No. 11-4667

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

WILLIAM P. DANIELCZYK, JR., and **EUGENE R. BIAGI**,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia, Case No. 1:11-cr-00085

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF APPELLANT AND URGING REVERSAL

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The Campaign Legal Center (CLC) is a nonprofit corporation, and is not a publicly held corporation or other publicly held entity. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC. The CLC is not aware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

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This case does not arise out of a bankruptcy proceeding.

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STATEMENT OF INTEREST

Amici curiae Campaign Legal Center and Democracy 21 are nonpartisan, nonprofit organizations that work to strengthen the laws governing campaign finance. *Amici* have participated in numerous past cases addressing corporate restrictions, including *Citizens United v. FEC*, 130 S. Ct. 876 (2010), *Wisconsin Right to Life* (*WRTL*), 551 U.S. 449 (2007), and *McConnell v. FEC*, 540 U.S. 93 (2003). *Amici* thus have a demonstrated interest in the law at issue here.

SUMMARY OF ARGUMENT

For over a century, Congress has prohibited contributions from corporations in connection to federal elections.

The federal restriction on corporate contributions at issue in this case, *see* 2 U.S.C. § 441b(a), originated from the Tillman Act of 1907, which prohibited corporations and national banks from making "money contribution[s] in connection with any election to any political office." Tillman Act, ch. 420, 34 Stat. 864 (1907). This law has remained on the books for over 100 years, assuming its modern form with the enactment of the Federal Election Campaign Act (FECA), 2 U.S.C. § 431, *et seq*. And throughout this history, the Supreme Court has repeatedly affirmed the constitutionality of the restriction. In 1982, the Court upheld the federal restriction, or more specifically, its requirement that corporations and unions form political action committees ("PACs") in order to

make contributions to federal candidates, in *FEC v. Nat'l Right to Work Comm.* (*NRWC*), 459 U.S. 197 (1982). In 2003, the Supreme Court again affirmed the constitutionality of the federal corporate contribution restriction in a more direct challenge to the law brought in *FEC v. Beaumont*, 539 U.S. 146 (2003).

In a radical break from this precedent, however, the U.S. District Court for the Eastern District of Virginia struck down the 104-year-old federal restriction on corporate contributions in two opinions in May and June of this year. *See U.S. v. Danielczyk*, -- F. Supp. 2d --, 2011 WL 2161794 (E.D. Va. May 26, 2011), *opinion clarified on denial of reconsideration*, 2011 WL 2268063 (E.D. Va. Jun. 7, 2011).

On May 26, 2011, the district court dismissed Count Four and part of Count One of the Indictment in this case on grounds that the federal corporate contribution restriction at § 441b had been implicitly invalidated by *Citizens United*. 2011 WL 2161794 at *19. Astoundingly, the district court failed to consider or even cite *Beaumont* in this opinion. After this oversight was criticized by legal experts and the media,[1] the district court, *sua sponte*, requested additional briefing on whether it should reconsider its initial decision in light of the *Beaumont* precedent. Order, No. 1:11-cr-00085 (E.D. Va. May 31, 2011). The court then

[1] *See, e.g.,* N.Y. TIMES, Editorial, *About That Precedent* (June 2, 2011), *available at* http://www.nytimes.com/2011/06/03/opinion/03fri2.html; Rick Hasen, *Federal District Court, in Criminal Case, Holds That Ban on Direct Corporate Contributions to Candidates is Unconstitutional under Citizens United*, ELECTION LAW BLOG (May 26, 2011), *at* http://electionlawblog.org/?p=18342.

issued a second opinion that reiterated its initial holding, this time arguing that *Beaumont* does not "directly control" this case because *Beaumont* held that the federal corporate contribution restriction was constitutional as applied to contributions from a non-profit corporation, whereas this case concerns contributions from a for-profit corporation. 2011 WL 2268063, at *3-4.[2]

The district court's decision thus rests entirely on the Supreme Court's recent ruling in *Citizens United*, which it claims "gravely wounded" *Beaumont*. 2011 WL 2268063, at *5. But the expenditure restriction reviewed by *Citizens United* and the contribution restriction under review here are subject to different standards of scrutiny and are supported by different governmental interests. The Supreme Court's assessment of the former thus does not have any bearing on the constitutionality of the latter.

Furthermore, the district court's attempt to avoid *Beaumont*'s status as controlling precedent is untenable. First, *Beaumont* makes clear that § 441b is constitutional as to contributions from both for-profit and non-profit corporations. Second, the district court's holding has the effect of exempting for-profit, but not non-profit, corporations from the federal corporate contribution restriction, which

[2] The court, however, clarified that this holding was limited to the "the circumstances of this case" and § 441b was not "unconstitutional as applied to all corporate donations." 2011 WL 2268063, at *1.

if anything, is exactly the reverse of Supreme Court case law that has held that the First Amendment provides greater protection to non-profit corporations.

