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 OF LAW SUPPORTING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

There is no material dispute that the ban on businesses' political contributions imposed by G.L. c. 55, § 8 burdens the political speech of businesses like Plaintiffs. Defendant disputes that this burden is unconstitutional, but this legal argument flies in the face of everything the United States Supreme Court has said about the sanctity of political contributions in the past five years, as well as the Supreme Judicial Court's rulings on the rights of organizations to engage in political dialogue, and the candid admissions of two other Attorneys General, who have declined to defend similar lawsuits challenging lopsided treatment of business and union political contributions. See *Protect My Check, Inc. v. Dilger*, 2016 WL 1306200, at *4 (E.D. Ky. Mar. 31, 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).

As discussed below, the undisputed evidence shows that the contribution ban fails to serve the only government interest that could justify it: preventing *quid pro quo* corruption. Moreover, even if the ban served that interest, it goes too far in restricting fundamental freedoms, ignoring the equal protection clause of the Fourteenth Amendment and Article 1 of the Massachusetts Declaration of Rights, as well as the free speech and association clauses of the First Amendment and Articles 16 and 19 of the Declaration of Rights.

Procedural History

On February 24, 2015, Plaintiffs filed this civil rights action against Defendant in his official capacity, requesting declaratory and injunctive relief against continued enforcement of the Section 8 ban on political contributions by businesses. Plaintiffs moved on April 16, 2015, for a preliminary injunction, which was denied on August 20, 2015. The parties then engaged in discovery.

Legal and Factual Background

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." PSOF ¶ 1. Businesses may not even establish, finance, maintain, or control a PAC that supports candidates. PSOF ¶ 2. Non-profits and PACs with business members are likewise barred from making these sorts of contributions. PSOF ¶ 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. PSOF ¶ 4 ("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. PSOF ¶ 5. 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. PSOF ¶ 6. 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. PSOF ¶ 7; 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. PSOF ¶¶ 9, 13, 17, 18. Plaintiff 1A Auto, Inc., is a family-owned auto parts retailer in Pepperell. PSOF ¶¶ 9-10. Plaintiff 126 Self Storage, Inc., is a small self-storage facility in Ashland. PSOF ¶ 14. As small businesses that employ hundreds of workers between them, local, state, and federal policies affect Plaintiffs just as much as those policies affect unions; but as corporations, they cannot support candidates, parties, or committees that understand their concerns about those policies—while unions can. Plaintiffs filed the instant action seeking declaratory and injunctive relief to remedy Defendant's unconstitutional deprivation of their rights to engage in political speech.

ARGUMENT

I. Standard of Review.

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c). The moving party bears the burden of proving that there are no material issues of fact and that he is entitled to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). Where, as here, the moving party does not bear the burden of proof at trial, "this burden need not be met by affirmative evidence negating an essential element of the … case, but may be satisfied by

demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Tech. Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). The issue here—whether Section 8 is unconstitutional—is appropriate for summary judgment and does not involve any dispute over material facts.

II. 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 v. Valeo*, 424 U.S. 1, 14 (1976)); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) ("The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" (*quoting Buckley*, 424 U.S. at 21-22)). A business's right to make political contributions 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 Mass. v. Attorney Gen.*, 418 Mass. 279, 288–89 (1994); *Bowe v. Secretary 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)); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) ("the Government may not suppress political speech on the basis of the speaker's corporate identity.").

A political contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." *McCutcheon*, 134 S. Ct. at 1448. (*quoting Buckley*, 424 U.S. at 21–22). Because Section 8 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. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) ("*NCPAC*"); *Opinion of the Justices to the House of Reps.*, 418 Mass. 1201, 1208 (1994) (citing *NCPAC*). The contribution ban here fails to serve the corruption-prevention interest. But even if it could serve that interest, it goes too far in restricting fundamental freedoms because "[t]he interest in avoiding corruption, and its appearance, cannot justify … an outright ban on a contributor's right to express support for a candidate." *Opinion of the Justices*, 418 Mass. at 1210–11.

III. Plaintiffs are Entitled to Relief Because 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. Corporations, no less than individuals, are entitled to equal protection. *Vigeant v. Postal Tel. Cable Co.*, 260 Mass. 335, 343 (1927); *Santa Clara Cnty. v. Southern Pac. R. Co.*, 118 U.S. 394, 396 (1886). Under both 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).

