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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should overrule *FEC v. Beaumont*, 539 U.S. 146 (2003), which upheld the federal prohibition on corporate campaign contributions as justified by the government's interests in preventing corruption, the appearance of corruption, and the circumvention of individual contribution limits.

2. Whether First Amendment and equal protection challenges to laws that impose differing limits on campaign contributions should continue to be reviewed under the "closely drawn" standard of review adopted in *Buckley v. Valeo*, 424 U.S. 1 (1976).

3. Whether the Supreme Judicial Court correctly rejected petitioners' First Amendment and equal protection challenges to Mass. Gen. Laws ch. 55, § 8, which bars business corporations in Massachusetts from making contributions to campaigns for state office.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Page

Statutes

Page

Page

Regulations

Court Rules

Miscellaneous

Page

Page

STATEMENT

Since 1907, Massachusetts, like the federal government, has prohibited business corporations from making contributions to candidates running for political office. In *FEC v. Beaumont*, 539 U.S. 146 (2003), this Court upheld the federal bar on corporate contributions as consistent with the First Amendment. Laws forbidding contributions from corporations, this Court explained, represent permissible government efforts to combat corruption and the appearance of corruption in the electoral process, including the circumvention of limits on individual contributions through the corporate form. *Id.* at 154-63.

1. Public awareness of the corruptive potential of corporate contributions emerged at the turn of the 20th century. In 1894, a Senate committee charged with investigating bribery heard testimony describing the American Sugar Refining Company's contributions to state politicians in Massachusetts and New York, where its refineries were located. *See* S. Rep. No. 606, 53rd Cong., 2nd Sess., at 334, 351, 426 (Aug. 2, 1894). That same year, a proposal to prohibit campaign contributions by corporations was introduced at New York's constitutional convention. Its sponsor, Elihu Root, observed that the revelations that corporations were creating political indebtedness through contributions had "shake[n] the confidence of the plain people of small means of this country in our political institutions." 3 William H. Steele, ed., Revised Record of the Constitutional Convention of the State of New York, May 8, 1894 to September 29, 1894, at 894-95 (1900). A prophylactic ban on such contributions was necessary, he argued, because

"laws aimed directly at the crime of bribery ha[d] been so far ineffective." *Id.* at 897.

A decade later, a New York investigation uncovered evidence that the major life insurance companies had a longstanding practice of giving large campaign contributions to politicians and concealing those contributions through improper accounting. *See* New York State Assembly, Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate the Affairs of Life Insurance Companies, Assembly Doc. No. 41, at 393 (Feb. 22, 1906). The investigation prompted widespread calls for reform. President Theodore Roosevelt urged the "National and the several State legislatures [to] forbid any officer of a corporation from using the money of the corporation in or about any election" in order to prevent "bribery and corruption." 40 Cong. Rec. 96 (Dec. 5, 1905); *see also* 41 Cong. Rec. 22 (Dec. 4, 1906) (reiterating his support for a ban on corporate contributions). In 1907, Congress responded by enacting the Tillman Act, which barred all corporations from making contributions to candidates for federal office. *See* Act of Jan. 26, 1907, c. 420, 34 Stat. 864; S. Rep. No. 3056, 59th Cong., 1st Sess., at 2 (Apr. 27, 1906).

The same year Congress passed the Tillman Act, the Massachusetts Legislature enacted a law that barred certain corporations from making campaign contributions in state elections. *See* Mass. St. 1907, ch. 581, § 3. In 1908, the Legislature extended the law to any "business corporation incorporated under the laws of or doing business in the commonwealth." Mass. St. 1908, ch. 483, § 1. By the late 1920s, twenty-six other states had prohibited all corporations from

making political contributions, and nine more had prohibited contributions from certain classes of corporations. *See* E. Sikes, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 127, 279-83 (1928). Before these laws were enacted, corporate executives regarded political contributions "as necessary expenses of the business. The corporations receive[d] their rewards in governmental favors and special privileges." *Id.* at 108. By banning this type of *quid pro quo*, these state laws sought to deter transactions that corrode public faith in democratic elections.[1]

Since its enactment, the Commonwealth's corporate contribution ban has repeatedly been re-codified as part of state anti-corruption measures. *See, e.g.*, Mass. St. 1946, ch. 537, § 10; Mass. St. 1913, ch. 835, § 356. The law now provides:

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

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[1] Today, corporate contributions are prohibited by federal law and the laws of twenty-one other states. *See* 52 U.S.C. § 30118(a); Nat'l Conference of State Legislatures, State Limits on Contributions to Candidates: 2017-2018 Election Cycle (June 27, 2017), http://tinyurl.com/y5ogw3ej.

Mass. Gen. Laws ch. 55, § 8 (hereinafter "Section 8"). The Massachusetts Office of Campaign and Political Finance ("OCPF") interprets the statutory phrase "directly or indirectly" to prohibit both direct contributions from the corporate treasury and indirect financial support via an affiliated political action committee ("PAC") that makes campaign contributions. *See* OCPF, Advisory Opinion, AO-00-05, at 3 (Apr. 21, 2000).[2]

While Section 8 prohibits direct and indirect contributions, business corporations in Massachusetts have multiple outlets for political speech and expression. They can make unlimited independent expenditures to advocate for or against candidates through the internet, television, radio, newspapers, and other channels of communication. *See* Mass. St. 2014, ch. 210, §§ 4, 20-21, 24 (amending Mass. Gen. Laws ch. 55, §§ 1, 18A, 18C, 18G); 970 Code Mass. Regs. § 2.17. They can make unlimited contributions to Independent Expenditure PACs (also known as "Super PACs"), which can in turn make unlimited independent expenditures. *See* OCPF, Interpretive Bulletin 10-03, at 1 (rev. July 26, 2018).[3] And corporate employees can form PACs using the name of their employer. *See* Mass. Gen. Laws ch. 55, § 5B. About a quarter of registered PACs in Massachusetts use a name that identifies a business employer or business-related interest. *See* SJC App. Vol. V 326-30.