Finally, the district court's decision would authorize large-scale circumvention of the contribution limits and give rise to political corruption and the appearance of corruption. Indeed, the post-*Citizens United* era has already been marked by various schemes involving the use of corporations to circumvent other campaign finance laws – namely, the disclosure requirements typically applicable to independent spending.

In short, the district court decision represents an indefensible judicial overreach, lacks any basis in law, and will endanger the integrity of federal elections. This Court should accordingly reverse.

ARGUMENT

I. *Citizens United* Did Not Undermine the Constitutionality of Corporate Contribution Restrictions.

A. The Holding in *Citizens United* Neither Directly Nor Indirectly Impacts the Federal Corporate Contribution Restriction.

The district court concedes that *Citizens United* reviewed only a restriction on corporate expenditures, not a restriction on corporate contributions, and therefore has no direct application to this case. Indeed, it could hardly hold otherwise in light of the Supreme Court's express statement that "*Citizens United* has not made direct contributions to candidates, and it is not suggested that the

Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." 130 S. Ct. at 909. Further, *Citizens United* did not even discuss the *Beaumont* decision, much less question its validity. Any assertion that *Citizens United* directly overruled *Beaumont* is thus unsustainable.

Nevertheless, the district court contends that the "logic" underlying the *Citizens United* decision indirectly undermines the constitutionality of the corporate contribution restriction and therefore justifies its decision to invalidate the law. 2011 WL 2268063, at *2. But the district court has no basis for taking this radical step. It is black-letter law that expenditure restrictions and contribution restrictions are subject to different standards of scrutiny and are supported by different governmental interests. *Citizens United*'s analysis of an expenditure restriction therefore cannot be "logically" applied to the review of a contribution restriction, and certainly does not support the district court's invalidation of the contribution limit at § 441b.

First, different standards of scrutiny apply to expenditure restrictions and contribution restrictions, a point the district court entirely overlooks. Beginning with *Buckley*, the Court has held that expenditure limits bar individuals from "any significant use of the most effective modes of communication," and therefore represent "substantial … restraints on the quantity and diversity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 19-20 (1976). Consequently, a statutory

restriction on expenditures must satisfy strict scrutiny review. *Citizens United*, 130 S. Ct. at 898; *WRTL,* 551 U.S. at 464; *Buckley*, 424 U.S. at 44-45. By contrast, a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," because a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley,* 424 U.S. at 20-21. As a result, a contribution restriction "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (internal quotations omitted); *see also Buckley*, 424 U.S. at 25. Further, the fact that § 441b "bans" corporate contributions instead of limiting such contributions does not change this analysis. *Beaumont* made clear that "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association," not whether this activity is subject to a ban or a limit. 539 U.S. at 161-62 (internal quotations omitted). Accordingly, the *Beaumont* Court applied only "closely drawn" scrutiny to the federal restriction on corporate contributions.

Consistent with these precedents, the Court in *Citizens United* applied strict scrutiny to the federal corporate expenditure restriction. 130 S. Ct. at 898. But these same precedents, in particular *Beaumont*, hold that the federal corporate contribution restriction should be reviewed under "closely drawn scrutiny." Therefore, one cannot mechanically apply the legal analysis of the expenditure

restriction in *Citizens United* to this case, as the district court attempts to do. And given these different levels of judicial review, there is no reason to believe that the Supreme Court's analysis of the federal corporate contribution restriction would parallel its analysis of the federal corporate expenditure restriction.

Second, the *Citizens United* decision is also of limited relevance to the constitutionality of a corporate contribution restriction because expenditure restrictions and contribution restrictions are justified by different governmental interests. In *Austin* and earlier precedents, restrictions on corporate expenditures were found to further two governmental interests: first, the "distortion" interest in ensuring that the expenditure of corporate funds amassed in the "economic marketplace" did not distort the "political marketplace," *see Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990), *quoting FEC v. Massachusetts Citizens for Life (MCFL),* 479 U.S. 238, 257 (1986); and second, the "shareholder protection" interest in preventing unapproved corporate use of shareholders' investment funds to finance campaign-related advocacy, *see id.* at 670-71 (Brennan, J., concurring).

By contrast, corporate contribution restrictions have been justified on the basis of wholly different governmental interests. In *Beaumont*, the Court noted that the federal restriction on corporate contributions prevented "corporate earnings from conversion into political 'war chests,'" and thereby was "intended to

'preven[t] corruption or the appearance of corruption.'" 539 U.S. at 154, *quoting National Conservative PAC (NCPAC) v. FEC*, 470 U.S. 480, 496-97 (1985). Relatedly, the Court found that "another reason for regulating corporate electoral involvement" was to "hedge[] against their use as conduits for 'circumvention of [valid] contribution limits.'" *Id.* at 155, *quoting FEC v. Colorado Republican Federal Campaign Comm*. ("*Colorado II*"), 533 U.S. 431, 456 (2001).

