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.	)

RESPONSE IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

A U.S. District Court and two Attorneys General have already acknowledged that laws imposing lopsided treatment of corporate and union political contributions violate the Constitution. See *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 690 (E.D. Ky. 2016) ("Defendants acknowledge that the historic distinctions between them would likely not survive scrutiny under the Fourteenth Amendment, and that the ban on direct contributions should apply equally to LLCs and unions as well as corporations."); *Utah Taxpayers Assoc. v. Cox*, No. 15-cv-00805-DAK (D. Utah June 1, 2016), Utah's M. for Summary Judgment at 28–29 ("Regardless of what Utah might think are the merits of making such a distinction [requiring contributor reporting by corporations but not unions], that possibility has been foreclosed by *Citizens United*.") (Joint Appendix ("JA") at JA.000029). Without acknowledging these examples,

Defendant continues to defend G.L. c. 55, §8, which is indistinguishable from these laws in all salient respects.

Responding to Plaintiffs' equal protection challenge, Defendant relies almost exclusively on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 654–55 (1990), which was overruled by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and on the Eighth Circuit's decisions applying *Austin*. Because the wealth aggregation and shareholder protection reasoning underlying *Austin*'s equal protection analysis has been rejected by the Supreme Court, *Austin* is only binding to the extent it is directly applicable. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *Austin* is not directly applicable, however, for the simple reason that the Section 8 contribution ban is very different in its application and justification from the law at issue in *Austin*. Even if *Austin* did apply, the Eighth Circuit decisions on which Defendant relies helpfully demonstrate that strict scrutiny applies and *Austin*'s reasoning can no longer support a corporate speech ban. See *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879–80 (8th Cir. 2012). Defendant's only effort to meet even intermediate, much less strict scrutiny, is to rely on *Austin*'s now defunct rationale—rejected in *Citizens United* and *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014)—that the freedom to make political contributions can be limited based on the contributor's wealth.

As with his response to the equal protection claim, Defendant relies on inapposite precedent and obsolete reasoning to defend Section 8's violation of the free speech and association protections of the Massachusetts and U.S. Constitutions. Although the parties agree that intermediate scrutiny applies to the First Amendment claim, Defendant attempts to avoid his burden under that standard. Rather, Defendant falls back on *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 149 (2003), which is inapplicable here. Unlike the federal law at issue in

Beaumont, Section 8 draws arbitrary distinctions among unions, non-profit corporations, and business corporations, and does not provide a corporate PAC option. *Beaumont* cannot relieve Defendant of the obligation of proving that Massachusetts' corporate contribution ban is necessary to prevent corruption. Defendant's list of enforcement actions (regarding *other* provisions of Massachusetts campaign finance law) does nothing to justify the Section 8 ban.

Defendant's failure to carry his burden means that Plaintiffs are entitled to Summary Judgment on both of their claims.

II. THE CONTRIBUTION BAN VIOLATES EQUAL PROTECTION.

Austin is an empty shell. The Supreme Court in *Citizens United*, 558 U.S. at 339, repudiated the wealth-aggregation and shareholder-protection rationales underpinning *Austin*. See Memorandum of Law Supporting Plaintiffs' Cross-Motion for Summary Judgment ("Pls.' MSJ") at 8. The *Citizens United* Court "reject[ed] *Austin*" because it "was not well reasoned," "contravened this Court's earlier precedents," and "abandoned First Amendment principles." 558 U.S. at 363.

The Supreme Court has counseled that, when it abrogates a prior decision, the prior decision remains binding only if it "has direct application in a case" and therefore "directly controls." *Agostini*, 521 U.S. at 237. But *Austin* does not "directly control[]" here. *Id*. Unlike the corporate contribution ban at issue here, *Austin* upheld a statute that imposed a partial ban on corporate *independent expenditures*, which did not draw arbitrary distinctions between business corporations and non-profit corporations. *Austin*, 494 U.S. at 696–97. This case challenges only Massachusetts' unequal treatment of corporate *contributions*. Far from "directly control[ing]," *Austin* has nothing in common with this case. Even if *Austin* were directly on point, the Eighth

