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.

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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SUMMARY

Plaintiffs seek this injunction to halt a brazen discrimination in Massachusetts law: banning businesses from making political contributions, while allowing robust contributions by unions. Constitutional protections for freedom of speech have their "'fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339–40 (2010) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)). Accordingly, political "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Massachusetts campaign finance law is of two minds when it comes to political contributions.

On the one hand, business corporations "may not contribute to candidates, PACs (other than independent expenditure PACs), or party committees." IB-88-01 (Compl. Ex. 1) (citing G.L. c. 55, § 8). Businesses may not even establish, finance, maintain, or control a PAC that supports candidates. AO-90-30 (Compl. Ex. 2). Non-profits and PACs with business members are likewise barred from making these sorts of contributions. AO-98-01 (Compl. Ex. 3). Section 8 provides in pertinent part:

> [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.

G.L. c. 55, § 8. An offending corporation can be fined up to $50,000; any officer, director, or agent of the corporation can be fined up to $10,000 and/or imprisoned for one year. *Id.* On its face and as applied by Defendant through the various Interpretive Bulletins and Advisory Opinions cited herein, Section 8 is an outright ban on political contributions by businesses, both directly from their general treasuries and indirectly from business-controlled PACs.

On the other hand, unincorporated associations—namely unions—are free to make political contributions, both directly and through union-controlled PACs. AO-97-21 (Compl. Ex. 4); IB-88-01 ("It is not uncommon, however, for unions to use their general treasury fund to make contributions or independent expenditures to support or oppose candidates."). Indeed, if a union directly contributes the lesser of 10 percent of its revenue or $15,000 per year from its general treasury funds—i.e., funds not solicited for a political purpose—no disclosure requirements or other contribution limits apply to the union. IB-88-01. Both contributions and independent expenditures from a union's general treasury count toward the 10-percent/$15,000 limit. *Id.* However, spending by a union-controlled PAC is separate from and in addition to this limit. AO-97-21. If a union exceeds the limit, its subsequent contributions are subject to ordinary contribution limits and all of its spending becomes subject to disclosure requirements. IB-88-01; G.L c. 55 §§ 6, 6a, 7, 7a.

In other words, businesses are totally prohibited from contributing to political candidates, parties, or committees, but unions have special dispensation to contribute in excess of ordinary limits. There is no legitimate justification for allowing unions to contribute thousands of dollars to candidates, parties, and political committees, while completely banning any contributions from businesses. This disparity violates the equal protection, free speech, and free association protections of the Massachusetts and United States constitutions.

Plaintiffs are Massachusetts business corporations that, but for Defendant's enforcement of Section 8, would contribute to candidates, PACs other than independent expenditure PACs, and party committees. Affidavit of Richard Green ("Green Affidavit") ¶ 10 (Exhibit 1); Affidavit of Michael Kane ("Kane Affidavit") ¶ 10 (Exhibit 2). Plaintiff 1A Auto, Inc., is a family-owned auto parts retailer in Pepperell, Massachusetts. Green Affidavit ¶ 5. Plaintiff 126 Self Storage, Inc., is a small self-storage facility in Ashland, Massachusetts. Kane Affidavit ¶ 5. As small businesses that employ hundreds of workers between them, both Plaintiffs are impacted by local, state, and federal policies; but as corporations, neither can support candidates, parties, or committees that understand their concerns about those policies. Green Affidavit ¶ 7; Kane

Affidavit ¶ 7. Plaintiffs filed the instant action seeking declaratory and injunctive relief to remedy Defendant's unconstitutional deprivation of their rights to engage in political speech.

Issuance of a preliminary injunction to abate the Section 8 contribution ban is appropriate here because: (1) Plaintiffs are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the risk of irreparable harm to Plaintiffs outweighs the potential harm to Defendant; and (4) an injunction is in the public interest. *Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 219 (2001).

