

No. 11-4667

**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
(The Hon. James C. Cacheris, District Judge)

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BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. On May 26, 2011, the district court dismissed Count Four of the indictment and a portion of Count One. Joint Appendix (JA) 145-146. On June 7, 2011, the district court denied the government's timely motion for reconsideration. JA 216-218. On June 16, 2011, the government timely filed a notice of appeal from those orders. JA 234. This Court has jurisdiction under 18 U.S.C. § 3731, pursuant to which the government may appeal "a decision, judgment, or order of a district court dismissing an indictment . . . as to any one or more counts, or any part thereof."

STATEMENT OF THE ISSUE

Federal law prohibits a corporation from making a contribution to any candidate for federal office in connection with an election. 2 U.S.C. § 441b(a). The question presented is whether the prohibition on the use of corporate-treasury funds to make a contribution to a candidate violates the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

A federal grand jury in the Eastern District of Virginia returned a seven-count indictment charging defendants William P. Danielczyk, Jr., and Eugene R. Biagi with offenses arising from a scheme to make unlawful campaign contributions. JA 15-32. Before trial, the district court granted the defendants' motion to dismiss Count 4, which charges that the defendants knowingly and willfully caused contributions of corporate money, totaling at least \$25,000 in a single year, to be made to a federal candidate, in violation of 2 U.S.C. §§ 441b(a) and 437g(d)(1)(A)(i) and 18 U.S.C. § 2. The district court also dismissed Count 1 to the extent that it charged the defendants with conspiring to violate the prohibition on corporate campaign contributions, in violation of 18 U.S.C. § 371. JA 145. The government timely sought reconsideration. The district court "clarifie[d]" its opinion dismissing the corporate-contribution charges but otherwise denied reconsideration. JA 216-218. The government timely appealed. JA 234. Further

proceedings in the district court have been stayed pending disposition of the appeal. JA 13.

STATEMENT OF FACTS

1. The Federal Prohibition On Contributions From Corporate Treasuries

Since 1907, federal law has prohibited corporations from contributing to candidates for federal office. See Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. That prohibition is now part of the Federal Election Campaign Act of 1971 (FECA) and appears in the United States Code at 2 U.S.C. § 441b(a). See Addendum, *infra*, 2a. Under Section 441b(a), no corporation (or labor organization) may “make a contribution . . . in connection with any election” for federal office; no candidate may receive such a corporate contribution; and no corporate officer or director may knowingly authorize such a contribution.

Although corporations may not contribute their treasury funds to federal candidates, a corporation may establish a “separate segregated fund,” commonly known as a political action committee or “PAC.” 2 U.S.C. § 441b(b)(2)(C). The corporation administers the separate segregated fund, decides to whom the fund will contribute, and may pay all of the fund’s administrative expenses out of its corporate treasury. 11 C.F.R. §§ 114.1(a)(2)(iii), (b), 114.5(d). Although the fund may incorporate separately, its name must include the corporation’s name. 11 C.F.R. § 102.14(c).

Separate segregated funds may contribute up to \$5000 to each federal candidate per election (a separate \$5000 limit applies to each primary, general, runoff, or special election) once they meet certain initial requirements. See 2 U.S.C. § 441a(a)(2)(A), (4).¹ A corporation's separate segregated fund makes those contributions not from the corporate treasury, but from money it raises from the stockholders, executives, and administrative personnel of the corporation, and their families, each of whom may contribute up to \$5000 per year. See 2 U.S.C. §§ 441a(a)(1)(C), 441b(b)(3)(A), (4). Contributions, whether from individuals or political committees such as separate segregated funds, must be disclosed by the recipient or a political committee in periodic reports to the Federal Election Commission (FEC). See 2 U.S.C. §§ 431(4)(B), 434 (2006 & Supp. IV 2010).

Any person who knowingly and willfully violates the prohibition on making or receiving corporate-treasury contributions is subject to criminal prosecution. 2 U.S.C. § 437g(d)(1)(A). The offense is a misdemeanor if it involves aggregate contributions of \$2000 or more (but less than \$25,000), and it is a felony if it involves aggregate contributions of at least \$25,000 in a single calendar year. 2 U.S.C. § 437g(d)(1)(A)(i), (ii). The

¹ While they are in the process of meeting those initial requirements, separate segregated funds may contribute the same amount as an individual. That amount is indexed for inflation: when the defendants' scheme began, the limit was \$2100 per election; later, when the defendants used corporate funds to reimburse contributors, the limit was increased to \$2300 per election; and the limit is now \$2500 per election. See 2 U.S.C. 441a(a)(1)(A), (c); 70 Fed. Reg. 11,659 (2005); 72 Fed. Reg. 5295 (2007); 76 Fed. Reg. 8370 (2011); JA 21-23.

FEC may also seek injunctions and civil penalties to remedy violations of Section 441b(a). 2 U.S.C. 437g(a)(6).

2. The Charged Scheme To Make Illicit Corporate-Treasury Contributions

On February 16, 2011, a grand jury in the Eastern District of Virginia returned a seven-count indictment against Danielczyk and Biagi, alleging that they had violated several provisions of federal law by making and conspiring to make and conceal numerous unlawful campaign contributions, including contributions made with corporate-treasury funds. JA 15-32. In the posture of this appeal, the allegations of the indictment are taken as true. *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 33 n.2 (1963); *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n.16 (1952); *United States v. Farmer*, 370 F.3d 435, 440 (4th Cir.).

Danielczyk was the Chairman of Galen Capital Corporation, a corporation organized under the laws of Nevada, and of the corporation's wholly owned subsidiary, Galen Capital LLC. Biagi was the corporate secretary of Galen Capital Corporation and an executive of the subsidiary. JA 15, 94.

In March 2007, Danielczyk co-hosted a fundraiser for then-Senator Hillary Rodham Clinton's campaign for the Democratic presidential nomination. JA 17, 94. Danielczyk recruited individuals (including Biagi himself) to serve as "straw donors" to Senator Clinton's campaign; he assured the donors that they would be reimbursed for their

contributions. Danielczyk's assistant collected the contributions for transmission to the campaign. JA 16, 19. Danielczyk and Biagi then reimbursed the straw donors for their contributions using Galen Capital Corporation's treasury funds, through the subsidiary. JA 21-23. Biagi disguised the nature of the reimbursement payments by writing "consulting fees" on the checks' memorandum line and by issuing the checks for amounts slightly larger than the campaign contributions (*e.g.*, \$4712.93 rather than \$4600). JA 21, 23.² Danielczyk and Biagi also created falsely back-dated letters to the individual contributors, which characterized the reimbursement payments as "consulting fees." JA 23-25.

