

No. 18-733

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IN THE  
**Supreme Court of the United States**

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

*Petitioners,*

v.

MICHAEL SULLIVAN, Director,  
Massachusetts Office of Campaign and Political Finance,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
MASSACHUSETTS SUPREME JUDICIAL COURT

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BRIEF OF *AMICUS CURIAE*  
FISCAL ALLIANCE FOUNDATION  
IN SUPPORT OF PETITIONERS

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## INTERESTS OF *AMICUS CURIAE*<sup>1</sup>

The Fiscal Alliance Foundation (the “Foundation”) is a Boston-based 501(c)3 non-partisan, non-profit organization. The Foundation primarily engages in the conduct of educational programs designed to increase public awareness about the public benefits to be derived from greater fiscal responsibility, transparency, and accountability in government. The Foundation also provides targeted legal assistance to defend the human and civil rights of the public at large and of private citizens secured by law when abridged by the absence of a fiscally responsible, transparent, and accountable government.

With its focus on government fiscal responsibility, transparency, and accountability, and with its headquarters in Boston, the Foundation has particular experience and expertise in evaluating the publicly available campaign finance reports and data from the Massachusetts Office of Campaign and Political Finance (“OCPF”). The Foundation believes an understanding of this empirical data will assist the Court in situating Petitioners’ Petition in a more robust context, demonstrating the scope and scale of

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<sup>1</sup> In accordance with Supreme Court Rule 37.2(a), parties’ counsel of record consented to the filing of this *amicus* brief after receiving timely notice of *amicus’s* intent on December 21, 2018. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amicus* or its counsel.

the imbalance that would result if the legal conclusion reached by the court below were allowed to stand.

### SUMMARY OF THE ARGUMENT

An analysis of seventeen years' worth of publicly available OCPF campaign finance filing data provides empirical support—both in scope and scale—for Petitioners' contention that Mass. Gen. Laws c. 55, § 8 is a discriminatory speaker-based restriction on speech and association, prohibiting direct candidate donations from businesses entirely while, at the same time, OCPF guidance permits unions to use general treasury funds to make direct candidate donations of up to \$15,000 annually in aggregate.

Even focusing only on large general treasury union donations (single donations to candidates over \$500), the OCPF data demonstrate empirically that candidate donations are extensive, ubiquitous, strategic, leveraged, and politically advantageous to unions. The OCPF data show that between 2002 and 2018, nearly \$1.9 million in large general treasury donations were made to 126 unique individuals by dozens of different unions located in twenty-five states. The OCPF data show empirically that numerous unions make general treasury donations in *addition* to—not as an *alternative* to—donations from their union-controlled PACs. And while the OCPF data provide no empirical evidence that limited liability entities were used to circumvent statutory contribution limits prior to 2010 (when they were allowed to make direct candidate contributions), the data suggest such risks may exist from coordinated expenditures by affiliated union locals.



*A Note About the OCPF Campaign Finance Data*

The OCPF data presented in this brief are drawn primarily from the publicly available OCPF online databases of campaign finance filings (<https://www.ocpf.us/Reports/SearchItems>).<sup>2</sup> This brief analyzes the subset of campaign finance filings designated by OCPF as “Record Type: Union/Association Contribution,” comprising about 38,000 entries from January 1, 2002 through December 30, 2018.<sup>3</sup> These entries include contributions *from* both unions and non-profit associations, and contributions *to* candidates and party committees (at issue here), and ballot question committees (not at issue here).

One challenge of analyzing this volume of raw OCPF contribution data is the fact that it is, in the parlance of data analysis, “noisy.” For instance, it includes certain *non*-contributions (such as vendor refunds or security deposit refunds mistakenly classified as contributions), contains multiple variations (and typographical misspellings) of

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<sup>2</sup> The respective Sections 201(b)(2) of the Massachusetts Guide to Evidence and the Federal Rules of Evidence are identical: Courts may “judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Data filed with OCPF as required by law (Mass. Gen. Laws c. 55, § 2) meet this threshold.

