

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
SUPREME JUDICIAL COURT OF MASSACHUSETTS

**SUPPLEMENTAL BRIEF FOR THE
RESPONDENT**

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This supplemental brief, filed pursuant to Rule 15.8 of this Court, brings to the Court's attention the final regulations that were submitted to the Massachusetts Secretary of State by the Office of Campaign and Political Finance ("OCPF") on Thursday, May 9, 2019. *See* Supplemental Appendix (970 Code Mass. Regs. 1.22). The draft version of those regulations was referenced in the respondent's brief in opposition to the petition for certiorari at pages 19-21. *See* Br. in Opp. at 20 (explaining that OCPF undertook rulemaking as a result of state-law questions raised by the decision below, *see* Pet. App. 31a-32a n.10).

The final regulations address when entities, other than business entities governed by Mass. Gen. Laws ch. 55, § 8, become “political committees” under Mass. Gen. Laws ch. 55, § 1, and therefore become subject to annual limits on campaign contributions set by Massachusetts law. Under the final regulations, organizations that do not receive money for political purposes become “political committees” once they have made campaign contributions exceeding \$15,000 or 10% of their gross revenues for the prior year, whichever is less. *See* 970 Code Mass. Regs. 1.22(3)(b). Before exceeding that incidental threshold, however, these organizations are subject to the same annual contribution limits applicable to individuals: a \$1,000 limit for contributions to each candidate, a \$500 limit for contributions to each political action committee, and a \$5,000 limit for contributions to political party committees of any one political party. *See id.* § 1.22(2). After exceeding that incidental threshold, these organizations must register with OCPF as political action committees, and they become subject to the contribution limits on political action committees imposed by Mass. Gen. Laws ch. 55, § 6. *See* 970 Code Mass. Regs. 1.22(4).

In accordance with Mass. Gen. Laws ch. 30A, § 6, OCPF’s final regulations will become effective upon their publication in the *Massachusetts Register*, which will occur on May 31, 2019. Any challenge to the final regulations under the Massachusetts Administrative Procedure Act, Mass. Gen. Laws ch. 30A, § 7, would occur after that effective date. Should any entity bring suit to challenge the regulations while this petition remains pending, OCPF will promptly inform the Court.

The submission of the final regulations, not yet reviewed by any Massachusetts court, does not affect the reasons set forth in the brief in opposition why this Court should deny review. In short, it remains the case that no split in authority exists on any of the questions presented, the petition is a poor vehicle for addressing those questions, and the Supreme Judicial Court correctly applied *FEC v. Beaumont*, 539 U.S. 146 (2003), as well as this Court's more recent decisions, in upholding the constitutionality of Mass. Gen. Laws ch. 55, § 8.

Respectfully submitted,

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Supplemental Appendix

Revised 970 CMR 1.22: Definition of “Political Committee,” and Identification of Funding Sources (5/9/19)

- (1) General Applicability. This regulation is issued to:
 - (a) Define contribution limits that apply to organizations that are not political committees;
 - (b) Define when an organization must register as a “political committee,” and provide rules for groups that do not engage in political fundraising but which make expenditures or contributions from their existing funds to support or oppose Massachusetts state or local candidates, PACs, party committees or ballot questions (for purposes of 970 CMR 1.22, “expenditures” or “contributions”); and
 - (c) Establish rules to ensure disclosure required of transfers of money or other things of value by individuals or organizations that are formed and operate as tax exempt organizations as well as by any other entity that is not organized as a Massachusetts political committee, where funds are ultimately used to make expenditures or contributions.

(2) Limits on Contributions by Organizations Prior to Exceeding the Incidental Threshold

Prior to exceeding the incidental threshold defined in 970 CMR 1.22(3)(b), an organization may contribute up to the following amounts in a calendar year: \$1,000 to a candidate's committee; \$500 to a PAC (other than an independent expenditure PAC); and \$5,000 in the aggregate during a calendar year to all political party committees of any one political party. Such contributions may not be made by business entities prohibited from contributing by M.G.L. c. 55, § 8, or by associations funded, in whole or in part, by such entities.

(3) When an Organization Must Register as a Political Committee.

An organization must register as a political committee if it: (1) receives contributions, as defined in 970 CMR 1.22(3)(a) or (2) makes contributions to candidates, PACs (other than independent expenditure PACs) or party committees that exceed the incidental threshold defined in 970 CMR 1.22(3)(b).

(a) Becoming a Political Committee - Receipt of Contributions. An organization, including a political committee registered in a non-Massachusetts jurisdiction, that receives money or anything of value to make contributions to Massachusetts candidates or political

committees, including ballot question committees or independent expenditure PACs, or to make independent expenditures, is a political committee pursuant to M.G.L. c. 55, § 1. Such an entity shall organize as a political committee and file campaign finance reports disclosing all contributions received, all expenditures made, and all liabilities incurred for the purpose of making contributions or independent expenditures. A determination of whether an organization has received contributions and is required to organize and file campaign finance reports as a political committee may depend on an assessment of various factors, including, but not limited to, the timing and content of solicitations and the timing of receipts.

