A.503; Ky. Rev. Stat. § 121.025, 121.035; Mich. Comp. Laws § 169.254; Minn. Stat. § 211B.15; Mont. Code Ann. § 13-35-227; N.C. Gen. Stat. § 163-278.15; N.D. Cent. Code § 16.1-08.1-03.3; Ohio Rev. Code § 3599.03; Okla. Stat. tit. 21, § 187.1; Pa. Stat. tit. 25, § 3253; R.I. Gen. Laws § 17-25-10.1; S.D. Codified Laws § 12-27-18; Tex. Elec. Code § 253.094; W. Va. Code § 3-8-8; Wis. Stat. § 11.38; Wyo. Stat. Ann. § 22-25-202.

[6] See 52 U.S.C. § 30118(a) (formerly, 2 U.S.C. § 441b(a)).

family members as well as work peers. *Id.* at *2. Second, according to the Attorney General, corporations could make expenditures "incidental to the internal dissemination of political views," by providing funding for newsletters or other in-house publications. *Id.* at *4. The OCPF eventually issued advisory opinions in accordance with the reasoning the Attorney General had laid out See, e.g., *OCPF, Advisory Opinion*, AO-00-05 (Apr. 21, 2000); *OCPF, Advisory Opinion*, AO-98-18 (July 31, 1998). For many years, this landscape remained largely unchanged.

Then, in 2010, the United States Supreme Court created a major shift in campaign finance laws when it decided *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310 (2010). In that case, the Supreme Court held that the government could not prohibit or limit independent expenditures made by corporations in support of, or opposition to, a political candidate. *Id.* at 365. An "independent expenditure" is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 Code Fed. Regs. § 100.16(a); see also generally 970 Code Mass. Regs. § 2.17 (discussing independent expenditure PACs).

Citizens United struck down limits and bans on corporate "independent expenditures" because, according to the Supreme Court, there was "[n]o sufficient government interest justif[ying]" these restrictions on

a corporation's right to free speech. 558 U.S. at 365. While striking down laws preventing corporations from making independent expenditures in connection with political campaigns, however, *Citizens United* expressly declined to reach the question of the constitutionality of laws such as Section 8, which ban corporate contributions made directly to a candidate or political party. *Id.* at 359.

After *Citizens United*, and in accord with its holding, the Massachusetts Legislature amended G. L. c. 55 to allow corporations to make independent expenditures. See St. 2014, c. 210, §§ 4, 20–21, and 24 (amending G. L. c. 55, §§ 1, 18A, 18C, and 18G. In addition, the OCPF issued regulations and interpretive bulletins making it clear that corporate independent expenditures are no longer subject to any limits, though certain disclosure obligations may still apply, See 970 Code Mass. Regs. § 2.17; *OCPF, Interpretive Bulletin*, OCPF-IB-10-03 (Revised Jan. 5, 2015) (explaining independent expenditure political action committees); *OCPF, Memorandum*, M-14-03 (Nov. 19, 2014) (explaining reporting obligations for independent expenditures).

In modifying Massachusetts law to conform to *Citizens United*, the Legislature left intact the ban on corporate campaign contributions found in Section 8. Now, the Plaintiffs seek a ruling declaring that, like bans on corporate independent expenditures, Section 8's prohibition on contributions interferes with the constitutional rights of corporations.

Relevant to the Plaintiffs' arguments are certain other provisions in Chapter 55, and the OCFP's [sic] interpretation of those provisions. In addition to the total ban on corporate contributions, that statute imposes limits on the sizes of campaign contributions made by "individuals" and "political committees,"[7] General Laws c. 55, § 1 defines a "political committee" as "any committee, association, organization or other group of persons, . . . which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate, or candidates, . . . or for the purposes of opposing or promoting a charter change, referendum question, constitutional amendment, or other question submitted to the voters." This definition was added to Chapter 55 in 1973. St. 1973, c. 1173, § 1.

In 1974, the Secretary of the Commonwealth responded to a question about how this newly-added definition applied to labor organizations. The Secretary

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[7] An individual is limited to; (1) a total of $1,000 per year to a candidate or candidate's committee; (2) an aggregate limit of $5,000 per year to a political party and/or a political committee of such party: and (3) $500 per year to a PAC (other than an independent expenditure PAC). G. L. c. 55, §§ 7A(a)(1)-(3); 970 Code Mass. Regs. § 1.04(12); 970 Code Mass. Regs. § 2.17(2). The analogous limits for contributions made by political committees (other than independent expenditure PACs) are: (1) a total of $500 per year to a candidate or that candidate's political committee; (2) an aggregate limit of $5,000 per year to a political party and/or a political committee of such party; and (3) $500 per year to a PAC (other than an independent expenditure PAC). G. L. c. 55, § 6 (fourth para.); 970 Code Mass. Reg. § 1.04(12); 970 Code Mass. Regs. § 2.17(2).

stated that, while the definition was "broadly worded," it "was not intended to sweep into [Chapter 55] every organization consisting of more than one individual which makes a disbursement of funds to a political committee or to a candidate." *Letter from the Secretary of the Commonwealth*, dated Jun. 14, 1974. In 1988, the OCPF issued an interpretive bulletin (revised from earlier versions) that expanded upon the Secretary's letter, stating a "strict application of th[e] definition [of 'political committee'] would . . . place an extraordinary burden, not intended by the Legislature, on non-political organizations making only incidental expenditures for a political purpose." *OCPF, Interpretive Bulletin*, OCPF-IB-88-01 (Revised May 9, 2014). Therefore, the OCPF stated, it would treat "groups and organizations," including labor unions, "that make contributions . . . but do not solicit or receive funds for any political purpose differently than groups and organizations that actively engage in political fundraising." *Id.* A non-political organization that made "more than incidental" political expenditures, defined as those "exceed[ing], in the aggregate, in a calendar year, either $15,000 or 10 percent of such organization's gross revenues for the previous calendar year, whichever is less," would be subject to the same contribution limits that applied to political committees. *Id.*

II. Factual and Procedural Background

Plaintiff 1A Auto is a family-owned company that has been in the business of selling auto parts in Pepperell, Massachusetts, since 1999. The company

employs 217 people. The summary judgment record does not indicate whether any or all of these employees are unionized. 1A Auto's officers are Richard Green, Merle Green, and Michael Green (collectively, the "Greens"). Since 2004, the Greens have contributed a total of $103,646.25 to political campaigns and PACs in Massachusetts. But for Section 8, 1A Auto would directly and indirectly contribute money or other valuable things for the purpose of aiding the nomination and election of numerous persons to public office. 1A Auto would make these contributions to candidates, PACs (other than independent expenditure PACs), and party committees.

Plaintiff Self Storage is a small family-owned company. Since July 1, 1999, it has been in the business of renting self-storage units in Ashland, Massachusetts. The company employs four individuals. Again, the Plaintiffs have provided no evidence about whether any of these employees are union members. Michael Kane is Self Storage's only officer. Since 2004, Kane has contributed $38,929.33 to political campaigns and PACs in Massachusetts. If not for Section 8, Self Storage would directly and indirectly contribute money and other valuable resources and services for the purpose of aiding the nomination and election of certain persons to public office. Self Storage would make these contributions to candidates, PACs (other than independent expenditure PACs), and party committees.