<sup>3</sup> While the raw dataset includes a very small number of entries from 2001, none involved the large general treasury union donations on which this brief focuses.

contributor names and addresses, and fails to distinguish between unions and non-profit associations (thus requiring significant extrinsic knowledge of the nomenclature of the Massachusetts political landscape to do so).

Further hampering transparency is the fact that because the raw OCPF data are candidate-reported, they frequently fail to distinguish between “direct” contributions made by a union’s general treasury, and contributions made by that same union’s political action committee (“PAC”). While such distinctions could be made manually by cross-referencing each contribution against the separate OCPF PAC filing databases, the effort required to do so for literally thousands of individual donations would be extensive.

Relying on its experience and knowledge of Massachusetts candidates, unions, non-profit associations, political action committees, and other similar entities, the Foundation filtered the OCPF data to identify those contributions made by a union to a candidate or party committee. Because of the practical difficulty noted above of distinguishing in the OCPF data between “direct” contributions made by a union entity and contributions made by that same union’s PAC, the Foundation took the additional conservative steps of analyzing only union contributions in *excess* of the statutory maximum permissible PAC contribution to a candidate (\$500, per Mass. Gen. Laws c. 55, § 6) and excluding union contributions to party committees entirely.<sup>4</sup> In other

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<sup>4</sup> The statutory maximum permissible PAC donation to a party committee is \$5,000. Mass. Gen. Laws c. 55, § 6. Three union

words, the Foundation presumed for purposes of this analysis that every union-related candidate contribution of \$500 or less was made by a union PAC, even though empirically this is not the case. As a result, the data presented here *underestimate*—potentially significantly—the magnitude of direct general treasury union contributions to candidates and parties.

Both the raw OCPF dataset and the filtered dataset utilized for this analysis are available at <https://www.fiscalalliancefoundation.org/amicus-1a-auto>.

## ARGUMENT

### I. OCPF DATA PROVIDE EMPIRICAL SUPPORT FOR PETITIONERS' CLAIM THAT THE MASSACHUSETTS BAN DISCRIMINATES IN FAVOR OF UNIONS AT THE EXPENSE OF BUSINESSES

The Petitioners, the Commonwealth, and the court below all agree that Massachusetts forbids for-profit corporations and other business entities from making any political contributions to candidates or political parties, directly or indirectly (Mass. Gen. Laws c. 55, § 8), and that in contrast, Massachusetts permits political contributions by unions, non-profit associations, and other non-business associations. Petition at 2. The latter are not subject to any disclosure requirements or contribution limits

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donations in the raw dataset exceed that amount, in a combined total of \$22,500.

provided their contributions and independent expenditures in a given year do not exceed \$15,000 or 10 percent of their revenues for the previous calendar year, whichever is less. Mass. Office of Campaign & Political Fin. Interpretive Bulletin No. OCPF-IB-88-01 at 4 (Sept. 1988, rev. May 9, 2014). As the Petitioners further observe, unions may also form and control their own PACs, whose spending is separate from and *in addition to* the \$15,000 threshold on a union's general treasury spending. Petition at 3.

Petitioners contend that in establishing the above framework, Massachusetts contravenes Petitioners' First and Fourteenth Amendment rights by "effectively determin[ing] that support from unions should be allowed to contribute to a candidate's success but support from businesses should not." Petition at 21, 27-28. Petitioners note that such an outcome is contrary to this Court's reasoning in *Davis v. FEC*, 554 U.S. 724 (2008) that when the government imposes lower contribution limits on select donors, it is impermissibly "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Id.* at 742. *Cf. Citizens United v. FEC*, 558 U.S. 310, 342 (2010) ("[P]olitical speech does not lose First Amendment protection simply because its source is a corporation.").