Circuit decision on which Defendant relies helpfully explains that Defendant still bears a "heavy burden":

> Under *Austin*, "statutory classifications impinging upon [the fundamental right to engage in political expression] must be narrowly tailored to serve a compelling governmental interest." *Id*. at 666, 110 S. Ct. 1391; *see also Dallman v. Ritter*, 225 P.3d 610, 634–35 (Colo. 2010) (holding a state law allowing corporations to contribute to candidates, but forbidding labor unions from doing the same, violated the Equal Protection Clause of the Fourteenth Amendment). We express no opinion as to the likelihood Minnesota will meet this heavy burden in light of the Supreme Court's rejection of the so-called anti-distortion rationale relied upon in *Austin*. *See Citizens United*… .

Minnesota Citizens, 692 F.3d at 879–80.

Having relied on *Minnesota Citizens*, Def.'s MSJ at 8, 10, 11, 19, Defendant is well aware of the Eighth Circuit's conclusion that lopsided contribution bans must be "narrowly tailored to serve a compelling governmental interest." 692 F.3d at 880. And there is nothing "anomalous" about applying strict scrutiny "when the government selectively infringes on a fundamental right." *Riddle v. Hickenlooper*, 742 F.3d 922, 932 (10th Cir. 2014) (Gorsuch, J., concurring). Indeed, the Supreme Court *requires* strict scrutiny for discriminatory regulation of First Amendment rights, most recently in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015), but also in *Austin* itself. 494 U.S. at 666.

This means that the Defendant bears the burden of proving, first, that the Section 8 contribution ban is tailored to prevent corruption, and, second, that it avoids unnecessary abridgement of political speech. *McCutcheon*, 134 S. Ct. at 1445–46. Defendant does not even attempt this.

Defendant never contends that business corporations are more corrupting than unions or non-profit corporations. Defendant makes no effort to explain how a ban on corporate contributions makes any sense when unions and other organizations that do not "actively engage

in political fundraising" can contribute up to $15,000 per year to candidates. Statement of Undisputed Facts Supporting Pls.' Mot. for Summ. J. ("PSOF") ¶20. Defendant's arguments about standing regarding the $15,000 rule are a red herring. Def.'s MSJ at 21–23. Plaintiffs are not challenging the lawfulness of the $15,000 rule; they are pointing out the obvious constitutional infirmity of banning one group from making contributions to candidates while giving their natural opposition special dispensation to contribute beyond ordinary limits. See *Reed*, 135 S. Ct. at 2232 ("[A] 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited … .'" quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)).

Unable to provide any evidence of corruption that might justify the contribution ban, Defendant instead relies on the repudiated "wealth aggregation" rationale from *Austin*. Def.'s MSJ at 20. The tragic flaw with this argument is that it is focused on "the corrosive and distorting effects of immense aggregations of wealth," *Austin*, 494 U.S. at 660, a focus that *Citizens United* explicitly repudiated. 558 U.S. at 349, 362. Wealth aggregation is no longer a valid justification for the state to stifle political speech, and so considerations about the corporate form and wealth aggregation are irrelevant to this case. See also *Minnesota Citizens*, 692 F.3d at 879–80; Pls.' MSJ at 8. Only evidence that the ban on corporate contributions is *uniquely necessary* to address corruption is relevant here. See *id*. Defendant has presented none.

Moreover, wealth aggregation and shareholder protection are peculiar justifications for banning contributions from business corporations, but not from *non-profit* corporations. Defendant asserts that Massachusetts is justified in differentiating between "contributions from other 'dissimilar' entities that do not exhibit the special characteristics of corporations," Def.'s

MSJ at 20. But business corporations and non-profit corporations *are* protected by very similar legal advantages. Both, for example, enjoy limited liability and other traditional corporate advantages. And the Supreme Court has held that there is no basis to distinguish between them in this context. *Citizens United*, 558 U.S. at 327 ("Citizens United also asks us to carve out an exception to § 441b's expenditure ban for nonprofit corporate political speech … . This line of analysis, however, would be unavailing."); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645–46 (6th Cir. 1997) (refusing to distinguish between for-profit and non-profit corporate speech). In any event, legal advantages that help corporations, LLCs, or unions to aggregate wealth are irrelevant to the only government interest that matters here: preventing corruption. Defendant's failure to address that burden in response to Plaintiffs' equal protection claim entitles them to summary judgment.[1]

