No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Massachusetts bans for-profit businesses from contributing money to political candidates or committees, but allows unions and nonprofits to do so. Mass. Gen. Laws c. 55, § 8.

The lower court rejected Petitioners' First Amendment challenge to this ban, relying on *FEC v. Beaumont*, 539 U.S. 146 (2003), although it acknowledged that *Beaumont*'s reasoning conflicts with recent decisions. It also denied Petitioners' Equal Protection Clause challenge, concluding that contribution limits that satisfy intermediate First Amendment scrutiny cannot receive strict scrutiny, and therefore must be upheld under the Fourteenth Amendment.

This case therefore presents the questions:

1. Should *Beaumont* be overruled because it conflicts with more recent decisions of this Court and insufficiently protects freedom of speech and association?

2. Should contribution limits that impose different limits on different classes of donors receive strict scrutiny?

3. Does Mass. Gen. Laws c. 55, § 8 violate the First Amendment and the Equal Protection Clause by banning businesses, but not unions and non-profit organizations, from making political contributions?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Plaintiffs-Appellants in the court below, are 1A Auto, Inc., and 126 Self Storage, Inc., both Massachusetts for-profit corporations.

Respondent, who was Defendant-Appellee in the court below, is Michael Sullivan, sued in his official capacity as Director of the Massachusetts Office of Campaign and Political Finance.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations, and no publicly-held company owns 10 percent or more of either company's stock.

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JURISDICTION

The Massachusetts Supreme Judicial Court entered judgment on September 6, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution are reproduced in the Appendix at App. 118a. The relevant statute is reproduced in the Appendix at App. 120a–121a.

STATEMENT OF THE CASE

This case presents a First Amendment and Equal Protection Clause challenge to a Massachusetts statute that bans for-profit corporations and other business

entities—but not unions and non-profit organizations—from making political contributions.

A. Massachusetts's ban on business—but not union and non-profit—political contributions

Massachusetts forbids for-profit corporations and other business entities from making any political contributions, directly or indirectly. Specifically, Mass. G. L. c. 55, § 8 prohibits businesses from spending money, or giving anything else of value, "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." This means that businesses cannot give direct financial support to a candidate, nor can they establish or administer a separate political action committee ("PAC") that does so—nor may they contribute to a PAC (other than an independent-expenditure PAC). App. 5a.

On the other hand, Massachusetts has not banned political contributions by unions, non-profit corporations, and other non-business associations. These entities are not subject to any disclosure requirements or contribution limits as long as 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).[1]

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

Once a union reaches the $15,000 threshold, it is subject to the same contribution limits and reporting requirements that apply to PACs that make contributions to candidates and other political committees. *Id.* at 4–7. Unlike businesses, unions may also form and control their own direct-contribution PACs, whose spending is separate from and in addition to the $15,000 threshold on a union's spending. *Id.* at 3; Mass. Office of Campaign & Political Fin. Advisory Op. No. AO-97-21 at 1–3 (Oct. 30, 1997).[2]

B. Proceedings below

On February 24, 2015, Petitioners—two Massachusetts corporations that wish to make political contributions—filed a complaint in the Massachusetts Superior Court, alleging that the state's ban on business contributions, but not union and non-profit contributions, violates the First Amendment's guarantees of freedom of speech and freedom of association, the Fourteenth Amendment's guarantee of equal protection of law, and analogous provisions of the Massachusetts Constitution. App. 75a–76a. On June 3, 2015, Petitioners moved for a preliminary injunction to enjoin the ban on corporate contributions, which the court denied on August 21, 2015. App. 76a, 107a–117a.

After conducting discovery, the parties filed cross-motions for summary judgment. On April 4, 2017, the court denied Petitioners' motion and granted Respondent's motion. App. 63a–106a. Petitioners appealed that

[2] http://files.ocpf.us/pdf/legaldocs/AO-97-21.pdf.

judgment to the Massachusetts Supreme Judicial Court, which affirmed it on September 6, 2018. App. 1a–61a.

The court concluded that *FEC v. Beaumont*, 539 U.S. 146 (2003)—in which this Court upheld a federal statute banning direct political contributions by corporations, unions, and other organizations—required it to reject Petitioners' First Amendment claim and their analogous claim under the state constitution. App. 9a–28a. The court acknowledged, however, that *Beaumont*'s reasoning conflicts with more recent campaign-finance decisions in which this Court has narrowed the purposes that campaign-finance restrictions may serve. App. 14a, 15a n.6. The Court further concluded that a campaign contribution limit that passes intermediate First Amendment scrutiny is not subject to strict scrutiny under the Equal Protection Clause, and it therefore rejected Petitioners' Fourteenth Amendment claim and the analogous state-law claim as well. App. 28a–33a.

SUMMARY OF REASONS FOR GRANTING THE PETITION

In recent years, this Court has clarified its campaign-finance jurisprudence to strengthen protections for First Amendment rights. Most significantly, it has declared that there is only one purpose campaign-finance restrictions may constitutionally serve: preventing actual or apparent *quid pro quo* corruption. *McCutcheon*

v. FEC, 572 U.S. 185, 192, 206 (2014) (plurality opinion). And the Court has emphasized that the First Amendment stands against laws that impose different restrictions on different kinds of speakers. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Such discriminatory rules are "distinct, different, and [even] more problematic" than across-the-board restrictions on speech. *Riddle v. Hickenlooper*, 742 F.3d 922, 931–32 (10th Cir. 2014) (Gorsuch, J., concurring).