2. Section 8 is only one part of the statutory framework that seeks to prevent corruption and its

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[2] *See* http://files.ocpf.us/pdf/legaldocs/AO-00-05.pdf.

[3] *See* http://files.ocpf.us/pdf/legaldocs/IB-10-03.pdf.

appearance in Massachusetts elections. Since 1892, the Legislature has required candidates to publicly disclose all campaign contributions and expenditures. *See* Mass. St. 1892, ch. 416; Mass. Gen. Laws ch. 55, § 18. And since 1914, the Legislature has set annual contribution limits for individuals, and later for "political committees," that donate to campaigns. *See* Mass. St. 1914, ch. 783, § 5; *see also* Mass. Gen. Laws ch. 55, § 7A(a) (current contribution limits for individuals); *id.* § 6 (current contribution limits for political committees).

Massachusetts law defines a "political committee" as "any committee, association, organization or other group of persons . . . which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate" or "question submitted to the voters." Mass. Gen. Laws ch. 55, § 1. In 1988, OCPF issued an interpretive bulletin that explained how it would apply this definition to nonprofit organizations, including labor unions, that have made incidental contributions or expenditures but have not actively engaged in political fundraising. *See* OCPF, Interpretive Bulletin 88-01 (rev. May 9, 2014).[4] Should these organizations make "more than incidental" political expenditures, defined as those "exceed[ing], in the aggregate, in a calendar year, either $15,000 or 10 percent of such organization's gross revenues for the previous calendar year, whichever is less," the organization would become a political committee, subject to disclosure obligations and the contribution limits on political committees. *Id.* at 1, 4; *see* Mass. Gen. Laws ch. 55, §§ 6, 18. In response to the decision below, however, OCPF is

[4] *See* http://files.ocpf.us/pdf/legaldocs/IB-88-01.pdf.

currently engaged in formal rulemaking on how the definition of "political committee" in Mass. Gen. Laws ch. 55, § 1 applies to campaign contributions by nonprofit organizations and labor unions in Massachusetts. *See infra*, at 19-21.

3. Petitioners are two business corporations operating in Massachusetts. Petitioner 1A Auto, Inc., an auto parts retailer, has annual sales of $200 million and employs 500 people. *See* Pet. App. 74a-75a; R. Bradley, *Rick Green: Living the American Dream*, NEW BOSTON POST (Sept. 20, 2018).[5] Its principal officers have individually contributed over $100,000 to political campaigns and PACs in Massachusetts since 2004. Pet. App. 75a. Petitioner 126 Self Storage, Inc., a self-storage rental business, employs four people. *Id.* Its principal officer has individually contributed at least $38,000 to political campaigns and PACs in Massachusetts since 2004. *Id.*

Asserting that they wish to make contributions to political campaigns, PACs, and party committees, petitioners brought a facial challenge to Section 8. They claimed that the Commonwealth's prohibition on corporate campaign contributions violates the First Amendment. They also claimed that, by barring contributions from business corporations but not nonprofit organizations and labor unions, Section 8 violates the Equal Protection Clause of the Fourteenth Amendment. The Superior Court denied petitioners' motion for a preliminary injunction, Pet. App. 107a-117a, and later denied their motion for

[5] *See* https://tinyurl.com/y3dcw7ht.

summary judgment and granted OCPF's cross-motion for summary judgment, Pet. App. 63a-106a.

The Supreme Judicial Court ("SJC") unanimously affirmed. Pet. App. 1a-61a. The SJC explained that, in *FEC v. Beaumont*, 539 U.S. 146 (2003), this Court rejected a First Amendment challenge to the federal bar on corporate contributions under the "closely drawn" standard of review applicable to restrictions on campaign contributions. Pet. App. at 10a. That standard of review reflects the "longstanding distinction," first articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), between laws regulating independent expenditures, which restrict core First Amendment freedoms, and laws regulating contributions, which "entai[l] only a marginal restriction upon the contributor's ability to engage in free communication.'" Pet. App. 10a-11a (quoting *Buckley*, 424 U.S. at 20-21, 39).

The SJC recognized that a prohibition on corporate campaign contributions may be justified only by the government's interests in preventing corruption and the appearance of corruption, as well as in preventing the circumvention of valid individual contribution limits. *Id.* at 12a-13a. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the SJC explained, this Court rejected the shareholder-protection and antidistortion interests also discussed in *Beaumont*. Pet. App. 15a n.6. But *Citizens United* reaffirmed that governments have a vital interest in preventing *quid pro quo* corruption and its appearance. *Id.* (citing *Citizens United*, 558 U.S. at 356-57). And *Citizens United* did not question the "closely related" government interest in preventing the circumvention of individual contribution limits, which are themselves justified by

anti-corruption aims. *Id.*; *see Buckley*, 424 U.S. at 25-29. Accordingly, *Beaumont* governed petitioners' First Amendment claim. Pet. App. 10a-17a.

The SJC next held that Section 8 advances the Commonwealth's important anti-corruption and anti-circumvention objectives. *Id.* at 17a-21a. Citing recent convictions of Massachusetts politicians who accepted corporate bribes, the SJC concluded that Section 8 remains an essential buffer against the risk of *quid pro quo* corruption in the Commonwealth. *Id.* at 18a-19a. The court also cited evidence of recent schemes to unlawfully funnel corporate contributions through individuals, and it explained that "[s]uch schemes indicate that, if not for § 8, the inverse would also be possible, with individuals circumventing the limits on their own political contributions" by funneling money through corporations. *Id.* at 19a.

