No. 18-733

In The
Supreme Court of the United States

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

Petitioners,

v.

MICHAEL SULLIVAN, Director,
Massachusetts Office of Campaign and Political Finance,

Respondent.

On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court

PETITIONERS' REPLY BRIEF

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I. Petitioners preserved their issues.

Contrary to Respondent's assertions, Petitioners have preserved all the issues they raise.

A. The Court may consider whether *Beaumont* should be overruled.

This Court may consider Petitioners' first question presented—whether *FEC v. Beaumont*, 539 U.S. 146 (2003), should be overruled—for three reasons, any of which would independently suffice.

First, contrary to Respondent's assertions, BIO.17–18, Petitioners raised the conflict between *Beaumont* and this Court's post-*Beaumont* First Amendment jurisprudence at every stage below. They raised it in the trial court in their memorandum in support of their motion for preliminary injunction,[1] in their brief opposing Respondent's motion for summary judgment,[2] and at the summary judgment hearing.[3] At the Massachusetts Supreme Judicial Court,

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[1] Pls.' PI Mem. at 15, *1A Auto, Inc.*, No. 15-0494E (Mass. Super. Ct. 2017), available at https://goldwaterinstitute.org/wp-content/uploads/2017/08/memo.pdf.

[2] Pls.' Cross-MSJ Resp. at 6, *1A Auto, Inc.* (Mass. Super. Ct. 2017), available at https://goldwaterinstitute.org/wp-content/uploads/2017/08/response.pdf.

[3] Tr. of Summ. J. Hr'g at 18–21, *1A Auto, Inc.* (Mass. Super. Ct. 2017), available at https://goldwaterinstitute.org/wp-content/uploads/2019/04/Transcript-re-Motion-for-Summary-Judgment-Hearing161227.pdf.

Petitioners noted the conflict in their opening brief,[4] and Respondent's brief urged the court to "conclude . . . that *Beaumont* remains binding precedent."[5] True, Petitioners did not ask the lower courts to overrule *Beaumont*, and sought to distinguish it from this case, but they had to do so because only this Court can overrule its own precedents. *See* App.13a–14a.

Second, even if Petitioners had not raised this particular *argument* below, they still could present it here because they preserved their underlying *claim* that Massachusetts' ban on business contributions violates the First Amendment. If a party has "properly presented" a claim in the lower courts, it "can make any argument in support of that claim" before this Court; "parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

That's why, in *Citizens United*, the petitioner could urge the Court to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), even though the petitioner had not argued that in the lower court. The argument was "not a new claim," but "a new argument to support what [had] been a consistent claim: that the FEC did not accord [the petitioner] the rights it was obliged to provide." *Citizens United v. FEC*, 558 U.S.

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[4] Opening Br. at 25 n.2, *1A Auto, Inc.*, 105 N.E.3d 1175 (Mass. 2018), available at http://ma-appellatecourts.org/?pdf=SJC-12413_01_Appellant_1A_Auto_Inc_Brief.pdf.

[5] Br. of Def.-Appellee at 16–17, *1A Auto*, *Inc.*, 105 N.E.3d 1175 (Mass. 2018), available at http://ma-appellatecourts.org/?pdf=SJC-12413_07_Appellee_Office_of_Campaign_and_Political_Finance_Brief.pdf.

310, 331 (2010) (internal marks and citation omitted). It is the same here: even if Petitioners did not argue below that *Beaumont* should be overruled, they can still make that argument to support their "consistent claim" that Massachusetts' contribution ban violates their First Amendment rights. *Id.*

Third, the Court may consider *Beaumont*'s continuing validity because the Massachusetts Supreme Judicial Court did address it. This Court may review any claim or issue, regardless of whether the parties raised it below, "so long as it has been passed upon" by the court below. *Id.* at 330. Here, both the majority opinion and a concurrence noted the conflict between *Beaumont* and this Court's later decisions. Both concluded that they were bound to follow *Beaumont* until this Court overrules it. App.13a–17a & n.6, 48a–49a, 60a–61a.

Citizens United confirms that the lower court's discussion of *Beaumont* allows this Court to review Petitioners' first question presented. In *Citizens United*, the lower court "did not provide much analysis" regarding a facial challenge to a statute, but noted that, for the plaintiffs to prevail on such a challenge, the court "would have to overrule *McConnell*," which it could not do because "[o]nly the Supreme Court may overrule its decisions." 558 U.S. at 330 (citations omitted). This Court then concluded that, with that brief discussion, the lower court had "'pass[ed] upon' the issue" and therefore this Court could address it. *Id.* (internal marks and citation omitted). Here, likewise, by discussing the conflict between *Beaumont* and later cases,

and concluding that it was bound by *Beaumont*, the Massachusetts court "passed upon" Petitioners' first question presented and preserved the issue.