On February 24, 2015, the Plaintiffs filed the Complaint, alleging that Section 8 violates free speech and association rights and equal protection guarantees of

the United States Constitution, as well as the equal protection and free expression clauses of the Massachusetts Declaration of Rights.[8] On June 3, 2015, the Plaintiffs filed a Motion for Preliminary Injunction (Paper #8), seeking to "halt" enforcement of Section 8's ban prohibiting corporations from making political contributions. The OCPF opposed. On August 21, 2015, after a hearing, this court (Giles, J.) issued a decision denying the Plaintiffs' requested injunctive relief. Judge Giles concluded the Plaintiffs were unable to show a likelihood of success on the merits, stating the "request to enjoin Section 8's contribution ban . . . flies in the face of years of U.S. Supreme Court and U.S. Court of Appeals jurisprudence upholding such . . . ban[s]."

On November 18, 2016, the Plaintiffs filed the pending Motion for Summary Judgment and the OCPF filed the Cross-Motion for Summary Judgment. I held a hearing on these motions on December 7, 2016. At that hearing and in their briefs, the Plaintiffs raise two constitutional objections to the operation of Section 8, contending that the provision violates their federal and state rights to free speech and association by inappropriately burdening protected speech, as well as

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[8] More precisely, the Plaintiffs asserted that Section 8 violates: equal protection rights guaranteed under article 1 of the Massachusetts Declaration of Rights (Count I); the Equal Protection Clause of the Fourteenth Amendment (Count II); freedom of speech and association rights protected by articles 16 and 19 of the Massachusetts Declaration of Rights (Count III); and rights of free speech and association protected by the First and Fourteenth Amendments (Count IV).

their equal protection rights by treating corporations differently than labor unions. The OCPF opposes, claiming Section 8 does not violate free speech and association rights because it is closely drawn to address the State's important interest in preventing corruption or the appearance of corruption in the electoral process, and does not violate equal protection guarantees because corporations and unions are not similarly situated.

DISCUSSION

I. Standard of Review

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso* v. *Commissioner of Corr*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). The moving party may satisfy its burden by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991).

These standards do not differ in situations where both parties have moved for summary judgment. A court addressing cross-motions for summary judgment "'must rule on each motion independently, deciding in

each instance whether the moving party has met its burden under Rule 56.'" *Federal Deposit Ins. Corp.* v. *Hopping Brook Trust*, 941 F. Supp. 256, 259 (D. Mass. 1996), quoting *Dan Barclay, Inc.* v. *Steward E. Stevenson Servs., Inc.*, 761 F. Supp. 194, 197–198 (D. Mass. 1991).

Finally, when constitutional questions are raised that only involve issues of law (as in the present matter), those questions are properly resolved on a motion for summary judgment. See *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 374 (1982), citing *Consolidated Cigar Corp.* v. *Department of Pub. Health*, 372 Mass. 844, 845–846 (1977).

II. Declaratory Relief

In the Complaint, the Plaintiffs seek a declaration that Section 8 is unconstitutional, and a permanent injunction enjoining the OCPF from enforcing Section 8. Both the Plaintiffs and the OCPF have moved for summary judgment on these claims.

The declaratory judgment statute "may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any . . . state agency or official which . . . are alleged to be in violation of the Constitution of the United States or the constitution or laws of the commonwealth[.]" G. L. c. 231A, § 2. A plaintiff has standing under this provision where he "can allege an injury within the area of concern of the statute or regulatory scheme [at issue]." *Enos* v. *Secretary of Envtl. Affairs*,

432 Mass. 132, 135 (2000). A pleading that sets forth a dispute which, unless resolved, will lead to "subsequent litigation as to the identical subject matter," is a pleading that satisfies this requirement. *Boston* v. *Keene Corp.*, 406 Mass. 301, 304 (1989) (internal citations omitted). Here, resolving the Plaintiffs' declaratory judgment claims at this stage is appropriate because the record contains no disputed issues of material fact on which the constitutional validity of Section 8 hinges. See *Rushworth* v. *Registrar of Motor Vehicles*, 413 Mass. 265, 268 n.4 (1992).

III. The Constitutional Validity of Section 8

A. Rights to Free Speech and Association

The Plaintiffs contend that Section 8 violates their rights to free speech and free association, which are protected by the First Amendment as well as articles 16 and 19 of the Massachusetts Declaration of Rights. They assert that, because Section 8 prohibits all political contributions by businesses, it burdens both corporate expressive activity and association rights. The OCPF argues Section 8 is consistent with the First Amendment as well as with state protections regarding the right to free expression.

1. The First Amendment

A. The Distinction Between Independent Expenditures and Contributions

All campaign finance regulations operate in an area involving the "most fundamental" First Amendment rights. *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). Nevertheless, the United States Supreme Court has long drawn a distinction between limitations on campaign expenditures and campaign contributions, "based on the degree to which each encroaches upon protected First Amendment Interests." *McCutcheon* v. *Federal Election Comm'n*, 134 S. Ct. 1434, 1444 (2014) (discussing *Buckley*'s distinction between independent expenditures and contributions).

On the one hand, campaign expenditures by a person or entity wishing to persuade others to adopt his or its political views "represent substantial, rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19. "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," because "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.*

On the other hand, campaign contributions "lie closer to the edges than to the core of political expression." *Federal Election Comm'n* v. *Beaumont*, 539 U.S.

146, 161 (2003), citing *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001). "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21. A person or entity contributing to the campaign war chest of a candidate is making only a "symbolic" expression of support. *Id.* "While contributions may result in political expression if spent by a candidate . . . to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* Thus, unlike an expenditure limit, a limit on campaign contributions "entails only a marginal restriction upon the contributor's ability to engage in free communication," which "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*

Because campaign expenditures and campaign contributions encroach to these different degrees upon First Amendment interests, the Supreme Court has adopted different tests for determining their constitutionality. A law limiting campaign expenditures must pass strict scrutiny, "which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340, quoting *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007). Laws restricting campaign contributions are, however, subject to a lesser but still "rigorous standard of review." *Buckley*, 424 U.S. at 29.

Under this standard, "[e]ven a 'significant interference' with protected rights of political association may be sustained if the government demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 25, quoting *Cousins* v. *Wigoda*, 419 U.S. 477, 488 (1975).

Applying the "closely drawn" test discussed in *Buckley*, the Supreme Court has upheld a federal law banning direct corporate campaign contributions challenged on First Amendment grounds by a non-profit advocacy group. *Beaumont*, 539 U.S. at 150–151. The plaintiff in *Beaumont* argued that, because a federal prohibition on *independent expenditures* was deemed unconstitutional as applied to non-profit advocacy corporations in *Federal Election Comm'n* v. *Massachusetts Citizens for Life*, 479 U.S. 238, 259 (1986) ("*MCFL*"), a ban on direct *contributions* made by non-profit corporations should also be found unconstitutional. *Id.* at 158. The Supreme Court rejected this argument.

The Court noted the long-recognized distinction between regulations that pertain to contributions and those that apply to expenditures. *Id.* at 158–159, citing *MCFL*, 479 U.S. at 259–260. The Court then stated the federal ban on corporate contributions (whether applied to non-profit or for-profit corporations) could stand so long as it was "'closely drawn' to serve a 'sufficiently important [government] interest[.]'" *Id.* at 162 (internal citations omitted). Ultimately, the Court concluded the absolute ban on contributions by non-profit corporations passed that

test, because it was "closely drawn" to support, among other things, the government's anti-corruption interest, which "is intended to 'prevent corruption or the appearance of corruption.'"[9] *Id.* at 154, quoting *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 496–497 (1985).