The SJC rejected petitioners' argument that Section 8 is both overinclusive and underinclusive and therefore not closely drawn. *Id.* at 21a-27a. First, with respect to overinclusiveness, the SJC noted that *Beaumont* itself upheld the federal ban on corporate contributions despite the availability of alternatives such as disclosure requirements or contribution limits. *Id.* at 21a (citing *Beaumont*, 539 U.S. at 162-63). And even though Massachusetts does not afford a corporate-funded "PAC option" identical to the federal PAC option discussed in *Beaumont*, the SJC continued, Massachusetts corporations today have more, and more effective, outlets for political expression than corporations had at the time *Beaumont* was decided. *Id.* at 21a-23a. Second, petitioners' contention that Section 8 restricts too *little* speech by not also barring contributions from

labor unions and nonprofit organizations failed because that feature of Section 8's scope did nothing to undermine the conclusion that the law advances the Commonwealth's important interests in preventing corruption, the appearance of corruption, and the circumvention of individual contribution limits. *Id.* at 23a-26a. And petitioners had offered no evidence to suggest that the Legislature sought to discriminate on the basis of viewpoint when it enacted Section 8. *Id.*

Finally, the SJC rejected petitioners' contention that their equal protection claim, which is premised on the same underinclusiveness theory, should be reviewed under a more rigorous standard than their First Amendment claim. *Id.* at 28a-33a. Adopting the reasoning of *Wagner v. FEC*, 793 F.3d 1, 32-33 (D.C. Cir. 2015) (en banc), the SJC concluded that application of strict scrutiny to petitioners' equal protection claim would "effect an end run around the Supreme Court's well-established distinction between independent expenditure limits, which trigger strict scrutiny, and contribution limits, which do not." Pet. App. 29a-31a. And petitioners' equal protection claim failed for the same reasons their First Amendment claim failed: namely, petitioners had identified no evidence of discrimination, and there was "'no doubt'" that strong anti-corruption and anti-circumvention interests justified the law as framed. *Id.* at 30a-31a & n.10 (quoting *Wagner*, 793 F.3d at 33); *see id.* at 17a-26a.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to overrule decades of precedent and thereby invalidate a Massachusetts

law, as well as the Tillman Act and other state laws, that have stood for more than a century to protect the integrity of the political process in this country. There is no warrant for such a far-reaching request. The SJC carefully applied *Beaumont* and this Court's more recent decisions, under which campaign contribution restrictions must be justified by the government's anti-corruption or anti-circumvention interests. On that basis, the SJC correctly rejected petitioners' First Amendment and equal protection challenges to Section 8, and its decision does not conflict with any decision of this Court or with any decision of a federal court of appeals or state court of last resort. Nor would this case be a suitable vehicle for addressing the questions presented. Petitioners failed to preserve two of those questions in the courts below, and OCPF is engaged in ongoing rulemaking on the degree to which Massachusetts law restricts contributions by nonprofit organizations and labor unions. The petition should therefore be denied.

I. This Case Does Not Present a Question Warranting This Court's Review.

This Court has long held that, "[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. *Buckley* explained that restrictions on campaign contributions do not "infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21. Thus, since *Buckley*, this Court has repeatedly confirmed that while restrictions on independent expenditures are

reviewed under strict scrutiny, laws restricting campaign contributions are valid if "they are closely drawn to serve a sufficiently important interest, such as preventing corruption and the appearance of corruption." *Davis v. FEC*, 554 U.S. 724, 737 (2008) (internal quotation marks omitted); *see also, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (plurality opinion); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735 (2011).

Beaumont applied *Buckley*'s "closely drawn" standard to uphold the federal prohibition on corporate campaign contributions. *See* 539 U.S. at 152-63. Petitioners may disagree with *Beaumont*, but no conflict exists on its validity: the lower courts have uniformly recognized that *Beaumont* remains controlling precedent after this Court's more recent decisions in *Citizens United* and *McCutcheon*. Nor does any split exist on the other questions presented by this petition. All appellate courts apply *Buckley*'s "closely drawn" standard to both First Amendment and equal protection claims challenging restrictions on campaign contributions.

A. There Is No Disagreement in the Lower Courts That *Beaumont* Remains Controlling Precedent.

Following this Court's decision in *Citizens United*, all courts to address challenges to laws prohibiting corporate contributions have held that *Beaumont* remains controlling precedent and have, accordingly, upheld the laws. *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 601 (8th Cir. 2013), *cert. denied*, 572 U.S. 1046 (2014) (corporate contribution ban);

Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 877-79 (8th Cir. 2012) (en banc) (same); *United States v. Danielczyk*, 683 F.3d 611, 615-19 (4th Cir. 2012), *cert. denied*, 568 U.S. 1193 (2013) (same); *Ognibene v. Parkes*, 671 F.3d 174, 194-97 & n.21 (2d Cir. 2011), *cert. denied*, 567 U.S. 935 (2012) (same); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-25 (9th Cir. 2011) (same); *King Street Patriots v. Texas Democratic Party*, 521 S.W.3d 729, 742-43 (Tex. 2017) (same); *see also Wagner v. FEC*, 793 F.3d 1, 6 (D.C. Cir. 2015) (en banc), *cert. denied sub nom.*, *Miller v. FEC*, 136 S. Ct. 895 (2016) (ban on contributions by government contractors); *Yamada v. Snipes*, 786 F.3d 1182, 1205 & n.17 (9th Cir.), *cert. denied sub nom.*, *Yamada v. Shoda*, 136 S. Ct. 569 (2015) (same); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) (same). Like the SJC, these courts have recognized that laws regulating corporate campaign contributions are subject to a lower level of scrutiny than laws regulating corporate independent expenditures. *See, e.g.*, *Danielczyk*, 683 F.3d at 617-18; *Thalheimer*, 645 F.3d at 1124-25. And, like the SJC, they have recognized that *Citizens United* did not disturb *Beaumont*'s anti-corruption and anti-circumvention rationales for upholding the federal bar on corporate contributions. *See, e.g.*, *Danielczyk*, 683 F.3d at 618; *Ognibene*, 671 F.3d at 195 n.21; *Thalheimer*, 645 F.3d at 1124-25.

There is also no split of authority with respect to the specific overinclusiveness and underinclusiveness challenges petitioners make to Section 8. Indeed, petitioners do not even attempt to claim such a split. The Eighth and Ninth Circuits have agreed with the SJC that a corporate contribution ban is not imperiled by the absence of a corporate-funded PAC option that

mirrors federal law. *See Minnesota Citizens*, 692 F.3d at 878-79 (upholding Minnesota's corporate contribution ban)[6]; *Thalheimer*, 645 F.3d at 1125 (upholding ordinance barring corporate contributions with no PAC option). And the Second Circuit, like the SJC, has rejected the contention that a law that prohibits business entities from making political contributions must also bar contributions from nonprofit organizations or labor unions in order to satisfy the closely drawn standard. *See Ognibene*, 671 F.3d at 191 (holding that a restriction on contributions that covered entities doing business with city, but not labor organizations or neighborhood associations, was not underinclusive because the city could "focus on one aspect of *quid pro quo* corruption, rather than every conceivable instance").