Citizens United did not question the validity of the governmental interests found by *Beaumont* to justify the corporate contribution restriction. It is true that *Citizens United* held that *Austin*'s "distortion" and "shareholder protection" interests were not legitimate and therefore could not form the constitutional justification for the corporate expenditure restriction. 130 S. Ct. at 904-11. But contrary to the district court's assertion, *Beaumont* did not "rel[y] significantly" on such interests. 2011 WL 2268063, at *4. Instead, *Beaumont* made clear that the contribution restrictions were justified principally by the state interests in preventing *quid pro quo* corruption and the circumvention of the individual contribution limits. 539 U.S. at 154-56. *See also Iowa Right to Life v. Smithson*, 750 F. Supp. 2d 1020, 1045 n.20 (S.D. Iowa 2010) (noting that *Beaumont* discussed *Austin* interests, but "never suggested that the government's interest in preventing corruption was not itself sufficient to support a ban on corporate contributions").

Further, the *Citizen United* majority reaffirmed that the state interest in preventing corruption and the appearance of corruption remained compelling in connection to contribution restrictions. To be sure, it found that the anti-corruption interest did not justify a restriction on corporate independent expenditures. 130 S. Ct. at 904-11. But the Court's decision that the anti-corruption interest failed to support a corporate expenditure restriction did not call into question this same interest with respect to a corporate contribution restriction. To the contrary, the *Citizen United* majority was careful to distinguish between expenditure restrictions and contribution restrictions in analyzing the applicability of the anti-corruption interest. It noted that "contribution limits … unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption." 130 S. Ct. at 908. The Court further noted that *Buckley* "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption," but "did not extend this rationale to independent expenditures." *Id.* Indeed, the Court acknowledged that *NRWC* had already upheld the PAC requirements associated with the federal corporate contribution restriction based upon this anticorruption interest. 130 S. Ct. at 909 (citing *NRWC*, 459 U.S. at 207-08). The Court then distinguished *NRWC* from *Citizens United* on grounds that "*NRWC* involved contribution limits … which, unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption." *Id*. (internal

citations omitted) (emphasis added). Thus, far from questioning whether the federal corporate contribution restriction is supported by the state's anticorruption interest, the *Citizens United* majority noted that the federal restriction had already been defended based upon this interest.

Finally, *Citizens United* did not even consider the key interest articulated in *Beaumont* for the corporate contribution restriction: namely, the state interest in preventing circumvention of the contribution limits. 539 U.S. at 155. Although the district court attempts to discount this interest by asserting that further regulation could alleviate circumvention concerns, *see* Section III.C *supra*, it never explains how *Citizens United* can be interpreted as "gravely wounding" *Beaumont* in the first place, given that *Citizens United* did not address the anti-circumvention interest that lies at the heart of the *Beaumont* decision. The Supreme Court cannot "wound" what it did not consider. And indeed, the *Citizens United* Court did not even have the opportunity to opine upon this interest for the simple reason that *Citizens United* did not concern direct contributions, and there were no contribution limits that could potentially be subject to circumvention.

Thus, the district court had no basis for its claim that the reasoning of *Citizens United sub silentio* overruled *Beaumont*. Neither the standard of scrutiny applied nor the governmental interests analyzed in *Citizens United* are relevant to the review of a contribution restriction.

B. The Weight of the Case Law Following *Citizens United* Has Recognized the Constitutionality of Corporate Contribution Restrictions.

Those courts that have addressed corporate contribution restrictions in the wake of *Citizens United* have come to the near-unanimous conclusion that *Beaumont* remains valid and controlling.

Most recently, the Ninth Circuit Court of Appeals found that *Beaumont* was unaffected by the *Citizens United* decision when it upheld a San Diego law prohibiting political contributions by "non-individual entities" (e.g., corporations and other organizations) to candidates, political parties and certain other political committees. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-26 (9th Cir. 2011). The *Thalheimer* plaintiffs had argued that *Citizens United* implicitly overruled *Beaumont*, asserting that *Citizens United* had found that the government's interest in preventing circumvention of the contribution limits was no longer valid. The Ninth Circuit, however, rejected this theory, concluding that "there is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions." *Id.* at 1125. Indeed, the Court of Appeals found that the plaintiffs had mistakenly equated two different governmental interests: the "anti-distortion rationale" recognized in *Austin*, which was "based on an equality rationale," and the anti-circumvention interest, "which was part of the familiar

anti-corruption rationale." 645 F.3d. at 1124 (emphasis added), *citing Colorado II*, 533 U.S. 431, 456.