Petitioners also contend that Massachusetts' statutory ban on corporate contributions cannot survive First Amendment scrutiny unless it is properly tailored to prevent actual or apparent *quid pro quo* corruption. Petition at 10, citing *McCutcheon v. FEC*, 572 U.S. 185, 206-09 (2014). In particular,

they note that the ban fails *McCutcheon*'s requirement that it be "closely drawn to avoid unnecessary abridgment of associational freedoms," *id.* at 218, for several reasons, among them that the ban is "under-inclusive because it does not apply to unions or non-profits, whose contributions have a similar potential for corruption." Petition at 18.

An analysis of seventeen years' worth of publicly available OCPF campaign finance filing data from 2002 through 2018 provides empirical support—in both scope and scale—for Petitioners' contentions. The data show that dozens of different unions and their locals have donated millions of dollars to hundreds of Massachusetts candidates through direct general treasury donations. While unions may make aggregate general treasury donations of up to \$15,000 annually (and can even choose to make a donation in that amount to a single candidate), individuals are limited to \$1,000 per candidate, PACs are limited to \$500 per candidate, and businesses are prohibited from such donations outright.

The consequences of this structural asymmetry are also evident in the OCPF data. Such donations allowed unions to favor certain candidates over others, provided those candidates with structural fundraising advantages unavailable to competitors who lacked union support, and enabled unions to speak freely to advance their own political positions. Any suggestion that the Massachusetts corporate contribution ban is "closely drawn" is belied empirically by the scope and scale of union general treasury donations made to Massachusetts candidates.

**A. OCPF Data Demonstrate that Direct Union Contributions to Massachusetts Candidates are Extensive.**

Looking broadly at the OCPF data, unions or labor-related entities made 614 large general treasury union (“LGTU”) donations to candidates in excess of \$500 between 2002 and 2018, totaling \$1,886,793.<sup>5</sup> The mean average LGTU donation was \$3,072. Twenty-three LGTU donations were for \$15,000—the maximum amount allowed—while sixty-two were for \$10,000 or more. Seventy-seven were between \$5,000 and \$9,999. Overall, 97.4% of the 614 LGTU donations were for \$1,000 or more.

As large as these figures are, they significantly *underestimate* the aggregate general treasury donations made by unions directly to candidates and party committees. For instance, while the Asbestos Workers Local #6 (also known as the Heat and Frost Insulators Union) has no PAC registered with OCPF, OCPF data indicate that it made at least 569 general treasury donations totaling \$111,715 between 2002 and 2018, none exceeding \$500. Similarly, the Massachusetts Organization of State Engineers and

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<sup>5</sup> As noted *supra*, a central limitation of the OCPF dataset is that it frequently fails to distinguish between “direct” contributions made by a union’s general treasury and PAC contributions made by that same union’s PAC. This brief therefore not only excludes union donations to party committees entirely, but also limits its analysis to individual candidate donations in excess of \$500. Because the statutory maximum permissible PAC contribution to candidates is \$500, any donation in excess of \$500 must—by definition—be a “direct” general treasury contribution.

Scientists has no PAC but made at least 602 general treasury donations totaling \$141,425 in that period, only three of which exceeded \$500. And 32BJ SEIU has no PAC but made at least 196 general treasury donations totaling \$77,650 during that time, none exceeding \$500.

**B. OCPF Data Demonstrate that Direct Union Contributions to Massachusetts Candidates are Ubiquitous.**

The ubiquity of LGTU donations in the Massachusetts campaign landscape is readily evident from the OCPF data. The annual mean aggregate of LGTU donations between 2002 and 2018 is \$110,988, with a median annual aggregate of \$68,987. Looking only at even-numbered (election) years, these averages are even higher: a mean of \$140,685, and a median of \$88,719. In 2018 alone, there were seventy LGTU donations to thirty-one candidates in an aggregate amount of \$163,399.

