NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. CV 15-00494-E

1A AUTO, INC. & another[1]

vs.

MICHAEL SULLIVAN[2]

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

INTRODUCTION

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

To find for the Plaintiffs, I would have to ignore binding and directly applicable United States Supreme Court precedent. To do that is beyond my power. Therefore, the Plaintiffs' Motion for Summary Judgment (Paper #14) will be **DENIED** and the OCPF's Cross-Motion for Summary Judgment (Paper #15) will be **ALLOWED**.

Notice sent 4-6-17 GDC M+E WWP DAG AD JM

[1] 126 Self Storage, Inc.

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

BACKGROUND

I. Statutory and Regulatory Background

Campaign finance reform has long been of interest to the public, as well as to the federal and state legislatures. The first real attempt at such reforms on the federal level can be traced back to the Naval Appropriations Bill of 1867, which prohibited federal officers and government employees from requesting political contributions from individuals working in navy yards.[3] In 1876, Congress included a provision in the appropriations legislation for the coming year that extended this prohibition to all administrative officers not appointed by the President, preventing these officers from "requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or any other thing of value for political purposes." Appropriations Bill of 1876, 19 Stat. 169 (1877). Less than ten years later, Congress passed the Pendelton Civil Service Reform Act, which created the civil service system and prohibited the solicitation of political contributions from government employees.[4] 22 Stat. 403, ch. 27, § 14 (1883).

While these laws made it more "difficult and risky" to "shake down" government officials to help finance political campaigns, the laws also increased office-seekers' reliance on wealthy corporations and individuals for campaign contributions, which created its own set of

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

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

problems. Steven G. Koven, *Responsible Governance: A Case Study Approach* (New York: M.E. Sharpe 2008), p. 59. During the 1904 presidential race, Republican candidate Theodore Roosevelt was accused of accepting large donations from corporations that expected special treatment if he was elected. See Jasper B. Shannon, *Money and Politics* (New York: Random House, 1959), p. 36. Although Roosevelt denied these assertions and won the election, he was mindful of the accusations and, in 1905, during his first address to Congress, he took aim at corporations, recommending a ban on all corporate contributions, to prevent "bribery and corruption in Federal elections." 40 Cong. Rec. 96 (Dec. 5, 1905). President Roosevelt asserted that "both the National and the several State Legislatures" should "forbid any officer of a corporation from using the money of the corporation in or about any election," in order to "effective[ly] . . . stop[] the evils aimed at in corrupt practices acts." *Id.* Congress answered President Roosevelt's call in 1907 with the enactment of the Tillman Act, which banned corporations from "mak[ing] a money contribution in connection with any election to any political office." 34 Stat. 864, ch. 420 (1907).

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

In the ensuing century, the ban on corporate contributions has been an essential part of the Legislature's efforts to prevent corruption in Massachusetts elections. See, e.g., St. 1913, c. 835, §§ 353, 356, and 503 (re-codifying laws passed in 1907 and 1908 into "Corrupt Practices" section of "Act to Codify the Laws Relative to Primaries, Caucuses and Elections"); St. 1946, c. 537, § 10 (replacing G. L. c. 55, enacted in 1932, entitled "Corrupt Practices and Election Inquests" with new G. L. c. 55, as part of "Act Relative to Corrupt Practices, Election Inquests and Violations of Election Laws"). In 2009, the Legislature extended the contribution ban to newer forms of corporate entities, applying it not just to traditional business corporations but to any "business or professional corporation, partnership, [or] limited liability company partnership" doing business in Massachusetts. St. 2009, c. 28, § 33.