B. The Parties' Positions

Here, the OCPF argues *Beaumont* is directly on point, and thus its "closely drawn" test is the appropriate standard for analysis of the Plaintiffs' First Amendment challenge to Section 8, and the statute passes that test. Meanwhile, the Plaintiffs contend the court is not bound by *Beaumont* because: (1) following the Supreme Court's decisions in *Citizens United* and *McCutcheon*, the "landscape of campaign finance law" has "changed" so that the continuing survival of *Beaumont* is suspect, *Plaintiffs' Brief*, p. 15; and (2) the current matter is distinguishable from *Beaumont* because the federal contribution ban at issue in that case

[9] In *Beaumont*, the Supreme Court recognized three other interests, not relevant here, that could support the contribution ban at issue in that case: the anti-distortion interest, arising from the "special characteristics of the corporate structure that threaten the integrity of the political process . . . [by] permit[ting] [corporations] to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace"; the dissenting-shareholder interest, intended to protect an individual's investments in a corporation from being used to support political candidates the shareholder might oppose; and the anti-circumvention interest, meant to prevent the evasion of valid individual contribution limits. 539 U.S. at 153–155.

permitted corporate contributions to PACs, which Section 8 does not. The OCPF has the better argument.

First, the Plaintiffs' assertion that *Citizens United* and *McCutcheon* place *Beaumont* on shaky ground is unpersuasive. Neither *Citizens United* nor *McCutcheon* displaced the *Beaumont* decision because, unlike *Beaumont*, neither of those later-decided cases involved a challenge to corporate campaign contributions.

In *Citizens United*, the plaintiff challenged a ban on independent corporate expenditures. 558 U.S. at 333. In addressing this challenge, the Supreme Court held only that, in the context of independent expenditures, the government could not suppress political speech on the basis of the speaker's corporate identity. 558 U.S. at 365. In fact, the *Citizens United* Court recognized the different levels of scrutiny used to review independent expenditures and contributions and declined to reconsider the level of review applied to contribution limits. 558 U.S. at 359 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny"); see also *United States v. Danielczyk*, 683 F.3d 611, 617 (4th Cir. 2012) (recognizing that, in *Citizens United*, the Supreme Court "did not discuss *Beaumont* and explicitly declined to address the constitutionality of the ban on direct contributions"); *Ognibene* v. *Parkes*, 671 F.3d 174, 183–184 (2d Cir. 2012) (same); *Thalheimer* v. *City of*

San Diego, 645 F.3d 1109, 1124–1126 (9th Cir. 2011) (same).

In *McCutcheon*, the Supreme Court invalidated the aggregate contribution limits that federal law placed on individuals, which restricted the amount a donor could contribute, in total, to all candidates or committees during an election cycle. 134 S. Ct. at 1461–1462. In reaching this decision, however, the Court reaffirmed the analytical framework that it has long applied to contribution limits, preserving *Buckley*'s distinction between contributions and expenditures and applying the "closely drawn" standard of review. *Id.* at 1445–1446. In abolishing the aggregate limits, the Supreme Court held only that the aggregate limits were not "closely drawn" to the anti-corruption and anti-circumvention rationales advanced by the government. *Id.* at 1446. The Court did not call into question limits on corporate campaign contributions, nor did it question the validity of the "closely drawn" test. See generally *id.* at 1445–1462.

Second, the Plaintiffs contend the present case is different from *Beaumont* because Section 8 lacks a PAC option. Here, the Plaintiffs misconstrue Massachusetts election law. As the OCPF points out, G. L. c. 55, § 5B, which was added by St. 1994, c. 43, § 22, requires any political committee, other than one affiliated with a candidate or political party, to use a name that: "(i) clearly identifies the economic or other special interest, if identifiable, of a majority of its contributors; and (ii) if a majority of its contributors share a common employer, that identifies the employer." In accord with

this provision, corporate employees may form PACs using the names of their corporate employers. In fact, numerous such PACs have registered in Massachusetts. See *Sullivan Aff.*, para. 3–5 (indicating that, between January 2012 and May 2015, out of approximately 372 PACs, 91 were identified by business/corporate name or business interest). After forming a PAC identified with their corporation, corporate employees may then make or solicit contributions to the PAC, provided they do so on their own time, and they may volunteer their free time in support of the PAC's political agenda. See *Mass. Atty. Gen. Op. No. 10*, 1980 WL 119563, at *1 (Nov. 6, 1980) (explaining that volunteer time expended by corporate employees is not covered by Section 8). Thus, contrary to the Plaintiffs' position, Massachusetts has a corporate PAC option.

Moreover, recent judicial authority indicates that the PAC option available under G. L. c. 55, § 5B, is sufficient. *Minnesota Citizens Concerned for Life, Inc.* v. *Swanson*, 692 F.3d 864, 879 (8th Cir. 2012) ("*Minnesota Citizens*"), addressed a Minnesota law that banned corporate contributions but allowed corporations to form "[e]mployee political fund[s]," which the parties and Court referred to as PACs. *Id.* at 878. These PACs were the "only means" for corporations to make contributions to a political candidate or committee. *Id.*, citing Minn. Stat. § 211B.15. And, in accordance with Minnesota law, these PACs were "sponsored by an organization in name only[,]" meaning they could not receive "direct or indirect subsid[ies] from the sponsoring organization." See *Minnesota Ass'n of Commerce &*

Indus. v. *Foley*, 316 N.W.2d 524, 527 (Minn. 1982) (defining the term "independent PAC"). The Eighth Circuit determined that *Beaumont* is still the controlling Supreme Court authority as to contribution limitations in a post-*Citizens United* world. *Minnesota Citizens*, 692 F.3d at 879 ("[r]ightly or wrongly decided, *Beaumont* dictates the level of scrutiny and the potential legitimacy of the interests Minnesota advances by prohibiting corporate contributions to political candidates and committees"). Thereafter, based on *Beaumont*, the Circuit Court found no First Amendment problem with Minnesota's ban on corporate contributions, despite Minnesota's limited PAC option. On this point, there is no principled distinction between *Minnesota Citizens* and the present matter.

I must apply the law as it exists today. Bans on corporate contributions have been in existence since 1907. Applying the "closely drawn" test, the Supreme Court reaffirmed the validity of corporate contribution bans less than fifteen years ago in *Beaumont*, 539 U.S. at 154–155, and then declined to revisit that holding when given the opportunity in *Citizens United*, 558 U.S. at 539. Thus, I am bound by *Beaumont*. See *Agostini* v. *Felton*, 521 U.S. 203, 237 ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court making the decision] should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions"), quoting *Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (internal quotations omitted).

Consequently, the distinction between expenditures and contributions remains intact, as does the rule applying the "closely drawn" test to restrictions on campaign contributions.

C. Application of the "Closely Drawn" Test

Under *Beaumont*, Section 8 survives First Amendment review if its ban on corporate contributions is "'closely drawn' to match a 'sufficiently important [government] interest[.]'" 539 U.S. at 162 (internal citations omitted). The government interest on which the OCPF relies is the prevention of *quid pro quo* corruption or the appearance thereof.

