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 Writ of Certiorari to the Massachusetts Supreme Judicial Court

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should *FEC v. Beaumont*, 539 U.S. 146 (2003), be overruled?

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INTEREST OF THE *AMICI CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. First and foremost, the Liberty Justice Center seeks to ensure that the rights to earn a living and to start a business – which are essential to a free and prosperous society – are available to all, not just to the politically-privileged. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018). To this end, the Liberty Justice Center has itself submitted a petition for certiorari raising similar issues, which is currently pending before this Court. *See Illinois Liberty PAC v. Madigan*, (No. 18-755).

This case interests *amicus* because the right to speak in support of, or against, candidates for elected office is fundamental to a free society.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014). Yet the decision below purports to deny petitioners access to that basic right on the sole ground that they have

[1] Rule 37 statement: All parties received timely notice of intent to file this brief. Petitioners filed a blanket consent, and the Respondent consented to the filing of this brief. No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission.

chosen to order their affairs through the corporate form. This deprivation is premised on an opinion of this Court, *FEC v. Beaumont*, 539 U.S. 146 (2003), that the state court below admitted is at odds with this Court's subsequent decisions. Pet. App. at 15a. *Beaumont* relied on *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), which has since been abrogated by this Court. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). The question before the Court is whether it should reject *Beaumont* as well, or whether considerations of *stare decisis* are sufficient to spare it.

Stare decisis is "not an inexorable command." *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). While respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), this Court has repeatedly outlined circumstances under which these values must give way to more acute considerations and has not hesitated to jettison misbegotten precedent, particularly where such cases implicated First Amendment rights. *See Janus*, 138 S. Ct. at 2486; *Citizens United*, 558 U.S. at 363; *FEC v. Wisconsin Right to Life*, 554 U.S. 449, 500 (2007) (Scalia, J., concurring) ("This Court has not hesitated to overrule decisions offensive to the First Amendment").

The doctrine of *stare decisis* is not "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). "If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap

ordinary criminal suspects without first obtaining warrants." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring).

This Court should clarify that the right to free speech likewise deserves more respect than erroneous precedent. "The First Amendment is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *McCutcheon*, 572 U.S. at 203 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). The First Amendment deserves more than the inconsistent doctrine that *Beaumont* creates.

This Court has identified a number of potential factors to consider when overruling precedent. The most prevalent are five: "[1.] the quality of reasoning [of the decision to be overturned], [2.] the workability of the rule it established, [3.] its consistency with other related decisions, [4.] developments since the decision was handed down, and [5.] reliance on the decision." *Janus*, 138 S. Ct. at 2478-79.

In their Petition for Writ of Certiorari, Petitioners ably expounded on the first two factors: that *Beaumont* did not possess quality reasoning or produce a workable rule. Therefore, *amicus* submits this brief to focus on the last three factors. Specifically, *Amicus* will show that (1) legal developments since *Beaumont* have eroded the basis on which the decision rested, (2) *Beaumont* is inconsistent with other related decisions, and (3) there are no reliance interests that should give

the Court pause before relegating the case to the dustbin of erroneous rulings.

ARGUMENT

I. THE COURT SHOULD OVERRULE *BEAUMONT* BECAUSE LEGAL DEVELOPMENTS SINCE THAT DECISION HAVE ERODED ITS BASIS

The development of this Court's case law since *Beaumont* has "eroded the decision's underpinnings and left it an outliner among [the Court's] First Amendment cases." Janus, 138 S. Ct. at 2482 (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)). This Court should therefore reconsider *Beaumont*.

The rationale put forward in *Beaumont* has been rejected by this Court. Both at the time of the *Beaumont* decision and now, the Court has allowed that the government "may regulate campaign contributions to protect against corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 191. However, since the *Beaumont* decision, the Court has rejected other claimed interests, such as to reduce campaign spending in general or to draw distinctions "restrict[ing] the political participation of some in order to enhance the relative influence of others." *Id.* That Massachusetts has chosen to draw such a distinction, and to enforce it on pain of fine and imprisonment, *see* Pet. App. at 121a, should give this Court pause: "[When g]overnment seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may

not hear, it uses censorship to control thought." *Citizens United*, 558 U.S. at 356.

The Court has refused to countenance rationales for regulation other than *quid pro quo* corruption. Justifications that rest on some particular evil of the corporate form or a desire to disfavor those with more resources to devote to the political process cannot be a basis for curtailing First Amendment rights. "Many people might find those latter objectives attractive . . . . Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects." *McCutcheon,* 572 U.S. at 191. "Any regulation must instead target what [this Court has] called *quid pro quo* corruption or its appearance." *Id.* at 192. In contrast with the opinion below, this Court holds that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id.* It is *quid pro quo* corruption and its equivalent that the First Amendment allows the government to regulate, not abstract concepts of "influence" or "access." *Citizen United*, 558 U.S. at 360 ("Ingratiation and access . . . are not corruption").