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

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

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

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[5] See Alaska Stat. § 15.13.074; Ariz. Rev. Stat. § 16-919(A); Colo. Rev. Stat. § 1-45-103.7; Conn. Gen. Stat. §§ 9-613; Iowa Code § 68A.503; Ky. Rev. Stat. § 121.025, 121.035; Mich. Comp. Laws § 169.254; Minn. Stat. § 211B.15; Mont. Code Ann. § 13-35-227; N.C. Gen. Stat. § 163-278.15; N.D. Cent. Code § 16.1-08.1-03.3; Ohio Rev. Code § 3599.03; Okla. Stat. tit. 21, § 187.1; Pa. Stat. tit. 25, § 3253; R.I. Gen. Laws § 17-25-10.1; S.D. Codified Laws § 12-27-18; Tex. Elec. Code § 253.094; W. Va. Code § 3-8-8; Wis. Stat. § 11.38; Wyo. Stat. Ann. § 22-25-202.

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

In 1980, the OCPF requested the Attorney General's opinion "concerning the extent to which business corporations . . . [could] become involved in Massachusetts political activities." *Mass. Atty. Gen. Op. No. 10*, 1980 WL 119563, at *1 (Nov. 6, 1980). In response, the Attorney General concluded Section 8 "interdicts any corporate expenditure or contribution of anything of value specifically to promote or oppose a candidate for state, county, or local political office." *Id.* at *5. In reaching this conclusion, the Attorney General noted there were other ways (aside from direct money contributions) for corporations to become involved in political activity. First, because Section 8 does not restrict political activity by individuals associated with corporations, but, instead, only political activity of the corporation itself, the Attorney General stated corporate officers and employees could make campaign contributions, volunteer their non-work time to support political candidates, and solicit support for candidates from family members as well as work peers. *Id.* at *2. Second, according to the Attorney General, corporations could make expenditures "incidental to the internal dissemination of political views," by providing funding for newsletters or other in-house publications. *Id.* at *4. The OCPF eventually issued advisory opinions in accordance with the reasoning the Attorney General had laid out. See, e.g., *OCPF, Advisory Opinion*, AO-00-05 (Apr. 21, 2000); *OCPF, Advisory Opinion*, AO-98-18 (July 31, 1998). For many years, this landscape remained largely unchanged.

Then, in 2010, the United States Supreme Court created a major shift in campaign finance laws when it decided *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310 (2010). In that case, the Supreme Court held that the government could not prohibit or limit independent expenditures made by corporations in support of, or opposition to, a political candidate. *Id.* at 365. An "independent expenditure" is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation,

consultation, or concert with, or at the request of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 Code Fed. Regs. § 100.16(a); see also generally 970 Code Mass. Regs. § 2.17 (discussing independent expenditure PACs).

Citizens United struck down limits and bans on corporate "independent expenditures" because, according to the Supreme Court, there was "[n]o sufficient government interest justif[ying]" these restrictions on a corporation's right to free speech. 558 U.S. at 365. While striking down laws preventing corporations from making independent expenditures in connection with political campaigns, however, *Citizens United* expressly declined to reach the question of the constitutionality of laws such as Section 8, which ban corporate contributions made directly to a candidate or political party. *Id.* at 359.

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

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

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

In 1974, the Secretary of the Commonwealth responded to a question about how this newly-added definition applied to labor organizations. The Secretary stated that, while the definition was "broadly worded," it "was not intended to sweep into [Chapter 55] every organization consisting of more than one individual which makes a disbursement of funds to a political committee or to a candidate." *Letter from the Secretary of the Commonwealth*, dated Jun. 14, 1974. In 1988, the OCPF issued an interpretive bulletin (revised from earlier versions) that expanded upon the Secretary's letter, stating a "strict application of th[e] definition [of 'political committee'] would . . . place an extraordinary burden, not intended by the Legislature, on non-political organizations making only incidental expenditures for a political purpose." *OCPF, Interpretive Bulletin*, OCPF-IB-88-01 (Revised May 9, 2014). Therefore, the OCPF