The Latin phrase *quid pro quo* "captures the notion of a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441, citing *McCormick* v. *United States*, 500 U.S. 257, 266 (1991). This type of corruption, or even just its appearance, undermines "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26–27. As a result, *Buckley*, the Supreme Court's seminal campaign finance case, recognized that the prevention of actual corruption, and of perceived corruption, are "important government interests" that support campaign finance regulations. See *id.* at 27 ("[o]f almost equal concern as the danger of actual *quid pro quo* arrangements [through contributions] is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse").

In *Citizens United*, the Supreme Court reaffirmed the validity and importance of the anticorruption interest, confirming *Buckley*'s rationale for upholding contribution limits "in order to ensure against the reality or appearance of corruption." 558 U.S. at 356–357. Thereafter, in *McCutcheon*, the Court noted that, in the past, it had labeled the anti-corruption interest "compelling," which "satisf[ies] even strict scrutiny." 134 S. Ct. at 1445, citing *National Conservative Political Action Comm.*, 470 U.S. at 496–497. These cases lead inexorably to the conclusion that the prevention of *quid pro quo* corruption or its appearance qualifies as a "sufficiently important interest" to justify bans on campaign contributions. Therefore, if Section 8 is "closely drawn" to further that interest, it passes First Amendment muster.

The Plaintiffs offer two alternative arguments that Section 8 is not closely drawn to serve the corruption-prevention interest. First, they contend, it does not serve that interest at all. Second, they say, even if it serves that interest, it goes too far because a contribution limit would be adequate and so, an outright ban on a corporation's right to express support for a candidate is unjustified. These arguments are unavailing.

In arguing that Section 8 does not serve the corruption-prevention interest, the Plaintiffs fault the OCPF for failing to present evidence that corporations have made campaign contributions in Massachusetts (which is illegal under Section 8) in an attempt to corrupt officeholders. No such showing is necessary, however.

"[L]ess direct evidence is required when . . . the government acts to prevent offenses that 'are successful precisely because they are difficult to detect.'" *Wagner* v. *Federal Election Comm'n*, 793 F.3d 1, 20 (D.C. Cir. 2015), citing *Burson* v. *Freeman*, 504 U.S. 191, 208 (1992) (upholding restriction on campaign speech near voting places as warranted to prevent "[v]oter intimidation and election fraud," notwithstanding limited record evidence of the occurrence of these dangers). It makes little practical sense to require the Legislature to wait for the Commonwealth to experience the very problem it fears before permitting it to take appropriate prophylactic measures. See *Citizens United*, 558 U.S. at 356 (noting the preventive nature of contribution limits because "'the scope of . . . [*quid pro quo* corruption] can never be reliably ascertained'"), quoting *Buckley*, 424 U.S. at 27.

Moreover, to require evidence of actual corruption-related scandals would conflate the government's interest in preventing actual corruption with its separate and distinct interest in preventing the appearance of corruption. "[I]f every case of apparent corruption required a showing of actual corruption, then the former would simply be a subset of the latter, and the prevention of actual corruption would be the only legitimate state interest for [restricting campaign contributions]." *Ognibene*, 671 F.3d at 188. The Supreme Court has declined to require a showing of actual corruption to support campaign finance regulations because of the difficulties related to detecting actual

corruption and the equal importance of eliminating apparent corruption. *Id.*

Ultimately, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgment will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). In the present matter, there is nothing novel or implausible about the suggestion that corporations may make political contributions as *quid pro quo* for favors from elected officials, such as the awarding of government contracts, and that the making of these contributions fosters the appearance of corruption. The OCPF has provided sufficient evidence that Section 8 serves the anti-corruption interest, identifying instances in the last decade where Massachusetts politicians have been convicted of crimes related to bribery schemes intended to benefit corporations. For example, in 2010, both Boston City Councilor Chuck Turner and State Senator Dianne Wilkerson were separately convicted of accepting bribes as *quid pro quos* for actions that benefited corporations, obtaining a liquor license for a nightclub in one case and passing legislation to aid a commercial development in the other. *Kobick Aff.*, Ex. Y–Z. Then, in 2011, House Speaker Salvatore DiMasi was convicted of multiple crimes related to his acceptance of bribes in exchange for steering state contracts to a software corporation. *Kobick Aff.*, Ex. V–X.

Only brief comment is necessary on the Plaintiffs' assertion that Section 8 must not advance the anti-corruption interest since the OCPF has brought few

Section 8 enforcement actions aimed at corporations. Because Section 8 prohibits corporate campaign contributions, a small number of enforcement actions is hardly surprising, and simply shows that the ban on corporate contributions appears to be working to prevent one form of possible corruption, namely the use of campaign contributions to obtain *quid pro quo* favors from politicians.

Furthermore, the sad tales of Councilor Turner, Senator Wilkerson, and Speaker DiMasi, all of whom accepted *quid pro quo* bribes to advance the interests of corporations, illustrate the very danger that Section 8 guards against—even if those bribes sparked no action from the OCPF because the bribes were not labelled as corporate campaign contributions. If corporate political contributions were permitted in Massachusetts, those bribes may well have been disguised as campaign contributions, as is often the case in states where there is no equivalent to Section 8. Among the more famous examples are those of former Illinois Governor Blagojevich, convicted for (among other things) attempting to extort campaign contributions from hospital officials in exchange for raising Medicaid reimbursement rates, and former Vice President Agnew, who accepted bribes labeled as campaign contributions in exchange for awarding contracts for public infrastructure projects while serving as Governor of Maryland. Sec *Wagner*, 793 F.2d at 15 n.17.

The OCPF is not required to prove that corporate contributions inevitably lead to *quid pro quo* corruption; instead, it merely needs to establish that the

State had a reasonable basis for concluding that banning corporate contributions would decrease the risk of this type of corruption. See *Florida Bar* v. *Went for It, Inc.*, 515 U.S. 627, 628 (1995) (stating "burden is not satisfied by mere speculation or conjecture," but may be justified "by reference to studies and anecdotes pertaining to different locales altogether, or even . . . based solely on history, consensus, and simple common sense") (internal quotations and citations omitted). This the OCPF has done.

In fact, the OCPF has done more. The interest in preventing the appearance of corruption, even when there is no actual provable corruption, is also an "important government interest," because the perception of corruption, or of opportunities for corruption, erodes the public's faith in our democracy. See *Buckley*, 424 U.S. at 27. The OCPF has presented considerable evidence that Section 8 serves the interest of preventing the perception that *quid pro quo* corruption is possible through corporate campaign contributions. See, e.g., *Kobick Aff.*, Ex. RR, Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending And Support for Achievable Reforms*, DEMOS.ORG, October 2012, p. 1 & 3 (reporting the findings of a poll commissioned by the Corporate Reform Coalition, stating majority of Americans believe political spending "drowns out the voices of average Americans and corrupts our democratic government" and "agree that corporations spend money on politics to gain an economic advantage over their competitors"); *Kobick Aff.*, Ex. SS, David M. Primo and

Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, ELECTION L. J., vol. 5, No. 1, p. 33 & 35 (2006) (finding statistically significant relationship between the presence of limits on corporate campaign contributions and belief that state government is responsive to individual citizens).