The ongoing deprivation of Plaintiffs' constitutional rights constitutes irreparable harm. *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 582 (1996). Because Plaintiffs raise a substantial constitutional claim, no further showing of irreparable harm is necessary. *Id.* The balance of equities tips in Plaintiffs' favor because the contribution ban is unnecessary to assuage concerns "properly addressed by contribution limitations and disclosure requirements." *Opinion of the Justices to the House of Representatives*, 418 Mass. 1201, 1210 n.8 (1994). It is obvious that the public interest is served by requiring strict adherence to the Constitution, which is all that Plaintiffs request here. See *Bettigole v. Assessors of Springfield*, 343 Mass. 223, 236 (1961). For these reasons, as further demonstrated below, Plaintiffs are entitled to a preliminary injunction.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs need not demonstrate they are certain to win; "a substantial possibility of success on the merits warrants issuing the injunction." *Packaging Indus. Grp., Inc. v. Cheney*, 380 Mass. 609, 617 n.12 (1980); *Wilson v. Comm'r of Transitional Assistance*, 441 Mass. 846, 860 n.1 (2004) (Ireland, J., dissenting) (quoting *Packaging Indus. Grp., id.*) ("If the merits are unclear, but the applicant's irreparable harm great, the court may order an injunction on a showing of a 'substantial possibility' rather than a 'likelihood' of success on the merits."); see also 11A Charles Alan Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2948.3

(2014) ("The courts use a bewildering variety of formulations of the need for showing some likelihood of success . . . [a]ll courts agree that plaintiff must present a prima facie case but need not show a certainty of winning."). Because the Section 8 contribution ban is in tension with the decisions of the Supreme Judicial Court and the United States Supreme Court discussed below, this burden is met.

A. The Contribution Ban Burdens Protected Speech.

"We know that the act of making political contributions and expenditures involves protected speech and not merely conduct." *Anderson v. City of Boston*, 376 Mass. 178, 192 n.15 (1978) (citing *Buckley*, 424 U.S. at 14). The political speech of corporations is protected by Article 16 of the Massachusetts Declaration of Rights and the First and Fourteenth Amendments to the United States Constitution. *Associated Indus. of Massachusetts v. Attorney Gen.*, 418 Mass. 279, 288–89 (1994); *Bowe v. Sec'y of the Com.*, 320 Mass. 230, 251 (1946) ("The liberty of the press is enjoyed, not only by individuals, but also by associations of individuals such as labor unions, and even by corporations . . . ." (citations omitted)); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Citizens United*, 558 U.S. at 365.

Because the contribution ban prohibits all political contributions by businesses, it "burden[s] both corporate expressive activity protected by art. 16 and corporate associational rights protected by art. 19 of the Declaration of Rights. The [] law's burdens on these rights could be justified only by a compelling State interest in the imposition of the restriction." *Associated Indus.*, 418 Mass. at 288–89 (citation omitted). The only government interest compelling enough to justify such a burden on these fundamental rights is preventing quid pro quo corruption or the appearance thereof. *Fed. Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480, 496–97 (1985) (*NCPAC*); *Opinion of the Justices*, 418 Mass. at 1211 (citing *NCPAC*). As discussed below, the contribution ban fails to serve the corruption prevention interest; even if the ban could serve that interest, it goes too far in restricting fundamental freedoms: "The interest in avoiding corruption, and its appearance,

cannot justify what will amount, in some cases, to an outright ban on a contributor's right to express support for a candidate." *Opinion of the Justices*, 418 Mass. at 1210–11.

B. The Contribution Ban Denies Equal Protection.

Plaintiffs first seek relief from the Section 8 contribution ban because it denies equal protection of the law guaranteed by Article 1 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution. Compl. ¶¶ 28–41. Corporations, no less than individuals, are entitled to equal protection. *Vigeant v. Postal Tel. Cable Co.*, 260 Mass. 335, 343 (1927); *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394, 396 (1886). Under both the Massachusetts and United States constitutions, "where free speech is involved strict scrutiny is required" for equal protection claims. *First Nat'l Bank of Boston v. Attorney Gen.*, 371 Mass. 773, 793 (1977), *rev'd on other grounds sub nom. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Opinion of the Justices*, 418 Mass. at 1208. This means that both Massachusetts and Federal law require that "statutory classifications impinging upon [political expression] must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990), *overruled on other grounds by Citizens United*, 558 U.S. at 365; see also *First Nat'l Bank*, 371 Mass. at 793 (same).