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

stated, it would treat "groups and organizations," including labor unions, "that make contributions . . . but do not solicit or receive funds for any political purpose differently than groups and organizations that actively engage in political fundraising." *Id.* A non-political organization that made "more than incidental" political expenditures, defined as those "exceed[ing], in the aggregate, in a calendar year, either $15,000 or 10 percent of such organization's gross revenues for the previous calendar year, whichever is less," would be subject to the same contribution limits that applied to political committees. *Id.*

II. Factual and Procedural Background

Plaintiff 1A Auto is a family-owned company that has been in the business of selling auto parts in Pepperell, Massachusetts, since 1999. The company employs 217 people. The summary judgment record does not indicate whether any or all of these employees are unionized. 1A Auto's officers are Richard Green, Merle Green, and Michael Green (collectively, the "Greens"). Since 2004, the Greens have contributed a total of $103,646.25 to political campaigns and PACs in Massachusetts. But for Section 8, 1A Auto would directly and indirectly contribute money or other valuable things for the purpose of aiding the nomination and election of numerous persons to public office. 1A Auto would make these contributions to candidates, PACs (other than independent expenditure PACs), and party committees.

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

services for the purpose of aiding the nomination and election of certain persons to public office. Self Storage would make these contributions to candidates, PACs (other than independent expenditure PACs), and party committees.

On February 24, 2015, the Plaintiffs filed the Complaint, alleging that Section 8 violates free speech and association rights and equal protection guarantees of the United States Constitution, as well as the equal protection and free expression clauses of the Massachusetts Declaration of Rights.[8] On June 3, 2015, the Plaintiffs filed a Motion for Preliminary Injunction (Paper #8), seeking to "halt" enforcement of Section 8's ban prohibiting corporations from making political contributions. The OCPF opposed. On August 21, 2015, after a hearing, this court (Giles, J.) issued a decision denying the Plaintiffs' requested injunctive relief. Judge Giles concluded the Plaintiffs were unable to show a likelihood of success on the merits, stating the "request to enjoin Section 8's contribution ban . . . flies in the face of years of U.S. Supreme Court and U.S. Court of Appeals jurisprudence upholding such . . . ban[s]."

On November 18, 2016, the Plaintiffs filed the pending Motion for Summary Judgment and the OCPF filed the Cross-Motion for Summary Judgment. I held a hearing on these motions on December 7, 2016. At that hearing and in their briefs, the Plaintiffs raise two constitutional objections to the operation of Section 8, contending that the provision violates their federal and state rights to free speech and association by inappropriately burdening protected speech, as well as their equal protection rights by treating corporations differently than labor unions. The OCPF opposes, claiming Section 8 does not violate free speech and association rights because it is

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

closely drawn to address the State's important interest in preventing corruption or the appearance of corruption in the electoral process, and does not violate equal protection guarantees because corporations and unions are not similarly situated.

DISCUSSION

I. Standard of Review

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

These standards do not differ in situations where both parties have moved for summary judgment. A court addressing cross-motions for summary judgment '"must rule on each motion independently, deciding in each instance whether the moving party has met its burden under Rule 56.'" *Federal Deposit Ins. Corp.* v. *Hopping Brook Trust*, 941 F. Supp. 256, 259 (D. Mass. 1996), quoting *Dan Barclay, Inc.* v. *Steward E. Stevenson Servs., Inc.*, 761 F. Supp. 194, 197-198 (D. Mass. 1991).

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

II. Declaratory Relief

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

The declaratory judgment statute "may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any . . . state agency or official which . . . are alleged to be in violation of the Constitution of the United States or the constitution or laws of the commonwealth[.]" G. L. c. 231A, § 2. A plaintiff has standing under this provision where he "can allege an injury within the area of concern of the statute or regulatory scheme [at issue]." *Enos* v. *Secretary of Envtl. Affairs*, 432 Mass. 132, 135 (2000). A pleading that sets forth a dispute which, unless resolved, will lead to "subsequent litigation as to the identical subject matter," is a pleading that satisfies this requirement. *Boston* v. *Keene Corp.*, 406 Mass. 301, 304 (1989) (internal citations omitted). Here, resolving the Plaintiffs' declaratory judgment claims at this stage is appropriate because the record contains no disputed issues of material fact on which the constitutional validity of Section 8 hinges. See *Rushworth* v. *Registrar of Motor Vehicles*, 413 Mass. 265, 268 n.4 (1992).