Similarly, the Eighth Circuit Court of Appeals rejected the argument that *Citizens United* "implicitly overruled" *Beaumont* in upholding Minnesota's restriction on corporation political contributions. *Minnesota Citizens Concerned for Life (MCCL) v. Swanson*, 640 F.3d 304, 317-18 (8th Cir. 2011), *reh'g granted*, *op. vacated* (July 12, 2011).[3] The Court of Appeals noted that "the Supreme Court in *Citizens United* expressly declined to reconsider its jurisprudence on direct corporate contributions." *Id.* at 318. It also rejected the claim that the reasoning of *Citizens United* indirectly undercut *Beaumont*, highlighting that "the Supreme Court in *Citizens United* never doubted the government's strong interest in preventing quid pro quo corruption or materially questioned the ability of corporations to serve as conduits for circumventing valid contributions limits." *Id.*

[3] The Court of Appeals vacated this decision on July 12, 2011 when it granted appellants' petition for an *en banc* rehearing on a different claim relating to Minnesota's political disclosure requirements. Order granting rehearing, No. 10–3126 (8th Cir. July 12, 2011). Following the grant of this petition, appellants requested to rebrief their claim relating to the state corporate contribution restriction as well, but Court rejected this request. Order denying appellants' motion for supplemental briefing, No. 10–3126 (8th Cir. July 27, 2011). It is unclear whether the Court of Appeals will reconsider the corporate contribution restriction claim, but at oral argument for the rehearing, the Court indicated that it was not likely to reconsider this claim. *See* Oral Argument (Sept. 21, 2011) (audio), at 12:45, *available at* http://www.ca8.uscourts.gov/cgi-bin/new/getDocs.pl?case_num=10-3126&from=inter ("Mr. Bopp, I think you probably arguing uphill on that to get this Court to overrule the Supreme Court.").

Two other courts that have upheld the constitutionality of corporate contribution restrictions following *Citizens United* are the Texas Court of Criminal Appeals and U.S. District Court for the Southern District of Iowa. In *Ex parte Ellis*, 309 S.W.3d 71, 85 (Tex. Crim. App. 2010), the defendants contended that *Citizens United* marked a "philosophical shift in the Court's treatment of restrictions on corporate free speech" that rendered Texas's state corporate contribution ban unconstitutional. *Id.* at 85. But the Texas Court of Criminal Appeals "disagree[d] with [defendants'] contention that the decision [in *Citizens United*] has had <u>any effect</u> on the Court's jurisprudence relating to corporate contributions." *Id.* (emphasis added). Similarly, in *Iowa Right to Life Comm., Inc. (IRTL) v. Tooker*, -- F. Supp. 2d --, 2011 WL 2649980 (S.D. Iowa June 29, 2011), the district court held that "pursuant to *Beaumont*, [Iowa] can generally ban all direct corporate contributions," noting that Iowa's ban was justified by a "sufficiently important interest in the prevention of corruption." *Id*. at *10. *See also Green Party of Connecticut v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) ("*Beaumont* … remain[s] good law.").

Indeed, the district court below stands alone in finding that *Citizens United* impacted the constitutionality of restrictions on corporate contributions.

II. *Beaumont* Controls This Case.

A. *Beaumont* Makes Clear that Restrictions on Contributions From Both For-Profit and Non-Profit Corporations Are Constitutional.

The district court justifies its break with *Beaumont* based on its theory that the decision is not "directly controlling" because it was limited to the narrow holding that the federal corporate contribution restriction is constitutional as applied to non-profit corporations. 2011 WL 2268063, at *3. The court accedes that the *Beaumont* majority "assumed" that § 441b could withstand facial attack, but maintains that the majority "never held" that the law was facially constitutional as to "any corporation whatever." *Id*. Consequently, the court declared itself free to disregard the decision because only contributions from a for-profit corporation are at issue in this case.

This position, however, relies on a mischaracterization of *Beaumont*. To be certain, the Supreme Court in *Beaumont* reviewed an as-applied challenge to § 441b brought by a non-profit corporation, North Carolina Right to Life (NCRTL). 539 U.S. at 149.[4] But the Court prefaced its consideration of the as-applied challenge with a detailed account of the history and purpose of § 441b that made clear that the general constitutionality of the law was not in question. *See id.* at

[4] Notably, the Court of Appeals in *Beaumont* held that the federal corporate contribution restriction was facially constitutional. *Beaumont v. FEC*, 278 F.3d 261, 277-78 (4th Cir. 2002).

152 ("Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially deleterious influences on federal elections") (internal quotations omitted).

The Court began its description of the federal corporate contribution restriction by emphasizing that "not only has the original ban on direct corporate contributions endured, but so have the original rationales for the law." *Id.* at 154. It then turned to a review of the rationales behind the ban, emphasizing that "the ban was and is intended to 'preven[t] corruption or the appearance of corruption.'" *Id*. (citing *NCPAC*, 470 U.S. at 496-497). It noted that "another reason for regulating corporate electoral involvement has emerged with restrictions on individual contributions, and recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for "'circumvention of [valid] contribution limits.'" *Id*. at 155 (citing *Colorado II*, 533 U.S. 431, 456, and n.18). The Court thus expressly endorsed the anti-corruption and anti-circumvention purposes served by the federal corporate contribution restriction in § 441b. Most importantly, the Court in no way indicated that these governmental interests applied only to the regulation of non-profit corporations, but rather endorsed their legitimacy as to all corporations.