The Supreme Court has recently reaffirmed that heightened scrutiny is required when the government uses speaker identity to discriminate:

> Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner*, 512 U.S., at 658.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230 (2015).

Discriminatory political contribution limits like this one especially demand strict scrutiny because "there is something distinct, different, and more problematic afoot when the government *selectively* infringes on a fundamental right." *Riddle v. Hickenlooper*, 742 F.3d 922, 932 (10th Cir. 2014) (Gorsuch, J., concurring) (*citing Davis v. FEC*, 554 U.S. 724, 743–44 (2008), for the proposition that "'imposing different contribution … limits on candidates vying for the same seat' may call out for especially heightened scrutiny[.]"). At the very least, if a law restricts political contributions but "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). Defendant cannot claim that banning business contributions is a "[]necessary abridgement" to prevent corruption while at the same time *allowing* contributions from *other* groups that could create the *same* problem.[1] *Id.*

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[1] Some courts have applied the lesser "closely drawn" test to equal protection claims involving political contributions, rather than the "narrowly tailored" test required by strict scrutiny. *Riddle*, 742 F.3d at 927 (striking down contribution limits under "closely drawn" test, but noting that "by treating the contributors differently, the statute impinged on the right to political expression … .

Applying heightened scrutiny here, the contribution ban fails. The burden is on Defendant to justify a rule that bans businesses' political contributions, while allowing unions to contribute $15,000—well beyond the normal limits that apply to individuals and PACs. See *Playboy Entm't Grp.*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *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."). This is a "heavy burden," which requires Defendant to offer evidence of a causal link between the ban and preventing corruption. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 880 (8th Cir. 2012) ("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*."); *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 cannot meet this burden. To do so would require Defendant to offer evidence that justifies the belief that unions can contribute thousands of dollars to candidates without creating any threat of corruption, but even 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

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As a result, we conclude that the statutory classification impinged on a fundamental right. … This conclusion would ordinarily require us to apply strict scrutiny."); *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015) (declining to apply strict scrutiny); *Woodhouse v. Maine Comm'n on Governmental Ethics & Election Practices*, 40 F. Supp. 3d 186, 195 (D. Me. 2014) (striking down contribution limits under "closely drawn" test). 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).

indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452.

There is no justification for treating businesses differently from unions. Although corporations and unions are structured differently, these structural differences are irrelevant to preventing corruption—which is the only justification for limiting political contributions. The inherent nature of businesses and unions make them point and counterpoint. See *Dallman v. Ritter*, 225 P.3d 610, 634–35 (Colo. 2010) ("Although unions and corporations are structurally dissimilar, both are similarly situated under Amendment 54's [ban on candidate contributions]."). Businesses attempt to create wealth for their shareholders and unions attempt to capture some of that wealth for their members. That adversarial relationship is reflected in the issues the two sides fight over and the candidates the two sides support—or would support, if one side were not legally forbidden from expressing its political views.

Massachusetts businesses alone face a total prohibition on political contributions to candidates, parties, and PACs. PSOF ¶ 1. Unions on the other hand benefit from special rules that allow them to vastly exceed ordinary contribution limits. PSOF ¶¶ 4-7. While individuals are limited to contributing $1,000 per candidate, $5,000 per party, and $500 per PAC, PSOF ¶ 8, unions can directly contribute up to $15,000 in the aggregate to candidates, parties, and PACs. PSOF ¶ 5. The avowed reason for the $15,000 limit is sensible—but it is 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." PSOF ¶ 20. Fair enough, but businesses even more than unions "do not solicit or receive funds for any political purpose." Defendant has never offered an 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. PSOF ¶ 2; *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. PSOF ¶ 6. Businesses may not freely allocate any resources to such a PAC, not even a business name. PSOF ¶¶ 1-2. 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, unequal treatment.

In numerous enforcement actions, Defendant has demonstrated that a complete ban on political contributions from businesses is unnecessary to prevent corruption. PSOF ¶¶ 23-27. On the contrary, many more enforcement actions have been directed at unions' political activities. PSOF ¶¶ 30-32.