III. The Constitutional Validity of Section 8

A. Rights to Free Speech and Association

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

The OCPF argues Section 8 is consistent with the First Amendment as well as with state protections regarding the right to free expression.

1. The First Amendment

A. The Distinction Between Independent Expenditures and Contributions

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

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

On the other hand, campaign contributions "lie closer to the edges than to the core of political expression." *Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 161 (2003), citing *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001). "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21.

A person or entity contributing to the campaign war chest of a candidate is making only a "symbolic" expression of support. *Id.* "While contributions may result in political expression if spent by a candidate . . . to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* Thus, unlike an expenditure limit, a limit on campaign contributions "entails only a marginal restriction upon the contributor's ability to engage in free communication," which "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*

Because campaign expenditures and campaign contributions encroach to these different degrees upon First Amendment interests, the Supreme Court has adopted different tests for determining their constitutionality. A law limiting campaign expenditures must pass strict scrutiny, "which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340, quoting *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007). Laws restricting campaign contributions are, however, subject to a lesser but still "rigorous standard of review." *Buckley*, 424 U.S. at 29. Under this standard, "[e]ven a 'significant interference' with protected rights of political association may be sustained if the government demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 25, quoting *Cousins* v. *Wigoda*, 419 U.S. 477, 488 (1975).

Applying the "closely drawn" test discussed in *Buckley,* the Supreme Court has upheld a federal law banning direct corporate campaign contributions challenged on First Amendment grounds by a non-profit advocacy group. *Beaumont*, 539 U.S. at 150-151. The plaintiff in *Beaumont* argued that, because a federal prohibition on *independent expenditures* was deemed

unconstitutional as applied to non-profit advocacy corporations in *Federal Election Comm'n* v. *Massachusetts Citizens for Life*, 479 U.S. 238, 259 (1986) ("*MCFL*"), a ban on direct *contributions* made by non-profit corporations should also be found unconstitutional. *Id.* at 158. The Supreme Court rejected this argument.

The Court noted the long-recognized distinction between regulations that pertain to contributions and those that apply to expenditures. *Id.* at 158-159, citing *MCFL*, 479 U.S. at 259-260. The Court then stated the federal ban on corporate contributions (whether applied to non-profit or for-profit corporations) could stand so long as it was "'closely drawn' to serve a 'sufficiently important [government] interest[.]'" *Id.* at 162 (internal citations omitted). Ultimately, the Court concluded the absolute ban on contributions by non-profit corporations passed that test, because it was "closely drawn" to support, among other things, the government's anti-corruption interest, which "is intended to 'prevent corruption or the appearance of corruption.'"[9] *Id.* at 154, quoting *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985).

B. The Parties' Positions

Here, the OCPF argues *Beaumont* is directly on point, and thus its "closely drawn" test is the appropriate standard for analysis of the Plaintiffs' First Amendment challenge to Section 8, and the statute passes that test. Meanwhile, the Plaintiffs contend the court is not bound by *Beaumont* because: (1) following the Supreme Court's decisions in *Citizens United* and

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

McCutcheon, the "landscape of campaign finance law" has "changed" so that the continuing survival of *Beaumont* is suspect, *Plaintiffs' Brief*, p. 15; and (2) the current matter is distinguishable from *Beaumont* because the federal contribution ban at issue in that case permitted corporate contributions to PACs, which Section 8 does not. The OCPF has the better argument.