Furthermore, the "logic" of *Beaumont*'s as-applied holding rests upon the premise that § 441b is constitutional with respect to all corporations, including for-profit corporations. The reason the Court found that NCRTL could constitutionally be subject to the corporate contribution restriction was its determination that non-profit advocacy corporations such as NCRTL posed a similar "corrupting potential" as their for-profit counterparts. *Id.* at 159-60. The Court noted, for instance, that "[n]onprofit advocacy corporations are . . . no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals." *Id.* at 160. If contributions from for-profit corporation were corruptive, the Court reasoned, then so too were contributions from non-profit corporations, given their common characteristics. Thus, the *Beaumont* Court necessarily relied upon the constitutionality of § 441b with respect to for-profit corporations in holding that the restriction is constitutional with respect to non-profit corporations.

B. The District Court's Reading of *Beaumont* to Exempt For-Profit Corporations From § 441b Runs Counter to Supreme Court Jurisprudence.

The district court's reading of *Beaumont* has the effect of requiring only non-profit corporations to adhere to the federal corporate contribution restriction. But this disfavoring of non-profit corporations turns Supreme Court jurisprudence

on its head, because the Court has held that the First Amendment provides more protection, not less, to non-profit corporations than to for-profit corporations.

In *MCFL*, the Supreme Court exempted from the federal corporate expenditure restriction certain non-profit advocacy corporations that did not accept contributions from business corporations or unions. 479 U.S. at 264-65. The Court reasoned that the regulation of corporate political expenditures was based on the "distortion" rationale – *i.e.* "the prospect that resources amassed in the economic marketplace [by corporations] may be used to provide an unfair advantage in the political marketplace." *Id.* at 257. Non-profit corporations such as MCFL, however, were less likely to distort the "political marketplace" because "MCFL was formed to disseminate political ideas, not to amass capital," and its resources "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *Id.* at 259. Consequently, the Supreme Court found that the corporate expenditure restriction could not constitutionally be applied to MCFL, nor to any other non-profit advocacy corporations that did not accept funds from business corporations or unions.

In *Beaumont*, the Court considered whether to grant NCRTL's request to create an *MCFL*-style exemption for political contributions by non-profit corporations. 539 U.S. at 159-60. The Court ultimately rejected the expansion of this exemption, reasoning that non-profit advocacy corporations were sufficiently

similar to for-profit corporations to justify regulating their political contributions. *Id*. But the Court did not dispute the basic principle articulated in MCFL that non-profit corporations were entitled to greater constitutional protection for certain campaign activities such as independent spending.

The district court has turned this jurisprudence upside down. In *Beaumont*, the Court framed its decision as an extension of the corporate contribution restriction from the sphere where it was clearly constitutional – *i.e*., in connection with for-profit corporate contributions – to a sphere where the restriction was more controversial – *i.e*., in connection with non-profit corporations. But following this logic, if the corporate contribution restriction is constitutional as applied to a non-profit corporation, then the restriction is on even more solid constitutional ground as to a for-profit corporation. *See also* Rick Hasen, *Breaking News: Judge in Va. Contributions Case Reaffirms Opinion Striking Down Federal Campaign Contribution Limits Law*, ELECTION LAW BLOG (June 7, 2011), at http://electionlawblog.org/?p=18848 ("In *Beaumont*, the Court held that even such ideological ... corporations could constitutionally be barred from making direct contributions to candidates.... If such non-profit corporations could constitutionally be barred from making contributions to candidates, *a fortiori* for-profit corporations should be barred as well."). But now the district court has issued a decision that will subject only non-profit corporations to the corporate contribution

restriction, defying the fundamental principles guiding Supreme Court jurisprudence in this area.

III. The District Court Decision Would Authorize Widespread Circumvention of Contribution Limits and Give Rise to Political Corruption and the Appearance of Corruption.

The district court acknowledged that the *Beaumont* Court upheld § 441b based in part on "fears that corporations could be used to hide conduit (or 'pass-through') contributions by those wishing to circumvent individual contribution limits." 2011 WL 2268063, at *4. But it dismisses this interest, claiming that any circumvention that arises can easily be combated by narrower campaign finance regulations. As a threshold issue, this claim appears to be predicated on a "least restrictive means" analysis that is not applicable to a case subject only to "closely drawn" scrutiny. But more simply, this argument is incorrect. First, the district court is short-sighted in minimizing circumvention concerns in the context of corporate contributions: the post-*Citizens United* era has been already been marked by multiple instances where corporations have facilitated the circumvention of related campaign finance laws, namely political disclosure requirements. Second, the district court has also erred in concluding that other existing laws and regulations would meaningfully reduce any circumvention of contribution limits that would arise from the invalidation of § 441b.

A. The Supreme Court Has Endorsed the Importance of the Anti-Circumvention Interest in Numerous Cases.

The Supreme Court has repeatedly held that reducing circumvention of the contribution limits is part of the government's compelling interest in combating corruption, and has upheld a broad range of campaign finance laws on this basis. *McConnell*, 540 U.S. at 144 (upholding the party "soft money" restrictions on grounds that "[anti-corruption] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *Colorado II*, 533 U.S. at 455 (upholding coordinated party spending limits to prevent the "exploitation [of parties] as channels for circumventing contribution and coordinated spending limits binding on other political players"); *California Medical Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding limits on contributions to political committees "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*"). Most importantly for the purposes of this case, the Supreme Court has specifically upheld the federal corporate contribution restriction on grounds that it "hedges against … use [of corporations] as conduits for 'circumvention of [valid] contribution limits.'" *Beaumont*, 539 U.S. at 155, *quoting Colorado II*, 533 U.S. at 456.