B. The Court may consider the appropriate level of First Amendment scrutiny for discriminatory contribution limits.

The Court may also consider Petitioners' second question presented, regarding the level of scrutiny that applies to laws that impose different contribution limits on different donors.

It is beyond dispute that Petitioners argued below that their Equal Protection Clause claim calls for strict scrutiny. *See* App.29a–31a; BIO.18. Nonetheless, Respondent contends that Petitioners "waived" any argument that strict scrutiny applies to their First Amendment claim because their First Amendment arguments below applied the "closely drawn" scrutiny prescribed by *Buckley v. Valeo*, 424 U.S. 1 (1976). BIO.18–19.

Respondent errs in arguing that Petitioners were required to make a specific argument below to present it here. Again, it is enough that Petitioners preserved their First Amendment claim, which allows them to "make any argument in support of" it in this Court. *Lebron*, 513 U.S. at 379.

Moreover, in the lower courts, Petitioners were bound by Supreme Court precedent, under which First Amendment challenges to contribution limits receive

"closely drawn" scrutiny, *Buckley*, 424 U.S. at 25, while Equal Protection Clause challenges to statutory classifications that impinge on the exercise of fundamental rights are supposed to receive *strict* scrutiny, *see Plyler v. Doe*, 457 U.S. 202, 217–18 (1982). Unlike the lower courts, this Court can harmonize these lines of cases and avoid the anomalous situation in which the level of scrutiny discriminatory contribution limits receive depends on whether a plaintiff formulates a claim under the First Amendment or the Equal Protection Clause. *See* Pet.31–32. Thus, in seeking strict scrutiny under both constitutional provisions, Petitioners appropriately ask this Court to do what the lower courts could not.[6]

II. Proposed regulations will not inhibit this Court's review.

Regulations the Massachusetts Office of Campaign and Political Finance ("OCPF") has proposed do

[6] Contrary to Respondent's suggestion, the Court would not have to overrule *Buckley* to apply strict scrutiny to Petitioners' First Amendment claim. *See* BIO.19. Lower courts have assumed that *Buckley*'s "closely drawn" scrutiny applies to First Amendment challenges to contribution limits that treat some donors better than others because *Buckley* did not say otherwise. But this Court can clarify that *Buckley* does not control without overruling it. *Cf. McCutcheon v. FEC*, 572 U.S. 185, 200, 202 (2014) (plurality opinion) (concluding that *Buckley*'s approval of a statute's aggregate contribution limits in "three sentences . . . that were written without the benefit of full briefing or argument on the issue" "[did] not control" a First Amendment challenge to a later statute's aggregate limits).

not threaten to "inhibit" this Court's review of the questions presented. *See* BIO.19–21.

To review, Massachusetts currently bans for-profit business entities from making political contributions, Mass. G. L. c. 55, § 8, but allows unions and nonprofits to do so without registering as "political committees," as long as their contributions and independent expenditures in a given year do not exceed the lesser of $15,000 or 10 percent of their revenues for the previous calendar year. Mass. Office of Campaign & Political Fin. Interpretive Bulletin No. OCPF-IB-88-01 at 4 (Sept. 1988, rev. May 9, 2014).[7] Although the lower court questioned the extent to which Massachusetts authorizes union and nonprofit contributions, App.31a n.10, the state officials responsible for enforcing the law (Respondent and OCPF) have long held the law does allow them. *See* BIO.5. Unions therefore make substantial political contributions in Massachusetts. *See* Amicus Br. Fiscal Alliance Found. at 8–20.