Petitioners do not dispute this unanimity in the lower courts, but instead make a general entreaty that the "lower courts require guidance" on how to analyze challenges to laws prohibiting corporate contributions after *Citizens United*. Pet. 14. But it is clear from the courts' wholesale agreement on that exact question that they need no guidance. In any event, a generalized request for guidance is not a basis for granting certiorari where there is no actual conflict. *See* Sup. Ct. R. 10.

Belying their request for "guidance," petitioners further request that this Court simply overrule

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[6] Like Massachusetts, Minnesota permits corporate employees to form a PAC that is "sponsored by an organization in name," but "receives no direct or indirect subsidy from the sponsoring organization." *Minnesota Ass'n of Commerce & Ind. v. Foley*, 316 N.W.2d 524, 527 (Minn. 1982); *see also* Minn. Adv. Op. 115, 1991 WL 734371, at *4 (Dec. 9, 1991).

Beaumont. Pet. 6. But, as explained in more detail below, petitioners do not come close to overcoming the principles of *stare decisis*; none of the confusion, workability, or erosion problems that can justify overruling a case are present here. *See infra*, at 25-26. Moreover, having failed to preserve in the courts below the question whether *Beaumont* should be overruled, they cannot for the first time ask this Court to decide that question. *See infra*, at 17-18.

B. Appellate Courts Uniformly Apply *Buckley*'s "Closely Drawn" Standard to Review First Amendment and Equal Protection Challenges to Laws Restricting Campaign Contributions.

Petitioners also fail to identify any conflict on the standard of review applicable to claims challenging laws that set different contribution limits for different types of donors, whether brought under the First Amendment or the Equal Protection Clause.

Consistent with *Buckley* and this Court's subsequent cases, the lower courts apply the "closely drawn" standard to First Amendment claims challenging laws that impose differing contribution restrictions. *See, e.g.*, *Illinois Liberty PAC v. Madigan*, 904 F.3d 463, 469-71 & n.3 (7th Cir. 2018), *pet. for cert. pending*, No. 18-755; *Wagner*, 793 F.3d at 27; *Ognibene*, 671 F.3d at 191. Appellate courts also apply the "closely drawn" standard to equal protection claims challenging laws that impose differing contribution restrictions. *See Wagner*, 793 F.3d at 32-33; *Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014). As the D.C. Circuit's unanimous en banc decision in *Wagner* explained, application of strict

scrutiny to an equal protection claim in this context would be inconsistent with "the Supreme Court's determination that the 'closely drawn' standard is the appropriate one under the First Amendment." 793 F.3d at 32-33 (noting that there is "no case in *any* court in which an equal-protection challenge to contribution limits succeeded where a First Amendment one did not" (emphasis in original; quotation marks omitted)).

Across other areas of First Amendment jurisprudence, too, courts review First Amendment and equal protection claims under the standard applicable to the First Amendment right at stake. For example, in a case challenging a prohibition on minor party candidates appearing on a ballot for a different party, the Third Circuit held that the plaintiff's equal protection claim should receive "the same level of scrutiny"—that is, an "intermediate level of scrutiny"—as its First Amendment claim. *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dept. of Elections*, 174 F.3d 305, 314-15 (3d Cir. 1999) (en banc). Likewise, when a plaintiff challenges a regulation of commercial speech, a broadcast regulation, or a time, place, or manner restriction, courts invariably review a corollary equal protection claim under the standard of review set by the First Amendment. *See, e.g.*, *Kiser v. Kamdar*, 831 F.3d 784, 792 (6th Cir. 2016) (commercial speech); *Ruggiero v. FCC*, 317 F.3d 239, 247 (D.C. Cir. 2003) (en banc) (broadcast regulation); *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047-48 (9th Cir. 2002) (time, place, or manner restriction); *Anderson v. Treadwell*, 294 F.3d 453, 464-65 (2d Cir. 2002) (commercial speech); *Chambers v. Stengel*, 256 F.3d 397, 401 (6th Cir. 2001) (commercial speech).

Petitioners' effort to identify three "conflicting decisions," Pet. 25-26, only underscores the unanimity in the appellate courts. First, they point to *Riddle v. Hickenlooper*, but that case likewise applied the "closely drawn" standard to an equal protection challenge to different contribution limits set by Colorado law. *See* 742 F.3d at 928. While then-Judge Gorsuch's concurrence in *Riddle* did "confess some uncertainty about the level of scrutiny the Supreme Court wishes us to apply to this contribution limit challenge," he agreed that Colorado's discriminatory contribution limits—which favored major-party candidates over all other candidates—failed any level of heightened scrutiny. *Id.* at 930, 932 (Gorsuch, J., concurring).

Second, a district court decision cited by petitioners, *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016), also does not create a conflict warranting this Court's review. In that case, which was not appealed to the Sixth Circuit, the state defendant chose to stipulate that strict scrutiny applied to an equal protection challenge to Kentucky's corporate contribution ban, and that the law did not satisfy that standard. *Id.* at 689. An unexplained concession in one district court is not a basis for granting review. *See* Sup. Ct. R. 10(a).

Finally, petitioners cite *Russell v. Burris*, a case in which the Eighth Circuit, based on its prior decision in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), applied strict scrutiny to First Amendment and equal protection challenges to contribution limits. *See Russell v. Burris*, 146 F.3d 563, 567-68, 571-72 (8th Cir. 1998). But two years after *Russell* was decided, this Court corrected the Eighth Circuit's mistaken

understanding of the standard of scrutiny applicable to contribution restrictions. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-89 (2000). In *Shrink Missouri*, this Court rejected the Eighth Circuit's reliance on *Carver* and clarified that the Court has "'consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.'" *Id.* at 384, 387 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("*MCFL*"). *Shrink Missouri*, which rejected both First Amendment and equal protection claims, thus resolved any conflict that might have been created by *Russell*. *See id.* at 389-97 & n.4.

