COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 2015-00494-E

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

VS.

MICHAEL SULLIVAN, Director, Office of Campaign and Political Finance

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The plaintiffs, 1A Auto, Inc., and 126 Self Storage, Inc. (collectively, "Plaintiffs"), two business corporations, have brought a complaint for declaratory and injunctive relief against Michael J. Sullivan, the Director of the Massachusetts Office of Campaign and Political Finance ("Defendant" or "OCPF"), challenging the enforceability of that provision of a Massachusetts campaign finance law, G. L. c. 55, § 8 ("Section 8"), that imposes a ban on political contributions by business corporations to candidates, parties, and political committees. The Plaintiffs have moved for a preliminary injunction to abate the Section 8 contribution ban, which motion the Defendant opposes. After hearing, and for the reasons set forth below, the motion is **DENIED**.

BACKGROUND

In pertinent part, Section 8 provides:

> "[N]o business or professional corporation, partnership, limited liability company partnership under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, 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."

Section 8 imposes an outright ban on political contributions by business corporations to candidates, parties, and political committees, both directly from a business's general treasury and indirectly to a "separate segregated account" or through a business-controlled political action committee ("PAC") (except with regard to a ballot question); unincorporated associations, *e.g.*, unions, are not constrained by Section 8 in making political contributions, however. G. L. c. 55, § 8. See 1980-81 Mass. Op. Atty. Gen. No. 10, 1980 WL 119563, at *1 (Nov. 6, 1980). A corporation that violates Section 8 can be fined up to $50,000; and any officer, director, or agent of the corporation violating any provision of Section 8 can be punished by a fine of up to $10,000, or by imprisonment for up to one year, or both. G. L. c. 55, § 8. The Attorney General's Opinion noted, however, that other avenues for engaging in political activity and discourse remain open to corporations, including, *inter alia*, contributions by corporate officers and employees, the formation of PACs, the donation of volunteer time by corporate officers and employees, and the dissemination of newsletters and other publications. *Id.* at *2, *4.

In interpreting Section 8 of General Laws Chapter 55, the Campaign Finance Law, the OCPF has determined that business corporations "may not contribute to candidates, PACs (other than independent expenditure PACs), or party committees." OCPF-Interpretive Bulletin-88-01. In the opinion of the OCPF, businesses may not establish, finance, maintain, or control a PAC that supports candidates, OCPF-Advisory Opinion ("AO")-90-30; and non-profit corporations and PACs with business members similarly are barred from making these sorts of contributions, OCPF-AO-98-01.

The Plaintiffs are two family-owned Massachusetts business corporations which acknowledge that, as corporations registered to do business in Massachusetts, are governed by the contribution ban under Section 8. 1A Auto, Inc., has sold auto parts in Pepperell, Massachusetts, since 1999 and employs 217 people. 126 Self Storage, Inc., has rented self-storage units in Ashland, Massachusetts, since 1999 and employs four people. According to the affidavits of the Plaintiffs' presidents, each Plaintiff would have made direct and indirect contributions to political candidates, PACs, and party committees but for the OCPF's enforcement of Section 8. The Plaintiffs contend that, by applying different contribution limits to unions and business, the Defendant has violated their right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and by art. 1 of the Declaration of Rights of the Massachusetts Constitution. The Plaintiffs further submit that the contribution ban imposed by Section 8 violates their freedoms of speech and association protected by the First and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1983; and art. 16 and art. 19 of the Massachusetts Declaration of Rights.

DISCUSSION

I. Preliminary Injunction Standard

In considering a request for a preliminary injunction, a court must evaluate a moving party's likelihood of success on the merits and claim of irreparable harm and balance the risks of harm to the parties. *Packing Industries Group, Inc.* v. *Cheney*, 380 Mass. 609, 617 (1980). See *Winter* v. *National Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Where, as here, a party seeks to enjoin governmental action, the court also is "required to determine that the

requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Cote-Whitacre* v. *Dept. of Public Health*, 446 Mass. 350, 357 (2006), quoting *Commonwealth* v. *Mass. CRINC*, 392 Mass. 79, 89 (1984).

"Where a court contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard the separation of powers mandated by art. 30 of the Declaration of Rights of the Massachusetts Constitution." *Smith* v. *Comm'r of Transitional Assistance*, 431 Mass. 638, 651 (2000). The "fact that [the Plaintiffs are] asserting First Amendment rights does not automatically require a finding of irreparable injury." *Respect Maine PAC* v. *McKee*, 622 F.3d 13, 15 (1st Cir. 2010), quoting *Pub. Serv. Co. of New Hampshire* v. *Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987). See *Holmes* v. *Fed. Election Comm'n*, No. 14-1243, 2014 WL 5316216, at *6-*7 (D.D.C. Oct. 20, 2014); *Rufer* v. *Fed. Election Comm'n*, 64 F. Supp.3d 195 (D.D.C. 2014), 2014 WL 4076053, at *6-*7.