The most telling evidence that Section 8 does not prevent or police corruption is the lack of enforcement actions against LLCs. Section 8 did not apply to LLCs until 2010. St.2009, c. 28, § 33, eff. Jan. 1, 2010. But in the four years prior to 2010, there was only one investigation involving an LLC. PSOF ¶ 21. There was no backdrop of corruption to justify the General Court's expansion of Section 8 to include LLC contributions. In the only investigation involving an LLC prior to the Section 8 expansion, Defendant Sullivan cleared a Massachusetts Representative of wrong-doing over allegations that his campaign had not appropriately

reimbursed "$804.54 for the use of [corporate] phones" and "$228.49 to Acton Coffee and Ice Cream [LLC] for … conference room use … ." *Id.* It would be another three years until the expanded Section 8 would be applied to investigate an LLC contribution—against an attorney who was chastised for using his firm's website to talk about his candidacy. PSOF ¶ 22. There is simply *no evidence* to support the idea that Section 8 is necessary to prevent or police corruption.

Section 8 has prohibited political activity by corporations much longer than it has for LLCs, yet there is still no evidence that Section 8 is a tool for fighting corruption by corporate donors. Defendant's persnickety enforcement of Section 8 over the past 10 years is a history of petty harassment, not of combating corruption. Defendant has identified only a handful of violations of Section 8 over the past ten years—all minor lapses. The largest involved "12 prohibited business corporation contributions totaling $1,575, [and] receipt of a prohibited in-kind corporate contribution (a bus used to drive voters to the polls)." PSOF ¶ 23. Another involved a Honda dealership holding a "meet the candidate" event in its showroom, which resulted in a $120 in-kind donation. PSOF ¶ 24. In-kind donations were a common theme: Defendant busted a conference room donation, worth $400, unpaid office rent worth $1,200, and office space that was rented for $150/month but should have cost $400/month, resulting in a larger-than-reported in-kind contribution. PSOF ¶¶ 25-27. These are obviously not examples of anti-corruption investigations; these are examples of Defendant faithfully enforcing Section 8 to stifle even incidental political activity by businesses.

The only other examples of Section 8 enforcement in the past ten years have actually involved violations of G.L. c. 55, § 10, not Section 8. PSOF ¶ 28. Section 10 prohibits a person from "mak[ing] a campaign contribution in any name except his own" and would remain unchanged were Section 8 declared unconstitutional. See, e.g., G.L. c. 55 § 10. Some Section 10

enforcement actions also involve allegations under Section 8, because business funds were used to reimburse individuals for contributions, but those reimbursements would remain unlawful under Section 10, even in the absence of Section 8. See, e.g., PSOF ¶ 29. Section 8 is demonstrably not necessary to address the issue of reimbursed contributions.

Defendant has also demonstrated a finely honed ability to regulate union political activity to address corruption, without imposing a total ban on contributions. In numerous enforcement actions against unions, Defendant has demonstrated an ability to identify inappropriate transfers among union PACs, misreporting of independent expenditures, failure to disclose deposits, and various other infractions—all without a total prohibition on union contributions. PSOF ¶¶ 30-32.

These enforcement actions show that there is simply no reason to single out businesses for especially harsh treatment in the political speech context. Plaintiffs are not requesting unfettered ability to make unlimited contributions or special dispensation to flood Massachusetts elections with money, but simple equality and fairness in the rules that apply to all contributors. Whatever valid campaign finance limits apply to unions should apply to businesses, and vice versa. Indeed, this is the approach taken by 43 states and the federal government. JA.000090–106; *Protect My Check, Inc.*, 2016 WL 1306200 at *4. More important, it is the approach required by the Equal Protection Clauses of the Massachusetts and United States constitutions. Therefore, Section 8 should be declared unconstitutional and enjoined to the extent that it prohibits Plaintiffs from contributing to political candidates, PACs, or party committees on the same terms as unions.

IV. Plaintiffs are Entitled to Relief Because the Contribution Ban Denies Freedom of Speech and Association.

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 of free speech and the

closely related right of free association protected by Articles 16 and 19 of the Declaration of Rights and the federal First Amendment.

A. 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).[2] 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.*, 418 Mass. at 288–89. And the SJC has held that applying Section 8 to unions would violate the Declaration of Rights; the same conclusion supports striking down Section 8 as applied to businesses. *Bowe*, 320 Mass. at 252.