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

In *Citizens United*, the plaintiff challenged a ban on independent corporate expenditures. 558 U.S. at 333. In addressing this challenge, the Supreme Court held only that, in the context of independent expenditures, the government could not suppress political speech on the basis of the speaker's corporate identity. 558 U.S. at 365. In fact, the *Citizens United* Court recognized the different levels of scrutiny used to review independent expenditures and contributions and declined to reconsider the level of review applied to contribution limits. 558 U.S. at 359 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny"); see also *United States* v. *Danielczyk*, 683 F.3d 611, 617 (4th Cir. 2012) (recognizing that, in *Citizens United*, the Supreme Court "did not discuss *Beaumont* and explicitly declined to address the constitutionality of the ban on direct contributions"); *Ognibene* v. *Parkes*, 671 F.3d 174, 183-184 (2d Cir. 2012) (same); *Thalheimer* v. *City of San Diego*, 645 F.3d 1109, 1124-1126 (9th Cir. 2011) (same).

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

Second, the Plaintiffs contend the present case is different from *Beaumont* because Section 8 lacks a PAC option. Here, the Plaintiffs misconstrue Massachusetts election law. As the OCPF points out, G. L. c. 55, § 5B, which was added by St. 1994, c. 43, § 22, requires any political committee, other than one affiliated with a candidate or political party, to use a name that: "(i) clearly identifies the economic or other special interest, if identifiable, of a majority of its contributors; and (ii) if a majority of its contributors share a common employer, that identifies the employer." In accord with this provision, corporate employees may form PACs using the names of their corporate employers. In fact, numerous such PACs have registered in Massachusetts. See *Sullivan Aff.*, para. 3-5 (indicating that, between January 2012 and May 2015, out of approximately 372 PACs, 91 were identified by business/corporate name or business interest). After forming a PAC identified with their corporation, corporate employees may then make or solicit contributions to the PAC, provided they do so on their own time, and they may volunteer their free time in support of the PAC's political agenda. See *Mass. Atty.*

Gen. Op. No. 10, 1980 WL 119563, at *1 (Nov. 6, 1980) (explaining that volunteer time expended by corporate employees is not covered by Section 8). Thus, contrary to the Plaintiffs' position, Massachusetts has a corporate PAC option.

Moreover, recent judicial authority indicates that the PAC option available under G. L. c. 55, § 5B, is sufficient. *Minnesota Citizens Concerned for Life, Inc.* v. *Swanson*, 692 F.3d 864, 879 (8th Cir. 2012) ("*Minnesota Citizens*"), addressed a Minnesota law that banned corporate contributions but allowed corporations to form "[e]mployee political fund[s]," which the parties and Court referred to as PACs. *Id.* at 878. These PACs were the "only means" for corporations to make contributions to a political candidate or committee. *Id.*, citing Minn. Stat. § 211B.15. And, in accordance with Minnesota law, these PACs were "sponsored by an organization in name only[,]" meaning they could not receive "direct or indirect subsid[ies] from the sponsoring organization." See *Minnesota Ass'n of Commerce & Indus.* v. *Foley*, 316 N.W.2d 524, 527 (Minn. 1982) (defining the term "independent PAC"). The Eighth Circuit determined that *Beaumont* is still the controlling Supreme Court authority as to contribution limitations in a post-*Citizens United* world. *Minnesota Citizens*, 692 F.3d at 879 ("[r]ightly or wrongly decided, *Beaumont* dictates the level of scrutiny and the potential legitimacy of the interests Minnesota advances by prohibiting corporate contributions to political candidates and committees"). Thereafter, based on *Beaumont*, the Circuit Court found no First Amendment problem with Minnesota's ban on corporate contributions, despite Minnesota's limited PAC option. On this point, there is no principled distinction between *Minnesota Citizens* and the present matter.