II. Analysis

In 1907, Massachusetts enacted legislation banning contributions from corporations involved in certain businesses. See St. 1907, c. 581, § 3. That was the same year that Congress first banned corporate political contributions. See 34 Stat. 864-65. In 1908, the ban was extended in Massachusetts to any "business corporation incorporated under the laws of or doing business in the commonwealth," St. 1908, c. 483, § 1, and later to any "business or professional corporation, partnership, limited liability company partnership," St. 2009, c. 28, § 33. The corporate contribution ban was part of the Massachusetts Legislature's efforts over the last century to combat corruption in state elections. See St. 1913, c. 835, §§ 353, 356, 503; St. 1946, c. 537, § 10; 1965 Report of Mass. Crime Commission at 75-76. In addition to the Federal

Election Campaign Act, the laws of twenty other states ban corporate contributions.[1]

Section 8 applies on its face to both political contributions and independent expenditures[2] by business corporations, but the Defendant concedes that application of the ban to *expenditures* is unconstitutional in the wake of the U. S. Supreme Court's decision in *Citizens United.* See *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).[3] Thus, only political *contributions* are at issue in the case at bar. Laws that regulate campaign contributions are subject to "a lesser but still rigorous standard of review," *McCutcheon* v. *Fed. Election Comm'n*, 134 S. Ct. 1434, 1444 (2014), quoting *Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976),[4] because "contributions lie closer to the edges than to the core of political expression," *Fed. Election Comm'n* v. *Beaumont*, 539 U.S. 146, 161 (2003). In the First Amendment context, limitations on political contributions must meet the "closely drawn" test so as "to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444. See *Buckley*, 424

---

[1]See 52 U.S.C. § 30118(a); Alaska Stat. § 15.13.074; Arizona Rev. Stat. § 16-919(A); Colo. Const. Art. XXVIII, § 3; Conn. Gen. Stat. §§ 9-613; Iowa Code § 68A.503; Ky. Rev. Stat. § 121.025, 121.035; Mich. Comp. Laws § 169.254; Minn. Stat. § 211B.15; Mont. Code Ann. § 13-35-227; N.C. Gen. Stat. § 163-278.15; N.D. Cent. Code § 16.1-08.1-03.5; Ohio Stat. § 3599.03; Okla. Stat. tit. 21, § 187.1; Pa. Stat. tit. 25, § 3253; R.I. Gen. Laws § 17-25-10.1; S.D. Codified Laws § 12-27-18; Tex. Elec Code § 253.094; W. Va. Code § 3-8-8; Wis. Stat. § 11.38; Wyo. Stat. § 22-25-102.

[2]An independent expenditure is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 C.F.R. 100.16(a).

[3]Following *Citizens United*, Massachusetts now permits unlimited corporate spending on independent expenditures and unlimited corporate donations to "independent expenditure PACs."

[4]The Supreme Judicial Court has construed *Buckley* as imposing a lesser standard of review for contribution restrictions. See *Opinion of the Justices*, 418 Mass. 1201, 1205 (1994); *Weld for Governor* v. *Dir. of Office of Campaign & Political Finance*, 407 Mass. 761, 765 n.6 (1990). The Plaintiffs' reliance on the recent Supreme Judicial Court decision of *Commonwealth* v. *Lucas* is unavailing: the present case, unlike *Lucas*, does not raise an issue of a content-based restriction on political speech. See *Commonwealth* v. *Lucas*, —Mass.— (August 6, 2015).

U.S. at 21.[5]

The Plaintiffs' request to enjoin Section 8's contribution ban on them flies in the face of years of U. S. Supreme Court and U. S. Court of Appeals jurisprudence upholding such a ban. See *Rufer*, at *6. In 1990, the Supreme Court held that the different treatment of corporations and labor unions in campaign finance laws does no violence to the Equal Protection Clause of the Fourteenth Amendment. *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990).[6] Then in 2003, the Supreme Court ruled that the federal ban on corporate contributions is consonant with the First Amendment. *Beaumont*, 539 U.S. Recently, two Eighth Circuit decisions rejected free-speech and equal-protection arguments similar to the ones advanced by the instant Plaintiffs. *Iowa Right to Life Committee, Inc.* v. *Tooker*, 717 F.3d 576 (8th Cir. 2013); *Minnesota Citizens Concerned for Life* v. *Swanson*, 692 F.3d 864 (8th Cir. 2012). See also *Wagner* v. *Fed. Election Comm'n*, —F.3d—, 2015 WL 4079575 (C.A.D.C.) (*en banc*) (July 7, 2015). Simply put, "restrictions on contributions require less compelling justification than restrictions on independent spending." *Beaumont*, 539 U.S. at 158-59. Furthermore, Section 8 meets the "closely drawn" test since it is directed only at wealth-generating, *for*-profit businesses. See *McCutcheon*, 134 S. Ct. at 1444.