Over one hundred different unions have made LGTU donations—big, small, national, municipal, and across the full panoply of trades. These include national unions like the International Brotherhood of Electrical Workers, the International Union of Elevator Constructors, and the Service Employees International Union. They also include state-level unions such as the Massachusetts Correction Officers Federated Union, the Massachusetts Organization of State Engineers and Scientists, and the Massachusetts Nurses Association. And they include municipal unions like the Boston Teachers Union, the

Boston Carmen’s Union, and numerous municipal firefighter and police unions and locals.

LGTU donors are also geographically diverse: While 82% of all LGTU donations came from unions with addresses in Massachusetts, 18%—amounting to \$549,786—came from out-of-state unions located in twenty-four different states and the District of Columbia, as close as New Hampshire and Rhode Island, and as far away as California and Hawaii.

**C. OCPF Data Demonstrate that Direct Union Contributions to Massachusetts Candidates are Strategic.**

The OCPF data also demonstrate the strategic nature of LGTU donations. The OCPF campaign filer database lists roughly 4,000 unique individuals as having registered with OCPF as candidates for state or local office.<sup>6</sup> (For context, the Massachusetts House is comprised of 160 seats and the Massachusetts Senate is comprised of forty seats, all of which are elected every two years.) Yet the 614 LGTU donations were made to only 126 unique individuals. Of those, 123 were registered as Democrats, who received 607 LGTU donations for a combined total of \$1,865,043, while three were registered as Republicans, who

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<sup>6</sup> OCPF, Filers Index, “All Candidates (including inactive committees)”, *available at* <https://www.ocpf.us/Filers/Index> (last accessed Dec. 30, 2018). This index also indicates candidate party affiliation. While the majority of individuals who have run for multiple offices have only a single entry, a small number of such individuals have multiple entries.



received seven LGTU donations for a combined total of \$21,750.

While this partisan discrepancy in LGTU donations is notable, equally as notable is that even *intra*-party contests are subject to the influence of LGTU donations. Filtering the 614 LGTU donations for those reported in “pre-primary report” filings—OCPF-mandated reports filed by House and Senate candidates—reveals 124 LGTU donations made to fifty-three unique individuals (all in Democratic primaries) totaling \$333,470. Moreover, this analysis is likely underinclusive, as OCPF requires primary candidates for statewide offices (and the mayoralities of fourteen large cities) to file twice-monthly “deposit reports” in lieu of “pre-primary reports,” and the former are not coded in the OCPF database in a manner conducive to efficient sorting.

Nonetheless, identifying instances where LGTU donations have played a role in primaries is possible on a candidate-by-candidate basis. For instance, in the 2018 election cycle, incumbent Secretary of the Commonwealth William Galvin faced a competitive Democratic primary against challenger Boston City Councilor Joshua Zakim. Secretary Galvin received \$5,000 in LGTU donations in advance of the September 4 primary, while Councilor Zakim received none. Galvin won.

The OCPF data also show that unions favor certain individual candidates more than others with LGTU donations. Fourteen candidates (11% of all recipients) received 325 of the 614 LGTU donations, in an amount of \$1,257,097, or 67% of the total for all

candidates combined. Nor were the candidates receiving the greatest dollar amounts of LGTU donations necessarily those running for statewide office (i.e., the races that might be expected to be the most expensive). Of the top ten recipients by total LGTU dollars received, only half had been candidates for statewide office at any point. The offices sought by the remaining five included state senate (one), state representative (three), and mayor of Boston.

Of particular illustrative note in that respect is the role that LGTU donations played in the 2013 Boston mayoral campaign of Martin Walsh. While Walsh was elected state representative in 1997, prior to the announcement of his mayoral candidacy in April 2013, he had received only \$12,500 in LGTU donations between 2002 and 2012. In the five months between June 2013 and the November 2013 election, however, Walsh received fifty-six such donations totaling \$342,246. Of those fifty-six donations, eighteen were for \$10,000 or more, including eleven for the maximum amount of \$15,000. His opponent, John R. Connolly, received no LGTU donations in that race. Walsh narrowly defeated Connolly 51.5% to 48.1%, or by 4,889 votes out of 140,837 cast.<sup>7</sup>

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<sup>7</sup> City of Boston, Municipal Election (Nov. 5, 2013) Results – Mayor, *available at* <https://tinyurl.com/2013-Boston-Mayor-Results> (last accessed Dec. 30, 2018).