I must apply the law as it exists today. Bans on corporate contributions have been in existence since 1907. Applying the "closely drawn" test, the Supreme Court reaffirmed the validity of corporate contribution bans less than fifteen years ago in *Beaumont*, 539 U.S. at 154-

155, and then declined to revisit that holding when given the opportunity in *Citizens United*, 558 U.S. at 539. Thus, I am bound by *Beaumont.* See *Agostini* v. *Felton*, 521 U.S. 203, 237 ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court making the decision] should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions"), quoting *Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (internal quotations omitted). Consequently, the distinction between expenditures and contributions remains intact, as does the rule applying the "closely drawn" test to restrictions on campaign contributions.

C. Application of the "Closely Drawn" Test

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

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

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

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

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

"[L]ess direct evidence is required when . . . the government acts to prevent offenses that 'are successful precisely because they are difficult to detect.'" *Wagner* v. *Federal Election Comm'n*, 793 F.3d 1, 20 (D.C. Cir. 2015), citing *Burson* v. *Freeman*, 504 U.S. 191, 208 (1992) (upholding restriction on campaign speech near voting places as warranted to prevent "[v]oter intimidation and election fraud," notwithstanding limited record evidence of the occurrence of

these dangers). It makes little practical sense to require the Legislature to wait for the Commonwealth to experience the very problem it fears before permitting it to take appropriate prophylactic measures. See *Citizens United*, 558 U.S. at 356 (noting the preventive nature of contribution limits because '"the scope of . . . [*quid pro quo* corruption] can never be reliably ascertained"'), quoting *Buckley*, 424 U.S. at 27.

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

Ultimately, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgment will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). In the present matter, there is nothing novel or implausible about the suggestion that corporations may make political contributions as *quid pro quo* for favors from elected officials, such as the awarding of government contracts, and that the making of these contributions fosters the appearance of corruption. The OCPF has provided sufficient evidence that Section 8 serves the anti-corruption interest, identifying instances in the last decade where Massachusetts politicians have been convicted of crimes related to bribery schemes intended to benefit corporations. For

example, in 2010, both Boston City Councilor Chuck Turner and State Senator Dianne Wilkerson were separately convicted of accepting bribes as *quid pro quo*s for actions that benefited corporations, obtaining a liquor license for a nightclub in one case and passing legislation to aid a commercial development in the other. *Kobick Aff.*, Ex. Y-Z. Then, in 2011, House Speaker Salvatore DiMasi was convicted of multiple crimes related to his acceptance of bribes in exchange for steering state contracts to a software corporation. *Kobick Aff.*, Ex. V-X.

Only brief comment is necessary on the Plaintiffs' assertion that Section 8 must not advance the anti-corruption interest since the OCPF has brought few Section 8 enforcement actions aimed at corporations. Because Section 8 prohibits corporate campaign contributions, a small number of enforcement actions is hardly surprising, and simply shows that the ban on corporate contributions appears to be working to prevent one form of possible corruption, namely the use of campaign contributions to obtain *quid pro quo* favors from politicians.

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

contracts for public infrastructure projects while serving as Governor of Maryland. See *Wagner*, 793 F.2d at 15 n.17.

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

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

States, ELECTION L. J., vol. 5, No. 1, p. 33 & 35 (2006) (finding statistically significant relationship between the presence of limits on corporate campaign contributions and belief that state government is responsive to individual citizens).

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

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

2. **State Law Regarding Free Expression**

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

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

Opinion of the Justices also fails to provide the Plaintiffs with much support. In that case, too, the Justices did not address corporate contributions; instead, they considered whether a proposed bill restricting the "total receipts" a political candidate could raise in the aggregate in a non-election year would violate the First Amendment. *Opinion of the Justices*, 418 Mass. 1201-

1203. The Justices specifically "express[ed] no opinion" on claims under articles 16 and 19 of the Massachusetts Declaration of Rights, other than to state that the rights available under those provisions were "comparable" to those guaranteed by the First Amendment. *Id.* at 1212.