Applying strict scrutiny here, the contribution ban fails. The burden is on Defendant to justify a ban on businesses' political contributions, while allowing unions to contribute well beyond the normal limits that apply to individuals and PACs. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). This is a heavy burden, which requires Defendant to offer evidence of a causal link between the ban and preventing corruption. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 379 (2000) ("This Court has never accepted mere conjecture as adequate to carry a First Amendment burden . . . ."). Defendant will not be able to meet this burden. Defendant must offer evidence that justifies the rationale that unions can contribute thousands of dollars to candidates with no threat of

corruption, but a single dollar from a corporation would destroy public confidence in democracy. On its face, that is impossible because Defendant's "selection of a [$15,000 union contribution] limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1452 (2014).

There is no justification for treating businesses differently from unions. Although corporations and unions are structured differently, these structural differences are irrelevant to the equal protection inquiry here. The critical inquiry in equal protection cases is whether the disparate treatment of two groups can be justified on the basis of differences relevant in the context. See *Dallman v. Ritter*, 225 P.3d 610, 634–35 (Colo. 2010). The Colorado Supreme Court struck down a similar discriminatory law on equal protection grounds in *Dallman* because, "[a]lthough unions and corporations are structurally dissimilar, both are similarly situated under Amendment 54's [ban on candidate contributions]." *Id.* That case was the mirror image of this one: union PACs were prohibited from contributing to candidates, but business PACs were allowed to donate. *Id.* at 634 n.41.

The Colorado Supreme Court realized that, when they meet on the political battlefield, businesses and unions are functionally equivalent. *Id.* at 634–35. Indeed, they are often opposed forces, serving as point and counter-point on many issues. That observation is as true in Massachusetts as it is in Colorado. See, e.g., Mass. 2014 Ballot Questions, Question 4, Earned Sick Time for Employees, http://www.sec.state.ma.us/ele/ele14/pip144.htm (Exhibit 3).[1] But

[1] The Section 8 contribution ban does not apply to issue elections like Massachusetts' 2014 Ballot Question 4, which was supported by unions and opposed by businesses. "Raise Up Massachusetts," to which unions contributed close to $1.2 million in cash and in-kind contributions, supported Question 4. See Ballot Question Committee Reports, Raise Up Massachusetts, Excerpts, Office of Campaign & Political Finance, http://www.ocpf.us/Filers/Index?q=95395&section=Reports (Exhibit 4). Question 4 was opposed by the aptly named "No on 4 Committee," which raised approximately $56,000 in monetary and in-kind contributions from such sources as the National Restaurant Association, Massachusetts Restaurant Association, National Federation of Independent Business, and Retailers Association of Massachusetts. See Ballot Question Committee Reports, No on 4

Massachusetts businesses alone face a total prohibition on their political contributions to candidates, parties, and PACs. Unions on the other hand benefit from special rules that allow them to vastly exceed the contribution levels of other political contributors. IB-88-01. While individuals are limited to contributing $1,000 per candidate, $5,000 per party, and $500 per PAC, G.L. c. 55 § 7A(a)(1)–(3), unions can directly contribute up to $15,000 in the aggregate to candidates, parties, and PACs. IB-88-01. The avowed reason for the $15,000 limit is sensible; the reason is just not applied consistently. Defendant explains that the $15,000 limit exists because "OCPF considers groups and organizations that make contributions or independent expenditures but do not solicit or receive funds for any political purpose differently than groups and organizations that actively engage in political fundraising." IB-88-01 at 3. Fair enough, but businesses even more than unions "do not solicit or receive funds for any political purpose." Defendant offers no explanation for not applying the same rationale to businesses, except that he is hamstrung by the Section 8 ban from reaching that sensible conclusion.

If the lopsided direct contribution limits were not enough, Section 8 also uniquely prohibits businesses from establishing, financing, maintaining, or controlling PACs that contribute to candidates, parties, or other PACs. AO-98-01; AO-90-30; cf. *Dallman*, 225 P.3d at 634 n.41 ("[T]he fact that a corporation can advocate its views through a PAC under Amendment 54 while a union cannot represents disparate treatment under the Fourteenth Amendment."). Beyond the special $15,000 limit for direct contributions, union-controlled PACs can contribute up to the ordinary PAC limits. AO-97-21. Businesses may not freely allocate any resources to such a PAC, not even a business name. AO-98-01; AO-90-30. Defendant's restrictive treatment of businesses and permissive treatment of unions tips the political landscape sharply against the former and in favor of the latter. There is no legitimate justification for such unjust treatment.