**D. OCPF Data Demonstrate that Direct Union Contributions to Massachusetts Candidates are Leveraged.**

The OCPF data also suggest that the effect of LGTU donations in state Senate and House races can be particularly pronounced, as the modest average per-race cost means that even relatively small dollar donations can have outsized leverage.

According to OCPF, in the 2018 election cycle there were 300 House candidates and 75 Senate candidates in Massachusetts. Between January 1 and October 19, those House candidates expended a total of \$7,505,632—a mean of \$25,019, and a median of \$15,268. Senate candidates expended a total of \$3,889,019—a mean of \$51,854, and a median of \$37,673.<sup>8</sup> While candidates have yet to file their “year-end reports” (reporting expenditures from October 20 through December 31), these data provide a useful order-of-magnitude understanding of the cost of an average House or Senate race in Massachusetts.

Where the average House or Senate race costs between \$15,000 to \$25,000 and \$37,000 to \$52,000, respectively, it does not seem controversial to posit that even a single LGTU donation of \$1,000 or more can make a potentially significant beneficial difference to the recipient.<sup>9</sup>

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<sup>8</sup> OCPF, 2018 Expenditures by Legislative Candidates, *available at* <http://files.ocpf.us/pdf/guides/2018pehousesenate.pdf> (last accessed Dec. 30, 2018).

<sup>9</sup> And as indicated in Section I.A, *supra*, the OCPF data suggest that unions have made hundreds of thousands—if not millions—

More specifically, the OCPF data illustrate that where individual House and Senate races are *more* expensive than average, candidates who receive LGTU donations can wield them to neutralize the fundraising of competitors who do not. For instance, in 2008, Ken Donnelly ran for a state Senate seat and raised \$108,116 prior to the Democratic primary,<sup>10</sup> of which \$17,741 came from seven LGTU donations. Those donations effectively offset 43% of the \$40,815 raised by his Democratic primary opponent John Hurd—who received no LGTU donations.<sup>11</sup> Donnelly defeated Hurd 54.3% to 39.5%.<sup>12</sup>

In 2017, a similar pattern played out in a special state Senate election. Paul Feeney raised \$63,409 for the special general election between September 1 and November 6,<sup>13</sup> of which \$31,499 came from seven

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of dollars' worth of general treasury donations to candidates in amounts of \$500 or less.

<sup>10</sup> OCPF, Filers Index, #14734 (2008 Pre-Primary Report), *available at* <https://www.ocpf.us/Filers/Index> (last accessed Dec. 30, 2018).

<sup>11</sup> OCPF, Filers Index, #14827 (2008 Pre-Primary Report), *available at* <https://www.ocpf.us/Filers/Index> (last accessed Dec. 30, 2018).

<sup>12</sup> Secretary of the Commonwealth, 2008 State Senate Democratic Primary (4th Middlesex) Results, *available at* <http://electionstats.state.ma.us/elections/view/13506/> (last accessed Dec. 30, 2018).

<sup>13</sup> OCPF, Special Elections – Prior Special Election Spending Data, *available at*

LGTU donations. His opponent raised \$41,646 during that same period, with no LGTU donations.<sup>14</sup> Feeney won by only 577 votes out of nearly 15,000 cast, with a plurality of 47.3%.<sup>15</sup>

The above two examples also illustrate that a LGTU donation has a strategic value *beyond* its face value, for at least two reasons. First, if a union making a LGTU donation had instead been required to donate via a PAC, its per-candidate donation would be limited to \$500, per Mass. Gen. Laws c. 55, § 6. In the above two examples, donations that would have been limited in the aggregate to \$3,500 if made by PACs (i.e., seven donations at \$500 each) were allowed to balloon to a \$17,741 aggregate donation for Donnelly and a \$31,499 aggregate donation to Feeney—windfalls of 507% and 900%, respectively.