Danielczyk and Biagi reimbursed a total of \$156,400 in contributions to Senator Clinton's presidential campaign. The campaign unwittingly reported them as lawful contributions from the individual "straw donors." JA 23-25, 31.

3. Proceedings In The District Court

a. The grand jury returned an indictment (JA 15-32) charging Danielczyk and Biagi with seven criminal offenses arising from their unlawful-contribution scheme. The only substantive count relevant here, Count 4, charged that Danielczyk and Biagi had knowingly and willfully caused contributions of corporate money, totaling at least

² The indictment also alleges that Danielczyk and Biagi engaged in a similar scheme in 2006, reimbursing contributions to then-Senator Clinton's reelection campaign, but that scheme did not involve corporate funds and is not implicated by this appeal. See JA 15, 20-21.

\$25,000 in a single calendar year, to be made to a presidential campaign, in violation of 2 U.S.C. §§ 441b(a) and 437g(d)(1)(A)(i) and 18 U.S.C. § 2. JA 29. The indictment also charged Danielczyk and Biagi with two counts of making contributions in the name of another (Counts 2-3), in violation of 2 U.S.C. §§ 441f and 437g(d)(1)(A)(i) and 18 U.S.C. § 2; one count of obstruction of justice (Count 5), in violation of 18 U.S.C. §§ 1519 and 2; and Danielczyk alone with two counts of causing false statements to be made to the government (Counts 6-7), in violation of 18 U.S.C. §§ 1001(a)(2) and 2. JA 27-28, 30-32. The indictment also charged Danielczyk and Biagi with conspiracy to make corporate contributions, to make contributions in the name of another, and to obstruct justice (Count 1), in violation of 18 U.S.C. § 371. JA 18-26.

Danielczyk and Biagi moved to dismiss the indictment in part. As relevant here, they contended that the prohibition on corporate-treasury contributions violates the First Amendment and that Count 4 and the corresponding portion of Count 1 should be dismissed.

b. The district court (Cacheris, J.) held that “§ 441b(a) is unconstitutional,” JA 138, and granted the motion to dismiss Count 4 and the corresponding portion of Count 1. JA 134-138, 145.

The district court justified its conclusion by relying on the “logic” of *Citizens United v. FEC*, 130 S. Ct. 876 (2010). JA 136. In that case, the Supreme Court considered a First Amendment challenge to the federal prohibition on the use of a corporation’s

treasury funds to spend independently on electioneering communications and express advocacy in federal elections. 130 S. Ct. at 886 (citing 2 U.S.C. § 441b). The Supreme Court found unconstitutional the bar on such independent corporate expenditures to engage in “political speech.” *Id.* at 913 (“[T]he Government may not suppress political speech on the basis of the speaker’s corporate identity.”); see JA 136 (citing *Citizens United*, 130 S. Ct. at 899-903). *Citizens United* did not address contribution limits. 130 S. Ct. at 909.

The district court nevertheless read *Citizens United* to prohibit any distinction between an individual and a corporation with respect to direct contributions to a candidate’s campaign. JA 138; see JA 136-137. The district court acknowledged that the Supreme Court has upheld FECA’s limits on campaign contributions as “an accepted means to prevent *quid pro quo* corruption” and that “*Citizens United* did not overrule” those cases. JA 137 (quoting *Citizens United*, 130 S. Ct. at 909). But in the district court’s view, “[i]t follows that contributions *within FECA’s limits*” for individual contributors, see note 1, *supra*, “do not create a risk of corruption or its appearance.” JA 135. The court therefore concluded that corporations must be able to contribute the same dollar amount to federal candidates that individuals may contribute. JA 138 & n.14. “[B]ecause § 441b(a) does not allow corporations to [contribute within those limits],” the district court held, “§ 441b(a) is unconstitutional and Count [4] must be dismissed.” JA 138.

With respect to Count 1, the district court concluded that a violation of Section 441b(a) “can no longer serve as the object of a conspiracy,” and so it dismissed that aspect of the conspiracy count (Paragraph 10(b) of the indictment). JA 144, 145.

c. Five days later, the district court *sua sponte* ordered the parties to file supplemental briefs “addressing whether, in light of *FEC v. Beaumont*, 539 U.S. 146 (2003), and *Agostini v. Felton*, 521 U.S. 203 (1997), this Court should reconsider its ruling” dismissing the corporate-contribution counts. JA 147. The government responded to that order by arguing that the case was controlled by *Beaumont*, in which the Supreme Court held that Section 441b(a)’s corporate-contribution ban may constitutionally be applied to a nonprofit advocacy corporation. Under *Agostini*, the government argued, a lower federal court may not disregard a controlling Supreme Court decision (*Beaumont*) based on a subsequent Supreme Court decision that does not expressly overrule the earlier decision (*Citizens United*).³ JA 170-177. The government acknowledged that, while both Danielczyk and Biagi had discussed *Beaumont* in their briefs, the government had not cited *Beaumont* or *Agostini* in its response. JA 174 (citing JA 35-42, 61-62).

d. The district court entered a new opinion (JA 219-233) in which it “clarif[ied]” its previous holding, “supersede[d]” the inconsistent portions of its previous opinion, and otherwise denied reconsideration. JA 220 & n.2. The court “cho[se] to exercise [its]

³ The government concurrently moved for reconsideration of the court’s order dismissing the indictment in part. See JA 170.

discretion” to entertain arguments not raised in the previous briefing, “to ensure that its ruling conforms to controlling Supreme Court precedent.” JA 231 n.8; see JA 216.

The district court acknowledged that under *Agostini*, it was “bound to apply controlling Supreme Court precedent,” even where it might think that “later Supreme Court rulings [have] erode[d] that precedent’s logical underpinnings.” JA 224. In the court’s view, however, *Beaumont* was not “directly controlling.” JA 225, 228.