There is, accordingly, no conflict in the lower courts on any of the questions presented by this petition. The petition should be denied.

II. This Case Is Not a Suitable Vehicle to Address the Questions Presented.

This Court should also deny certiorari because this case would be a poor vehicle for addressing the questions raised by petitioners.

A. Petitioners Failed to Preserve Two of the Questions Presented.

Petitioners' failure to preserve two of the questions they ask this Court to address counsels strongly against certiorari.

The first question presented—whether *Beaumont* should be overruled—was raised for the first time in this Court. *See generally* Petrs. SJC Br. 11-33; Petrs.

Summ. J. Br. 5-16; Petrs. Preliminary Inj. Br. 4-16.[7] While petitioners argued in the Superior Court that this Court's recent decisions have "undermined" *Beaumont*, they nevertheless insisted that "[i]t is enough here to recognize that the lack of a 'PAC option' is fatal to Section 8." Petrs. Preliminary Inj. Br. 14-15 (quoting *Beaumont*, 539 U.S. at 163); *accord* Petrs. Summ. J. Br. 15. Subsequently, in the SJC, petitioners abandoned their argument that *Citizens United* undermined *Beaumont*, and instead contended only that this case is distinguishable from *Beaumont* on the facts. *See* Petrs. SJC Br. 13-27. Thus, in neither court did petitioners preserve the argument that *Beaumont* should be overruled. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue "raised for the first time in the petition for certiorari").

Petitioners' second question presented asks this Court to rule that strict scrutiny applies to both First Amendment and equal protection claims challenging differential contribution limits. Pet. i, 20, 32. But to the extent petitioners contend that strict scrutiny should apply to the First Amendment claim at issue here, they have waived that argument, too. In the SJC, they affirmatively represented that all aspects of their First Amendment claim, including their argument that Section 8 is underinclusive, are governed by *Buckley*'s "closely drawn" standard of review. *See* Petrs. SJC Br. 13 ("If Section 8 is not 'closely drawn' to 'avoid unnecessary abridgment of First Amendment rights, it cannot survive rigorous

[7] Petitioners' SJC briefs are available at http://ma-appellatecourts.org/display_docket.php?src=party&dno=SJC-12413.

review.'" (quoting *McCutcheon*, 572 U.S. at 199 (plurality opinion))); *see also id.* at 22-23 (relying on *McCutcheon*'s discussion of *Buckley*'s standard in arguing underinclusiveness); Petrs. SJC Reply Br. 17. And before the Superior Court, petitioners' counsel repeatedly conceded that "the lesser standard . . . does apply in the First Amendment" context. SJC App. Vol. V 344; *see also id.* at 380-81 (agreeing that "intermediate scrutiny" applies to the First Amendment claim). Thus, petitioners have waived any contention that *Buckley*'s standard should not apply to their First Amendment claim (and have never contended in any court, including this Court, that *Buckley* should be overruled). This Court should not, therefore, consider the question. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[D]ue regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.").

B. OCPF's Ongoing Rulemaking Could Inhibit Review of the Questions Presented.

Waiver problems aside, the legal framework governing campaign contributions by nonprofit organizations and labor unions in Massachusetts is in flux, making this case an especially poor vehicle for addressing petitioners' equal protection claim and argument about underinclusiveness. OCPF is currently engaged in rulemaking on the question of how the definition of "political committee" in Mass. Gen. Laws ch. 55, § 1 affects campaign contributions made by nonprofit organizations and labor unions.

That rulemaking process was prompted by the SJC's decision in this case, which explained that because OCPF's interpretive bulletin on that topic had not gone through a formal rulemaking process, it did not carry "the force of law." Pet. App. 32a n.10. The SJC stated that, "under current Massachusetts law, it is not clear to what extent unions and nonprofit organizations are free to make political contributions." *Id.* at 31a n.10.

OCPF accordingly initiated a rulemaking process on the applicability of the definition of "political committee" to nonpolitical nonprofit organizations. *See* OCPF, Advance Notice of Proposed Rulemaking (Nov. 2018).[8] In late January, after holding an initial hearing and accepting an initial round of written comments, OCPF issued draft regulations. *See* OCPF, 970 CMR 1.22: Definition of "Political Committee," and Identification of Funding Sources (Jan. 31, 2019 draft).[9] Under those draft regulations, nonpolitical organizations would become "political committees"—subject to annual contribution limits of $500 per candidate—once they have made contributions exceeding $15,000 or 10% of the organization's gross revenues for the prior year, whichever is less. *Id.* § 3(b). Before reaching that incidental threshold, however, any organization that makes a political contribution would be subject to the same contribution limits applicable to individuals. *Id.* § 2. Thus, for example, a nonprofit organization or labor union could contribute at most $1,000 per year to a candidate or candidate's committee. *Id.*

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[8] *See* http://files.ocpf.us/pdf/guides/rulemakingnotice.pdf.

[9] *See* http://files.ocpf.us/pdf/guides/2019draftregs1.pdf.

While OCPF expects to finalize its regulations shortly, it is currently reviewing oral testimony and written comments submitted on those draft regulations. Assuming the final regulations resemble the draft regulations, the regulatory framework governing direct campaign contributions in Massachusetts would shift significantly. And regardless of the final form the regulations take, OCPF anticipates that, due to the divergent views of state law advanced by commenters during the rulemaking process, the regulations may be challenged under the Massachusetts Administrative Procedure Act, Mass. Gen. Laws ch. 30A, § 7. Ultimately, the evolving legal framework governing campaign contributions by nonprofit organizations and labor unions in Massachusetts could hinder this Court's review of petitioners' equal protection claim and the underinclusiveness component of their First Amendment claim.