Although the Court has spoken clearly on these principles, lower courts nonetheless lack clarity on how they should analyze challenges to certain types of campaign-finance restrictions that the Court's recent decisions have not directly addressed. As a result, they are insufficiently protecting First and Fourteenth Amendment rights.

For example, the lower court and others have recognized that this Court has repudiated the purported government interests that it cited to uphold the federal ban on corporate campaign contributions in *Beaumont*, 539 U.S. 146—but they have nonetheless considered themselves bound to follow *Beaumont*, and to uphold any bans on corporate contributions, until the Court expressly overrules it. And although this Court has condemned laws that favor some political speakers over others, the lower courts still give discriminatory contribution limits minimal scrutiny for lack of specific guidance from this Court.

This case presents an opportunity for the Court to align its jurisprudence on corporate contributions and

discriminatory contribution limits with the principles that more recent campaign-finance decisions have recognized are essential for the protection of fundamental constitutional rights.

ARGUMENT

I. The Court should overrule *Beaumont* because it directly conflicts with more recent decisions and insufficiently protects First Amendment rights.

The Court should grant this petition and overrule *Beaumont* because its reasoning directly contradicts the Court's more recent campaign-finance decisions, and courts that apply *Beaumont* to uphold bans on corporate contributions insufficiently protect businesses' freedom of speech and association.

A. This Court has already rejected *Beaumont*'s reasoning in more recent decisions that have limited the government's ability to restrict political contributions and corporate political speech.

Beaumont should be overruled because the Court has repudiated key premises of its reasoning in more recent decisions that have limited the interests that states may accomplish by means of campaign contribution limits, and that have provided stronger protection for political speech by corporations.

Beaumont assumed the government could ban corporate campaign contributions based on several purported government interests, 539 U.S. at 152–56, but the Court has since made clear that there is only one government interest important enough to justify campaign-finance restrictions: "preventing corruption or the appearance of corruption," *McCutcheon*, 572 U.S. at 206; *see also Davis v. FEC*, 554 U.S. 724, 741 (2008) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." (citation omitted)). The Court has also clarified that the "corruption" campaign-finance rules may target is limited to one specific type: "*quid pro quo* corruption"—i.e., "a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192 (citing *Citizens United*, 558 U.S. at 359). Therefore, under the intermediate level of First Amendment scrutiny that *Buckley v. Valeo*, 424 U.S. 1 (1976), has prescribed for campaign contribution limits, the government may justify a contribution limit only by showing that it serves the government's interest in preventing actual or apparent *quid pro quo* corruption and is closely drawn to do so while avoiding unnecessary abridgment of First Amendment rights. *See McCutcheon*, 572 U.S. at 199 (citing *Buckley*, 424 U.S. at 25).

In upholding the federal statute prohibiting corporations (and other organizations) from directly contributing to federal political candidates, *Beaumont* did not find that the statute at issue was closely drawn to prevent actual or apparent *quid pro quo* corruption.

Instead, it cited four supposed governmental interests the ban served: (1) preventing corporations from using special advantages to amass wealth and exert outsize influence over the political process; (2) protecting dissenting corporate shareholders; (3) preventing corruption, broadly defined to include not only *quid pro quo* corruption but also "influence"; and (4) preventing corporations from being used to circumvent other contribution limits. 539 U.S. at 152–56. Since *Beaumont*, this Court has expressly, entirely repudiated the first two purported interests as legitimate bases for campaign finance rules; it has limited the anti-corruption interest to include *quid pro quo* corruption alone; and it has applied "rigorous" review to ensure anti-circumvention justifications are "closely drawn." *McCutcheon*, 572 U.S. at 199.

1. *Beaumont* relied on two purported government interests the Court repudiated in overruling *Austin*.

The first two purported interests *Beaumont* cited were preventing corporate wealth from distorting the political process and protecting dissenting corporate shareholders—both of which the Court had endorsed as legitimate government interests in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658–59 (1990), but which it later repudiated in *Citizens United*, 558 U.S. at 350–51, 361–62, and *McCutcheon*, 572 U.S. at 208.

Beaumont said the government could limit corporate contributions in order to counter special advantages—"such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets"—that supposedly allow corporations "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Beaumont*, 539 U.S. at 153–54 (quoting *Austin*, 494 U.S. at 659; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)). In identifying this purported governmental interest, *Beaumont* quoted and cited *Austin*, in which the Court held that a state could prohibit corporations from making independent expenditures supporting or opposing candidates for state office because corporations' wealth, resulting from state-provided advantages in the marketplace, could allow them to "distort[]" the political process through political spending in amounts "that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. 659–60.

But *Citizens United* overruled *Austin* and rejected this "anti-distortion" rationale as a basis for campaign-finance restrictions. *Citizens United*, 558 U.S. at 350–51. Although corporations might enjoy "special advantages," it was "'rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'" *Id.* at 351 (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)). It is also "irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas,'"

because "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech," which the First Amendment protects "even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." *Id.* (quoting *Austin*, 494 U.S. at 660). Thus the "distortion" rationale offered by *Beaumont* is no longer applicable.

Beaumont also cited a purported governmental interest in protecting dissenting shareholders from having corporate money used "to support political candidates to whom they may be opposed." 539 U.S. at 154. But *Citizens United* also rejected that rationale, finding "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" 558 U.S. at 361–62 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

But because *Citizens United* involved a federal ban on corporate independent expenditures, rather than corporate contributions, the Court was not called upon to address the continuing validity of *Beaumont*. *See Citizens United*, 558 U.S. at 359. Still, *McCutcheon* has since made clear that, regardless of whether the government is limiting expenditures *or* contributions, it may *only* do so when such limits are properly tailored to prevent actual or apparent *quid pro quo* corruption. 572 U.S. at 192, 206–09.