The plaintiff in *Beaumont* was a nonprofit advocacy corporation, North Carolina Right to Life, Inc. JA 225. The district court read *Beaumont* as holding only that Section 441b is “constitutional *as applied to nonprofit advocacy corporations.*” *Ibid.*; see JA 227-228. And the district court noted that the “[d]efendants’ corporation—Galen—is not a nonprofit advocacy corporation.” JA 228. Therefore, the court concluded, *Beaumont* does not control this case. JA 227-228, 232.

The district court acknowledged that in *Beaumont*, before holding that the statute validly applied to North Carolina Right to Life, the Supreme Court extensively discussed the historical and legal reasons that “would discourage any broadside attack on corporate campaign finance,” as opposed to the narrower one brought by North Carolina Right to Life. JA 226. But on the district court’s reading, the Supreme Court only “*assumed—but never held—that*” the restriction on corporate-treasury contributions was valid as a general matter. *Ibid.* Although the court stated that “*Beaumont’s* holding . . . certainly can be

logically *extended* to support § 441b(a)'s ban" on corporate-treasury contributions, the court concluded such an extension is not a binding "precedent." *Ibid.*

After concluding that *Beaumont* did not "directly control[]," the court rejected several aspects of *Beaumont's* reasoning as "gravely wounded" and "no longer viable," based on its reading of the holding and the "logical implications" of *Citizens United*. JA 228-230. It therefore reaffirmed its holding that "the First Amendment treats corporations and individuals equally for purposes of political speech," modifying its ruling to state only that Section 441b(a) "is unconstitutional as applied to the circumstances of *this case*, as opposed to being unconstitutional as applied to *all corporate donations*." JA 230, 233.

e. The government filed this timely appeal. The district court stayed further proceedings pending the appeal. JA 234; see JA 13.

SUMMARY OF ARGUMENT

I. Section 441b(a) prohibits a corporation from using its treasury funds to make a contribution in a federal election. The district court held that the ban is unconstitutional as applied to a for-profit corporation's campaign contributions. That holding squarely conflicts with controlling decisions of the Supreme Court. The Supreme Court has held that the prohibition on corporate-treasury contributions does not violate the First Amendment. In *FEC v. Beaumont*, 539 U.S. 146 (2003), the Supreme Court rejected a claim that nonprofit advocacy corporations are exempt under the First Amendment from Section 441b(a)'s blanket prohibition. The Court's rationale for rejecting that claim

was that the same government interests that justify a general ban—the prevention of corruption and the appearance of corruption, and the avoidance of circumvention of individual contribution limits—also apply to a nonprofit advocacy corporation. That rationale forms part of the Court’s holding, see *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996), and it cannot be reconciled with the district court’s conclusion here: that nonprofit advocacy corporations are validly barred from making contributions, but for-profit corporations are not. Indeed, the district court’s approach is wholly illogical: if *any* corporation could present a valid First Amendment claim for an exception, it would be an advocacy corporation, not a business corporation like Galen. Yet *Beaumont* upheld the corporate-treasury contribution ban even as applied to advocacy corporations.

The district court believed that *Citizens United v. FEC*, 130 S. Ct. 876 (2010), undermined *Beaumont*, but that is incorrect. *Citizens United* involved independent corporate expenditures to speak to the public; it did not involve direct corporate contributions to candidates. In addition, *Citizens United* did not overrule the central premises that support *Beaumont*’s holding: (1) strict scrutiny does not apply to contribution limits; (2) campaign contributions are not pure speech, but instead are a means of conveying largely symbolic support for a message to be selected and conveyed by the candidate; (3) in fashioning contribution limits, Congress may distinguish between corporations and individuals; (4) a prohibition on the use of corporate-treasury funds to make contributions is not a complete ban, because corporations may form PACs; and (5)

the applicable standard of scrutiny requires only that a contribution rule be closely drawn to serve anticorruption and anticircumvention interests.

The Supreme Court has made clear that the lower federal courts are bound to follow its holdings until and unless the Court expressly overrules them. *E.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). A court may not depart from a controlling precedent on the theory that it has been overruled “by implication.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Because *Beaumont* remains the authoritative precedent, the district court erred by invalidating Section 441b(a).

II. Even apart from *Beaumont*, Section 441b(a) is constitutional. A contribution regulation is valid if closely drawn to serve an important government interest. Section 441b(a) satisfies that test.

First, the prohibition of corporate-treasury contributions is a valid means of preventing corruption and the appearance of corruption. Even though not every contribution poses a risk of *quid pro quo* corruption, the Supreme Court has recognized that restrictions on contributions serve a vital interest, given the difficulty of identifying outright bribery and the capacity of large contributions to create an appearance of corruption. And the use of corporate-treasury funds to make campaign contributions creates heightened risks. Not only is the corporate form suited to pursue economic interests through campaign contributions, but corporate contributions fuel public perceptions of government corruption.

The district court erred in equating corporations with individuals and in reasoning that corporate contributions within the individual maximum amounts would pose no greater risk of corruption or its appearance. Corporations are easy and inexpensive to form. A single corporation can thus multiply its capacity to make contributions by creating a web of subsidiaries or affiliates. Regulatory monitoring would scarcely be equal to the task of ferreting out that mischief, and in any event, Congress is not required to pursue the least restrictive means in regulating contributions. In addition, although direct contributions with treasury funds are barred, the corporation is free to have a voice in elections through unlimited independent speech, under *Citizens United*, and to contribute to candidates through a PAC.

Second, the corporate-treasury ban serves a compelling interest in avoiding circumvention of individual limits. The Supreme Court has long since made clear that those limits, and measures to prevent their evasion, are valid means of preventing corruption. Individual corporate officers are subject to those valid contribution limits, but they could easily evade those limits if given the opportunity to funnel contributions through a corporation. No easy remedy would prevent that circumvention. Direct prohibitions on making a contribution in another's name or on making false statements to the government are difficult to enforce. Allowing individuals, but not corporations, to contribute serves Congress's surpassing interests in this context far more effectively. Section 441b(a) thus is "closely drawn" to protect contribution limits against evasion. Accord-

ingly, Congress’s century-long judgment to ban corporate-treasury contributions in federal elections is constitutionally valid.