III. THE CONTRIBUTION BAN VIOLATES THE FIRST AMENDMENT.

The parties agree that *McCutcheon* provides the standard of review for Plaintiffs' First Amendment claim. Def.'s MSJ at 7. Accordingly, if Section 8 "does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review." *McCutcheon*, 134 S. Ct. at 1445–46 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

Rather than meet this standard, Defendant falls back on *Beaumont*, underestimating the reach of *Citizens United*, which "blazes through our precedents, overruling or disavowing a body of case law including … *FEC v. Beaumont* … ." *Citizens United*, 558 U.S. at 395 (Stevens, J, dissenting). As with *Austin*, Defendant can be saved by *Beaumont* only if it "directly controls." *Agostini*, 521 U.S. at 237. It does not.

[1] Nor is it necessarily the case that for-profit corporations are in general wealthier than non-profits. The YMCA is a non-profit corporation, with an annual budget of almost $6 *billion* dollars. Goodwill is a non-profit with an annual budget of $4.4 billion.

Beaumont is closer to this case than *Austin*, but the federal law upheld in *Beaumont* differed in two important respects that distinguish this case from that one: (1) the federal law restricting contributions applied evenhandedly to unions, LLCs, and both for-profit and non-profit corporations—whereas the Massachusetts ban discriminates against for-profit entities, suggesting that it is animated by animus toward business corporations and LLCs; and (2) the federal law included a robust PAC option, which Defendant concedes Massachusetts does not provide. Def.'s MSJ at 12.

The law upheld in *Beaumont* applied across the board to all organizations. See 11 C.F.R. § 110.1. *Beaumont* did not address the sort of discriminatory ban against for-profit corporations at issue here. The lopsided nature of the Section 8 ban not only distinguishes this case from *Beaumont*, it also erodes Defendant's justification for the ban on First Amendment grounds. See *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (regulatory exemptions "may diminish the credibility of the government's rationale for restricting speech in the first place."). Under-inclusive speech restrictions are unconstitutional because a "'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited … .'" *Reed*, 135 S. Ct. at 2232 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). Other than relying on outright speculation and the repudiated rationale of wealth aggregation, Defendant makes no attempt to justify the under-inclusiveness of Section 8. Nor does Defendant acknowledge how significantly under-inclusive Section 8 is when compared to the law at issue in *Beaumont*.

This case also differs from *Beaumont* because Defendant admits that Massachusetts has no corporate PAC option, and also does not dispute that "[t]he 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." Pls.' MSJ at 15 (citing *Beaumont*, 539 U.S. at 149; *Austin*, 494 U.S. at 660; and *Buckley*, 424 U.S. at 28 n.31). The Eighth Circuit upheld Minnesota's ban on direct contributions because "[l]ike Minnesota's law, the challenged provision in *Beaumont* prohibited corporations from making election-related contributions, but allowed corporations to establish, administer, and control a PAC, through which the corporation could solicit contributions." *Minnesota Citizens*, 692 F.3d at 879. Nothing in the Eighth Circuit's decision suggests that it took a different view of the PAC option than what the Supreme Court has called the essential constitutional minimum. See *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203 (2003) ("The ability to form and administer separate segregated funds … has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy."). The lack of a PAC option is therefore fatal to Section 8.

Defendant tries to excuse the lack of a PAC option by reference to options for corporate *employees* to engage in political activity, but these are irrelevant. Def.'s MSJ at 3, 12. Corporations *themselves* have an independent right to speak, separate from their employees. See *Citizens United*, 558 U.S. at 337 ("A PAC is a separate association from the corporation. So the PAC exemption … does not allow corporations to speak."). Defendant, after all, does not argue that a *union* could be prohibited from contributing to candidates because *its* individual members might make contributions of their own—because such an argument would be absurd. In fact, the SJC has already rejected a similar argument. *Bowe v. Sec'y of the Commonwealth*, 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)). Just as unions have a right to speak apart from the rights of union members, so too corporations have a right to speak apart from their shareholders. The contribution ban here must be enjoined because it lacks a "PAC option [that] allows corporate political participation." *Beaumont*, 539 U.S. at 163; *McConnell*, 540 U.S. at 203.