(b) Becoming a Political Committee – Making Contributions in Excess of the Incidental Threshold. If an organization does not receive money or anything of value to make contributions to Massachusetts candidates or political committees, including ballot question committees or independent expenditure PACs, or to make independent expenditures, but uses its existing funds to make contributions that are more than incidental when compared to the organization's revenues, it must register as a political committee and comply with 970 CMR 1.22(4). "More than incidental," for purposes of 970 CMR 1.22, means making contributions in any calendar year that exceed, in the aggregate,

either \$15,000 or 10% of the organization's gross revenues for the previous year, whichever is less.

(c) Political Activity Excluded From Incidental Threshold Analysis. The following activity by an organization is not included in calculating whether the organization has made contributions in excess of the incidental threshold: independent expenditures, contributions to independent expenditure PACs, expenditures to support or oppose ballot questions, contributions to ballot question committees, or contributions or expenditures made to influence a federal election or election for office in another state.

(4) Consequences of Making Contributions in Excess of the Incidental Threshold.

(a) Registration. An organization that is not a registered political committee, which makes contributions to candidates, political action committees (not including independent expenditure PACs) and political party committees that exceed the incidental threshold defined in 970 CMR 1.22(3)(b), must register as a PAC immediately upon exceeding the threshold.

(b) Disclosure. After exceeding the incidental threshold, the organization must file reports as a PAC to itemize all contributions received and expenditures made, as those terms are defined by M.G.L. c. 55, for the calendar year in which the threshold was exceeded as well as during the

following calendar year, and must remain organized as a PAC until the first year after the calendar year in which its contributions do not exceed the incidental threshold. In addition, receipts and disbursements of the organization, that are not contributions or expenditures as defined by M.G.L. c. 55, must also be disclosed, in the aggregate (not itemized), in the new PAC's campaign finance reports.

(c) Non-political Expenditures. An organization that exceeds the incidental threshold defined in 970 CMR 1.22(3)(b) but that does not receive contributions may make expenditures other than for political purposes without restriction under 970 CMR 1.22.

d) Limits. The new PAC would be subject, during the remainder of the calendar year in which the incidental threshold is exceeded, and at least for the next calendar year, to the limits on contributions that may be made by PACs, as defined in M.G.L. c. 55, § 6, including the \$500 limit on the amount that PACs may contribute to a candidate, and to all other limits and disclosure requirements that apply to PACs. For example, an organization that exceeds the incidental threshold in 2019 may contribute (1) \$1,000 to a particular candidate in 2019 *prior to* exceeding the threshold, and (2) no more than an additional \$500 to the candidate during 2019 *after* exceeding the threshold (for a total contribution that year of \$1,500), and (3) may also contribute no more than

\$500 to any candidate during 2020. If the incidental threshold in contributions made by the PAC is not exceeded in 2020, then the PAC may dissolve as of December 31, 2020. If the PAC dissolves as of December 31, 2020, the organization may again make contributions subject to the threshold in 2021, and would not, during 2021, be subject to the \$500 contribution limit that applies to PACs, unless the incidental threshold is exceeded in 2021.

(5) Required Verifications.

(a) Recipient Statements Regarding Preceding Year's Revenues. An organization that is not a political committee may be required by OCPF to complete and file a written disclosure that affirms that, during the year in which it made contributions, the organization did not make contributions exceeding the incidental threshold, as defined in 970 CMR 1.22(3)(b). The statement, if required, shall indicate the organization's gross annual revenue for the year prior to the year in which the contributions were made, and the amount of contributions made during the year.

(b) Statements Regarding Source of Funds. A political committee that receives a contribution from an organization, whether the organization is existing in Massachusetts or in another state, may be required by OCPF to obtain a written statement from the organization. The written statement shall verify that the organization made

the contribution solely from general treasury funds and not in any part from funds received for political purposes, *i.e.*, not received to support or oppose a candidate or candidates, a political party or a ballot question, whether in Massachusetts or elsewhere. In addition, the statement shall certify that funds provided do not, except as allowed by M.G.L. c. 55, include money derived from business or professional corporations or partnerships. If a statement is not provided to the political committee in response to its request, OCPF may require the committee to return the contribution

(c) Form and Review of Statements. The statements required by 970 CMR 1.22 must be submitted under penalties of perjury. All statements and reports filed by organizations under 970 CMR 1.22 shall be verified by an officer of the organization with knowledge of the organization's financial activities. The organization submitting a statement shall be entitled to a presumption that the statement is accurate, and the organization may submit additional evidence and argument in support of that statement. OCPF shall be entitled to request or subpoena evidence from the organization with respect to the accuracy of the statement. OCPF may conclude that the statement is not credible and require that a contribution be returned only upon a written finding, based on substantial evidence, and only

after having provided the organization both notice and an opportunity to be heard.