2. *Beaumont* applied a broad definition of "corruption" that this Court has since rejected.

Another supposed government interest *Beaumont* relied on was preventing "corruption"—defined broadly to include not only "*quid pro quo* agreements, but also . . . undue influence on an officeholder's judgment, and the appearance of such influence." 539 U.S. at 156. But the Court has since rejected that definition and has made clear that the government may not restrict political speech, including contributions, to prevent corporations (or anyone else) from gaining "access" to or "influence" over officeholders. *McCutcheon*, 572 U.S. at 208; *Citizens United*, 558 U.S. at 359. "Favoritism and influence are not avoidable in representative politics," and to allow the government to try to prevent "influence" would be "at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.* (internal marks and citations omitted).

B. Lower courts continue to assume that *Beaumont* requires them to uphold any corporate contribution ban because the Court has not overruled it.

Although several courts have noticed the conflict between *Beaumont*'s reasoning and this Court's more recent campaign-finance jurisprudence, lower courts have continued to assume that *Beaumont* requires them to uphold laws banning corporate contributions because the Court has not explicitly overruled it.

The court below, for one, acknowledged that "the landscape of campaign finance law has changed significantly since *Beaumont*" and that the Court has repudiated at least two of the governmental interests *Beaumont* cited. App. 14a, 15a n.6. A concurring opinion added that "it is not clear . . . how much of the reasoning of *Austin* and other Supreme Court cases such as *Beaumont* and *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) (NRWC), remain good law and how deferential the Supreme Court will be in the future to legislative choices regarding concerns about corruption even when they combine with disfavored considerations toward business corporations." App. 48a–49a. Nonetheless, the majority and the concurrence concluded that *Beaumont* still controlled, citing the "principle that, where a Supreme Court precedent 'has direct application in a case,' lower courts must follow that precedent, even if it were 'to rest on reasons rejected in some other line of decisions.' " App. 13a–14a, 60a–61a.

Similarly, in rejecting a First Amendment challenge to a Minnesota ban on corporate contributions, the Eighth Circuit stated that "*Citizens United*'s outright rejection of the government's anti-distortion rationale, as well as the Court's admonition 'that the State cannot exact as the price of [state-conferred corporate] advantages the forfeiture of First Amendment rights,' casts doubt on *Beaumont*, leaving its precedential value on shaky ground." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (internal citations omitted). But the court

concluded that, until this Court overrules it, "*Beaumont* dictates the level of scrutiny and the potential legitimacy of the interests" that the government may assert to justify a ban on corporate contributions. *Id.* at 879. The following year, the same court applied *Beaumont* to uphold Iowa's corporate contribution ban, noting that it "leav[es] to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 601 (8th Cir. 2013). Likewise, the Texas Supreme Court recently upheld a ban on corporate contributions, stating that "even if *Beaumont*'s rationale is in doubt," courts must "follow it unless and until the Supreme Court overrules it." *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 743 (Tex. 2017).

Justices of this Court have also noted the conflict between *Beaumont* and later decisions. The dissenting opinion in *Citizens United* stated that, in rejecting *Austin*'s anti-distortion rationale, the Court implicitly "overrul[ed] or disavow[ed]" *Beaumont*, which had been based on *Austin*'s "holding and rationale." 558 U.S. at 395, 439 (Stevens, J., dissenting). And the dissenting opinion in *McCutcheon* stated that requiring campaign contribution limits to target only *quid pro quo* corruption was "flatly inconsistent" with *Beaumont*'s "broader definition" of corruption. 572 U.S. at 239–40 (Breyer, J., dissenting).

On the other hand, some courts have concluded that *Citizens United* did not affect *Beaumont*'s validity because it preserved the anti-corruption and anti-circumvention interests used in *Beaumont*. *See United*

States v. Danielczyk, 683 F.3d 611, 615–19 (4th Cir. 2012); *Ognibene v. Parkes*, 671 F.3d 174, 194–97 & n.21 (2d Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124–25 (9th Cir. 2011).

These cases show that lower courts require guidance on how to analyze challenges to bans on corporate contributions in light of this Court's recent campaign-finance decisions. Unless this Court provides that guidance, lower courts will continue to apply *Beaumont*'s holding, even as some of them acknowledge that this Court has rejected key premises of *Beaumont*'s reasoning as incompatible with the First Amendment.

C. Failure to overrule *Beaumont* perpetuates discriminatory rules allowing some, but not others, to speak.

Overruling *Beaumont* is essential to ensure that courts protect political speech and freedom of association as fully as the First Amendment requires.

McCutcheon made clear that restrictions on contributions to candidates call for "rigorous" First Amendment scrutiny because a contribution is an exercise of the "right to participate in the public debate through political expression and political association": it "'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" 572 U.S. at 203 (quoting *Buckley*, 424 U.S. at 21–22). By contributing to candidates, a political donor "is participating in an electoral debate that [the Court has] recognized is 'integral to the

operation of the system of government established by our Constitution.'" *Id*. at 203–04 (quoting *Buckley*, 424 U.S. at 14).

In addition, restrictions on contributions, like political-speech restrictions generally, create a threat of government intrusion on the democratic process to favor some voices and candidates over others. *See id*. at 192–93. That threat is a key reason why contribution limits must only target *quid pro quo* corruption. "Campaign finance restrictions that pursue other objectives, . . . impermissibly inject the Government 'into the debate over who should govern.'" *Id.* at 192 (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011)).