The Plaintiffs' other contention, that Section 8 cannot survive First Amendment review because it involves a total ban rather than merely a dollar limitation, is also without merit. In *Beaumont*, the Supreme Court rejected the argument that contribution bans and limits should be treated differently. 539 U.S. at 161–163. According to the Court, such an argument "overlooks the basic premise . . . followed in setting First Amendment standards for reviewing political financial restrictions: the level of scrutiny is based on the importance of the 'political activity at issue[.]'" *Id.* at 161, citing *MCFL*, 479 U.S. at 259. In other words, the "degree of scrutiny turns on the nature of the activity regulated[,]" not on the degree of regulation. *Id.* at 162. Since restrictions on campaign contributions, whether in the form of contribution limits or contribution bans, represent only "marginal" speech restrictions "closer to the edges than to the core of political expression," they are subject to the "closely drawn" test. *Id.* at 161–162 ("[i]t is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself").

For these reasons, I conclude that Section 8's prohibition on corporate campaign contributions is closely drawn to serve the State's interest in preventing corruption or the appearance of corruption. Thus, Section 8 is consistent with First Amendment requirements. Consequently, the Plaintiffs' Motion for Summary Judgment will be ***DENIED*** and the OCPF's Cross-Motion for Summary Judgment will be ***ALLOWED***, as to the Plaintiffs' claim that Section 8 violates the First Amendment. I shall enter a declaration, under G. L. c. 231A, § 2, in accordance with this ruling.

2. State Law Regarding Free Expression

The Supreme Judicial Court "consider[s] th[e] protections [granted by articles 16 and 19 of the Massachusetts Declaration of Rights, concerning free speech and free assembly] as comparable to those guaranteed by the First Amendment." *Opinion of the Justices*, 418 Mass. 1201, 1212 (1994). Because the analysis under articles 16 and 19 is generally the same as under the First Amendment, *id.*, the Plaintiffs' failure to establish that Section 8 violates the First Amendment forecloses their analogous state claim. The Massachusetts cases the Plaintiffs cite, *Opinion of the Justices*, 418 Mass. at 1201, and *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230 (1946), do not require a different outcome.

In *Bowe*, the Supreme Judicial Court held that a proposed law, which would have prevented labor unions from "pay[ing] any sum of money for the rental of

a hall in which to hold a public rally or debate, or for printing or circulating pamphlets, or for advertising in newspapers, or for buying radio time," was contrary to the protections afforded by articles 16 and 19. *Id.* at 252. The Court reasoned the law was invalid under these provisions because it would have made it impossible for a labor union to "get its message to the electorate." *Id.* But the types of expenditures at issue in *Bowe* were not campaign contributions, but rather independent expenditures. In the wake of *Citizens United*, Massachusetts law now allows corporations to make unlimited independent expenditures to rent halls, circulate pamphlets, and advertise in newspapers and on radio, all without violating Section 8.

Opinion of the Justices also fails to provide the Plaintiffs with much support. In that case, too, the Justices did not address corporate contributions; instead, they considered whether a proposed bill restricting the "total receipts" a political candidate could raise in the aggregate in a non-election year would violate the First Amendment. *Opinion of the Justices*, 418 Mass. 1201–1203. The Justices specifically "express[ed] no opinion" on claims under articles 16 and 19 of the Massachusetts Declaration of Rights, other than to state that the rights available under those provisions were "comparable" to those guaranteed by the First Amendment. *Id.* at 1212.

Now the Plaintiffs quote, in a vacuum, the Justices' statement that the proposed law could not stand under the First Amendment, because "[t]he interest in avoiding corruption, and its appearance, [could not]

justify what [would] amount, in some cases, to an outright ban on a contributor's right to express support for a candidate." *Id*. at 1210–1211. At issue, however, were the rights of candidates to receive contributions, not the rights of contributors to make them. Moreover, the Justices did not state that any of those contributors were corporations already long prohibited by Section 8 from making political contributions—a ban that the Justices in no way questioned. In any event, the Plaintiffs found this dicta about First Amendment rights (not state constitutional rights) in an opinion that predated by decades the Supreme Court's First Amendment holdings in *Beaumont*, which I have already found controlling, and in *Citizens United*, which now guarantees that corporations have ample rights to express support for a candidate by making independent expenditures on the candidate's behalf.

I conclude that Section 8 is consistent with the protections afforded by articles 16 and 19 of the Massachusetts Declaration of Rights. The Plaintiffs' Motion for Summary Judgment will be ***DENIED*** and the OCPF's Cross-Motion for Summary Judgment will be ***ALLOWED***, insofar as each pertains to the Plaintiffs' claim that Section 8 violates these provisions. I shall enter a declaration, under G. L. c. 231A, § 2, in accord with this conclusion.

B. Rights to Equal Protection

The Plaintiffs contend Section 8 violates the Fourteenth Amendment's Equal Protection Clause as well as the equal protection guarantees established under article 1 of the Massachusetts Declaration of Rights, because there is no valid justification for a rule that totally bans political contributions from corporations while allowing labor unions to make such contributions. The OCPF argues this equal protection argument has been foreclosed by *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990). In reply, the Plaintiffs contend that, following *Citizens United, Austin* is no longer good law.[10] For the reasons discussed below, I conclude the Plaintiffs' equal protection challenge fails.

In accord with the Fourteenth Amendment and article 1 of the Massachusetts Declaration of Rights, all

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[10] To support their position, the Plaintiffs rely upon two United States District Court cases, *Protect My Check, Inc.* v. *Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016), and *Utah Taxpayers Assoc.* v. *Cox*, No. 15-cv-00805-DAK, slip op. (D. Utah Jul. 14, 2016). This reliance is misplaced. Unlike in the present matter, in both *Dilger* and *Cox* the State conceded the equal protection argument. See *Dilger*, 176 F. Supp. 3d at 690 ("[d]efendants have not sufficiently explained why corporations should be treated differently from unions or LLCs . . . This is not to say there could never be a valid reason for treating corporations differently than unions or LLCs, but so far Defendants have not presented one, and during oral argument defense counsel conceded that the ban should apply equally to all three groups"); *Cox*, slip. op. at 3 ("[the State Defendants] conceded . . . that the distinction between corporations and unions created by Utah Code Ann. §§ 20A-11-701 and -702 was foreclosed by the Supreme Court in [*Citizens United*]").

people in the Commonwealth are guaranteed the right to equal protection of the laws. The analysis is the same under either provision. *Tobin's Case*, 424 Mass. 250, 253 (1997), quoting *Dickerson* v. *Attorney Gen.*, 396 Mass. 740, 743 (1986). The equal protection mandate requires that "all persons similarly circumstanced shall be treated alike." *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982); see also *City of Cleburne* v. *Cleburne Living Ctr*, 473 U.S. 432, 439–440 (1985). Thus, as an initial matter, to establish a viable equal protection claim, a plaintiff must "allege facts indicating that, 'compared with others similarly situated, [it] was selectively treated[.]'" *Barrington Cove Ltd. Partnership* v. *Rhode Island Hous. and Mtge. Fin. Corp.*, 246 F.3d 1, 7 (1st Cir. 2001), quoting *Rubinovotz* v. *Rogato*, 60 F.3d 906, 909–910 (1st Cir. 1995).