The regulations OCPF is considering would not change any of this. The ban on business contributions would remain, and unions and nonprofits could still make contributions of $15,000 or 10 percent of the organization's gross revenues for the previous year, whichever is less, without being regulated as "political committees." BIO.20. The only notable difference would be that, before reaching the $15,000 or 10 percent threshold, organizations' contributions would be

[7] http://files.ocpf.us/pdf/legaldocs/IB-88-01.pdf.

subject to the same limits that apply to individuals—e.g., a limit of $1,000 per year to a candidate. *Id.*

Thus it is beyond dispute that the proposed regulations would not affect the Court's analysis of the first two questions presented, which concern: (1) whether *Beaumont* should be overruled; and (2) the scrutiny applicable to laws that restrict some political donors more than others. And the proposed regulations would not affect the Court's ability to address Petitioners' third question presented—regarding the merits of their First and Fourteenth Amendment claims—either. Contrary to Respondent's suggestion, BIO.19, the regulations would not significantly affect Petitioners' "underinclusiveness" arguments because the fundamental underinclusiveness problem, and Petitioners' injury, would remain: the state would still allow unions and nonprofits to make substantial political contributions while completely prohibiting business entities from making contributions.

But most importantly, mere *proposed* regulations that the OCPF might never adopt—and which would not eliminate Petitioners' constitutional injuries—are not sufficient reason to avoid addressing the important constitutional problems this case presents. *See* Reply Brief for Petitioner at 3–5, *Knight v. Comm'r*, 552 U.S. 181 (2008) (No. 06-1286), 2007 WL 1594328 (June 4, 2007) at *3–5 (discussing cases in which certiorari was granted notwithstanding pending legislation to address issue). If a mere *proposal* to change a law or regulation could defeat a petition for certiorari—even, as in this case, a proposed change that would not moot a

plaintiff's claims—then governments could easily evade review of virtually any challenged law or regulation.

III. This case presents important constitutional questions that warrant this Court's review.

Respondent's brief casts no doubt on the importance of the constitutional questions presented.

A. The Court should overrule *Beaumont* to eliminate a conflict within its campaign-finance jurisprudence and protect First Amendment rights.

Respondent's argument that Petitioners' first question presented does not warrant review because lower courts agree "that *Beaumont* remains controlling precedent," BIO.11–14, misses the point. Petitioners are not asking this Court to resolve a circuit conflict regarding whether *Beaumont* remains on the books, but rather a conflict between *Beaumont* and this Court's subsequent campaign-finance cases regarding how to analyze challenges to bans on corporate contributions. *See* Pet.6–11. It is important for the Court to resolve that conflict because those later decisions provide stronger protection for the First Amendment rights of political donors, including corporations, which means that lower courts that continue to follow *Beaumont*—as all will until the Court overrules it—are not sufficiently safeguarding First Amendment rights. *See* Pet.11–20.

Respondent's efforts to downplay the conflict between *Beaumont* and later decisions also fail.

There is no basis for Respondent's assertion that *Beaumont*'s approval of the federal corporate contribution ban was "based in large part" on the government's legitimate anti-corruption interests. BIO.23. On the contrary, *Beaumont* upheld the federal ban based in part on two purported government interests, and on a broad definition of "corruption," that this Court has since repudiated. *See* Pet.8–11. *Beaumont* did not say how "large" of a "part" any factor played in its analysis. *See Beaumont*, 539 U.S. at 152–63.

Respondent's assertion that "there was no dispute" in *Beaumont* "that, under closely drawn scrutiny, the federal ban was justified by the risk of *quid pro quo* corruption alone, irrespective of the shareholder-protection and antidistortion interests rejected in *Citizens United*," BIO.24, is false. In fact, *Beaumont* referenced *quid pro quo* corruption only once, to state that the definition of "corruption" it applied was *not* limited to "*quid pro quo* agreements, but also [included] undue influence on an officeholder's judgment, and the appearance of such influence." *Beaumont*, 539 U.S. at 156. And *Beaumont* did not say whether any of the government interests it cited to uphold the statute would have independently sufficed. *See id.* at 152–63.

Respondent also lacks any basis for stating that Petitioners have "suggest[ed] that *Citizens United* categorically prohibited all campaign finance regulations

applicable to corporations." BIO.25. The question is not whether the government may ever regulate corporations' campaign activity; Petitioners' first question presented concerns only whether courts should continue to *automatically* uphold *any* ban on corporate (or business) contributions under *Beaumont* or should subject such bans to the rigorous scrutiny that more recent decisions prescribe. *See* Pet.11–17.

Respondent has presented no reason why *Beaumont* should continue to control challenges to bans on business contributions. *Stare decisis* should not prevent the Court from overruling *Beaumont*, *see* BIO.25–26, because more recent decisions have "eroded the decision's underpinnings and left it an outlier among [the Court's] First Amendment cases," *Janus v. AFSCME*, 138 S.Ct. 2448, 2482 (2018); because it represents an "anomaly" in conflict with both earlier and later decisions; and because the state has no legitimate reliance interest in violating First Amendment rights. *See* Amicus Br. Liberty Justice Center at 4–13. Indeed, "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights," which is why the "Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Janus*, 138 S. Ct. at 2478.