Committee, Office of Campaign & Political Finance, http://www.ocpf.us/Filers/Index?q=95410&section=Reports (Exhibit 5).

That Section 8 prohibits even corporate PAC contributions distinguishes it from corporate speech restrictions that have been upheld by other courts. See *Austin*, 494 U.S. at 660 ("Contrary to the dissents' critical assumptions . . . the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds."); *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 602 (8th Cir. 2013) *cert. denied*, 134 S. Ct. 1787 (2014) ("The ban is also not complete—entities may contribute through PACs."). Those older decisions go against the grain of recent U.S. Supreme Court decisions; but even under their reasoning, total contribution bans simply go too far. Section 8 is a particularly harsh curtailment of businesses' political speech, set against particularly permissive allowances for union political speech. No court has upheld the sort of lopsided political contribution ban enforced by Defendant.

Moreover, the courts' reasons for upholding corporate speech restrictions in those older cases have been eroded by the subsequent evolution of campaign finance case law. Courts have suggested two differences between unions and businesses in applying equal protection guarantees to political speech restrictions, but both these differences have been disavowed in subsequent decisions: (1) protecting shareholders from ultra vires activities; and (2) "antidistortion," i.e., restricting the influence of political war chests amassed with the state-conferred advantages of the corporate form.

The only difference between unions and businesses that the Supreme Judicial Court has recognized in the political speech context is the first of these two: shareholder protection. As explained below, subsequent case law has revealed this distinction to be irrelevant.

In *First National Bank*, the SJC applied rational basis scrutiny to the contribution ban and held "Section 8 could represent a legislative desire to protect such shareholders against ultra vires activities, and could thus be 'reasonably related to a legitimate public purpose.'" 371 Mass. at 794. This conclusion fails to sustain the contribution ban here, because the SJC admittedly applied the wrong level of scrutiny in *First National Bank*. *Id.* at 793. The SJC's application of rational basis scrutiny was explicitly predicated on the ruling that businesses "do not possess

First Amendment rights on matters not shown to affect materially their business, property or assets." *Id.* This premise was false, as the United States Supreme Court pointed out in reversing the SJC's free speech holding. *Bellotti*, 435 U.S. at 784. The SJC has since acknowledged that both the Massachusetts and United States constitutions protect businesses' right to speak. *Associated Indus. of Massachusetts*, 418 Mass. at 288–89.

The *First National Bank* court acknowledged that its ruling on the free speech issue all but foreclosed its analysis of the equal protection issue. 371 Mass. at 793. With the error in the SJC's free speech ruling corrected, even the *First National Bank* court acknowledged that "where free speech is involved strict scrutiny is required" for equal protection claims. *Id.* Strict scrutiny therefore applies here and the SJC's speculation about the effects of Section 8 on shareholders is wholly inadequate to sustain the ban under that level of review. See *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 243–44 (2012) ("To clarify the burden incumbent on the Commonwealth, we review the evidence supporting State actions that have recently satisfied strict scrutiny.").

Worse yet, for Defendant, is the fact that the Supreme Court has rejected shareholder protection as a legitimate reason for limiting political speech. Concerns about protecting dissenting shareholders from being compelled to fund corporate political speech cannot justify bans on corporate speech; "the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment." *Citizens United*, 558 U.S. at 362; see also *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 13 (1st Cir. 2012) (same). This is a sound conclusion because, like union members, shareholders have procedures in place to protect their interests. *Lustwerk v. Lytron, Inc.*, 344 Mass. 647 (1962) (shareholders); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 (1986) (unions). Diminishing fundamental freedoms to protect shareholders from the specter of impolitic political spending was never necessary and the Supreme Court has now made that clear. *Citizens United*, 558 U.S. at 362. The only distinction

between unions and businesses that the SJC has embraced when applying equal protection guarantees to political speech restrictions is therefore irrelevant.[2]