Accordingly, courts must ensure that governments regulating campaign contributions respect "[t]he line between *quid pro quo* corruption and general influence . . . in order to safeguard basic First Amendment rights." *McCutcheon*, 572 U.S. at 209. And the Court has stated that, "'[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.'" *Id.* (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C.J.)).

The Court has made clear "that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Citizens United*, 558 U.S. at 347. As the Court has explained:

> [P]olitical speech does not lose First Amendment protection simply because its source is a

> corporation. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."

Id. at 342–43 (internal marks and citations omitted).

Yet, contrary to *McCutcheon*'s teaching, *Beaumont* took *no* care to respect the line between *quid pro quo* corruption and mere influence, stating explicitly that its definition of "corruption" encompassed *both*. 539 U.S. at 155–56. And, contrary to *Citizens United*'s teaching, *Beaumont* considered it proper to restrict corporations' speech—and deliberately curb their influence—simply because they were corporations. *Id.* at 152–55.

As a result, *Beaumont*'s analysis did not seek to ensure that the ban it upheld was closely drawn to serve the government's interest in preventing *quid pro quo* corruption. And that means that courts that continue to apply *Beaumont* to uphold state or local bans on corporate contributions, as the lower court did, are making little effort to ensure that those bans are closely drawn to prevent *quid pro quo* corruption.

Illustrating that point, the Massachusetts ban that Petitioners challenge cannot survive the First Amendment scrutiny that the Court's post-*Beaumont*

cases call for—especially given Respondent's failure to present any evidence to justify it. *See* App. 17a.

It will not suffice to assume, as the lower court did, that corporate contributions entail just *some* threat of actual or apparent corruption and that banning them must therefore be valid. App. 18a–27a. Although that sufficed in *Beaumont*, it does not satisfy the government's burden to show that the ban not only serves to prevent corruption but also is "'closely drawn to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 572 U.S. at 218 (quoting *Buckley*, 424 U.S. at 25). Even where strict scrutiny does not apply, the First Amendment "still require[s] 'a fit that is . . . not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . a means narrowly tailored to achieve the desired objective.'" *Id.* (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

Massachusetts's ban fails the "closely drawn" test for several reasons.

First, it is over-inclusive because it prohibits even contributions that pose no conceivable threat of corruption. *Buckley* upheld contribution limits based on "large" contributions' potential to corrupt, 424 U.S. at 26, but Massachusetts bans even the smallest contributions, which could not pose any threat of corruption but would allow a business to express support for a candidate and affiliate itself with the candidate's views, *see McCutcheon*, 572 U.S. at 203.

Second, it is under-inclusive because it does not apply to unions or non-profits, whose contributions have a similar potential for corruption. As a concurring opinion below noted, many jurisdictions have long restricted unions' political participation for the same reasons they have restricted corporations' participation, and few states ban corporate contributions without also banning union contributions. App. 50a–51a (collecting statutes). So it is not apparent why Massachusetts would ban contributions by one group but not the other—if its purpose is to prevent corruption. And a "law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (internal marks and citation omitted). Therefore, Massachusetts's unexplained failure to limit unions and non-profits as it limits corporations shows that the statute is not closely drawn to prevent corruption.

Third, the ban is not closely drawn to prevent circumvention of the state's limits on individuals' contributions. Respondent presented no evidence that business entities would be a practical vehicle for circumvention,[3] or that individuals ever used limited liability companies—whose political contributions remained legal in Massachusetts until 2010, *see* MA ST

[3] Incidents the lower court cited in which corporations reimbursed employees for contributions, App. 19a, do not show that individuals could use corporations to circumvent limits on individual contributions; they just show that some corporations have used individuals to violate the ban on corporate contributions.

2009, c. 28, § 33 eff. Jan. 1, 2010—to circumvent limits on individual contributions. Nor did Respondent explain why non-profit entities do not present similar circumvention risks. Without such evidence, the state cannot rely on the anti-circumvention interest to survive a First Amendment challenge. *See McCutcheon*, 572 U.S. at 220; *Free & Fair Election Fund v. Mo. Ethics Comm'n*, 903 F.3d 759, 764 (8th Cir. 2018) (striking ban on transfers between PACs where government failed to show transfers had been used to circumvent limits).

Finally, there are other measures the state could take, short of a ban, that would serve its interest in preventing corruption "while avoiding 'unnecessary abridgment' of First Amendment rights." *McCutcheon*, 572 U.S. at 221 (citation omitted). For instance, it could impose a contribution *limit* instead of a ban; it apparently deems limits sufficient to prevent corruption by unions, non-profit organizations, and PACs. Or it could require that corporations make contributions only indirectly, by operating PACs, as under federal law. *See Beaumont*, 539 U.S. at 149; *Buckley*, 424 U.S. at 28 n.31 (identifying corporate-controlled PAC option as meeting the "closely drawn" tailoring requirement).[4] Or it

[4] Forcing businesses to contribute through PACs, rather than directly, would still infringe their First Amendment rights—excessively, in Petitioners' view—because a PAC does not "allow a corporation [itself] to speak." *Citizens United*, 558 U.S. at 337. But, as discussed further in Section III below, the state cannot maintain that it has avoided unnecessary infringement of First Amendment rights when it has *not even* given businesses the PAC option that even *Beaumont* and other cases upholding restrictions

could require businesses to disclose their contributions, which would "minimize[] the potential for abuse of the campaign finance system" without "impos[ing] a ceiling on speech." *McCutcheon* 572 U.S. at 223.

But the court below found it unnecessary to even address these questions about tailoring, because it relied on *Beaumont*'s now-abrogated rationale in upholding the Massachusetts statute. Thus, this case demonstrates how courts that approve corporate contribution bans based on *Beaumont* insufficiently protect First Amendment rights, and why it is essential to overrule *Beaumont* to ensure a rigorous protection of First Amendment rights.