In *Bowe*, the SJC held that applying Section 8 to unions would violate the Declaration of Rights because their "rights of freedom of the press and of peaceable assembly would be crippled." *Id.* 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. The Declaration of Rights simply does not tolerate a total prohibition on political giving. *Id.*

Applying *Bowe* and *Opinion of the Justices* here leads inevitably to the conclusion that Section 8's absolute prohibition on businesses contributing to candidates, PACs (other than

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[2] This is what James Madison called the "double security" of 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.").

independent expenditure PACs), or party committees is unconstitutional. 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.

B. The Contribution Ban Violates the First Amendment.

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. Here, this is a distinction without a difference because Section 8 is neither "closely drawn" nor "narrowly tailored." Accordingly, if Section 8 "does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review." *Id.* at 1445–46 (*quoting Buckley*, 424 U.S. at 25).

Defendant must demonstrate a connection between the anti-corruption interest and an outright ban on one source of political speech. *Id.* To meet that burden Defendant would have to justify the lopsided application of the ban, *Reed*, 135 S. Ct. at 2232; *City of Ladue*, 512 U.S. at 52, including justifying an outright *ban* on business contributions, rather than more modest regulations tailored to prevent corruption. *McCutcheon*, 134 S. Ct. at 1459–60 ("[D]isclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech."). And Defendant would also have to explain how a ban on limited contributions makes any sense, when unlimited independent expenditures are allowed. *Id.* at 1454. Independent expenditures are no substitute for direct candidate contributions—see *id.* ("We have said in the context of independent expenditures that '[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent … undermines the value of the expenditure to the candidate.'" (*quoting Citizens United*, 558 U.S. at 357))—but it defies credulity that a business

could spend unlimited funds on independent expenditures advocating the election or defeat of a candidate without weakening public confidence in the electoral process—but that a single dollar in business *contributions* would destroy public faith in democracy. This is especially incredible considering the dollars already flowing directly to Massachusetts candidates from unions and non-profit organizations. After *Citizens United* and *McCutcheon*, the Section 8 contribution ban is untenable in light of the changed landscape of campaign finance law. The undisputed facts show that Section 8 "does not 'avoid unnecessary abridgement' of First Amendment rights." *McCutcheon*, 134 S. Ct. at 1446 (*quoting Buckley*, 424 U.S. at 25).

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. *FEC v. Beaumont*, 539 U.S. 146, 149 (2003) ("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 also *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 28 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."). But under Section 8, a business can give no support to a PAC, not even the right to use the business's name. PSOF ¶¶ 1-2. 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 … .").

It is far from certain that the Supreme Court would consider the PAC option an adequate alternative since a PAC does not "allow a corporation to speak." *Citizens United*, 558 U.S. at 337. If *Citizens United* decided anything, it is that corporations themselves have an independent right to speak, even if corporations can establish PACs, which of course in Massachusetts they cannot. *Id.* ("Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption … does not allow corporations to speak."). For now, whether a PAC option would go far enough is academic, because there is no such option. Given its unequivocal ban, Section 8 must be declared unconstitutional because it lacks a "PAC option [that] allows corporate political participation." *Beaumont*, 539 U.S. at 163. Therefore, Section 8 should be enjoined to the extent that it prohibits Plaintiffs from contributing to political candidates, PACs, or party committees.

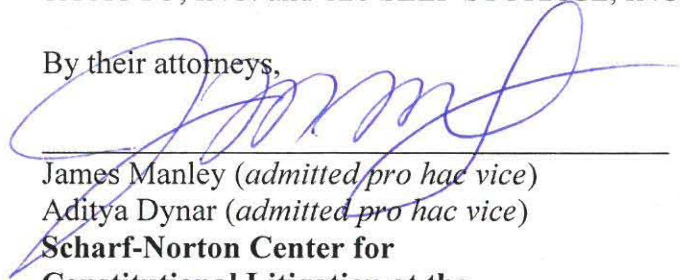
CONCLUSION

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 political speech by one element of society—while its natural opposition is free to contribute 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 Section 8's 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.

Respectfully submitted,

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

By their attorneys,



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September 22nd, 2016

CERTIFICATE OF SERVICE

I, James Manley, hereby certify that on this 22nd day of September, 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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