Nor has the Supreme Court long tolerated speech restrictions that embrace the so-called antidistortion rationale, i.e., preventing "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." *Austin*, 494 U.S. at 660. The Court relied on this so-called antidistortion interest in *Austin* to rationalize different limits on speech for unions and businesses, but it has thrice repudiated the idea that the government's desire to level the political playing field justifies any limits on speech. *Davis v. Fed. Election Comm'n,* held that leveling the playing field is not a constitutionally cognizable interest. 554 U.S. 724, 742 (2008) ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices."). *Citizens United* reinforced the holding that the antidistortion interest is invalid and held that the mere fact that a group has taken on the corporate form (with its associated state-conferred advantages) is not a legitimate reason to infringe speech. 558 U.S. at 349 ("If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form."). *McCutcheon v. Fed. Election Comm'n* put another nail in antidistortion's coffin, striking down the $48,600 federal aggregate limit on candidate contributions, reasoning "[i]t is no answer to say that the individual can simply contribute less money to more people. . . . [A]s we have recently admonished, the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights." 134 S. Ct. 1434, 1449 (2014) (citing *Davis*, 554 U.S. at 739). The SJC's avoidance of the antidistortion interest makes

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[2] Even if shareholder protection were relevant, Section 8 would be overbroad to accomplish this purpose. First, because it bans political speech by corporations that do not have multiple shareholders as well as those that do. See *Citizens United*, 558 U.S. at 362 ("[T]he statute is overinclusive because it covers all corporations, including . . . for-profit corporations with only single shareholders."). Second, because, as discussed *infra*, it overlooks less burdensome alternatives to protect shareholder rights. See *id.; McCutcheon*, 134 S. Ct. at 1459–60.

that consideration immaterial to Plaintiffs' state claims, and the Supreme Court's repeated rejection of the interest makes it likewise immaterial to Plaintiffs' federal claims.

The decisions examined above show that there is simply no reason to treat businesses and unions differently in the political speech context. Whatever valid campaign finance limits apply to unions should apply to business corporations, and vice versa. Indeed, this is the approach taken by 42 states and the federal government. *State Limits on Contributions to Candidates*, National Conference of States Legislatures (Oct. 2013), http://www.ncsl.org/research/elections-and-campaigns/state-limits-on-contributions-to-candidates.aspx. More importantly, it is the approach required by the equal protection clauses of the Massachusetts and United States constitutions. Therefore, Section 8 should be enjoined to the extent that it prohibits Plaintiffs from contributing to political candidates, PACs, or party committees on the same terms as unions.

C. The Contribution Ban Denies Freedom of Speech and Association.

Plaintiffs also seek relief from the contribution ban because it violates their freedom of speech and association. Compl. ¶¶ 42–52. Even if Section 8 treated businesses' and unions' political speech equally and therefore did not violate equal protection guarantees, it would still violate the right to free speech and the closely related right to free association.

Although Section 8 applies on its face to both political contributions and expenditures, Defendant has acknowledged that application of the ban to expenditures is unconstitutional in light of the Supreme Court's holding that independent expenditures cannot be prohibited "on the basis of the speaker's corporate identity." *Citizens United*, 558 U.S. at 365; IB-10-03 (Exhibit 6). Therefore, only political contributions are at issue here. In the First Amendment context, the Supreme Court has held that limitations on political contributions must be "closely drawn" rather than "narrowly tailored." *McCutcheon*, 134 S. Ct. at 1445–46.[3]

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[3] As discussed above, the most rigorous scrutiny applies in equal protection challenges to laws that impair political speech by drawing distinctions between groups. Several Justices have criticized the lower standard of scrutiny applied to First Amendment challenges to contribution limits. *McCutcheon*, 134 S. Ct. at 1462–63 (Thomas, J., concurring) ("To justify a lesser

Here, this is a distinction without a difference because Section 8 is neither "closely drawn" nor "narrowly tailored." Regardless how the test is described, "if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review." *McCutcheon*, 134 S. Ct. at 1445–46 (quoting *Buckley*, 424 U.S. at 25); *Opinion of the Justices*, 418 Mass. at 1208. The contribution ban's total prohibition on businesses' political contributions unnecessarily abridges the freedoms protected by Articles 16 and 19 of the Declaration of Rights and the First Amendment.