II. The Court should grant certiorari to ensure that contribution limits that favor some donors over others receive rigorous scrutiny under the First Amendment and the Equal Protection Clause.

The Court should also grant certiorari here to clarify its campaign-finance jurisprudence in another way: by specifying the circumstances under which the government may restrict contributions by some classes of donors more than contributions by other classes of donors.

Although this Court has broadly condemned laws that stifle or privilege select voices in the political

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on corporate political participation have considered to be an essential minimum.

process, it has not specifically addressed how courts should analyze First Amendment and Equal Protection Clause challenges to discriminatory contribution limits. As a result, courts remain "uncertain[] about the level of scrutiny the Supreme Court wishes [them] to apply" in such cases. *Riddle*, 742 F.3d at 930 (Gorsuch, J., concurring).

As a concurring opinion below observed, recent campaign finance jurisprudence casts doubt on "whether the reasoning of *Austin* will [still] allow [contribution limits that make] distinctions among business corporations, nonprofits, and unions, and if so, how," but this Court has not told courts how they should analyze contribution limits that make such distinctions in light of recent case law. App. 59a–60a.

This lack of clarity has led some courts, including the lower court here, to give contribution limits that treat some donors less favorably than others *no* meaningful scrutiny when, in light of the fundamental First Amendment and equal protection interests at stake, such limits should receive the *highest* scrutiny, or at least a form of scrutiny that requires the government to justify its discriminatory treatment of different donors. The Court should therefore grant certiorari to clarify the law and ensure that courts adequately protect First and Fourteenth Amendment rights.

A. The lower courts have not given meaningful scrutiny to contribution limits that favor some donors over others.

Although the First Amendment and the Equal Protection Clause both demand that the government treat political speakers equally, the lower court and several Circuit Courts of Appeals have given minimal scrutiny to campaign finance schemes that treat some classes of political donors more favorably than others.

"[T]he First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 558 U.S. at 340. That is because, among other reasons, "speech restrictions based on the identity of the speaker are all too often simply a means to control content," *id*., and the First Amendment prohibits government attempts to control the "relative ability of individuals and groups to influence the outcome of elections," *id.* at 350; *see also Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012) ("The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals."); *Davis*, 554 U.S. at 742 ("[I]t is a dangerous business for [the government] to use the election laws to influence the voters' choices."); *Bellotti*, 435 U.S. at 791 n.31 (1978) ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."). Again, this concern—ensuring that the government does not "impermissibly inject" itself "'into the debate over who should govern'"—is a key reason

why all campaign finance restrictions must be narrowly tailored or closely drawn to serve the government's interest in *quid pro quo* corruption and no other purpose. *McCutcheon*, 572 U.S. at 192 (quoting *Bennett*, 564 U.S. at 750).

Yet the lower court's decision gave *no* regard to the discriminatory nature of the ban Petitioners challenge. In rejecting Petitioners' First Amendment claim, the lower court simply considered whether Massachusetts's ban on business contributions, considered in isolation, could survive First Amendment scrutiny, and, relying on *Beaumont*, answered yes. App. 9a–27a. It concluded that the state's failure to ban union contributions did not render the statute fatally underinclusive because the record did not show that the legislature intended to silence businesses for the purpose of benefitting unions. App. 25a. And, the court said, even if union contributions might pose a threat of corruption that could justify banning their contributions as well, the state's failure to do so still created no constitutional problem because "the Legislature 'need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns.'" App. 26a (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015)).

The court also concluded that Plaintiffs' Equal Protection Clause claim had to fail because that claim did not invoke any greater scrutiny, and therefore could fare no better, than the First Amendment claim. App. 28a–33a.

Thus, the lower court effectively held that the government's decision to enact contribution limits that allow some people to contribute money to their chosen candidates, but forbid others from doing so *does not matter at all*, as far as the First Amendment and the Equal Protection Clause are concerned, if the restriction on the disfavored party, considered on its own, would survive First Amendment scrutiny—except in the unlikely event that plaintiffs can present evidence that the legislature had some improper motive.

The Seventh Circuit recently took the same approach in rejecting a First Amendment challenge to Illinois statutes placing differing contribution limits on different classes of donors. *See Ill. Liberty PAC v. Madigan*, 904 F.3d 463, 466 (7th Cir. 2018). Like the lower court here, it concluded that the proper focus of its analysis was not the *difference* between the limits imposed on different classes of donors, but simply whether the limit on any given class of donor—standing alone—was unconstitutionally low. *Id.* at 470. And, like the lower court here, the Seventh Circuit cited *Williams-Yulee* (not a campaign-finance case) for the idea that the government may limit the speech of some political donors but not others. *Id.* (citing, among other cases, *Williams-Yulee*, 135 S. Ct. at 1668, 1671). The court then concluded that the contribution limits the state imposed on various classes of donors—considered separately—served the government's interest in preventing corruption and upheld them. *See id.* at 471–75.

Similarly, the District of Columbia Circuit concluded in *Wagner v. FEC*, 793 F.3d 1, 32 (D.C. Cir. 2015),

that if a ban on contributions by a given class of donors—considered by itself—satisfies First Amendment "closely drawn" scrutiny, then the government's failure to similarly limit other donors cannot violate the Equal Protection Clause.