"The formula for determining whether individuals or entities are 'similarly situated' for equal protection purposes is not always susceptible to precise demarcation." *Id.* at 8, citing *Coyne* v. *City of Somerville*, 972 F.2d 440, 444–445 (1st Cir. 1992). Even so, it is "clear that the burdens of production and persuasion [with respect to this requirement] must be shouldered by the party asserting the equal protection violation." *Cordi-Allen* v. *Conlon*, 494 F.3d 245, 250 (1st Cir. 2007) (discussing equal protection in the land-use context). Ultimately, the test "'is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated . . . In other words, apples should be compared to apples.'" *Barrington Cove Ltd. Partnership*, 246 F.3d at

8, quoting *Dartmouth Review* v. *Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989).

The "similarly situated" requirement "demands more than lip service, It is meant to be 'a very significant burden.'" *Cordi-Allen*, 494 F.3d at 251, quoting *Discovery House, Inc.* v. *Consolidated City of Indianapolis*, 319 F.3d 277, 283 (7th Cir. 2003). "It is inadequate to . . . leave it to the [government] to disprove conclusory allegations[.]" *Id.* "There is hardly a law on the books that does not affect some people differently from others," *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 59–60 (1973) (Stewart, J., concurring); nevertheless, as it cannot legislate on a purely individualized basis, government must proceed by classifications. *Opinion of the Justices*, 423 Mass. 1201, 1232 (1996). The "similarly situated" requirement "furnishes the limiting principle" that "guards against" opening the floodgates for every claim of unequal treatment. See *Cordi-Allen*, 494 F.3d at 251. Consequently, "'a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met.'" *Id.* at 252, quoting *Harlen Assocs.* v. *Incorporated Village of Mineola*, 273 F.3d 494, 499 (2nd Cir. 2001).

In the present matter, I conclude that the Plaintiffs have failed to meet their burden to demonstrate labor unions and corporations are similarly situated. The summary judgment record is wholly lacking on this point. There are no facts in evidence discussing the similarities or differences between labor unions and corporations. Rather than present facts, the Plaintiffs

merely state in conclusory fashion that the two types of entities are similarly situated for purposes of Section 8's contribution ban because "[b]usinesses attempt to create wealth for their shareholders and unions attempt to capture some of that wealth for their members." *Plaintiffs' Brief*, p. 9. The summary judgment record, however, contains no evidence that any union is attempting to capture any of the wealth created by these Plaintiffs. In any event, this conclusory assertion is not sufficient, by itself, to support the Plaintiffs' argument that they are "similarly situated" to (and thus, must be treated the same as) any union, hypothetical or real.

Because the Plaintiffs have provided no evidence to support their conclusory assertion that corporations and unions are similarly situated, the OCPF is entitled to summary judgment on their equal protection claims. No further analysis is necessary.

But, even if I were to conclude that the Plaintiffs had met their burden to show labor unions and corporations are similarly situated, their equal protection claim would still fail.

Ordinarily, "government programs that classify or differentiate are constitutional if they bear a rational relationship to a legitimate government objective." *Woodhouse* v. *Maine Comm'n on Gov't Ethics and Election Practices*, 40 F. Supp. 3d 186, 194 (D. Maine 2014), citing *Plyler*, 457 U.S. at 216. When, however, "a fundamental interest . . . is at stake, . . . a much stronger justification is required, namely a compelling government

interest, and a necessary relationship between the classification and that interest." *Id.*, citing *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995). Here, the Plaintiffs argue that I must apply strict scrutiny when analyzing their equal protection challenge because the ability to engage in political expression is a fundamental right. I am not convinced that strict scrutiny is the appropriate standard.

"In the First Amendment context, the Supreme Court has applied a less rigorous test for contribution limits, examining whether they are closely drawn to a sufficiently important government interest." *Riddle* v. *Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014), citing *Randall* v. *Sorrell*, 548 U.S. 230, 247 (2006); see also *Buckley*, 424 U.S. at 25 (stating that interference with contributor's protected rights of political association "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms"). In the recently-expressed view of more than one federal Circuit Court of Appeals, it makes little sense to apply one standard to free speech and association claims and a second standard to equal protection claims attacking the same contribution restrictions. "[A]lthough equal protection analysis focuses upon the validity of the classification rather than the speech restriction, the critical questions asked are the same. [Thus] . . . the same level of scrutiny is . . . appropriate in both [the First Amendment and the equal protection] contexts." *Wagner*, 793 F.3d at 33 (internal quotations and citations omitted). Indeed, the

District of Columbia Circuit Court of Appeals recently went farther, stating, "[t]here is . . . no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protections principles." *Id.* at 32. Consequently, I conclude the "closely drawn" test "applies when contributors challenge contribution limits based on the . . . Equal Protection Clause rather than the First Amendment." *Riddle*, 742 F.3d at 928.

The OCPF argues the State's interest in preventing *quid pro quo* corruption or the appearance of corruption is sufficiently important to justify differences between how labor unions and corporations are treated and, that Section 8 is closely drawn to serve that interest. I agree. As I explained in detail above while analyzing the Plaintiffs' First Amendment claim, the OCPF has met its burden to demonstrate Section 8's corporate contribution ban serves the anticorruption interest.

At base, the Plaintiffs' equal protection argument is an assertion of underinclusiveness—they argue that Section 8 is unlawful because it does not regulate unions to the same extent that it regulates corporations. "A statute is not, however, 'invalid under the Constitution because it might have gone farther than it did.'" *Ognibene*, 671 F.3d at 191, quoting *Buckley*, 424 U.S. at 105. "[A] rule is struck for underinclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest[,]" *Blount* v. *Securities and Exchange Comm'n*, 61 F.3d 938, 946 (D.C. Cir. 1995) (internal quotations and citations omitted). The

fact that the State Legislature has made a determination that *quid pro quo* corruption and its appearance are particularly problematic in the corporate context does not render Section 8's corporate contribution ban unlawful.

Lastly, I note that, even as it overruled the First Amendment holding in *Austin*, 494 U.S. at 660, *Citizens United* did not overrule—or even discuss—*Austin*'s equal protection analysis. See generally, 558 U.S. at 342–372. Thus, *Austin*'s holding, that "crucial differences" between the structure and functioning of corporations and unions justified treating the two types of entities differently when establishing election laws, 494 U.S. at 665–668, is still good law, which I am bound to follow. As I mentioned above, the Supreme Court has explicitly admonished the lower courts to leave to it the "'prerogative of overruling its own decisions.'" *Agostini*, 521 U.S. at 237, quoting *Rodriguez de Quijas*, 490 U.S. at 484. In this vein, the Court has stated that lower courts should not "conclude . . . more recent cases have, by implication, overruled . . . earlier precedent." *Id.* In fact, "absent clear indication from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled *sub silentio* merely because its reasoning and results appear inconsistent with later cases." *Williams* v. *Whitley*, 994 F.2d 226, 235 (5th Cir. 1993). In accord with *Austin*, Section 8 does not violate equal protection guarantees because it treats corporations and unions differently.

In summary, even if the summary judgment record contained evidence sufficient to support the Plaintiffs'

conclusory allegations that corporation [sic] and unions are similarly situated—and it does not—I conclude that Section 8 does not violate the equal protection guarantees of the Fourteenth Amendment or article 1 of the Massachusetts Declaration of Rights. The Plaintiffs' Motion for Summary Judgment will be ***DENIED*** and the OCPF's Cross-Motion for Summary Judgment will be ***ALLOWED***, insofar as each pertains to the Plaintiffs' equal protection claims. I shall enter a declaration, under G. L. c. 23 IA, § 2, in accordance with this determination.