ARGUMENT

This Court reviews *de novo* a district court’s decision to dismiss an indictment based solely on a question of law. See, e.g., *United States v. Hatcher*, 560 F.3d 222, 224 (4th Cir. 2009); *United States v. Good*, 326 F.3d 589, 591 (4th Cir. 2003). Because the district court’s decision is squarely contrary to controlling precedents of the Supreme Court, and because it is in any event incorrect on the merits, this Court should reverse that decision and reinstate the portions of the indictment that the district court dismissed.

I. This Case Is Squarely Controlled By Supreme Court Precedent, Including *FEC v. Beaumont*

In *FEC v. Beaumont*, 539 U.S. 146 (2003), the Supreme Court held that the compelling interest in preventing corruption and the appearance of corruption permits Congress to bar corporations—including but not limited to nonprofit advocacy corporations—from contributing corporate-treasury funds to federal candidates. *Beaumont* refused to make an exception for “advocacy corporations,” explaining that to do so, the Court would have to “recast[] [its] understanding of the risks of harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them.” 539 U.S. at 159.

The district court in this case adopted an untenable reading of *Beaumont* under which Congress may ban contributions only from ideological nonprofits like North Carolina Right to Life, but may not ban contributions from for-profit business corporations like Galen. That reading is erroneous. The district court focused narrowly on the type of corporation before the Court in *Beaumont*, while overlooking the Court’s rationale in rejecting the First Amendment claim in that case. But the rationale for *Beaumont*’s result forms part of the Court’s holding. *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996). *Beaumont*’s rationale is that direct political contributions by advocacy corporations can be banned because direct contributions from *all* corporations can be banned. Accordingly, *Beaumont*’s holding dictates that the corporate-contribution restriction is constitutional on its face and as applied to the corporation at issue here.⁴

A. The Supreme Court Has Squarely Held That The Bar On Corporate-Treasury Contributions Is Constitutional

1. In *Beaumont*, North Carolina Right to Life, Inc. (NCRL), and four individuals sued the FEC to challenge the constitutionality of the prohibition of corporate contributions and expenditures. NCRL contended that it was a “non-profit political advocacy corporation,” see *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*),

⁴ This Court has under submission another case that may bear on this issue. In *Preston v. Leake*, No. 10-2294 (argued Sept. 21, 2011), the appellant has argued that *Citizens United* altered the “closely drawn” standard of review that applies to contribution restrictions. See pp. 26-28, 37-38, *infra*, *Preston v. Leake*, 743 F. Supp. 2d 501, 507-508 (E.D.N.C. 2010) (applying “closely drawn” scrutiny to uphold prohibition on contributions by lobbyists).

and that the prohibition on corporate-treasury contributions was both facially unconstitutional, as overbroad, and unconstitutional as applied to corporations like it. *Beaumont v. FEC*, 278 F.3d 261, 264-265 (4th Cir. 2002).⁵ This Court held that the contribution prohibition was not unconstitutionally overbroad, noting that NCRL “d[id] not suggest that § 441b(a) and the regulations are unconstitutional with respect to for-profit corporations, not to mention the many labor organizations and national banks to which the provisions also apply.” *Id.* at 278. But this Court held that the First Amendment exempted nonprofit advocacy corporations from the prohibition on corporate-treasury contributions. This Court reasoned that, unlike for-profit corporations, nonprofit advocacy corporations “are formed to disseminate political ideas,” “play a distinctive role in the political process,” “lend vitality to our political discourse,” and “present no risk

⁵ In *MCFL*, the Supreme Court recognized an as-applied exemption from the ban on independent corporate electioneering expenditures for certain nonprofit advocacy corporations. Such corporations are, accordingly, sometimes referred to as “*MCFL*” organizations. See *McConnell v. FEC*, 540 U.S. 93, 211 (2003). The FEC provided a regulatory exemption for *MCFL* organizations that tracked the factors identified in the Supreme Court’s decision. See 11 C.F.R. § 114.10. One factor was that the organization refused contributions from business corporations or labor unions. *MCFL*, 479 U.S. at 263-264. NCRL did not qualify under that regulation because it accepted a small amount of corporate contributions, but this Court nevertheless determined that it qualified for constitutional treatment as an *MCFL* organization. *Beaumont*, 278 F.3d at 266, 272-273. The Supreme Court did not decide whether this Court’s holding on that issue was correct. *Beaumont*, 539 U.S. at 151 n.2. Cf. *McConnell*, 540 U.S. at 211 (noting that all of the factors in *MCFL* were “central” to its holding); *Citizens United*, 130 S. Ct. at 891 (finding that an organization that used donations from for-profit corporations “d[id] not qualify for the *MCFL* exemption”).

whatever to the political process.” *Id.* at 266, 277 (internal quotation marks and citations omitted).

2. The Supreme Court reversed this Court’s holding that the statute was unconstitutional as applied. *Beaumont*, 539 U.S. at 152-163. Before discussing any circumstances specific to nonprofit advocacy corporations, the Court first examined at length the century-old prohibition on corporate-treasury contributions. The Court concluded from that history that “[a]ny 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 influence on federal elections.” *Id.* at 152 (citation and internal quotation marks omitted). That prohibition, the Court stated, is supported by important interests: “to prevent corruption or the appearance of corruption” and to prevent corporations from being “use[d] as conduits for circumvention of valid contribution limits.” *Id.* at 154-155 (citations, internal quotation marks, and brackets omitted).⁶

The Court then explained that its previous cases, especially *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982), had already “all but decided the issue against NCRL’s position.” 539 U.S. at 156. *National Right to Work*, the Court explained, had long been

⁶ The Court also noted that the prohibition on corporate-treasury contributions protected shareholders from having money they paid into corporations being used to support political candidates whom they may oppose. 539 U.S. at 154-155. But the Court held that, even assuming that this interest did not apply to *MCFL*-type organizations, corruption and circumvention concerns adequately supported the ban on corporate-treasury contributions. *Id.* at 159-160 & n.5.