1. The Contribution Ban Violates the Massachusetts Declaration of Rights.

"Although the analysis under art. 16 is generally the same as under the First Amendment . . . we leave open the possibility that, as here, art. 16 will call for a different result." *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 201 (2005) (citation omitted).[4] The SJC has repeatedly held that "[t]he liberty of the press is enjoyed, not only by individuals, but also by associations of individuals such as labor unions, and even by corporations . . . ." *Bowe*, 320 Mass. at 251 (citations omitted); *Associated Indus. of Massachusetts*, 418 Mass. at 288–89. In

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standard of review for contribution limits, *Buckley* relied on the premise that contributions are different in kind from direct expenditures. None of the Court's bases for that premise withstands careful review."); *Austin*, 494 U.S. at 678 (Stevens, J., concurring) ("In my opinion the distinction between individual expenditures and individual contributions . . . should have little, if any, weight in reviewing corporate participation in candidate elections."); *NCPAC*, 470 U.S. at 509–512 (White, J., dissenting) (advocating similar limits on expenditures and contributions); *id.* at 518–521 (Marshall, J., dissenting) (same); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S.182, 201–202 (1981) (Blackmun, J., concurring in part and in the judgment) (advocating full First Amendment protection for contributions and expenditures). The SJC has also questioned this dichotomy. See *Opinion of the Justices*, 418 Mass. at 1206 n.2 ("The distinction between contributions and expenditures set out in the *Buckley* opinion does not take us far in the present context.").

[4] This is the beauty of the "double security" provided by our Federal system. Federalist No. 51, ¶ 9; see also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

Bowe, the SJC prevented voters from applying Section 8 to unions. The SJC held that an outright ban on political activity simply goes too far:

> We do not doubt that labor unions, like individuals, may be curbed by corrupt practices acts and prevented from dumping immense sums of money into political campaigns. But under the proposed law the political activities of labor unions are not regulated or curbed but are substantially destroyed. Deprived of the right to pay 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, a union could not carry on any substantial and effective political activity. It could not get its message to the electorate. Its rights of freedom of the press and of peaceable assembly would be crippled. In the language of Amendment 48, The Initiative, II, Initiative Petitions, § 2, the proposed law is 'inconsistent with' those rights, and consequently cannot be the subject of legislation by the popular initiative.

Bowe, 320 Mass. at 252. Many years later, the SJC reiterated the conclusion that outright bans on political contributions violate the Declaration of Rights:

"The interest in avoiding corruption, and its appearance, cannot justify what will amount, in some cases, to an outright ban on a contributor's right to express support for a candidate." *Opinion of the Justices*, 418 Mass. at 1210–11.

Applying *Bowe* in a subsequent case involving a proposed amendment of Section 8 that would have limited businesses to the use of PACs when speaking about ballot questions, the SJC noted the critical distinction between *Bowe* and the proposed ballot question restriction was "[t]he case before us does not involve an absolute prohibition of speech as in the *Bowe* case, but it does materially restrict the use of corporate funds to support or to oppose a ballot question." *Associated Indus. of Massachusetts*, 418 Mass. at 287. Here we have a case in the mold of *Bowe* and *Opinion of the Justices*: Section 8 absolutely prohibits businesses from contributing to candidates, PACs (other than independent expenditure PACs), or party committees. Section 8 must be struck down because *Bowe* and *Opinion of the Justices* make clear that "an outright ban on a contributor's right to express support for a candidate" violates the Massachusetts Declaration of Rights. *Opinion of the Justices*, 418 Mass. at 1210–11; cf. *Bowe*, 320 Mass. at

252 (If Section 8 applied to unions, "the political activities of labor unions are not regulated or curbed but are substantially destroyed.").