The Supreme Court has explained that political speech regulations must "target what we have called '*quid pro quo*' corruption or its appearance. Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.'" *McCutcheon*, 134 S. Ct. at 1441 (quoting *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011)). Defendant offers examples of individual contributions leading to corruption, but not *corporate* contributions (or even corporate independent expenditures). See Def.'s MSJ at 13. Given that LLC contributions were not banned under Section 8 until 2010, it stands to reason that there is at least *one* example of business contributions leading to bribery—yet Defendant found none. The *only* examples of business contributions that Defendant points to involve funneling contributions through individuals, which violates G.L. c. 55, §10, not Section 8, and have nothing at all to do with *quid pro quo* corruption. *Id*. Such cases may support Section 10, but they are simply irrelevant to Section 8's connection to *quid pro quo* corruption.

Likewise, the survey data Defendant relies on has nothing to say about *quid pro quo* corruption. See Def.'s MSJ at 13–15. Those surveys are about access, not corruption, and the Supreme Court has explicitly distinguished between the two: "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. … The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy." *Citizens United*, 558 U.S. at 359–60.

Defendant's examples do not support a contribution ban targeted at businesses. At best, Defendant's argument shortcuts the constitutional standard: suggesting that *any* ban on contributions is justified if *quid pro quo* corruption is present *at all*. But that is not the constitutional standard. Defendant must show how the total ban is *tailored* to prevent corruption and also that it "'avoid[s] unnecessary abridgement' of First Amendment rights." *McCutcheon*, 134 S. Ct. at 1445–46 (quoting *Buckley*, 424 U.S. at 25). Defendant ignores his tailoring burden and loses focus of the only government interest that matters: *quid pro quo* corruption. The failure to address his evidence to the only relevant government interest is fatal to his opposition.

Defendant argues that anti-corruption remains a viable interest after *Citizens United*. See Def.'s MSJ at 9–10. Plaintiff never argued otherwise. Pls.' MSJ at 2. But identifying the government interests is not enough. Defendant must also demonstrate a *connection* between those interests and a selective ban on one form of political speech. *McCutcheon*, 134 S. Ct. at 1445–46. Aside from focusing on "wealth generation," Def.'s MSJ at 20, Defendant does nothing to justify the lopsided application of the ban. And Defendant never explains why contribution limits and robust disclosure requirements are not better tailored to prevent corruption. *McCutcheon*, 134 S. Ct. at 1460 ("[D]isclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech."). Defendant is also silent when it comes to explaining why contributions of $15,000 from unions or non-profit corporations "do not create a cognizable risk of corruption," *Id.* at 1452, while similar contributions from business corporations do.

Because Defendant disregards *McCutcheon*'s requirement that contribution limits be tailored to "avoid[] 'unnecessary abridgement' of First Amendment rights," his opposition to

Plaintiffs' Motion for Summary Judgment must fail. *Id.* at 1439 (quoting *Buckley* 424 U.S. at 25).

CONCLUSION

The equal protection, free speech, and free association protections of the United States and Massachusetts Constitutions proscribe the Commonwealth's discriminatory treatment of business corporations. Plaintiffs respectfully ask this Court to declare Section 8 unconstitutional and enjoin Defendant from enforcing the ban to the extent it prohibits Plaintiffs from contributing to political candidates, PACs, or party committees.

Respectfully submitted,

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November 17, 2016

CERTIFICATE OF SERVICE

I, Aditya Dynar, hereby certify that on this 17th day of November, 2016, a true and accurate copy of the foregoing Memorandum of Law Supporting Plaintiffs' Motion for Summary Judgment was served via electronic mail and regular, first-class United States mail, postage prepaid, upon the following:

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