The Eighth Circuit showed the same lack of concern for discriminatory limits in upholding an Iowa statute that banned corporate, but not union, political contributions. *Tooker*, 717 F.3d at 600–01. First, like the lower court here, it rejected the plaintiffs' First Amendment challenge because it concluded that *Beaumont* controlled. *Id.* Then it concluded that the plaintiffs' equal protection claim was foreclosed by *Austin*, which rejected an equal protection challenge to a statute that prohibited corporations in general, but not media corporations or other associations, from making independent expenditures supporting or opposing candidates. *Id.* at 602–03 & n.11. It relied on *Austin* in doing so, and although it acknowledged that *Citizens United* rejected *Austin*'s "anti-distortion rationale," it nonetheless concluded *Citizens United* "did not explicitly overrule *Austin*'s equal protection analysis." *Tooker*, 717 F.3d at 603 & n.11. Of course, *Citizens United* had no reason to do so; it considered a challenge to federal restrictions on corporate independent expenditures under the First Amendment alone.

On the other hand, some courts have required the government to justify statutes imposing different contribution limits on different classes by showing that such discriminatory rules are narrowly tailored or closely drawn to address differences in the potential to

corrupt flowing from a particular class's contributions. *See Riddle*, 742 F.3d at 928–30 (statute imposing different contribution limits for different classes of candidates violated the First Amendment because the government could not show that the disfavored candidates "were more corruptible (or appeared more corruptible)" than the favored candidates); *Russell v. Burris*, 146 F.3d 563, 571–72 (8th Cir. 1998) (differing limits for regular PACs and "small-donor" PACs violated the Equal Protection Clause because the government could not show they were justified by differences in potential for corruption); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 691–92 (E.D. Ky. 2016) (ban on corporate, but not union or LLC, contributions violated the Equal Protection Clause because the government could not "justify the disparate treatment").

These conflicting decisions show that courts need guidance on how to scrutinize schemes that impose lower contribution limits on some political donors than on others and that there is no need for this issue to percolate further. And these decisions show that, until this Court provides that guidance, many courts will not require the government to justify its discrimination at all.

B. The lower court's approach is inadequate to protect First and Fourteenth Amendment rights.

The analysis that the lower court and others have applied is inadequate to protect First and Fourteenth

Amendment rights. To ignore the government's differential treatment of different classes of donors is to completely disregard key reasons why this Court has subjected campaign-finance restrictions to rigorous First Amendment scrutiny: to ensure that the government does not indirectly control the content of speech by controlling who may speak, *Citizens United*, 558 U.S. at 340; to ensure that the public is not "deprive[d] . . . of the right and privilege to determine for itself what speech and speakers are worthy of consideration," *id*. at 341; and to prevent the government from "impermissibly inject[ing] [itself] 'into the debate over who should govern,'" *McCutcheon*, 572 U.S. at 192 (quoting *Bennett*, 564 U.S. at 750).

And this case illustrates well how governments that control who may speak also control the content of political speech. Businesses (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.

In addition, discriminatory limits threaten to distort the outcomes of elections. When the government imposes lower contribution limits on select donors, it is "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Davis*, 554 U.S. at 742. In Massachusetts, the state has effectively determined that

support from unions should be allowed to contribute to a candidate's success but support from businesses should not. *Cf. id.* (disapproving limits disfavoring candidates whose "strengths" include wealth or support from wealthy donors). And that, of course, violates the principle that, under our system of government, voters, not elected officials, should "evaluate the strengths of candidates competing for office." *Id.* As *McCutcheon* put it, "those who govern should be the *last* people to help decide who *should* govern." 572 U.S. at 192.

Further, the lower court's view that plaintiffs cannot receive meaningful scrutiny unless they provide evidence that the legislature actually intended to silence some political speakers to benefit others, App. 25a, has no basis in this Court's First Amendment and Equal Protection Clause jurisprudence. A statute can violate First Amendment rights regardless of whether the government "has acted with animus" toward certain speech; "discriminatory treatment is [not] suspect under the First Amendment only when the legislature intends to suppress certain ideas." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (internal marks and citation omitted). Indeed, this Court has gone out of its way to repudiate a motive-based analysis in cases where government treats some speakers differently from others. In *Reed*, 135 S. Ct. at 2228, for example, it firmly rejected the proposition that "the government's benign motive" or its "lack of 'animus'" should lighten the degree of scrutiny applied to laws that burden some speech more than others (quoting *Discovery Network*, 507 U.S. at 429). The

decision below, however, attempts to reassert this motive-based analysis by saying that a lack of animus insulates Massachusetts's discriminatory speech restriction from strict scrutiny.

The government should have the burden of justifying its decision to discriminate between speakers, regardless of whether plaintiffs present evidence of improper intent, because "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*, 572 U.S. at 210. And under the Equal Protection Clause, plaintiffs are not required to prove that the government had illicit intentions where, as here, a statute contains a discriminatory classification that impinges on fundamental rights. *See Plyler v. Doe*, 457 U.S. 202, 216–17 (1982); *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985).

If the First Amendment or the Equal Protection Clause prohibits *any* type of campaign contribution restriction, it should be *this* kind: one that allows speech by one class of political donors and wholly *bans* speech by an opposing class of (would-be) donors without justification. Yet under the deferential approach used by the lower court and three federal circuits, the government's decisions to discriminate will receive minimal scrutiny, and discriminatory contribution limits will virtually never be struck down.

C. The Court should require governments to justify their decisions to favor some donors over others.

To protect First and Fourteenth Amendment rights, the Court should subject contribution limits that favor some donors over others to strict scrutiny—or at least rigorous intermediate scrutiny that requires the government to show that the differences between the limits on different classes of donors are closely drawn to account for differences in the potential for *quid pro quo* corruption inhering in those classes' contributions.