read as “*generally* approving the § 441b prohibition on direct contributions, even by nonprofit corporations.” *Id.* at 157 (emphasis added). *National Right to Work* upheld restrictions on the persons whom a corporation may solicit to donate to its PAC, reflecting the Court’s conclusion that the “threat of real or apparent corruption” justified the limitations on corporate-treasury contributions. 459 U.S. at 206-211 & n.7. As the Court explained in *Beaumont*, “[i]t would be hard to read our conclusion in *National Right to Work*, that the PAC solicitation restrictions were constitutional, except on the practical understanding that the corporation’s capacity to make contributions was legitimately limited to indirect donations within the scope allowed to PACs.” *Ibid.*

Only after this extensive discussion of the general prohibition on corporate-treasury contributions did the Court examine whether the First Amendment required a specific exception for nonprofit advocacy corporations. *Beaumont*, 539 U.S. at 159-161. The Court readily concluded that no such exception was warranted, for three reasons: first, nonprofit advocacy corporations share the same features of traditional business corporations that justified the prohibition in the first place; second, under the relatively more permissive standard of review that applies to contribution limits, those interests justify the prohibition; and third, corporations may form a PAC, which gives them an alternative way to make contributions without using their treasury funds.

First, the Court explained that nonprofit advocacy corporations did not differ in any material way from for-profit corporations, to which NCRL conceded Section 441b(a)

could be applied. 539 U.S. at 156, 159-160. Advocacy corporations, just like “their for-profit counterparts,” raise the “concern about the corrupting potential” of contributions that underlies the prohibition. *Id.* at 159-160. And “[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.

Second, the Court explained that even a complete ban on corporate-treasury contributions would not have to survive strict scrutiny. Rather, one “basic premise” of the Court’s campaign-finance cases “[g]oing back to *Buckley v. Valeo*, 424 U.S. 1 (1976),” is that contribution limitations are not subject to strict scrutiny. 539 U.S. at 161. Rather, under those cases, a contribution limit “passes muster if it satisfies the lesser demand of being ‘closely drawn’ to match a sufficiently important interest.” *Id.* at 162 (citations and internal quotation marks omitted). The reason is that contribution limitations are “merely ‘marginal’ speech restrictions . . . , because contributions lie closer to the edges than to the core of political expression.” *Id.* at 161. Indeed, compared to other contributions, “corporate contributions are furthest from the core of political expression,” because restricting the corporation from contributing directly “leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.” *Id.* at 161 n.8. And judicial deference to the regulation of corporate (as opposed to individual) contributions is “particularly warranted where, as [in Section 441b(a)], we deal with a congressional

judgment that has remained essentially unchanged throughout a century of ‘careful legislative adjustment.’” *Id.* at 162 n.9 (quoting *National Right to Work*, 459 U.S. at 209).

Third, the Court held that it was “simply wrong” to “characteriz[e] § 441b as a complete ban” on contributions by corporations. 539 U.S. at 162. The Court noted that corporations may make contributions through a PAC, though not from their treasuries. *Id.* at 162-163. And the Court acknowledged that, although establishing a PAC entails some “administrative burdens,” *National Right to Work* had already rejected the notion that those burdens “rendered a PAC unconstitutional as an advocacy corporation’s sole avenue for making political contributions.” *Id.* at 163.

3. The holding of *Beaumont*, therefore, is not limited to the proposition that corporations like NCRL may be barred from making contributions with their treasury funds. Rather, the Court’s holding must be understood in light of its fundamental rationale: that all corporations may be barred from making such contributions, a proposition already “generally approv[ed]” by the Court’s previous cases. 539 U.S. at 157. The Court rejected NCRL’s “as applied” challenge because, it reasoned, Section 441b(a) is equally valid when applied to NCRL and when applied to any other corporation. Indeed, the Supreme Court did not even need to decide whether (as this Court had held) NCRL qualified as an *MCFL* corporation at all: the distinction did not matter,

because Section 441b(a) was constitutional in all of its applications to corporate contributions. See *id.* at 151 n.2.⁷

B. The District Court Impermissibly Disregarded The Reasoning And The Holding Of *Beaumont*

The Supreme Court and this Court have both repeatedly held that the federal district courts and courts of appeals must follow Supreme Court “precedent” that “has direct application in a case.” *E.g.*, *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). A court may not disregard that duty merely because it concludes that the controlling precedent has been overruled “by implication,” *Agostini v. Felton*, 521 U.S. 203, 237 (1997), or undermined by “some other line of decisions.” *Rodriguez de Quijas*, 490 U.S. at 484. When the Supreme Court exercises its “prerogative” to overrule one of its decisions, it does so expressly. *Ibid.* Accord, *e.g.*, *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc); *United States v. Powell*, 650 F.3d 388, 393 (4th Cir. 2011), cert. denied, No. 11-5824 (Oct. 3, 2011).

The district court recognized this principle, JA 224-225, but erred in failing to apply it. Instead, the court relied (JA 226) on an Eleventh Circuit decision stating that a “moribund” and “gravely wounded” Supreme Court decision must be followed, but

⁷The only dissenters in *Beaumont* were two Justices who would subject all restrictions on campaign contributions to strict scrutiny, overrule the numerous Supreme Court cases to the contrary, and strike down Section 441b in its entirety. See 539 U.S. at 164-165 (Thomas, J., dissenting).

need not be “extend[ed].” *Jefferson County v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000). The district court thought that it would be an “extension” of *Beaumont* to apply the Supreme Court’s reasoning to any corporation except for a nonprofit advocacy corporation. But the district court erred by focusing exclusively on the plaintiff’s particular contentions in *Beaumont*, rather than the Court’s rationale for rejecting those contentions. As the Supreme Court has explained, its holdings include not only the result, but the “rationale upon which the Court based the results of its earlier decisions.” *Seminole Tribe*, 517 U.S. at 66-67. Accordingly, “[a] holding . . . can extend through its logic beyond the specific facts of the particular case.” *Los Angeles County v. Humphries*, 131 S. Ct. 447, 453 (2010) (holding that the requirements for municipal liability under 42 U.S.C. § 1983 that the Court announced in a case involving requests for monetary relief also apply to requests for injunctive relief).

As shown above, *Beaumont*’s rationale is that nonprofit advocacy corporations have no greater right to make direct contributions to candidates than business corporations, because all corporate contributions implicate compelling government interests—combating corruption and the appearance of corruption, and preventing circumvention of the individual contribution limits—and Section 441b(a) is “closely drawn” to further those interests. Accordingly, the holding of *Beaumont* is that the ban on corporate contributions does not violate the First Amendment. 539 U.S. at 161-162. That holding is not limited to nonprofit plaintiffs like NCRL.