The Plaintiffs' attempts to distinguish this long line of precedents are unpersuasive. *Inter alia*, the Plaintiffs rely on inapposite case law regarding content-based regulation rather than that

---

[5]The Supreme Judicial Court has construed *Buckley* as imposing a lesser standard of review for contribution restrictions. See *Opinion of the Justices*, 418 Mass. 1201, 1205 (1994); *Weld for Governor* v. *Dir. of Office of Campaign & Political Finance*, 407 Mass. 761, 765 n.6 (1990). The Plaintiffs' reliance on the recent Supreme Judicial Court decision of *Commonwealth* v. *Lucas* is unavailing: the present case, unlike *Lucas*, does not concern a content-based restriction on political speech. See *Commonwealth* v. *Lucas*, —Mass.— (August 6, 2015).

[6]*Citizens United* overruled *Austin* only with regard to corporate independent campaign expenditures, not contributions.

concerning the relevant content-neutral restriction at issue here, see *Turner Broadcasting System, Inc.* v. *FCC*, 412 U.S. 622, 658 (1994); they apply the incorrect standard of "strict scrutiny" as opposed to, at most, "intermediate scrutiny," see *id.* at 661-62; and they gloss over the distinction between contributions and expenditures that originated in *Buckley*, see *Opinion of the Justices*, 418 Mass. at 1205. The Plaintiffs also make much of the fact that Section 8 does not provide an "indirect" means by which a corporation can contribute to an affiliated PAC, the so-called "PAC option." However, in *Minnesota Citizens*, the Eighth Circuit rejected a First Amendment challenge to a statutory scheme in Minnesota that also precludes indirect financial support of a PAC (while allowing corporate contributions through an "employee political fund"). *Minnesota Citizens Concerned for Life*, 692 F.3d at 879.[7]

Accordingly, the Plaintiffs have failed to demonstrate a likelihood of success on the merits in light of the aforesaid controlling precedents. See *Packaging Industries Group*, 380 Mass. at 617. Moreover, if this court were to enjoin the enforcement of a contribution ban that has been in existence for over 108 years based on the Plaintiffs' yet untested legal theory, the public's long-standing expectations with respect to campaign finance laws would be upset in the middle of an election cycle, thus clearly tipping the balance of equities in favor of denying the requested relief. See *Respect Maine PAC* v. McKee, 622 F.3d 13, 15-16 (1st Cir. 2010); *Rufer*, 2014 WL 4076053, at *7. Perhaps the Plaintiffs' challenge is better left to the vehicle of reporting the case to the Appeals Court pursuant to G. L. c. 231, § 111 and Mass. R. Civ. P. 64 at some appropriate juncture.

[7]Massachusetts actually has a Minnesota-style PAC option: Section 5B of General Laws Chapter 55 allows corporate employees to form PACs using the names of their corporate employers. See G. L. c. 55, § 5B.

ORDER

For all the foregoing reasons, the Plaintiffs' motion for a preliminary injunction is hereby **DENIED**.

Linda E. Giles,
Justice of the Superior Court

Dated: August 20, 2015

notice sent
08.21.15
(ms)

notify

8

COMMONWEALTH OF MASSACHUSETTS 6-5

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
TRIAL COURT OF THE COMMONWEALTH
CIVIL ACTION NO. 15-0494E

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

Plaintiffs,

v.

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

Defendant.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2015 JUN -3 PM 3:52
MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

7/20/15 Denied. See Memorandum of Decision and Order. (Giles, J.) Attest: Margaret M. Buckley Asst. Clerk

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through their undersigned counsel, respectfully move pursuant to Mass. R. Civ. P. 65 for a preliminary injunction. Attached hereto is a Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, which demonstrates in detail the grounds for granting this motion. In short, the grounds for this motion are as follows:

1. Plaintiffs seek this injunction to halt a brazen discrimination in Massachusetts law: G.L. c. 55, § 8 bans businesses from making political contributions, while allowing robust contributions by unions.

2. Issuance of a preliminary injunction to abate the Section 8 contribution ban is appropriate here because: (1) Plaintiffs are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the risk of irreparable harm to Plaintiffs outweighs the potential harm to Defendant; and (4) an injunction is in the public interest. *Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 219 (2001).

notice sent 08.21.15
JM
AD
GDC
M+E
WWP
AAG
(mo)