Furthermore, the Supreme Court has not discounted the importance of this anti-circumvention interest simply because alternative regulation may prevent some measure of circumvention. In *Colorado II*, the Supreme Court upheld the

party coordinated spending limits because they prevent donors from circumventing the individual contribution limits by using political parties as "pass-throughs" for additional donations to their preferred candidates. *Id.* at 464-65. The plaintiffs challenging the coordinated spending limits argued that any circumvention that arose from the invalidation of the limits could be averted by application or enhancement of the earmarking rules, implying that the law was not properly tailored. While not disputing that the earmarking rules might prevent some circumvention schemes – *i.e.*, "the most clumsy attempts to pass contributions through to candidates" – the Supreme Court rejected the argument that this alternative regulation nullified the government's anti-circumvention interest in the challenged law. *Id.* at 462. As the Court noted, "[plaintiffs'] position … ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Id*.

B. The Elimination of Restrictions on Corporate Political Activity Already Has Resulted in Evasion of the Campaign Finance Laws.

This long line of precedent notwithstanding, the district court displayed little concern for potential circumvention of the contribution limits when striking down § 441b, suggesting that any such abuse would be minimal and remediable. 2011 WL 2268063, at *4. But this stance is somewhat myopic, to say the least. The artificial nature of corporate entities can easily be manipulated for the purpose of concealing or facilitating campaign-related contributions and expenditures, and

consequently, legalizing corporate contributions would allow sophisticated evasion of the contribution limits. The invalidation of the corporate contribution restriction would open up at least two methods of potential circumvention:

- **"Conduit Contributions."**

  Invalidation of § 441b would allow individuals, corporations and other groups to circumvent the contribution limits by routing contributions of their own funds through corporations to candidates and political parties. This was the only method of circumvention acknowledged by the district court, which noted that "an individual wanting to donate more money than the law allows could incorporate a number of corporations and use the corporations as fronts for her own contributions to a candidate." 2011 WL 2268063, at *4. However, a more likely scenario is that individuals and corporations will forego the clumsy process of forming new corporate entities, and instead give to existing corporations with the understanding that these corporations will contribute to their favored candidates and/or political parties.

- **"Corporate Control."**

  Invalidation of § 441b would also allow individuals to exploit their control or influence over existing corporations to direct multiple contributions to favored candidates or political parties. In this scenario, the individual would not be using the corporation as a "pass-through" for his or her own funds, but rather would direct or influence the donation of corporate funds, thus magnifying his or her political influence over candidates and officeholders. This was the loophole identified in *Beaumont*, where the Court noted that "[t]o the degree that a corporation could contribute to political candidates, the individuals who created it, who own it, or whom it employs, could exceed the bounds imposed on their own contributions by diverting money through the corporation." 539 U.S. at 155 (internal citations and quotations omitted).

  A variant of the "control" form of circumvention would come from corporate control or influence over other corporations. For instance, a

> corporation could direct multiple contributions to a candidate by utilizing its connections to fully- or partially-owned subsidiaries or to affiliated corporations over which it has influence.

Furthermore, the above schemes are not merely theoretical. Following the *Citizens United* decision and its authorization of corporate expenditures, several variants of the first circumvention scheme (*i.e.* "conduit contributions) have already been attempted – albeit for the purpose of evading disclosure requirements instead of the contribution limits.

Several of these schemes have centered on "Super PACs," a new breed of political committee created after *Citizens United* that is permitted under law to accept unlimited individual, and corporate and union contributions for the purpose of making independent expenditures.[5] For instance, in the summer of 2011, Restore Our Future, a Super PAC supporting Mitt Romney's campaign for the Republican presidential nomination, came under fire for accepting a $1-million contribution from a newly-created corporation called W Spann LLC. Media sources reported that W Spann LLC was created in March, apparently for the sole purpose of contributing to Restore Our Future, and then dissolved in July.[6] Reform

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[5] *See* FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten).

[6] Michael Isikoff, *Firm gives $1 million to pro-Romney group, then dissolves*, NBC NEWS, August 4, 2011, *available at* http://today.msnbc.msn.com/id/44011308/ns/politics-decision_2012/; Dan Eggen, *Mystery firm's $1M donation to pro-Romney PAC raises concern over*

groups, including the *amici* herein, filed complaints with the FEC and DOJ[7] in August urging investigation into whether W Spann LLC had been established for the illegal purpose of shielding the identity of the actual source of the $1-million contribution. Following the complaint, the donor voluntarily stepped forward: it was revealed to be Edward Conard, a former Romney colleague at Bain Capital.