2. The Contribution Ban Violates the First Amendment.

The Supreme Court has upheld certain limits on corporate political contributions. *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 149 (2003); *Austin*, 494 U.S. at 660; *Buckley*, 424 U.S. at 29 n.31. Those older decisions have been largely repudiated by recent U.S. Supreme Court decisions, as explored below; yet, even those cases' more deferential First Amendment test for corporate contribution limits is offended by Section 8's outright ban. The Supreme Court has never upheld a regulation on *direct* corporate political contributions without noting that it was doing so because those regulations allowed businesses to make *indirect* contributions through establishing, financing, maintaining, and controlling a PAC. *Beaumont*, 539 U.S. at 149 ("The prohibition does not, however, forbid 'the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes.'" (quoting 2 U.S.C. § 441b(b)(2)(C)); see *Austin*, 494 U.S. at 660 ("Contrary to the dissents' critical assumptions . . . the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds."); *Buckley*, 424 U.S. at 29 n.31 ("Corporate and union resources without limitation may be employed to administer these [PAC] funds and to solicit contributions from employees, stockholders, and union members."). Under Section 8, a business can give no support to a PAC, not even the right to use the business's name. AO-90-30. It is enough here to recognize that the lack of a "PAC option" is fatal to Section 8. *Beaumont*, 539 U.S. at 163 ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . .").

For purposes of enjoining the contribution ban, it is sufficient to acknowledge that Section 8 provides no accommodation for political speech through business PACs. *Id.*; AO-90-30. It is far from certain that the Supreme Court would find the PAC option to be a sufficient

alternative since a PAC does not "allow a corporation to speak." *Citizens United*, 558 U.S. at 337. It is also unclear whether Massachusetts law would suffer this hamstringing of businesses' free speech rights. *Associated Indus.*, 418 Mass. at 288 ("It is clear that the proposed law [requiring the use of corporate PACs] imposes a limitation on the right of a corporation to use its funds to speak out in favor of or in opposition to a ballot question that materially affects it."). For now, whether a PAC option would go far enough is academic in light of Section 8's unequivocal ban. At the very least, Section 8 must be enjoined because it lacks a "PAC option [that] allows corporate political participation." *Beaumont*, 539 U.S. at 163.

If Section 8 applied a more nuanced restraint on only *direct* corporate contribution—as the Court's decision in *Beaumont* allows—it would still violate the First Amendment. The Supreme Court has significantly undermined the core holding of *Beaumont*, "leaving its precedential value on shaky ground." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012). *Beaumont*'s First Amendment analysis relies heavily on the shareholder protection and antidistortion rationales, which—as explained above in the context of *Austin*'s Equal Protection analysis—have been repudiated since *Beaumont* was decided. *Beaumont* also justified regulation of direct corporate contributions on the concern that corporations could be "misuse[d] as conduits for circumventing the contribution limits imposed on individuals . . . ." 539 U.S. at 160. But the Court has since held that disclosure is the proper approach to circumvention, rather than contribution limits (let alone contribution bans):

> Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.

McCutcheon, 134 S. Ct. at 1459–60 (citations omitted). Every aspect of *Beaumont*'s First Amendment analysis—shareholder protection, antidistortion, and anticircumvention—has been bankrupted by subsequent refinement of the Supreme Court's campaign finance jurisprudence.

Beaumont does not control here since Section 8 has no PAC option, but even if *Beaumont* were on point it would be a thin reed to support a ban on direct political contributions from businesses. Therefore, Section 8 should be enjoined to the extent that it prohibits Plaintiffs from contributing to political candidates, PACs, or party committees.

II. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM.

Because Plaintiffs have a strong possibility of success on the merits, an injunction would be appropriate even without a strong showing on the equitable factors; however, those factors also weigh strongly in Plaintiffs' favor.

The ongoing deprivation of Plaintiffs' constitutional rights constitutes irreparable harm. *T & D Video, Inc.*, 423 Mass. at 582 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury")). Because Plaintiffs raise a substantial constitutional claim, no further showing of irreparable harm is necessary. *Id.*; see also *Asociación de Educación Privada de Puerto Rico, Inc. v. García–Padilla*, 490 F.3d 1, 21 (1st Cir. 2007) (applying *Elrod* to irreparable harm component of permanent injunction analysis); *Maceira v. Pagan*, 649 F.2d 8, 18 (1st Cir. 1981) ("It is well established that the loss of first amendment freedoms constitutes irreparable injury."). "Accordingly, irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." *Sindicato Puertorriqueno de Trabajadores*, 699 F.3d at 10–11.

III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFFS' FAVOR BECAUSE DEFENDANT COULD SUFFER ONLY ILLUSORY HARM.