III. The SJC's Decision Is Correct and Consistent with This Court's Precedent.

Petitioners principally argue that the SJC's decision was wrong and inconsistent with this Court's precedent. Pet. 14-20, 26-39. They are mistaken. The SJC's analysis hewed carefully to, and is wholly consistent with, this Court's long line of cases addressing the constitutionality of campaign finance regulations. *Citizens United* does not cast doubt on *Beaumont*, and the Legislature's choices in crafting Section 8 respect petitioners' First Amendment and equal protection rights.

A. There Is No Warrant for Revisiting *Beaumont*, Which Remains Good Law After *Citizens United*.

As an initial matter, the SJC correctly ruled that *Beaumont*'s holding and core logic are consistent with *Citizens United*.

Beaumont upheld a challenge to the federal law prohibiting corporate contributions, which "lie closer to the edges than to the core of political expression." 539 U.S. at 161; *see Buckley*, 424 U.S. at 21 (noting that contribution restrictions do not "infringe the contributor's freedom to discuss candidates and issues," and that contributions become speech only if they are "transform[ed]" into "speech by someone other than the contributor"). *Citizens United*, in contrast, involved a challenge to a prohibition on corporate independent expenditures, which was a direct "ban on speech" that affected core First Amendment rights. 558 U.S. at 339. Applying strict scrutiny, *Citizens United* invalidated the law because corporate independent expenditures "do not give rise to corruption or the appearance of corruption," and because the law did not advance any other compelling government interest. *Id.* at 348-62.

At the same time, both in *Citizens United* and later in *McCutcheon*, this Court confirmed that "preventing corruption or the appearance of corruption" remains a "legitimate governmental interest for restricting campaign finances." *McCutcheon*, 572 U.S. at 206 (plurality opinion); *accord Citizens United*, 558 U.S. at 345, 356-59. And preventing the circumvention of individual contribution limits—which themselves are a permissible means of combatting *quid pro quo*

corruption and its appearance—remains a part of the government's valid anti-corruption interest. *See McCutcheon*, 572 U.S. at 192-93, 210-18 (plurality opinion); *FEC v. Colorado Republican Fed'l Campaign Comm.*, 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption."); *Buckley*, 424 U.S. at 25-29.[10]

Beaumont upheld the federal ban on corporate contributions based in large part on these legitimate government interests. It recounted that "the ban was and is intended to 'preven[t] corruption or the appearance of corruption.'" *Beaumont*, 539 U.S. at 154 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NC PAC*")). And it described how this Court's earlier decisions in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("*NRWC*"), and *MCFL*, 479 U.S. 238, compelled the conclusion that the ban was justified by the government's interest in preventing corruption and its appearance. *See Beaumont*, 539 U.S. at 156-59. "Quite aside from war-chest corruption," *Beaumont* further held, the federal ban was also closely drawn to protect against the use of corporations "as conduits for 'circumvention of valid [individual] contribution limits.'" *Id.* at 155 (quoting *Colorado Republican*, 533 U.S. at 456 & n.18) (alterations omitted). Experience demonstrates, *Beaumont* explained, "'how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how [individual] contribution limits would be eroded if inducement to

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[10] Petitioners agree that the government's anti-corruption and anti-circumvention interests remain legitimate bases for regulating contributions if the regulation is "closely drawn." *See* Pet. 8.

circumvent them were enhanced.'" *Id.* (quoting *Colorado Republican*, 533 U.S. at 457).

This reasoning—that the federal ban is closely drawn to the government's interests in preventing corruption, the appearance of corruption, and the circumvention of valid individual contribution limits—remains as compelling today as it was when *Beaumont* was decided. To be sure, in *Citizens United*, this Court emphasized that the "interest in preventing corruption" is "limited to *quid pro quo* corruption." 558 U.S. at 359. In *Beaumont*, however, there was no dispute 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*, 558 U.S. at 349-56, 361-62. *See Beaumont*, 539 U.S. at 155, 159. Indeed, nearly two decades before *Beaumont*, this Court had recognized "the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office," while also making clear that "the hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *NC PAC*, 470 U.S. at 495, 497 (explaining that "the prohibition of corporate campaign contributions to political candidates [does] not violate the First Amendment"). And *Citizens United* itself explained that, under *Buckley*, "the potential for *quid pro quo* corruption distinguishe[s] direct contributions to candidates from independent expenditures." 558 U.S. at 345. "[U]nlike limits on independent expenditures," the Court elaborated, contribution restrictions "have been an accepted means to prevent *quid pro quo* corruption." *Id.* at 358-59.

Petitioners thus err in suggesting that *Citizens United* categorically prohibited all campaign finance regulations applicable to corporations. Pet. 15-16. While the Court held that the First Amendment does not permit direct "political speech" restrictions on corporations, it contrasted those restrictions with contribution limits that further anti-corruption aims without limiting a corporation's own ability to speak. *See Citizens United*, 558 U.S. at 342-43, 345-47 (citing *Buckley*, 424 U.S. at 25-29, 47-48). Unlike restrictions on a corporation's expenditures for its own political speech, restrictions on corporate contributions entail only a marginal restraint on the speech of others and, at the same time, guard against *quid pro quo* corruption. *See Buckley*, 424 U.S. at 20, 25-29. For that reason, under this Court's precedent, "corporate contributions can be regulated more closely than corporate expenditures." *Beaumont*, 539 U.S. at 164 (Kennedy, J., concurring in the judgment).

Tacitly recognizing that *Beaumont* remains good law after *Citizens United*, petitioners go further and ask this Court to overrule *Beaumont* entirely. Pet. 6. But there is no compelling reason for upending decades of this Court's precedent. The "doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). Even in constitutional cases, this Court has always "require[d] 'special justification,' not just an argument that the precedent was wrongly decided," before it will "overtur[n] a long-settled precedent." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). And petitioners give no special justification for departing from *Beaumont*. For nearly four

decades, this Court has repeatedly affirmed the constitutionality of laws prohibiting corporate contributions to political campaigns. *See Beaumont*, 539 U.S. at 154-64; *NC PAC*, 470 U.S. at 495; *NRWC*, 459 U.S. at 208-10. There is no evidence that these decisions have generated confusion or workability problems, nor is there evidence that time has eroded the commonsense underpinnings of this Court's reasoning. Moreover, these decisions affirm the constitutionality of statutes that have stood for 112 years as safeguards of electoral integrity. That factor influenced the decision in *Beaumont*, which found "[j]udicial deference" to be "particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of 'careful legislative adjustment.'" 539 U.S. at 162 n.9 (quoting *NRWC*, 459 U.S. at 209); *see also Citizens United*, 558 U.S. at 343 (highlighting the historical pedigree of "the laws of some States and of the United States [that have] imposed a ban on corporate direct contributions to candidates"). There is no warrant for revisiting *Beaumont*.