The W Spann incident is not the only example of exploitation of the corporate form to circumvent campaign finance regulations. Press reports indicated that two additional corporations, F8 LLC and Eli Publishing L.C., appeared to have been used as conduits for two additional $1-million contributions to the Restore Our Future Super PAC in 2011.[8] Although these corporations did not have the suspiciously short lifespan of W Spann, they also appear to have been utilized for

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transparency, WASH. POST, August 4, 2011, *available at* http://www.washingtonpost.com/politics/short-lived-firms-1m-donation-to-gop-fund-raises-concern-over-transparency/2011/08/04/gIQAvczruI_story.html.

[7] Complaint, Legal Center et al. v. W Spann LLC et al. (filed Aug. 5, 2011), *available at* http://www.campaignlegalcenter.org/attachments/W_Spann_LLC_FEC_Complaint_Signed_and_Notarized_8.5.11.pdf; Letter to Attorney General Holder (Aug. 5, 2011), *available at* http://www.campaignlegalcenter.org/attachments/W_Spann_LLC_DOJ_Cover_Letter_with_FEC_Complaint_Signed_and_Notarized_8.5.11.pdf.

[8] Max Roth, *2 Utah companies donate $1 million apiece to Romney PAC*, FOX 13 NEWS, August 4, 2011, *available at* http://www.fox13now.com/news/local/kstu-mitt-romney-2-utah-companies-donate-1-million-apiece-to-romney-campaign-20110804,0,4424937.story.

the purpose of circumventing the disclosure law and concealing the true donors responsible for the contributions.[9]

Thus, the relatively brief period following *Citizens United* demonstrates that concerns about circumvention through misuse of the corporate structure – concerns already recognized by the *Beaumont* Court as important – are not merely hypothetical. If attempts at evasion have already occurred when the only regulation at issue is disclosure, then circumvention can be expected to worsen exponentially when contribution limits are the target, and wealthy donors are pursuing not only anonymity, but also direct influence over candidates and officeholders.

C. The District Court's Proposed Regulatory "Solutions" to This Potential Corruption Are Unworkable.

Although the district court acknowledged that invalidation of § 441b may open the door to certain of the circumvention schemes outlined above, it dismissed such concerns by arguing that current campaign finance law and regulations would prevent most abuse. It claimed first that "[t]his sort of behavior already is illegal under … 2 U.S.C. § 441f, making it illegal to make a contribution in the name of

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[9] Complaint, Legal Center et al. v. F8 LLC et al. (filed Aug. 11, 2011), *available at* http://www.campaignlegalcenter.org/attachments/F8_Complaint_Signed.pdf; Complaint, Legal Center et al. v. Lund et al. (filed Aug. 11, 2011), *available at* http://www.campaignlegalcenter.org/attachments/Eli_Publishing_Complaint_Signed.pdf.

another person." 2011 WL 2268063, at *4 (internal quotations omitted). It next claimed that the FEC was "capable of addressing such concerns through rules like those it already uses for *un*incorporated entities such as partnerships and limited liability companies ("LLCs"), which attribute their contributions to partners' or members' individual contribution limits." *Id*.

The court's confidence in current law is misplaced.

Use of § 441f, *i.e.*, the "straw donor" prohibition, is untested in connection to contributions routed through corporations, and in any event, would only avert a small percentage of the range of possible circumvention schemes. In the complaints filed against the various corporations that were used to conceal the donors to the Super PAC Restore Our Future, *amici* alleged that there was "reason to believe" that the donors and the associated corporations had violated § 441f, and urged the FEC to investigate the activities.[10] However, the FEC's actions with respect to complaints are not made public until the case is dismissed or otherwise resolved, *see e.g.*, 2 U.S.C. §§ 437g(a)(4)(B), (a)(12), and thus it is not yet known how or whether the FEC will enforce the straw donor prohibition in this context.

Moreover, even if the FEC makes clear that § 441f prohibited the activities alleged in the Romney Super PAC-related cases, its applicability to other types of circumvention is more tenuous. The prohibition is unlikely to extend beyond

[10] *See supra* notes 7 & 9.

circumvention schemes where a clear intent to misrepresent the source of a contribution can be demonstrated or inferred. W Spann LLC, F8 LLC and Eli Publishing L.C. were notable because none apparently had any revenue beyond the funds contributed by their associated donors, nor did they conduct any legitimate business activities. Intent to circumvent the disclosure laws by making illegal straw contributions could thus be inferred in these cases. A violation of § 441f would be far more difficult to prove, however, in a case where the "conduit" was a corporation with legitimate business income – at least absent evidence of an explicit agreement between the donor and the conduit corporation. Such an agreement would be easy to avoid, and hard to prove. Further, § 441f would not apply to circumvention schemes that rely upon a donor's control or influence over a corporation, as outlined in the second hypothetical above, because there the corporation would be indisputably using its own funds.[11] Thus, the straw donor prohibition is at best a limited deterrent and "would reach only the most clumsy