The harm to Plaintiffs' constitutional rights in the absence of a preliminary injunction far outweighs any illusory harm to Defendant that could result from this Court insisting on adherence to the Massachusetts and United States constitutions. See *Packaging Industries Group, Inc.*, 380 Mass. at 617 (concluding that "[w]hat matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits"). Any harms Defendant might imagine in

the absence of the contribution ban are "properly addressed by contribution limitations and disclosure requirements." *Opinion of the Justices*, 418 Mass. at 1210 n.8; see also *Ezell v. City of Chicago*, 651 F.3d 684, 710 (7th Cir. 2011) ("[T]he harms invoked by the City are entirely speculative and in any event may be addressed by more closely tailored regulatory measures."). On the other side of the scale, Plaintiffs have established a genuine likelihood that the Massachusetts and United States Constitutions are violated every day Section 8 is in effect. The balance of equities favors Plaintiffs.

IV. GRANTING AN INJUNCTION IS IN THE PUBLIC INTEREST, GIVEN THE IMPORTANT CONSTITUTIONAL RIGHTS AT STAKE.

Where a public entity is a party, this Court may weigh the risk of harm to the public interest when deciding a preliminary injunction motion. *Brookline v. Goldstein*, 388 Mass. 443, 447 (1983). It is obvious that the public interest is served by requiring strict adherence to the Constitution. *Bettigole*, 343 Mass. at 236. Because Plaintiffs have established a genuine likelihood that Section 8 violates the Massachusetts and United States Constitutions, a preliminary injunction is in the public interest.

V. THE WAIVER OF BOND IS APPROPRIATE.

This Court has discretion to waive the security requirements of Mass. R. Civ. P. 65(c), or require only a nominal bond. *Petricca Constr. Co. v. Commonwealth*, 37 Mass. App. Ct. 392, 400–01 (1994) ("[R]ule 65(c) explicitly allows the court discretion as to security."); *Gramercy Park Investments L.P. v. Airfund Int'l Ltd. P'ship*, 1997 WL 399851, at *3 (Mass. Super. July 9, 1997) ("For good cause shown the court waives the bond requirement of Mass. R. Civ. P. 65(c)."). Where a preliminary injunction would merely require compliance with the Constitution, no bond is required. See *Ten Taxpayer Grp. v. City of Fall River Redevelopment Auth.*, 2010 WL 6576213, at *3 (Mass. Super. Nov. 18, 2010); see also *Doe v. Pittsylvania County*, 842 F. Supp. 2d 927, 937 (W.D. Va. 2012) (fixing the bond at zero dollars where injunction merely required compliance with the Constitution); *Baca v. Moreno*, 936 F. Supp. 719, 738 (C.D. Cal. 1996) (waiving bond because "to require a bond would have a negative impact on plaintiff's

constitutional rights, as well as the constitutional rights of other members of the public affected by the policy"). Plaintiffs are seeking only to vindicate their constitutional rights. Therefore, it would be appropriate to waive the bond requirement or to set bond at a nominal amount.

CONCLUSION

The views of businesses are traditionally a counterbalance to those of unions. That the viewpoints embraced by unions are customarily opposed by businesses is a persistent characteristic of American labor relations. Equally persistent is the rule that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48–49. A ban on the political speech of one element of society—while its natural counterpart freely contributes to candidates, parties, and committees—is unconstitutional from any perspective. The equal protection, free speech, and free association protections of the Massachusetts and United States constitutions proscribe Massachusetts' discriminatory treatment of businesses. Plaintiffs respectfully ask this Court to declare G.L. c. 55, § 8 unconstitutional and enjoin Defendant from enforcing Section 8 to the extent that it prohibits Plaintiffs from contributing to political candidates, PACs, or party committees.

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REQUEST FOR A HEARING

Pursuant to Superior Court Rule 9A(c)(2), Plaintiffs request a hearing on their Motion for Preliminary Injunction. There is a presumptive right to a hearing under Superior Court Rule 9A(c)(3) ("Requests for hearings on the following motions will ordinarily be allowed: … Injunctions (Rule 65)[.]").

Respectfully submitted,

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

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April 16, 2015

CERTIFICATE OF SERVICE

I, James Manley, hereby certify that on this 16th day of April, 2015, a true and accurate copy of the foregoing Motion for Preliminary Injunction was served via overnight mail, postage prepaid, upon the following:

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