B. The Court should ensure that discriminatory contribution limits receive meaningful scrutiny.

Respondent argues review of Petitioners' second question presented is not warranted because lower courts consistently apply *Buckley*'s "closely drawn" scrutiny to "laws that impose differing contribution restrictions" under both the First Amendment and the Equal Protection Clause. BIO.14–15. But to the extent that is true, it is a reason why the Court *should* grant certiorari, because it means that courts are failing to adequately protect fundamental constitutional rights due to lack of direction from this Court. *See* Pet.26–29.

Lower courts have not been entirely consistent, however. Courts applying "closely drawn" scrutiny do not typically require the government to justify its decision to impose different limits on different donors. Instead, they simply analyze whether a restriction on a given class of donors, considered alone, is unconstitutionally low. *See* Pet.23–25. In *Riddle v. Hickenlooper*, however, the Tenth Circuit required the government to specifically justify its discrimination. 742 F.3d 922, 928–30 (10th Cir. 2014). And in *Russell v. Burris*, 146 F.3d 563, 571–72 (8th Cir. 1998), the Eighth Circuit applied strict scrutiny in an Equal Protection Clause challenge to a statute that imposed different limits on regular PACs and "small-donor" PACs.

Respondent's attempt to dismiss *Russell* fails. According to Respondent, *Russell* was based on *Carver*

v. Nixon, 72 F.3d 633 (8th Cir. 1995), which was later "corrected" in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 386–89 (2000). BIO.16–17. But *Russell* applied strict scrutiny to an equal protection claim, based *not* on *Carver*'s First Amendment analysis, but on *Austin*'s equal protection analysis, particularly the principle that "the right to engage in political expression is fundamental to our constitutional system," which means that "statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Russell*, 146 F.3d at 572 (quoting *Austin*, 494 U.S. at 666). And *Austin*'s equal protection analysis remains relevant: as a concurring opinion below recognized, "it is far from clear whether the reasoning of *Austin*," to the extent *Citizens United* did not overrule it, "will allow [campaign-contribution restrictions that make] distinctions among business corporations, nonprofits, and unions, and if so, how." App.59a–60a. Only this Court can answer that question.

Finally, there is no merit in Respondent's argument that this issue is unimportant because discriminatory contribution limits simply reflect "policymakers . . . focus[ing] on their most pressing concerns," as approved in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015). BIO.30, quoting *Williams-Yulee*, 135 S. Ct. at 1668. *Williams-Yulee* is inapposite because it involved a challenge to a ban on judges' personal solicitation of contributions, not a challenge to discriminatory contribution limits. *Id.* at 1663–64. The plaintiff there argued, among other things, that the ban was

underinclusive because it did not "restrict other speech equally damaging to judicial integrity and its appearance," such as solicitation by a judge's campaign committee (run by others) and notes from a judge thanking donors for contributions. *Id.* at 1668.

Williams-Yulee's solicitation ban is not comparable to the discriminatory limits at issue here because, among other reasons, the solicitation ban "applie[d] evenhandedly to all judges and judicial candidates," *id.*, and did not impose different restrictions on different participants in the political process, as the law at issue here does. Unlike Massachusetts' discriminatory contribution limits, the law in *Williams-Yulee* posed no threat of undue government intrusion into the political process. *Cf.* Pet.26–33.

Where that threat is absent, it might make sense to say, as *Williams-Yulee* did, that a restriction on speech "need not address all aspects of a problem in one fell swoop" and may instead "focus on [legislators'] most pressing concerns." 135 S. Ct. at 1668. But that makes no sense where, as with Massachusetts' discriminatory limits, restricting the speech of one political group will benefit competing groups. Respondents—and too many lower courts—fail to appreciate this distinction. *See* App.26a (quoting the *Williams-Yulee* language to uphold Massachusetts' discrimination against business entities); *Ill. Liberty PAC v. Madigan*, 904 F.3d 463, 470 (7th Cir. 2018) (quoting the same language to uphold Illinois's different limits for different classes of contributions).

To shrug off limits that restrict some donors but not others as "addressing one problem at a time," as these courts have, is to ignore the First Amendment harm such discriminatory limits cause. *See* Pet.26–33. This Court should therefore grant certiorari to ensure that discriminatory limits receive meaningful scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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