Two decisions of lower courts have already recognized that discriminatory contribution limits call for strict scrutiny. *See Russell*, 146 F.3d at 571–72; *Protect My Check*, 176 F. Supp. 3d at 691–92. Limits on campaign contributions impinge on a fundamental First Amendment right. *McCutcheon*, 572 U.S. at 227 (contribution limits "intrude . . . on a citizen's ability to exercise 'the most fundamental First Amendment activities' ") (quoting *Buckley*, 424 U.S. at 14). And classifications that "impinge upon the exercise of a 'fundamental right' " are "presumptively invidious" and therefore call for strict scrutiny. *Plyler*, 457 U.S. at 216–17; *see also Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 101 (1972).

The lower court and others, however, have refused to apply strict scrutiny to discriminatory contribution limits. In doing so, they have assumed, first, that *Buckley* requires courts to apply intermediate "closely drawn" scrutiny to any First Amendment challenge to

contribution limits and, second, that contribution limits can receive no greater scrutiny under the Equal Protection Clause than they receive under the First Amendment itself. App. 28a–31a; *see also Wagner*, 793 F.3d at 32; *Ill. Liberty PAC v. Madigan*, 902 F. Supp. 2d 1113, 1125–26 (N.D. Ill. 2012), *aff'd*, No. 12–3305, 2012 WL 5259036 (7th Cir. Oct. 24, 2012).

But there is an obvious reason why discriminatory contribution limits should receive strict scrutiny, regardless of the scrutiny that non-discriminatory limits receive: because they privilege some voices in the political arena over others and suggest that the government might be using its campaign-finance laws for that very purpose.

The question whether a limit on a given class of donors is unconstitutionally low—which was *Buckley*'s focus when it prescribed less-than-strict scrutiny for contribution limits, 424 U.S. at 23–29—is not the same as the question whether different limits on different classes of donors unduly favor some contributors over others.

As Justice Gorsuch summarized the point (without adopting or rejecting it):

> [W]hatever level of scrutiny should apply to *equal* infringements of the right to contribute in the First Amendment context, the strictest degree of scrutiny is warranted under [the] Fourteenth Amendment equal protection doctrine when the government proceeds to *discriminate* against some persons in the exercise of

> that right. On this account, there is something distinct, different, and more problematic afoot when the government *selectively* infringes on a fundamental right.

Riddle, 742 F.3d at 931–32 (Gorsuch, J., concurring).

And discriminatory limits should receive strict scrutiny regardless of whether a plaintiff challenges them under the First Amendment or under the Equal Protection Clause. Strict scrutiny is necessary to enforce the guarantees of both provisions—i.e., to ensure that people may exercise their First Amendment rights and that the government treats political speakers equally in the exercise of their fundamental rights. This would avoid the anomalous situation that some courts have sought to avoid, where the scrutiny of a challenge to discriminatory contribution limits would vary depending on which provision a plaintiff relies on in framing his or her claim. *See* App. 29a–31a.

For 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.

In sum, to adequately protect constitutional rights, courts must make governments specifically justify their decisions to discriminate by showing that their differing contribution limits for different donors are tailored to serve the government's interest in preventing *quid pro quo* corruption. And to ensure that courts do that consistently, this Court must give them

direction they currently lack. This case presents an opportunity for the Court do so.

III. Regardless of whether *Beaumont* remains good law, the lower court's decision conflicts with decisions of this Court.

Even if *Beaumont* remains good law, the lower court's decision should be overruled because it conflicts with this Court's decisions, including *Beaumont* itself.

This Court has *never* approved a ban on corporate contributions or expenditures where the government did not at least allow businesses to make the same type of contributions or expenditures indirectly by establishing, administering, and financing a separate segregated fund (i.e., a corporate PAC) for that purpose. In fact, the Court has always treated the corporate PAC option as a constitutionally mandated minimum. Yet the lower court upheld Massachusetts's statute that bans *both* direct contributions by businesses *and* contributions by business-controlled PACs, concluding that allowing businesses to make independent expenditures and contribute to independent-expenditure PACs is enough. App. 22a–23a. For that reason, the lower court's decision conflicts with this Court's decisions and should be reversed.

A. This Court has always considered the availability of a corporate-controlled PAC to be the First Amendment minimum.

This Court has always considered the ability to make contributions through a corporate-controlled PAC to be the minimum the First Amendment requires to respect corporations' freedom of speech and association.

Beaumont did not hold that the First Amendment allows the government to ban contributions by both corporations and corporate-controlled PACs. On the contrary, *Beaumont* concluded that a "corporation's capacity to make contributions [may be] legitimately *limited to indirect donations within the scope allowed to PACs*." 539 U.S. at 157 (emphasis added). The federal statute *Beaumont* upheld banned direct corporate contributions but allowed corporations to establish, administer, and solicit candidate contributions indirectly by establishing, administering, and soliciting contributions to "a separate segregated fund"—i.e., a corporate PAC—that could, in turn, contribute to candidates. *Id.* at 149. The Court cited the PAC option as a reason why the statute was closely drawn to serve the government's (supposed) legitimate interests, noting that an organizational PAC "allows corporate political participation without the temptation to use corporate funds for political influence." *Id.* at 163.

Similarly, in *Buckley*, the Court identified the ability of a corporation to use a corporate-controlled PAC as a reason why federal contribution limits satisfied

the tailoring requirement of the "closely drawn" test, noting that "[c]orporate and union resources without limitation may be employed to administer [PAC] funds and to solicit contributions from employees, stockholders, and union members." 424 U.S. at 28 n.31.