- (6) Organizations Receiving Contributions to Influence Ballot Questions. An organization that receives money or other things of value to support or oppose a ballot question must organize as a ballot question committee.
- (7) Organizations Receiving Donations to Make Electioneering Communications. If an organization receives money or other things of value to make electioneering communications, it must disclose its donors and electioneering communication expenditures in the organization's reports of electioneering communications filed in accordance with M.G.L. c. 55, § 18F and 970 CMR 1.14. Such an organization, however, is not a political committee and does not have to register as such.
- (8) Independent Expenditure PACs. An organization, whether existing in Massachusetts or in another state, that receives money or other things of value to make independent expenditures in Massachusetts, or for the purpose of allowing another individual, group, association, corporation, labor union or other entity to make independent expenditures in Massachusetts after transfer of the money or things of value to such individual or entity, is an independent expenditure political action committee.

(a) Registration and Disclosure. Independent Expenditure PACs must organize prior to soliciting or receiving any money or other things of value for that purpose, pursuant to M.G.L. c. 55 and 970 CMR 2.17: *Independent Expenditures*. Such independent expenditure political action committees are required to file campaign finance reports disclosing all contributions received, all expenditures made, and all liabilities incurred for the purpose of making contributions or independent expenditures in Massachusetts, and must also maintain detailed accounts of all campaign finance activity pursuant to M.G.L. c. 55, §§ 5 and 18, and 18A.

(b) Contributions by Independent Expenditure PACs to Other Independent Expenditure PACs. An independent expenditure PAC may contribute to another independent expenditure PAC if making the contribution is consistent with the donating committee's statement of purpose. The independent expenditure PAC making the contribution to the recipient independent expenditure PAC must file seven business day and 24-hour IE PAC reports, based on the date of the contribution to the IE PAC, with the director in accordance with the requirements of M.G.L. c. 55, § 18A(d).

(9) True Source of Contributions Must be Disclosed. No organization or individual may directly or indirectly make a contribution or

independent expenditure, or an electioneering communication, in any manner for the purpose of disguising the true origin of the contribution, independent expenditure, or electioneering communication.

(10) Identification of Contributors and Donors.

(a) Funds Used to Make Contributions or Independent Expenditures. There shall be a rebuttable presumption that a donor “knows or has reason to know” that a donor’s funds will be used to make a contribution or independent expenditure if:

1. Such donations are received within thirty days prior to an organization’s making a contribution or an independent expenditure; and
2. The organization’s general treasury account as of the date of the donation’s receipt contained insufficient funds to cover the contribution or independent expenditure.

(b) Funds Used to Make Electioneering Communications. There shall be a rebuttable presumption that funds received by an organization making electioneering communications were received by the organization for the purpose of making electioneering communications if:

1. Such donations are received within thirty days prior to an organization's making an electioneering communication; and

2. The organization's general treasury account as of the date the donation's receipt contained insufficient funds to cover the electioneering communication.

(c) Rebuttal of Presumption. Prior to requiring disclosure of donations in accordance with M.G.L. c. 55 §§ 18, 18A or 18F, and 970 CMR 1.22(10), OCPF shall provide the donor and organization with an opportunity to provide evidence and argument to rebut the presumption and to establish that it is more likely than not that the donor did not know the general treasury account balance of the organization and did not intend that the donation be used to make a contribution, independent expenditure, or electioneering communication.

(11) Identification of Contributors and Donors When General Treasury Funds are Insufficient.

(a) If an organization makes a contribution, electioneering communication, or independent expenditure that is not fully paid from general organizational income, it must identify additional donors to the extent that general treasury funds and those donors described in 970 CMR 1.22(10) did not provide the full balance of the funds used to make the contribution, electioneering communication, or independent expenditure. In

such cases the organization shall identify and report donors using a “last in, first out” accounting method, until a sufficient number of donors have been identified and reported to account for the full balance of the contribution, electioneering communication or independent expenditure.

(b) An organization that makes independent expenditures or contributions need not report a donor in accordance with M.G.L. c. 55, §§ 18 and 18A, if the organization has evidence clearly establishing that the donor did not intend that the payment would be used to make a contribution or independent expenditure.

(c) An organization receiving funds to make an electioneering communication must disclose each donor providing funds used to make the electioneering communication, in accordance with M.G.L. c. 55, § 18F, if the donor provides in excess of \$250 in the aggregate during a calendar year.

(12) Required Recordkeeping. Detailed accounts of all campaign finance activity shall be maintained pursuant to M.G.L. c. 55, §§ 5 and 18. Such accounts must be provided to the director upon request. An organization or individual making independent expenditures or electioneering communications, or soliciting, or receiving money or anything of value to make contributions, independent expenditures or electioneering communications in Massachusetts must maintain

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detailed records regarding the funds raised, expenditures, or electioneering communications made using funds or in-kind contributions raised, including all records necessary to demonstrate the source of the funds. This record-keeping requirement exists whether the funds or things of value used to make contributions, independent expenditures, or electioneering communications are contributions received for that purpose or funds from the organization's general treasury.