The Court did not always express the full gravity of these matters. *Beaumont* thus hails from an earlier era, where restrictions on these fundamental freedoms were assessed in a more cavalier manner. It was under these circumstances that *Beaumont* expressed a desire to "curb corporations' potentially 'deleterious influences on federal elections.'" *Beaumont*, 539 U.S. at 152 (quoting *United States v. Automobile Workers*, 352 U.S. 567, 585 (1957)). Per *Beaumont*, the government

is entitled to discriminate against certain speakers' exercise of their First Amendment rights because of the "special characteristics of the corporate structure that threaten the integrity of the political process." *Id.* (quoting *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982)). These "special characteristics" are precisely the sort this Court has since identified as an invalid basis to curtail fundamental rights. *See Citizens United*, 558 U.S. at 349-50 (rejecting the claim that greater regulation is necessary to "prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace," because "[t]he First Amendment's protections do not depend on the speaker's financial ability to engage in public discussion").

Indeed, to support its claim that corporations are different, *Beaumont* quoted at length from *Austin*, outlining various features of the corporate form that countenance discrimination among speakers. These were, in turn, 1) the economic power of corporate wealth, 2) the potential that not all shareholders of the corporation agree with the speech, 3) a broad concern not just for corruption as this Court understands it but for "influence", and 4) anti-circumvention. This Court has explicitly overruled *Austin* as to the first two rationales. *McCutcheon,* 572 U.S. at 191; *Citizen United*, 558 U.S. at 350. It has limited the anti-corruption interest only to actual corruption, not mere influence. *Citizen United*, 558 U.S. at 382. And it has demanded that anti-circumvention provisions be rigorously reviewed to ensure they are "closely drawn." *McCutcheon¸* 572 U.S. at 199.

Given that *Beaumont*'s proposed government interests have been rejected by this Court, it is difficult to see what remains of the decision for this Court to uphold.

II. THE COURT SHOULD OVERRULE *BEAUMONT* BECAUSE IT IS INCONSISTENT WITH OTHER RELATED DECISIONS

Beaumont is not simply in conflict with this Court's subsequent cases, it represents an "anomaly," inconsistent both with what came before as well as what came after it was handed down. *Janus*, 138 S. Ct. 2483 (overturning an anomalous case "involving significant impingements on First Amendment rights"). This Court should, therefore, grant the petition to clarify that *Beaumont* should be excised in the interest of clarifying campaign finance doctrine. This Court previously determined that *Austin* was anomalous and should be put to rest. *See Citizens United,* 558 U.S. at 379 (Roberts, C.J., concurring) (*Austin* "was an 'aberration' insofar as it departed from the robust protections we had granted political speech in our earlier cases.") (quoting the majority opinion, 558 U.S. at 355). *Beaumont* is due for the same treatment.

It cannot be disputed that the First Amendment protects the speech of corporations. *See Citizens United*, 558 U.S. at 342 (citing dozens of cases over decades that protected corporate speech). Long before *Beaumont*¸ this Court declared that a prohibition on corporate political spending "amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978). The basic principle involved extends back even further. *See*

Grosjean v. Am. Press Co., 297 U.S. 233, 244, 56 S. Ct. 444, 447 (1936). Indeed, many of this Court's core First Amendment principles come to us through cases where a corporate speaker was entitled to express its views. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964*)*; *see also Citizen United*, 558 U.S. at 352 (rejecting a distinction between media corporations and other corporations). *Bellotti* therefore "rested on the principle that the Government lacks the power to ban corporations from speaking." *Citizens United*, 558 U.S. 347. And yet in this case Massachusetts has banned exactly that—for-profit corporations cannot speak at all regarding candidates for office. Pet. at 2.

Similarly, in cases after *Beaumont*, this Court has emphasized that corporate speech is not in a special category subject to less protection. *See Citizen United*, 558 U.S. at 355; *Wisconsin Right to Life*, 551 U.S. at 481 ("the corporate identity of a speaker does not strip corporations of all free speech rights"). "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition." *McCutcheon,* 572 U.S. at 191 (citing *Texas v. Johnson*, 491 U.S. 397 (1989); *Snyder v. Phelps*, 562 U.S. 443 (2011); *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (per curiam)).

The exception, therefore, is *Beaumont*, as well as *Austin* and portions of *McConnell v. FEC*, 540 U.S. 93 (2003). But these cases were not a settled body of law. Indeed, "it is far more accurate to say that *McConnell* unsettled a body of law" by signing off on regulation of corporate expenditures. *Wisconsin Right to Life,* 551

U.S. at 502 (Scalia, J., concurring). "*Austin* abandoned First Amendment principles" in allowing regulation of corporate expenditures as a special, disfavored category. *Citizens United*¸ 558 U.S. at 363. This Court has already rectified the missteps it made in *Austin* and *McConnell*. *Id.* at 365. The logical next step is to recognize that *Beaumont*, which depends on the same rejected assumptions, should also be overruled.