And until the Court struck down the federal ban on corporate independent expenditures in *Citizens United*, it viewed corporate independent-expenditure PACs as a necessary alternative to corporate independent expenditures. *Bellotti*, for instance, struck down a Massachusetts statute that completely foreclosed any opportunity for corporate political speech supporting or opposing a state referendum. 435 U.S. 765. In *Massachusetts Citizens for Life*, however, the Court observed that the federal statute banning corporations, but not corporate-controlled PACs, from making independent expenditures was "distinguishable from the complete foreclosure of any opportunity for political speech" that *Bellotti* invalidated, implying that the federal ban was not necessarily unconstitutional for that reason. 479 U.S. at 259 n.12.

When the Court upheld a state ban on corporate independent expenditures in *Austin*, both the majority and concurring opinions stressed that the ban was "not an across-the-board prohibition on political participation by corporations" but "merely require[d] those corporations wishing to make independent expenditures in support of candidates to do so through segregated funds or political action committees (PACs) rather than directly from their corporate treasuries." 494 U.S. at 669 (Brennan, J., concurring); *see also id.* at 660

(majority opinion) ("[T]he Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds."). And in *McConnell*, the Court again stated that allowing corporations "to form and administer separate segregated funds" provided "a constitutionally sufficient opportunity" for them to engage in political speech. *McConnell v. FEC*, 540 U.S. 93, 203 (2003).

Austin's dissenting opinions argued that the PAC option for independent expenditures was necessary but insufficient to protect First Amendment rights, 494 U.S. at 681 n.* (Scalia, J., dissenting); *id.* at 708–09 (Kennedy, J., dissenting)—a view the Court later adopted in *Citizens United*, 558 U.S. at 337. As discussed above in Section I, *Citizens United* casts doubt on whether the PAC option for contributions adequately protects corporations' First Amendment rights because, among other reasons, a PAC is a "separate association" and "does not allow corporations to speak." *Id.* But however that may be, *Citizens United* did not overrule *Beaumont*, which regarded a corporate-controlled PAC as the essential constitutional minimum for corporate contributions, 539 U.S. at 163, so that is the least the Court's First Amendment jurisprudence requires.

B. The ability to make independent expenditures is not an adequate substitute for the ability to make contributions through a corporate PAC.

Contrary 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. Independent expenditures do not allow the would-be donor to express support for a candidate in the same way that a contribution does, and, unlike contributions, independent expenditures do not allow the supporter to associate with a candidate.

A contribution to a candidate is an exercise of both freedom of speech and freedom of association: It serves both "as a general expression of support for the candidate and his views" and "to affiliate [the donor] with a candidate." *McCutcheon*, 572 U.S. at 203. Therefore, to completely prohibit a donor from contributing to as many candidates as the donor would like to support is a *severe* restriction on First Amendment rights, not a "modest" one. *Id.* at 204.

The availability of independent expenditures doesn't change this. Although independent expenditures allow an individual or entity to express support for a candidate, such independent speech is not identical to the "symbolic expression of support" that a contribution represents. *Buckley*, 424 U.S. at 21. Indeed, *Buckley* approved contribution limits in part because allowing a donor to give a candidate at least *some*

amount preserves the donor's ability to symbolically express support through a contribution. *Id*. In downplaying the injury that contribution limits inflict, the *Buckley* Court *separately* cited citizens' freedom to "engage in independent political expression," *id.* at 28—but neither *Buckley* nor any other case has held that independent speech is equivalent to, or may fully substitute for, a contribution's symbolic expression. Indeed, *Buckley* recognized the inferiority of independent expenditures, stating that "[u]nlike contributions, [they] may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 47.

Further, independent expenditures, by definition, do not "associate" a political speaker with a candidate as contributions do. *Cf. id.* Therefore, by permitting corporations to make only independent expenditures, Massachusetts has completely extinguished business entities' First Amendment right to associate with political candidates—something the Court has never suggested is permissible.

McCutcheon confirms that independent expenditures are no substitute for contributions. In that case, the Court struck down the federal aggregate limits on individual contributions to candidates because the burden imposed on donors' First Amendment rights—an "outright ban" on contributions after a donor had exceeded the aggregate limit—was disproportionate to the harm the government sought to prevent. 572 U.S. at 204, 220. The Court deemed the burden on First Amendment rights severe and unjustified even though

the donors subject to the aggregate limits were free to make unlimited independent expenditures on behalf of as many candidates as they wished to support. *Cf. Buckley*, 424 U.S. at 44–51. Indeed, the Court apparently regarded independent expenditures as so insufficient that neither the plurality nor the dissenting opinion found it necessary to discuss them as a possible alternative to contributions exceeding the aggregate limits.

Independent expenditures are especially inadequate where, as in this case, businesses' natural rivals, unions, are allowed to both make direct contributions to candidates and form PACs to give candidates even more. If the corporate PAC option was essential in *Beaumont*—where the contribution ban at issue was even-handed, applying equally to corporations, unions, and other associations, *see* 11 C.F.R. § 110.1—it certainly is essential here, where different limits on different classes of donors cause additional First Amendment harm.

C. The Court should grant certiorari to overrule this extraordinary restriction on First Amendment rights.

The lower court upheld a greater restriction on corporate contributions than this Court has ever approved, even when the Court took a much broader view of the government's ability to restrict corporations' political activity than it does now. And the lower court's premise that the government may ban contributions

from a given class of donor—so long as the ban would tend to prevent some amount of actual or apparent corruption and the donors could still make independent expenditures—invites further legislative interference with political rights to benefit some classes, and the candidates they support, over others. The Court should grant certiorari to overrule this extraordinary infringement of First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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