The district court's view of *Beaumont* produces an illogical regime of campaign finance regulation. Under the district court's view, nonprofit advocacy corporations remain bound by *Beaumont*, but for-profit business corporations do not. Yet if any corporations could advance a plausible constitutional claim for an exemption from the corporate contribution ban, it would be nonprofit advocacy corporations. This Court described such entities as "formed to disseminate political ideas, not to amass capital," 278 F.3d at 266 (quoting *MCFL*, 479 U.S. at 259), engaging in activities that are "vital to our democratic political process," *ibid.*, and as "[l]ying] at the expressive heart of our political life," *id.* at 267. *Beaumont* nevertheless rejected their claim for a First Amendment exemption. That holding makes sense only given the validity of a general contribution ban on treasury-fund contributions by business corporations, which lack those special characteristics.

The district court nevertheless reasoned that for-profit corporations like Galen may contribute treasury funds to candidates, even though nonprofit advocacy corporations like NCRL may not. That is like saying that, although the Supreme Court rejected a "special [First Amendment academic-freedom] privilege" for universities in discrimination lawsuits over tenure decisions, *University of Pa. v. EEOC*, 493 U.S. 182, 184 (1990), its decision leaves open whether the First Amendment would afford a privilege for an ordinary business's hiring decisions. Yet given the Court's rationale, no reasonable

approach to precedent would accept such a claim.⁸ Indeed, the district court’s reasoning is even more incongruous than that, because the Supreme Court’s rationale in *Beaumont* for holding that nonprofit advocacy corporations are not entitled to a special exemption from Section 441b(a) rests squarely on the justifications for banning all corporations from making such contributions. The district court’s reading of *Beaumont*, therefore, is at odds with *Beaumont*’s fundamental premise—a premise that the Supreme Court grounded in nearly a century of history, 539 U.S. at 152-156, and traced to its prior holding in *National Right to Work* and to *MCFL* itself, *id.* at 156-159. The district court therefore erred in departing from *Beaumont*’s holding that Section 441b(a)’s ban on corporate-treasury contributions is constitutional.

C. *Beaumont* Has Not Been Undermined By Any Subsequent Supreme Court Decision

Not only does *Beaumont*’s holding establish that Section 441b(a) is constitutional as applied to for-profit corporations, the principles set out in *Beaumont* in upholding the ban on corporate contributions have not been undermined by any Supreme Court decision.

⁸ In rejecting the University’s common-law privilege claim, the Court stated that “[a]cceptance of petitioner’s claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner’s argument.” 493 U.S. at 194.

To the contrary, five key principles from *Beaumont* frame the analysis, and all are valid today.

1. *Strict Scrutiny Does Not Apply To Contribution Limits*

The district court never specified the level of constitutional scrutiny that it applied, but in places it appeared to assume that Section 441b(a) is unconstitutional unless it is the least restrictive means to accomplish a particular government interest. See, e.g., JA 229-230 (rejecting government interest in preventing circumvention of contribution limits because “[t]his sort of behavior is already illegal”).⁹ That analysis conflicts with multiple Supreme Court holdings, and *Citizens United* did not undermine—let alone overrule—any of those holdings.

The Supreme Court in *Beaumont* held that contribution limits—even a complete prohibition on corporate-treasury contributions—need not satisfy strict scrutiny. 539 U.S. at 161-162 & n.8 (explaining that “corporate contributions are furthest from the core of political expression” and that restrictions need only be “closely drawn to match a sufficiently important interest”) (citation and internal quotation marks omitted). The Court has applied the same standard of review in every one of its campaign-contribution cases. See *Randall v. Sorrell*, 548 U.S. 230, 246-247 (2006) (opinion of Breyer, J.); *McConnell v. FEC*, 540 U.S. 93, 134-142 & nn.40 & 42, 231-232 (2003), overruled in part

⁹ As discussed below, the district court was incorrect in concluding that other statutes already adequately prevent such behavior. See pp. 48-50, *infra*.

on other grounds by *Citizens United*, 130 S. Ct. at 913; *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-442 (2001) (*Colorado II*); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000); *Buckley*, 424 U.S. at 25; accord *MCFL*, 479 U.S. at 259-260; *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 440-441 (4th Cir. 2008).

The Court has also repeatedly rejected the suggestion that a contribution limit is unconstitutional if some other way of achieving the same goal can be hypothesized. Thus, the Court has declined to displace Congress's conclusion that alternative measures, such as laws against bribery or laws providing for the attribution of earmarked contributions, do not adequately combat the evils of corruption and circumvention that the regulation of political contributions addresses. See *Beaumont*, 539 U.S. at 160 n.7; *Colorado II*, 533 U.S. at 462-463 & n.26; *Shrink Missouri*, 528 U.S. at 395 n.7; *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.20 (1981) (plurality opinion); *Buckley*, 424 U.S. at 27-28.

Citizens United did not change that standard of review or adopt a "least restrictive means" test for contribution limits. To the contrary, the Court expressly limited its holding to restrictions on corporate independent expenditures and held that contribution limits were distinguishable: "[C]ontribution limits . . . have been an accepted means to prevent *quid pro quo* corruption. Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." 130 S. Ct. at 909;

id. at 910-911 (“This case . . . is about independent expenditures, not [contributions of] soft money.”); see also *id.* at 901-902 (“The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures.”); *id.* at 921 (Roberts, C.J., concurring) (referring to “the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech”).