[11] The district court did not address this second type of circumvention, *i.e.* "corporate control," but appellees may argue that this type of abuse may be averted by application of the affiliation rules. But this statutory provision by its terms applies only to political committees, not to corporate entities. *See* 2 U.S.C. § 441a(a)(5) ("for the purpose of the [contribution] limitations … all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, by any group of such persons, shall be considered to have been made by a single political committee.") (emphasis added); *see also* 11 C.F.R. §§ 100.5(g), 110.3(a)(2).

attempts to pass contributions through to candidates." *Colorado II*, 533 U.S. at 462. As the Supreme Court noted in *Colorado II*, the existence of alternative, less effective means for preventing circumvention does not render unconstitutional a more effective law, such as the corporate contribution restriction. *Id.*

The district court's other "solution" to the problem of circumvention – the FEC's attribution rules – is even less viable. First, as the court tacitly acknowledges, these rules would have to be amended before they even applied to corporate entities. 2011 WL 2268063, at *4. But even if the rules were amended, the theory of attribution relies on the ownership structure of a partnership, and the court is mistaken in believing it could feasibly be applied to corporations.

At the present, the attribution rules provide that a contribution from a partnership (or an LLC that is taxed as a partnership) to a candidate, political party or political committee is deemed a contribution both from the partnership itself and from each of the contributing partners on a pro rata basis. 11 C.F.R. §§ 110.1(e), (g), *see also* 52 Fed. Reg. 760, 764 (1987), *available at* http://fec.gov/law/cfr/ej_compilation/1987/1987-1.pdf. The contribution is attributed in proportion to each partner's share of the firm's profits, *id.* § 110.1(e)(1), or if only a subset of the partners contribute, then the contribution is attributed only to the contributing partners, and each of the contributing partners' profits must be reduced by the proportion of the contribution attributed to them, *id.*

at § 110.1(e)(2). Whatever the methodology for attribution, the portion attributed to each partner must not, when aggregated with other contributions from that partner, exceed the partner's contribution limit for the recipient of the contribution. *Id.* at § 110.1(e).

The theory of attribution thus reflects the ownership structure of a partnership, where the profits are not taxed at the organizational level, but rather flow directly to the partners. The theory is not compatible with the structure of a corporation, where profits do not flow directly to the shareholders and their use is not directly controlled by the shareholders. This point was well articulated by the FEC when it promulgated a 1999 regulation to clarify that only LLCs that do not elect to be taxed as corporations under the federal tax law are permitted to make contributions and are subject to the attribution rules. *Id.* at § 110.1(g). The FEC had been urged to treat all LLCs as partnerships, regardless of whether they were taxed as corporations or partnerships, but the FEC declined, explaining that:

> [P]artnerships, and by analogy partnership-like LLCs, 'must maintain a capital account for each member that directly reflects the actual amounts paid in respect to that particular membership interest. There is no such requirement for corporations. A corporation is a separate legal entity, whereas a partnership is an aggregate of its partners. A corporation does not have individual drawing accounts for each of its shareholders.'

See 64 Fed. Reg. 37397, 37398 (1999), *available at* http://www.fec.gov/law/cfr/ej_compilation/1999/1999-10_LLCs.pdf (quoting

Board of Trade of Chicago v. Comm. of Internal Revenue, 106 T.C. 369, 391 n.21 (1996)). Because of these distinctions, the FEC found that "the structure of LLCs that elect corporate tax treatment is such that they would find it impracticable, if not impossible, to comply with such a[n attribution] requirement." *Id*.

These considerations apply in even greater force to traditional corporations. A publicly-traded corporation may have hundreds of thousands of shareholders and attempting to attribute a corporation's political contribution to its shareholders in proportion to their ownership interest is wildly impractical and could result in shareholders being "docked" a fraction of a cent. Further, a corporation has no obligation to obtain shareholder consent for its political contributions and expenditures, or even to notify its shareholders of such activity, *see, e.g.,* Lucian A. Bebchuk, Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?,* 124 HARV. L. REV. 83, 87-89 (2010), and thus application of an attribution rule would force shareholders to be "responsible" for contributions over which they had no control or knowledge. The district court's "solution" is thus utterly unworkable.[12] And insofar as the attribution principle was applied only to certain closely-held

[12] Even more nonsensical would be an attempt to apply an attribution rule to non-profit corporations, where there are no parties with an ownership interest in the organization. While the *Danielczyk* court maintains that its ruling does not invalidate § 441b as applied to non-profit corporations, 2011 WL 2268063, at *1, the non-profit structure further underscores the incongruity of attempts to apply an attribution principle to the corporate form.

corporations, it would serve to prevent only a small percentage of potential circumvention schemes.

In short, the district court's reliance on of the straw donor prohibition and the attribution rules "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Colorado II*, 533 U.S. at 462. Far from casting doubt on the constitutionality of the corporate contribution restriction, the ineffectiveness of these alternative regulations instead further underscores the need for § 441b.

CONCLUSION

For the foregoing reasons, the district's court dismissal of Count Four and part of Count One should be reversed.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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