CONCLUSION AND ORDER

For the reasons explained above, the Plaintiffs' Motion for Summary Judgment is ***DENIED*** and the OCPF's Cross-Motion for Summary Judgment is ***ALLOWED***. In accordance with G. L. c. 231A, § 2, it is further ***DECLARED*** that: (1) Section 8 is consistent with the free expression and assembly protections afforded by the First Amendment as well as articles 16 and 19 of the Massachusetts Declaration of Rights; and (2) Section 8 does not violate the Fourteenth Amendment's Equal Protection Clause or the State's equal protection guarantees set forth in article 1 of the Massachusetts Declaration of Rights.

SO ORDERED.

/s/ Paul Wilson
Paul D. Wilson
Justice of the Superior Court

April 4, 2017

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
TRIAL COURT OF THE
COMMONWEALTH
CIVIL ACTION NO. 15-0494E

1A AUTO, INC. and
126 SELF STORAGE, INC.,
Plaintiffs,

v.

MICHAEL SULLIVAN,
Director, Office of Campaign
and Political Finance,
Defendant.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

8/20/15 Denial. See Memorandum of Decision and Order. (Giles, J.)
Attest: Margaret M. Buckley, Assist. Clerk

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION NO. 201 5-00494-E

1A AUTO. INC., and 126 SELF STORAGE, INC.

VS.

MICHAEL SULLIVAN, Director,
Office of Campaign and Political Finance

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The plaintiffs, 1A Auto, Inc., and 126 Self Storage, Inc. (collectively, "Plaintiffs"), two business corporations, have brought a complaint for declaratory and injunctive relief against Michael J. Sullivan, the Director of the Massachusetts Office of Campaign and Political Finance ("Defendant" or "OCPF"), challenging the enforceability of that provision of a Massachusetts campaign finance law, G. L. c. 55, § 8 ("Section 8"), that imposes a ban on political contributions by business corporations to candidates, parties, and political committees. The Plaintiffs have moved for a preliminary injunction to abate the Section 8 contribution ban, which motion the Defendant opposes. After hearing, and for the reasons set forth below, the motion is ***DENIED.***

BACKGROUND

In pertinent part, Section 8 provides:

> "[N]o business or professional corporation, partnership, limited liability company partnership under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party."

Section 8 imposes an outright ban on political contributions by business corporations to candidates, parties, and political committees, both directly from a business's general treasury and indirectly to a "separate segregated account" or through a business-controlled political action committee ("PAC") (except with regard to a ballot question); unincorporated associations, *e.g.*, unions, are not constrained by Section 8 in making political contributions, however. G. L. c. 55, § 8. See 1980–81 Mass. Op. Atty. Gen. No. 10, 1980 WL 119563, at *1 (Nov. 6, 1980). A corporation that violates Section 8 can be fined up to $50,000; and any officer, director, or agent of the corporation violating any provision of Section 8 can be punished by a fine of up to $10,000, or by imprisonment for up to one year, or both. G. L. c. 55, § 8. The Attorney General's Opinion noted, however, that other avenues for engaging in political

activity and discourse remain open to corporations, including, *inter alia*, contributions by corporate officers and employees, the formation of PACs, the donation of volunteer time by corporate officers and employees, and the dissemination of newsletters and other publications. *Id.* at *2, *4.

In interpreting Section 8 of General Laws Chapter 55, the Campaign Finance Law, the OCPF has determined that business corporations "may not contribute to candidates, PACs (other than independent expenditure PACs), or party committees." OCPF-Interpretive Bulletin-88-01. In the opinion of the OCPF, businesses may not establish, finance, maintain, or control a PAC that supports candidates, OCPF-Advisory Opinion ("AO")-90-30; and non-profit corporations and PACs with business members similarly are barred from making these sorts of contributions, OCPF-AO-98-01.

The Plaintiffs are two family-owned Massachusetts business corporations which acknowledge that, as corporations registered to do business in Massachusetts, are governed by the contribution ban under Section 8. 1A Auto, Inc., has sold auto parts in Pepperell, Massachusetts, since 1999 and employs 217 people. 126 Self Storage, Inc., has rented self-storage units in Ashland, Massachusetts, since 1999 and employs four people. According to the affidavits of the Plaintiffs' presidents, each Plaintiff would have made direct and indirect contributions to political candidates, PACs. and party committees but for the OCPF's enforcement of Section 8. The Plaintiffs contend that, by applying different contribution limits to unions and business,

the Defendant has violated their right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and by art. 1 of the Declaration of Rights of the Massachusetts Constitution. The Plaintiffs further submit that the contribution ban imposed by Section 8 violates their freedoms of speech and association protected by the First and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1983; and art. 16 and art. 19 of the Massachusetts Declaration of Rights.

DISCUSSION

I. Preliminary Injunction Standard

In considering a request for a preliminary injunction, a court must evaluate a moving party's likelihood of success on the merits and claim of irreparable harm and balance the risks of harm to the parties. *Packing Industries Group, Inc.* v. *Cheney*, 380 Mass. 609, 617 (1980). See *Winter* v. *National Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Where, as here, a party seeks to enjoin governmental action, the court also is "required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Cote-Whitacre* v. *Dept. of Public Health*, 446 Mass. 350, 357 (2006), quoting *Commonwealth* v. *Mass. CRINC*, 392 Mass. 79, 89 (1984).

"Where a court contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard the

separation of powers mandated by art. 30 of the Declaration of Rights of the Massachusetts Constitution." *Smith* v. *Comm'r of Transitional Assistance*, 431 Mass. 638, 651 (2000). The "fact that [the Plaintiffs are] asserting First Amendment rights does not automatically require a finding of irreparable injury." *Respect Maine PAC* v. *McKee,* 622 F.3d 13, 15 (1st Cir. 2010), quoting *Pub. Serv. Co. of New Hampshire* v. *Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987). See *Holmes* v. *Fed. Election Comm'n,* No. 14-1243, 2014 WL 5316216, at *6-*7 (D.D.C. Oct. 20, 2014); *Rufer* v. *Fed. Election Comm'n*, 64 F. Supp.3d 195 (D.D.C. 2014), 2014 WL 4076053, at *6-*7.

II. Analysis

In 1907, Massachusetts enacted legislation banning contributions from corporations involved in certain businesses. See St. 1907, c. 581, § 3. That was the same year that Congress first banned corporate political contributions. See 34 Stat. 864–65. In 1908, the ban was extended in Massachusetts to any "business corporation incorporated under the laws of or doing business in the commonwealth," St. 1908, c. 483, § 1, and later to any "business or professional corporation, partnership. limited liability company partnership," St. 2009, c. 28, § 33. The corporate contribution ban was part of the Massachusetts Legislature's efforts over the last century to combat corruption in state elections. See St. 1913, c. 835, §§ 353, 356, 503; St. 1946, c. 537, § 10; 1965 Report of Mass. Crime Commission at 75–76. In addition to the Federal Election Campaign Act,

the laws of twenty other states ban corporate contributions.[1]

Section 8 applies on its face to both political contributions and independent expenditures[2] by business corporations, but the Defendant concedes that application of the ban to *expenditures* is unconstitutional in the wake of the U. S. Supreme Court's decision in *Citizens United.* See *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).[3] Thus, only political *contributions* are at issue in the case at bar. Laws that regulate campaign contributions are subject to "a lesser but still rigorous standard of review," *McCutcheon* v. *Fed Election Comm'n*, 134 S. Ct. 1434, 1444 (2014), quoting *Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976),[4]

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[1] See 52 U.S.C. § 30118(a); Alaska Stat. § 15.13.074; Arizona Rev. Stat. § 16-919(A); Colo. Const. Art. XXVIII, § 3; Conn. Gen. Stat. §§ [sic] 9-613; Iowa Code § 68A.503; Ky. Rev. Stat. § 121.025, 121.035; Mich. Comp. Laws § 169.254; Minn. Stat. § 211B.15; Mont. Code Ann. § 13-35-227; N.C. Gen. Stat. § 163-278.15; N.D. Cent. Code § 16.1-08.1-03.5; Ohio Stat. § 3599.03; Okla. Stat. tit. 21, § 187.1; Pa. Stat. tit. 25, § 3253; R.I. Gen. Laws § 17-25-10.1; S.D. Codified Laws § 12-27-18; Tex. Elec. Code § 253.094; W. Va. Code § 3-8-8; Wis. Stat. § 11.38; Wyo. Stat. § 22-25-102.