2. Campaign Contributions Are Not Pure Speech

The Court’s “basic” reason for rejecting strict scrutiny of contribution limits is that limiting contributions—unlike independent expenditures—does not restrict pure speech. *Beaumont*, 539 U.S. at 158-159, 161-162. As the Court explained in *Buckley*, “[b]y contrast with a limitation upon expenditures for political expression, a limitation upon . . . the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication.” 424 U.S. at 20-21; see *id.* at 20-22, 28; *Randall*, 548 U.S. at 246-247 (plurality opinion); *McConnell*, 540 U.S. at 134-136; *Shrink Missouri*, 528 U.S. at 386-387; *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715 (4th Cir. 1999). A campaign contribution “does not communicate the underlying basis for the [contributor’s] support,” and a restriction on contributions “does not in any way infringe the contributor’s freedom to discuss candidates and issues.” *Buckley*, 424 U.S. at 20-21. Contribution restrictions therefore affect “one aspect of the contributor’s freedom of political association,” rather than the core of the right to

free expression. *Id.* at 24-25; see *id.* at 20-22; *Shrink Missouri*, 528 U.S. at 388. “[T]he transformation of contributions into political debate involves speech by someone other than the contributor,” *i.e.*, the candidate who receives the contributions and decides whether, when, and how to spend them. *Buckley*, 424 U.S. at 21.

Citizens United, by contrast, dealt with a corporation that wanted to enter the public marketplace of ideas on its own behalf, not to give money to a candidate for the candidate’s use of the funds. 130 S. Ct. at 897-898; see also, *e.g.*, *id.* at 907 (law at issue “prevents [corporations] from *reaching the public* and advising voters” or “from presenting both facts and opinions *to the public*”) (emphasis added). For that reason, the Court applied strict scrutiny and held the statute unconstitutional. *Id.* at 898, 913. The Supreme Court had long held that independent expenditures, in contrast to candidate contributions, must “satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.” *Buckley*, 424 U.S. at 44-45. *Citizens United* did not affect, much less overrule, the longstanding precedent reviewing contribution limits more permissively because of their more attenuated connection with expression. *Buckley*, 424 U.S. at 20-21.

The district court acknowledged none of these aspects of *Buckley*, *Beaumont*, *Citizens United*, or the Supreme Court’s other cases. Rather, the court stated that contributions “implicate fundamental First Amendment interests,” JA 135, 222, and repeatedly equated contributions with “political speech,” JA 136, 229, 230, 231. Under *Buckley* and every

subsequent contribution case, the district court was incorrect to equate independent expenditures with direct contributions.

3. *Congress May Impose Different Limits On Contributions By Corporations And Individuals To Further Its Important Interests*

The Supreme Court in *Beaumont* identified two reasons why Congress may permissibly decide to regulate contributions from all corporations, including nonprofit advocacy corporations, more tightly than contributions by individuals: the threat of corruption and the appearance of corruption, and the likelihood that corporations will be used to circumvent the individual contribution limits. *Citizens United* did not diminish either important interest, nor did it undermine the validity of the established distinction in federal law between corporate and individual contributions.

a. The Court in *Citizens United* held that the anticorruption interest could not justify a limit on corporate independent expenditures, because “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.” 130 S. Ct. at 910. The Court therefore concluded that no compelling interest justified restricting independent expenditures, whether or not the speaker was a corporation. The Court acknowledged, however, that limits on direct monetary contributions presented a different question and had been upheld as valid anticorruption measures. *Id.* at 908. As the Court has repeatedly stated, “[L]imits on contributions are more clearly justified by a link to political corruption than limits on other kinds of . . . political spending are.”

Beaumont, 539 U.S. at 155-156 (quoting *Colorado II*, 533 U.S. at 440-441) (ellipsis in original). *Citizens United* thus had no occasion to consider whether the Constitution guarantees corporations the same rights to contribute to political campaigns as individuals. The district court erred in extrapolating from *Citizens United* an “equal political speech rights” rule that applied identically in all political contexts. JA 136, 137, 229.¹⁰

The district court also thought (JA 229) that *Beaumont*’s discussion of corruption was no longer viable because the Supreme Court in *Beaumont* cited *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which the Supreme Court overruled in *Citizens*

¹⁰ Indeed, the Supreme Court’s post-*Citizens United* summary affirmance in *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C.) (three-judge court), aff’d, 130 S. Ct. 3544 (2010), left intact contribution limits to national political parties that treat corporations and individuals differently. In *McConnell*, the Court had described the explosion of corporate “soft money” contributions (*i.e.*, contributions that need not comply with federal source-and-amount restrictions) that led Congress to enact the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. 540 U.S. at 123-125 (noting, *e.g.*, that in 1996 the top five corporate soft-money donors together gave more than \$9 million to the two national political parties). Under BCRA, individuals may now contribute up to \$30,800 to a national political party. 2 U.S.C. § 441a(a)(1)(B); see 2 U.S.C. 441a(c); 76 Fed. Reg. 8370 (2011). Corporations, however, may not contribute to national political parties at all from their general treasuries. See 2 U.S.C. §§ 441b(a), 441i(a); *McConnell*, 540 U.S. at 123, 142. *McConnell* rejected a facial challenge to the ban on corporate and union soft-money donations and on individuals’ donations above the hard-money limits, see 540 U.S. at 142-161, and it did not disturb that holding in *Citizens United*, 130 S. Ct. at 910-911. When the Court affirmed the rejection of the RNC’s as-applied challenge to the soft-money ban in *RNC*, 130 S. Ct. at 3544, it necessarily left intact different hard-money contribution limits for individuals and corporations and the requirement that the latter use PACs to contribute to national political parties. Although *RNC* did not involve contribution limits to federal candidates, the outcome is inconsistent with the district court’s belief that a corporation must always be subject to the same contribution limits as individuals.

United, 130 S. Ct. at 913. The issue in both *Austin* and *Citizens United* was whether restrictions on corporate independent advocacy can survive strict scrutiny because such advocacy is uniquely corrupting when funded by corporations. Rejecting *Austin*, *Citizens United* held that they cannot. But *Austin* was not necessary to *Beaumont*'s recognition of a century-long judgment that corporate contributions posed a serious threat of "influence not stopping short of corruption." 539 U.S. at 152 (internal quotation marks omitted). And *Austin*'s overruling does not establish that monetary contributions by corporations do not pose a threat of corruption or the appearance of corruption.