B. Section 8 Is Closely Drawn to Prevent *Quid Pro Quo* Corruption, Its Appearance, and Circumvention of Massachusetts' Individual Contribution Limits.

The SJC was also correct to conclude that Section 8 is closely drawn to the Commonwealth's substantial anti-corruption and anti-circumvention objectives.

Even though corporate contributions have been prohibited in Massachusetts for more than a century, "experience under the present law confirms a serious

threat of abuse." *Colorado Republican*, 533 U.S. at 457. In just the last decade, multiple Massachusetts politicians have been convicted of crimes stemming from bribery schemes to benefit corporations. *See, e.g.*, *United States v. McDonough*, 727 F.3d 143, 147 (1st Cir. 2013) (House Speaker); *United States v. Turner*, 684 F.3d 244, 246 (1st Cir. 2012) (city councilor); *United States v. Wilkerson*, 675 F.3d 120, 121 (1st Cir. 2012) (*per curiam*) (city councilor); SJC App. Vol. V 155-84; *see also* Indictment, *United States v. Joyce*, Case No. 1:17-cr-10378-NMG (D. Mass., Dec. 7, 2017) (state senator). And corporations continue to make illegal campaign contributions in state elections. *See, e.g.*, SJC App. Vol. V 192-205. Regrettably, this type of misconduct has persisted over time. For example, the Massachusetts Crime Commission uncovered evidence in the mid-1960s "that some corporations have engaged in corrupt transactions to obtain favors or to overcome obstacles," and that businesses "often" turned to certain lawyers known to facilitate bribes in order to receive "favorable governmental action . . . without delay and frustration." Commonwealth of Massachusetts, Massachusetts Crime Commission: Comprehensive Report and Appendices 75-76 (Fifth Report, May 17, 1965)[11] ("Crime Commission Report"). Section 8 thus continues to serve compelling interests in preventing corruption and the appearance of corruption stemming from corporate campaign contributions.

In addition, without Section 8, individuals would be free to use the corporate form to circumvent the Commonwealth's individual contribution limits. In Massachusetts, an individual can create a new

[11] *See* http://tinyurl.com/yyhbvykw.

corporation or LLC simply by paying a fee and filing Articles of Incorporation or Articles of Organization, online or in person, with the Secretary of State. *See* Mass. Gen. Laws ch. 156C, § 12 (LLCs); Mass. Gen. Laws chs. 156, § 11; 156D, § 2.01 (corporations). The Secretary provides a straightforward template for these documents.[12] Consequently, a single person could easily create any number of corporations or LLCs to use as conduits for contributions. Such evasion would be hard to detect; this Court has noted the "practical difficulty of identifying and directly combating circumvention under actual political conditions." *Colorado Republican*, 533 U.S. at 462.

Evidence demonstrates that this concern is well founded. The Commonwealth's Crime Commission determined that "it is not uncommon for contributors of large amounts to make their contributions in the names of others so as to conceal the real source of the money, either because of the [individual contribution limit], or for other reasons." Crime Commission Report 20-21. And the record shows that corporations regularly attempt to circumvent Section 8 by requiring their employees to make individual contributions to candidates, and then reimbursing those employees out of corporate treasury funds. *See* Pet. App. 19a; SJC App. Vol. V 233-86. Outside Massachusetts, in states that permit corporate and LLC contributions, investigations have uncovered abuses by individuals who use business entities to covertly funnel contributions to candidates. *See, e.g.*, State of New York, Commission to Investigate Public Corruption: Preliminary Report 36-37 (Dec. 2, 2013)[13]

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[12] *See* http://tinyurl.com/y54hmucn.

[13] *See* https://perma.cc/57PS-4H39.

(citing examples of schemes to evade individual contribution limits by creating numerous LLCs); Maryland General Assembly, Commission to Study Campaign Finance Law: Final Report 9 (Dec. 2012)[14] (citing testimony regarding "persons who, through their control of multiple business entities, are able to donate hundreds of thousands of dollars in campaign contributions").

In light of these considerations, the SJC correctly held that Section 8 is closely drawn to important anti-corruption and anti-circumvention objectives. Section 8 is not overinclusive, as the SJC explained, because Massachusetts law allows ample "corporate political participation" in the electoral process. *Beaumont*, 539 U.S. at 163; *see* Pet. App. 21a-23a. Massachusetts corporations and LLCs can, and do, engage in robust political speech through independent expenditures and contributions to independent expenditure PACs, and business employees may, and do, form PACs that use the name of their employer. *See supra*, at 4. These options provide corporations and LLCs meaningful outlets for exercising their First Amendment rights of speech and association.[15] Contrary to petitioners' argument, *see* Pet. 17, 19, imposing limits on corporate contributions would not be a satisfactory alternative, because it would allow for circumvention of individual contribution limits through LLCs and

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[14] *See* https://perma.cc/KHT7-QJJX.

[15] Petitioners are simply wrong to argue that "independent expenditures do not allow the supporter to associate with a candidate." Pet. 37. *Buckley* made clear that independent expenditures are exercises of both "the freedom of speech *and* association." 424 U.S. at 44 (emphasis added).

corporations, which can proliferate under Massachusetts law. *See supra*, at 27-28.[16]

Nor is Section 8 underinclusive, as petitioners contend. Pet. 18. In advancing this argument, petitioners make the "somewhat counterintuitive" claim that Section 8 "violates the First Amendment by abridging *too little* speech." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (emphasis in original). It is their position that, when the Legislature enacted and re-codified Section 8, it was constitutionally required to *also* ban contributions by nonprofit organizations and labor unions. But this Court has made clear that "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). "A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Id.* Underinclusiveness is relevant to the First Amendment analysis only if it "reveal[s] that a law does not actually advance a compelling interest" or if it raises "doubts about whether the government is in fact pursuing the interests it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* (citation omitted).