[2] An independent expenditure is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 C.F.R. 100.16(a).

[3] Following *Citizens United,* Massachusetts now permits unlimited corporate spending on independent expenditures and unlimited corporate donations to "independent expenditure PACs."

[4] The Supreme Judicial Court has construed *Buckley* as imposing a lesser standard of review for contribution restrictions.

because "contributions lie closer to the edges than to the core of political expression," *Fed. Election Comm'n* v. *Beaumont*, 539 U.S. 146, 161 (2003). In the First Amendment context, limitations on political contributions must meet the "closely drawn" test so as "to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444. See *Buckley*, 424 U.S. at 21.[5]

The Plaintiffs' request to enjoin Section 8's contribution ban on them flies in the face of years of U. S. Supreme Court and U. S. Court of Appeals jurisprudence upholding such a ban. See *Ruler*, at *6. In 1990, the Supreme Court held that the different treatment of corporations and labor unions in campaign finance laws does no violence to the Equal Protection Clause of the Fourteenth Amendment. *Austin* v. *Michigan*

See *Opinion of the Justices*, 418 Mass. 1201, 1205 (1994); *Weld for Governor* v. *Dir. of Office of Campaign & Political Finance*, 407 Mass. 761, 765 n.6 (1990). The Plaintiffs' reliance on the recent Supreme Judicial Court decision of *Commonwealth* v. *Lucas* is unavailing: the present case, unlike *Lucas,* does not raise an issue of a content-based restriction on political speech. See *Commonwealth* v. *Lucas*, ___ Mass. ___ (August 6, 2015).

[5] The Supreme Judicial Court has construed *Buckley* as imposing a lesser standard of review for contribution restrictions. See *Opinion of the Justices*, 418 Mass. 1201, 1205 (1994); *Weld for Governor* v. *Dir. of Office of Campaign & Political Finance*, 407 Mass. 761, 765 n.6 (1990). The Plaintiffs' reliance on the recent Supreme Judicial Court decision of *Commonwealth* v. *Lucas* is unavailing: the present case, unlike *Lucas*, does not concern a content-based restriction on political speech. See *Commonwealth v. Lucas*, ___ Mass. ___ (August 6, 2015).

Chamber of Commerce, 494 U.S. 652, 668 (1990).[6] Then in 2003, the Supreme Court ruled that the federal ban on corporate contributions is consonant with the First Amendment. *Beaumont*, 539 U.S. Recently, two Eighth Circuit decisions rejected free-speech and equal-protection arguments similar to the ones advanced by the instant Plaintiffs. *Iowa Right to Life Committee, Inc.* v. *Tooker*, 717 F.3d 576 (816 Cir. 2013); *Minnesota Citizens Concerned for Life* v. *Swanson*, 692 F.3d 864 (8th Cir. 2012). See also *Wagner* v. *Fed. Election Comm'n*, ___ F.3d ___, 2015 WL 4079575 (C.A.D.C.) (*en banc*) (July 7, 2015). Simply put, "restrictions on contributions require less compelling justification than restrictions on independent spending." *Beaumont*, 539 U.S. at 158–59. Furthermore, Section 8 meets the "closely drawn" test since it is directed only at wealth-generating, *for*-profit businesses. See *McCutcheon*, 134 S. Ct. at 1444.

The Plaintiffs' attempts to distinguish this long line of precedents are unpersuasive. *Inter alia*, the Plaintiffs rely on inapposite case law regarding content-based regulation rather than that concerning the relevant content-neutral restriction at issue here, see *Turner Broadcasting System, Inc.* v. *FCC*, 412 U.S. 622, 658 (1994); they apply the incorrect standard of "strict scrutiny" as opposed to, at most, "intermediate scrutiny," see *id.* at 661–62; and they gloss over the distinction between contributions and expenditures that originated in *Buckley*, see *Opinion of the Justices*, 418

[6] *Citizens United* overruled *Austin* only with regard to corporate independent campaign expenditures, not contributions.

Mass. at 1205. The Plaintiffs also make much of the fact that Section 8 does not provide an "indirect" means by-which a corporation can contribute to an affiliated PAC, the so-called "PAC option." However, in *Minnesota Citizens*, the Eighth Circuit rejected a First Amendment challenge to a statutory scheme in Minnesota that also precludes indirect financial support of a PAC (while allowing corporate contributions through an "employee political fund"). *Minnesota Citizens Concerned for Life*, 692 F.3d at 879.[7]

Accordingly, the Plaintiffs have failed to demonstrate a likelihood of success on the merits in light of the aforesaid controlling precedents. See *Packaging Industries Group*, 380 Mass. at 617. Moreover, if this court were to enjoin the enforcement of a contribution ban that has been in existence for over 108 years based on the Plaintiffs' yet untested legal theory, the public's long-standing expectations with respect to campaign finance laws would be upset in the middle of an election cycle, thus clearly tipping the balance of equities in favor of denying the requested relief. See *Respect Maine PAC* v. *McKee*, 622 F.3d 13, 15–16 (1st Cir. 2010); *Rufer*, 2014 WL 4076053, at *7. Perhaps the Plaintiffs' challenge is better left to the vehicle of reporting the case to the Appeals Court pursuant to G. L. c. 231, § 111 and Mass. R. Civ. P. 64 at some appropriate juncture.

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[7] Massachusetts actually has a Minnesota-style PAC option: Section 5B of General Laws Chapter 55 allows corporate employees to form PACs using the names of their corporate employers. See G. L. c. 55, § 5B.

ORDER

For all the foregoing reasons, the Plaintiffs' motion for a preliminary injunction is hereby ***DENIED.***

/s/ _____
Linda E. Giles,
Justice of the Supreme Court

Dated: August 20, 2015

United States Constitution,
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution,
Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS DECLARATION OF RIGHTS

Article I.

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Article XVI.

The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth.

Article XIX.

The 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.

M.G.L.A. 55 § 8

§ 8. Political contributions by corporations; penalties

Effective: August 1, 2014
Currentness

No corporation carrying on the business of a bank, trust, surety indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business or professional corporation, partnership, limited liability company partnership under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party.

No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, other than a political committee organized on behalf of a ballot question campaign shall solicit or receive from such corporation or such holders

of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any such corporation violating this chapter shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation of any provision thereof, or any person who violates or in any way knowingly aids or abets the violation thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both.