Second, Mass. Gen. Laws c. 55, § 6A limits the *total* amount any given candidate may receive from all PACs combined in a calendar year. This statutory maximum is currently \$7,500 for House candidates and \$18,750 for Senate candidates. *Id.* Had the LGTU donations in the above races been made instead by union PACs, state law would have precluded the

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<https://www.ocpf.us/Filers/SpecialElections#tabSpecialsData>  
(last accessed Dec. 30, 2018).

<sup>14</sup> *Id.*

<sup>15</sup> Secretary of the Commonwealth, 2017 State Senate Special General Election (Bristol & Norfolk) Results, *available at* <http://electionstats.state.ma.us/elections/view/40320/> (last accessed Dec. 30, 2018).

candidates from accepting aggregate amounts in excess of those limits. Yet because the donations were made from union general treasury funds, the candidates (and the unions) could leave those PAC maximums untouched and fully available for PAC donations (including from union-affiliated PACs), arguably circumventing the intent of the statutory PAC limits.

**E. OCPF Data Demonstrate that Direct Union Contributions to Massachusetts Candidates are Politically Advantageous.**

In short, the OCPF data demonstrate empirically that unions believe their privileged ability to make up to \$15,000 in aggregate annual general treasury donations (and even to donate that entire amount to a single candidate) gives them a strategic advantage in Massachusetts campaigns. Indeed, as rational and sophisticated political actors, they are unlikely to have donated \$1,886,793 to hundreds of candidates (in LGTU donations alone) if they believed their money was better spent otherwise.

As Petitioners observe, “[b]usinesses (i.e., *employers*) and unions commonly have naturally opposing interests and divergent views on political candidates and issues of public policy. So for the government to allow unions to make political contributions, but completely prohibit businesses from doing so, as Massachusetts has, is inevitably to favor pro-union *speech and ideas* over pro-business speech and ideas.” Petition at 27. The empirical OCPF data suggest that the scale and scope of this imbalance is significant.

II. OCPF DATA CONFIRM THAT  
NUMEROUS UNIONS MAKE GENERAL  
TREASURY DONATIONS IN ADDITION  
TO—NOT AS AN ALTERNATIVE TO—  
PAC DONATIONS

Petitioners also observe that “[c]ontrary to the lower court’s view, allowing businesses to make independent expenditures and contribute to independent-expenditure PACs does not adequately protect their First Amendment rights” because (among other reasons) in Massachusetts, “businesses’ natural rivals, unions, are allowed to both make direct contributions to candidates and form PACs to give candidates even more.” Petition at 37, 39.

The OCPF data provide empirical support for the factual existence of the phenomenon identified by Petitioners. It also illustrates that the magnitude of the imbalance justifies Petitioners’ concern about the inadequacy of the protection asserted by the court below. General treasury donations are not being used by unions as an *alternative* to PAC donations; they are instead being used by numerous unions in *addition* to PAC donations.

The OCPF database of PAC filers includes approximately 275 active registered PACs, over sixty of which are union-affiliated on their face (as evidenced by the PAC name including the name of

union and/or a “Local” number).<sup>16</sup> As an empirical matter, numerous unions make both general treasury donations and PAC donations, often in substantial amounts. The following three examples drawn from the OCPF data are illustrative rather than exhaustive. Note also that the PAC data are likely comparatively *underinclusive*, since while the analyzed OCPF contribution data begins in 2002, OCPF PAC filing data are available online only starting in 2004:

- The Sheet Metal Workers Local 17 made at least 54 LGTU donations totaling \$117,500 between 2002 and 2018; between 2004 and 2018, the Sheet Metal Workers Local Union 17 People’s Committee made nearly 2,200 candidate donations totaling approximately \$550,000.<sup>17</sup>
- The Boston Carmen’s Local 589 made at least seventeen LGTU donations totaling \$60,899 between 2002 and 2018; between 2004 and 2018, the Boston Carmen’s Union

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<sup>16</sup> OCPF, Filers Index, “All PACs (not including inactive committees),” *available at* <https://www.ocpf.us/Filers/Index> (last accessed Dec. 30, 2018).