Such is not the case here. As described, the Legislature enacted and re-codified Section 8's prohibition on contributions from business entities in

[16] Petitioners cannot decide whether they believe a corporate-funded PAC option identical to the one afforded by federal law would be an adequate alternative. On the very same page of their petition, they argue both that such an option would and would not satisfy the First Amendment. Pet. 19 & n.4; *see also* Pet. 33-36.

order to advance the Commonwealth's substantial interests in deterring *quid pro quo* corruption and its appearance, including the circumvention of the Commonwealth's individual contribution limits. *See supra*, at 26-29. Petitioners have introduced no evidence that labor unions and other nonprofit organizations have a comparable record of *quid pro quo* corruption in Massachusetts. *See* Pet. App. 100a-01a, 104a-05a (noting petitioners' failure to submit evidence to support their claims). Business entities are, moreover, better suited to facilitate circumvention of individual contribution limits. Whereas corporations and LLCs can be formed and maintained quickly and easily in Massachusetts, *see supra*, at 27-28, the process for creating and operating a union or nonprofit organization is more onerous. To form a union, a person generally must marshal support from a substantial number of her co-workers, file a request to hold an election with the National Labor Relations Board, convince a majority of her co-workers to vote in favor of unionization at the election, wait for certification of the election results, and engage in negotiations on a contract with the employer. *See* 29 U.S.C. § 159; 29 C.F.R. §§ 102.60-102.70. And to create a tax-exempt nonprofit, a person generally must pay a filing fee and file Articles of Incorporation, online or in person, with the Secretary of State, *see* Mass. Gen. Laws ch. 180, § 3; register with the Nonprofit Organization / Public Charities Division of the Attorney General's Office, *see* Office of the Attorney General, Registering a Public Charity (2019)[17]; and apply for tax-exempt status with both the Internal Revenue Service and the Massachusetts

[17] *See* https://www.mass.gov/info-details/registering-a-public-charity.

Department of Revenue. Given these hurdles for labor unions and other nonprofit organizations, as well as the evidence of *quid pro quo* corruption stemming from corporate and LLC contributions in particular, the Legislature could permissibly pursue its anti-corruption and anti-circumvention objectives by barring only business entities from making campaign contributions.

Of course, the First Amendment would not be offended if the Legislature were to also prohibit contributions from labor unions and nonprofit organizations. *See Beaumont*, 539 U.S. at 159-60. But nothing requires Massachusetts to adopt the same approach as the federal government. Indeed, states have different approaches to regulating campaign contributions: some bar contributions by corporations, but not unions, *see, e.g.*, W. Va. Code § 3-8-8; Iowa Code § 68A.503; another bars contributions by unions, but not corporations, *see* N.H. R.S.A. § 664:4; and still others impose different contribution limits on corporations and unions, *see, e.g.*, Miss. Code § 97-13-15 (setting a contribution limit only for corporations). This diversity of state approaches is constitutionally permissible and accords with the deference this Court extends to legislatures in regulating campaign contributions. *See Davis*, 554 U.S. at 737; *Beaumont*, 539 U.S. at 162 n.9.

C. Section 8 Comports with the Equal Protection Clause.

Finally, the SJC correctly applied this Court's precedent in holding that the closely drawn standard of review governs petitioners' equal protection claim,

and that the claim fails for the same reasons the First Amendment claim fails.

This Court has long held that a plaintiff "can fare no better under the Equal Protection Clause than under the First Amendment itself." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n.4 (1986). This rule follows from the fact that equal protection challenges are analyzed under rational basis review unless the classification at issue burdens another underlying constitutional right or a suspect class. *See Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012). The underlying right itself determines the applicable standard of review, lest the Equal Protection Clause become a strict-scrutiny bypass for legislative judgments and classifications of any kind. Thus, in *Perry Education Association v. Perry Local Educators' Association*, for example, the Court rejected a First Amendment challenge to a school district policy that granted one teacher's union access to the interschool mail system while denying access to a rival union, because the policy was "reasonable in light of the purpose" of the mail system. 460 U.S. 37, 44-54 (1983). Addressing the argument that the differential access violated equal protection, the Court explained that the claim "fares no better in equal protection garb." *Id.* at 54. Similarly, in cases involving content-neutral time, place, or manner restrictions, the Court has reviewed equal protection claims by reference to the underlying First Amendment right. *See, e.g.*, *City of Renton*, 475 U.S. at 50, 54 n.4 (upholding a zoning ordinance against First Amendment and equal protection claims because it "serve[d] a substantial governmental interest and allow[ed] for reasonable alternative avenues of communication"); *Young v. American Mini*

Theatres, Inc., 427 U.S. 50, 63-73 (1976) (rejecting an equal protection challenge to a zoning ordinance by examining the First Amendment rights at stake). Consistent with this precedent, there is "no case in which [this] Court has employed strict scrutiny to analyze a contribution restriction under equal protection principles." *Wagner*, 793 F.3d at 32.

The SJC thus correctly concluded that petitioners' equal protection claim "can fare no better under the Equal Protection Clause than under the First Amendment itself." *City of Renton*, 475 U.S. at 55 n.4; *see* Pet. App. 30a-31a. Moreover, as the Superior Court explained, petitioners "have provided *no* evidence to support their conclusory assertion that corporations and unions [and nonprofit organizations] are similarly situated" in Massachusetts. Pet. App. 101a (emphasis added). To the contrary, among other differences, for-profit business entities pose distinct circumvention risks, as borne out by the experience of Massachusetts and other states. *See supra*, at 27-29. At bottom, Section 8 simply reflects the Legislature's permissible judgment "that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *California Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (rejecting equal protection challenge to limits on contributions to multicandidate political committees).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 12, 2019