Moreover, where campaign contribution rules favor some political speakers over others, as they do here, this Court should apply the strictest scrutiny, which *Beaumont* failed to do. "Premised on mistrust of governmental power, the First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id*. In particular, the First Amendment prohibits government attempts to control the "relative ability of individuals and groups to influence the outcome of elections." *Citizens United*, 558 U.S. at 350. The government may not "restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 572 U.S. at 191 (citing *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011)).[2]

"This Court has not hesitated to overrule decisions offensive to the First Amendment." *Wisconsin Right to Life,* 553 U.S. at 500 (Scalia, J., concurring). And it

[2] *Amicus* has elaborated on the need to apply strict scrutiny to campaign finance rules that discriminate among speakers in a petition for certiorari currently pending before this Court. *See Illinois Liberty PAC v. Madigan*, (No. 18-755).

should not hesitate to here. *Stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). That *Beaumont* represents a departure from the bulk of First Amendment doctrine is itself a substantial reason to reconsider it. *Janus*, 138 S. Ct. at 2844 (rejecting a prior decision as an "oddity" in order to "bring a measure of greater coherence to our First Amendment law").

Beaumont's incongruence with the body of campaign finance doctrine, both before and after it, therefore, counsels for its interment.

III. THE COURT SHOULD OVERRULE *BEAUMONT* BECAUSE MASSACHUSETTS HAS NOT RELIED ON THE DECISION IN A WAY THAT IT WOULD BE SUBSTANTIALLY HARMED BY ITS BEING OVERRULED

"In some cases, reliance provides a strong reason for adhering to established law." *Janus,* 138 S. Ct. 2483. But here the First Amendment rights at stake override any claimed interest the government might espouse. *Beaumont* should, therefore, be overruled because doing so will not undermine settled expectations of sufficient importance to sustain it.

Reliance interests are at their lowest ebb in First Amendment cases, since "it would be unconscionable to permit free speech rights to be abridged in perpetuity" simply because it is more convenient for the government to maintain its present arraignments. *Janus*, 138 S. Ct. at 2484. "The fact that [Massachusetts] may

view the [s]tate's version of [campaign finance regulation] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Arizona v. Gant*, 556 U.S. 332, 349 (2009); *See also Janus*, 138 S. Ct. at 2484 (quoting *Gant*).

For this reason, "this Court has a considered practice not to apply that principle of policy as rigidly in constitutional as in nonconstitutional cases." *Wisconsin Right to Life,* 551 U.S. at 500 (Scalia, J., concurring). And most particularly "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment . . . and to do so promptly where fundamental error was apparent." *Id.*

It is difficult to determine an interest in this case that could overcome First Amendment objections. Reliance interests typically arise where contractual or property rights are at stake. Private parties order their affairs based on certain expectations, and to upset such expectations would be to perpetrate an unfairness on them, perhaps especially on those who are not before the Court. *See Citizens United*, 558 U.S. 365.

Here, however, the status quo is that private parties such as Petitioners have been *prevented* from taking any action. *Id.* Corporations are not even allowed, under the challenged statute, to set up and contribute to a PAC, so it's not as if the corporations have committed resources to create entities which will now be superfluous. *See* Pet. at 2. The only interest to be relied on here is that "[l]egislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest

for *stare decisis*." *Citizens United,* 558 U.S. at 365. Indeed, "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id.*

Even assuming a reliance interest could overcome First Amendment objections, there is no such valid reliance problem present in this case.

The fact that *Beaumont* is an anomaly likewise undermines any reliance interest. *See supra,* Section II. *Beaumont* was based on the now discredited "*Austin,* which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*." *Citizens United,* 558 U.S. 363. Reasonable actors intent on conforming themselves to the precedents of this Court could at best view a world of divided authority, with the balance of authority in fact against *Beaumont*. The incongruence of *Beaumont* with this Court's other decisions does not form "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018). "*Stare decisis* considerations carry little weight when an erroneous governing decision has created an unworkable legal regime." *Wisconsin Right to Life,* 551 U.S. at 449 (Scalia, J., concurring) (internal quotation marks omitted).

Moreover, invalidating the Massachusetts ban on for-profit corporate contributions will enact no great chaos on the state's regime. Massachusetts already allows non-profit corporations and labor unions to contribute to candidates. Pet. at 2. A decision for petitioners will simply end the discrimination and place all actors on the political scene in parity with one another.

That Massachusetts is comfortable with the current regime is, therefore, of no moment. The government is not entitled to continue violating the Constitution simply because it is the style to which it has become accustomed. If that were so, then children would still be compelled to recite the Pledge of Allegiance. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overturning Minersville School District v. Gobitis, 310 U.S. 586 (1940)). Same-sex couples would still carry on their relationships subject to fear of arrest. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning Bowers v. Hardwick, 478 U.S. 186 (1986)). And public sector workers would still be "shanghaied for an unwanted voyage" of compelled political speech. *Janus*, 138 S. Ct. at 2466. This Court has not in the past, and should not now, countenance constitutional violations simply because the government has gotten used to it.

CONCLUSION

The basis for *Beaumont* has been eroded by legal developments since it was handed down. The case is inconsistent with the larger body of this Court's campaign finance cases. And there is no valid reliance interest that Massachusetts can claim in the decision. For these reasons, and those stated by the Petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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