<sup>17</sup> OCPF, Filers Index, “Filer #80194 (Sheet Metal Workers Local Union 17 People’s Committee),” *available at* <https://www.ocpf.us/Filers/Index> (last accessed Dec. 30, 2018).



PAC made 1,347 candidate donations totaling \$489,650.<sup>18</sup>

- The International Union of Painters and Allied Trades District Council #35 made at least 26 LGTU donations totaling \$69,000 between 2002 and 2018; between 2004 and 2018, the Painters District Council #35 PAC made 1,436 candidate donations totaling \$330,105.<sup>19</sup>

Moreover, OCPF's own guidance in OCPF-IB-88-01 confirms that such parallel contribution patterns are not an inadvertent consequence of the current system, but are instead an intended feature:

[A] union, like any group, may not solicit or receive funds for the purposes of influencing Massachusetts elections without first organizing a political committee in accordance with [Mass. Gen. Laws] c. 55. *It is not uncommon, however, for unions to use their general treasury fund[s] to make contributions or independent expenditures to support or oppose candidates.* For a union to make contributions or independent expenditures

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<sup>18</sup> OCPF, Filers Index, "Filer #80577 (Boston Carmen's Union PAC)," *available at* <https://www.ocpf.us/Filers/Index> (last accessed Dec. 30, 2018).

<sup>19</sup> OCPF, Filers Index, "Filer #80144 (Painters District Council #35 PAC)," *available at* <https://www.ocpf.us/Filers/Index> (last accessed Dec. 30, 2018).

in Massachusetts *without first organizing a separate political action committee*, the union must make expenditures from an account containing funds that were not raised for a political purpose, *such as the union's general treasury fund*.

OCPF-IB-88-01 at 3 (emphases supplied).

As is clear from OCPF-IB-88-01, the \$15,000 exemption is affirmatively designed to *encourage* unions to make direct contributions to candidates from their general treasuries *in addition* to making contributions to candidates from their own union-controlled PACs. OCPF's explanation merely highlights the inherent equal protection issues created by the exemption, given that "the lower court upheld Massachusetts's statute that bans *both* direct contributions by businesses *and* contributions by business-controlled PACs." Petition at 34. The empirical OCPF data, combined with the explanation offered by OCPF in support of its policy, underscore Petitioners' concern that "[f]or courts to simply *ignore* differences between limits on different classes of donors is to disregard the fundamental First Amendment and equal protection interests that discriminatory limits impinge on." Petition at 32.

### III. OCPF DATA PROVIDE NO EVIDENCE THAT LIMITED LIABILITY ENTITIES CIRCUMVENTED CONTRIBUTION LIMITS, BUT SUGGEST SUCH RISKS MAY EXIST FROM COORDINATED EXPENDITURES BY AFFILIATED UNION LOCALS

Petitioners also assert that the Massachusetts ban fails the “closely drawn” test of *McCutcheon* because the “ban is not closely drawn to prevent circumvention of the state’s limits on individuals’ contributions.” Petition at 18. Petitioners make two points of particular note: First, they observe that the Commonwealth has presented no evidence that “individuals ever used limited liability companies—whose political contributions remained legal in Massachusetts until 2010” to circumvent limits on individual contributions. And second, they protest that the Commonwealth has failed to “explain why non-profit entities do not present similar circumvention risks.” *Id.* at 18-19. The OCPF data provide empirical support for both of Petitioners’ contentions.