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

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

B. Rights to Equal Protection

The Plaintiffs contend Section 8 violates the Fourteenth Amendment's Equal Protection Clause as well as the equal protection guarantees established under article 1 of the Massachusetts

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

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

"The formula for determining whether individuals or entities are 'similarly situated' for equal protection purposes is not always susceptible to precise demarcation." *Id.* at 8, citing

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

Coyne v. *City of Somerville*, 972 F.2d 440, 444-445 (1st Cir. 1992). Even so, it is "clear that the burdens of production and persuasion [with respect to this requirement] must be shouldered by the party asserting the equal protection violation." *Cordi-Allen* v. *Conlon*, 494 F.3d 245, 250 (1st Cir. 2007) (discussing equal protection in the land-use context). Ultimately, the test "'is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated . . . . In other words, apples should be compared to apples.'" *Barrington Cove Ltd. Partnership*, 246 F.3d at 8, quoting *Dartmouth Review* v. *Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989).

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

In the present matter, I conclude that the Plaintiffs have failed to meet their burden to demonstrate labor unions and corporations are similarly situated. The summary judgment record

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

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

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

Ordinarily, "government programs that classify or differentiate are constitutional if they bear a rational relationship to a legitimate government objective." *Woodhouse* v. *Maine Comm'n on Gov't Ethics and Election Practices*, 40 F. Supp. 3d 186, 194 (D. Maine 2014), citing *Plyler*, 457 U.S. at 216. When, however, "a fundamental interest . . . is at stake, . . . a much stronger justification is required, namely a compelling government interest, and a necessary relationship between the classification and that interest." *Id.*, citing *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995). Here, the Plaintiffs argue that I must apply strict scrutiny when analyzing their equal protection challenge because the ability to engage in political expression is a fundamental right. I am not convinced that strict scrutiny is the appropriate standard.

"In the First Amendment context, the Supreme Court has applied a less rigorous test for contribution limits, examining whether they are closely drawn to a sufficiently important government interest." *Riddle* v. *Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014), citing *Randall* v. *Sorrell*, 548 U.S. 230, 247 (2006); see also *Buckley*, 424 U.S. at 25 (stating that interference with contributor's protected rights of political association "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms"). In the recently-expressed view of more than one federal Circuit Court of Appeals, it makes little sense to apply one standard to free speech and association claims and a second standard to equal protection claims attacking the same contribution restrictions. "[A]lthough equal protection analysis focuses upon the validity of the classification rather than the speech restriction, the critical questions asked are the same. [Thus,] . . . . the same level of scrutiny is . . . appropriate in both [the First Amendment and the equal protection] contexts." *Wagner*, 793 F.3d at 33 (internal quotations and citations omitted). Indeed, the District of Columbia Circuit Court of Appeals recently went farther, stating, "[t]here is . . . no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protections principles." *Id.* at 32. Consequently, I conclude the "closely drawn" test "applies when contributors challenge contribution limits based on the. . . Equal Protection Clause rather than the First Amendment." *Riddle*, 742 F.3d at 928.

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

OCPF has met its burden to demonstrate Section 8's corporate contribution ban serves the anti-corruption interest.

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

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

because its reasoning and results appear inconsistent with later cases." *Williams* v. *Whitley*, 994 F.2d 226, 235 (5th Cir. 1993). In accord with *Austin*, Section 8 does not violate equal protection guarantees because it treats corporations and unions differently.

In summary, even if the summary judgment record contained evidence sufficient to support the Plaintiffs' conclusory allegations that corporation and unions are similarly situated — and it does not — I conclude that Section 8 does not violate the equal protection guarantees of the Fourteenth Amendment or article 1 of the Massachusetts Declaration of Rights. The Plaintiffs' Motion for Summary Judgment will be **DENIED** and the OCPF's Cross-Motion for Summary Judgment will be **ALLOWED**, insofar as each pertains to the Plaintiffs' equal protection claims. I shall enter a declaration, under G. L. c. 231A, § 2, in accordance with this determination.

CONCLUSION AND ORDER

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

SO ORDERED.

Paul D. Wilson
Justice of the Superior Court

April 4, 2017