On the first point, OCPF data confirm that there *is* no evidence that LLCs were ever used to make significant contributions at all, much less circumvent limits on individual contributions. Prior to January 1, 2010, limited liability partnerships, limited liability corporations, and professional corporations were allowed to contribute to Massachusetts candidates and party committees. *See* MA ST 2009, c. 28, § 33 (eff. Jan. 1, 2010). Yet a search of the entire OCPF campaign finance filing database reveals only 274

entries for any “contributor” to a candidate between 2002 and December 31, 2009 whose name included LLC, LLP, PC, or common variants thereof.<sup>20</sup> Many such entries were accompanied by notations indicating that the payments reported were actually refunds of vendor overpayments, refunds of security deposits, or other transactional repayments—not contributions. Several dozen more entries used the abbreviation “PC” to denote that the contributor was a “people’s committee”—a variant of a PAC per Mass. Gen. Laws c. 55, § 1.

Filtering those entries results in (at most) 150 contributions from LLCs, LLPs, or PCs over that seven-year period, totaling \$228,129. And a single 2006 entry (for \$188,808, from a law firm to a defeated 2002 gubernatorial candidate’s committee), comprises almost 79% of that total. Excluding that outlier leaves 149 contributions totaling \$39,321, or an average donation of \$264. And only three of those 149 were for more than \$500. For comparison, during the same time period there were 196 LGTU candidate donations totaling \$676,994—again, a figure that *omits* any union general treasury donations of \$500 or less. The mean average LGTU donation in that period was \$3,454.

In short, despite the hypothetical concern that individuals could establish numerous shell LLCs in order to make the maximum allowable donation from

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<sup>20</sup> OCPF, Contributions and Expenditures, *available at* <https://www.ocpf.us/Reports/SearchItems> (last accessed Dec. 30, 2018).

each (and thus circumvent in practice the statutory contribution limits on either an individual or an entity), the OCPF data contain no evidence that prior to 2010, limited liability companies or their variants were either extensively or systematically used for this purpose in Massachusetts. The paucity of evidence suggests little (if any) abuse of the pre-2010 system in this manner, much less a level of abuse that warranted a legislative amendment prohibiting such contributions. Cf. *Free & Fair Election Fund v. Mo. Ethics Comm’n*, 903 F.3d 759, 764 (8th Cir. 2018).

If anything, the OCPF data suggest that the Petitioners’ second point—that the Commonwealth failed to “explain why non-profit entities do not present similar circumvention risks”—is perhaps the more relevant inquiry. For instance, on October 24, 2002, gubernatorial candidate Shannon O’Brien received \$50,000 in the form of five separate \$10,000 LGTU donations from NAGE Locals 207, 282, 290, 291, and 292, respectively. And between June 28 and October 30, 2013, Boston mayoral candidate Martin Walsh received sixteen LGTU donations totaling \$29,750 from Laborers’ International Union of North America Locals 4, 6, 75, 118, 133, 151, 169, 175, 288, 380, 381, 1035, 1162, 1249, and 1298, respectively. As a purely empirical matter, the OCPF data suggest that the strategic (and potentially coordinated) use of multiple locals of the same union to generate aggregate contributions in excess of the \$15,000 per-entity maximum allowed under OCPF-IB-88-01 is a more common circumvention scenario than was the use of LLCs to accomplish a similar end.

## CONCLUSION

Nearly two decades' worth of Massachusetts campaign finance data on the scope and scale of union contributions to Massachusetts candidates lends robust empirical support to Petitioners' central legal assertion: that Mass. Gen. Laws c. 55, § 8 is a discriminatory speaker-based restriction on speech and association, silencing even the smallest businesses while the largest unions are allowed to speak and associate freely.

For the foregoing reasons, the Foundation urges this Court to grant the Petition for Writ of Certiorari.

*Respectfully submitted,*

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