Finally, the district court fundamentally erred in concluding that corporate-treasury contributions of \$2500 or less (within FECA's current limit for contributions by individuals) categorically pose no risk of corruption. That is demonstrably incorrect, both because the Court has upheld lower dollar figures, see *Shrink Missouri*, 528 U.S. at 393, 395-397 (upholding a \$1075 limit), and because Congress's selection of a particular contribution limit does not reflect a judgment that corruption is impossible below that dollar amount. See *id.* at 397 (the Court has "specifically rejected the contention that \$1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate"); *Buckley*, 424 U.S. at 30 (upholding a \$1000 limit and rejecting the argument that no legislator could be corrupted by a contribution of that amount, or even "much more than that amount"). Rather, Congress may validly conclude that limits of \$2500 from individuals, \$5000 from corporate PACs (see pp. 34-36, *infra*), and zero from

corporate treasuries strikes the appropriate balance—preventing corruption and the appearance of corruption while still permitting contributions to a degree that ensures competitive elections. Contribution limits become constitutionally problematic when they are “so low as to ‘preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.’” *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21) (brackets in original); *Shrink Missouri*, 528 U.S. at 395-396; see *Randall*, 548 U.S. at 248-249 (opinion of Breyer, J.) (striking down contribution limit of \$200 to \$400 for an entire two-year election cycle because “contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders”). But the Supreme Court has never suggested, and it cannot be plausibly argued, that corporate-treasury contributions are necessary to ensure that federal candidates have enough money to fund their campaigns. The experience of the last century proves otherwise.

b. Given the validity of individual contribution limits, provisions that prevent circumvention are vital, lest the individual limits become meaningless. The interest in preventing circumvention of individual limits was not at issue in *Citizens United* at all, because, under *Buckley*, federal law does not limit individual independent expenditures. See *Buckley*, 424 U.S. at 45-46. The Court thus had no occasion to address it, much less to retreat from *Beaumont*'s holding that Congress may constitutionally prohibit contributions by artificial entities, such as corporations, to prevent those entities' use as conduits.

539 U.S. at 155 (explaining how persons associated with a corporation could use the corporation to channel contributions to a candidate, thus circumventing individual limits); see also *Colorado II*, 533 U.S. at 456 & n.18 (noting that in that case, “all Members of the Court agree[d] that circumvention is a valid theory of corruption”); *California Med. Ass’n*, 453 U.S. at 197-199 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in the judgment); *Buckley*, 424 U.S. at 38; *North Carolina Right to Life*, 525 F.3d at 292.

4. *Corporations May Contribute Through PACs*

The Court in *Beaumont* held that Section 441b(a) was not a “complete ban” on corporate contributions, because corporations may establish a separate segregated fund (or PAC), pay the expenses of raising money for that fund, and contribute the money raised to federal candidates. 539 U.S. at 162. Characterizing Section 441b(a) as a “complete ban” was “simply wrong.” *Ibid.*

The Court subsequently held in *Citizens United* that the plaintiff corporation’s ability to fund independent electoral advocacy through its PAC was not an adequate substitute for funding that advocacy from the general treasury. 130 S. Ct. at 897-898. PACs are “a separate association from the corporation” and are “expensive to administer,” the Court stated. *Id.* at 897. Thus, the Court held that the opportunity to fund expressive advocacy through a PAC did not prevent viewing Section 441b as a “prohibition on corporate independent expenditures.” *Id.* at 898. But contributions stand on a different footing, because their expressive function “rests solely on the undifferentiated, symbolic act of

contributing,” *Buckley*, 424 U.S. at 21, and their dollar amount can be limited, *id.* at 30. The corporation’s ability to direct contributions from the PAC that bears its name—indeed, contributions of up to \$5000, twice as large as the contributions the district court would permit from the general treasury—allows it to give “the symbolic expression of support evidenced by a contribution.” *Id.* at 21. And keeping the PAC a separate entity that can raise contributions only in limited amounts serves an important purpose in the contribution context: preventing circumvention of the individual contribution limits. *California Med. Ass’n*, 453 U.S. at 197-199 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in the judgment); accord *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 292 (4th Cir. 2008).

The district court’s discussion of *Beaumont* did not address the Court’s holding that the “PAC option” distinguishes Section 441b(a) from a “complete ban” on all corporate contributions. 539 U.S. at 162. Rather, the district court opined that under Section 441b(a), “a corporation like Galen cannot donate a cent.” JA 230. In fact, Galen could have established a PAC and donated \$5000 in PAC funds to a presidential primary campaign. The statute thus does not absolutely prohibit contributions. It does, however, prohibit what the defendants did here, *i.e.*, to contribute \$156,400 from Galen’s general treasury—the money that Galen makes through its ordinary, for-profit business activities.

5. *The Restriction On Corporate-Treasury Contributions Is Closely Drawn To Address The Anticorruption And Anticircumvention Interests*

Applying the foregoing principles, the Supreme Court concluded in *Beaumont* that Section 441b(a), which prohibits corporate-treasury contributions but leaves open the “PAC option,” is “closely drawn” to serve important interests and thus consistent with the First Amendment. 539 U.S. at 161-163; see also *id.* at 163 (“[A] unanimous Court in *National Right to Work* did not think the regulatory burdens on PACs . . . rendered a PAC unconstitutional as an advocacy corporation’s sole avenue for making political contributions.”). Direct contributions pose both the danger and the appearance of *quid pro quo* corruption. Contributions by corporations heighten those concerns, and corporate-treasury contributions raise the additional risk that individuals will use them to circumvent the concededly valid contribution limits. Section 441b(a) furthers those interests while imposing only a modest restriction on expression. To the extent that using a PAC is more burdensome than using the general treasury, the First Amendment and the more lenient “closely drawn” standard permit that restriction in the contribution context. *Citizens United* did not hold otherwise.

D. Every Court Of Appeals That Has Considered The Issue Has Concluded That *Beaumont* Is Still The Controlling Precedent

In nearly two years since *Citizens United*, no other court has read that decision (or *Beaumont*) the way the district court did here. To the contrary, the Ninth Circuit has specifically rejected the contention that *Citizens United* changed the law on direct

contributions: it sustained a flat ban on contributions by corporations and similar entities, *i.e.*, a ban that has no “PAC option,” unlike the federal statute here. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-1126 (9th Cir. 2011).¹¹

The Second Circuit has likewise rejected arguments that *Citizens United* invalidated a flat ban on contributions by state contractors. That court observed that “[a]lthough the [Supreme] Court’s campaign-finance jurisprudence may be in a state of flux (especially with regard to campaign-finance laws regulating corporations), *Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law.” *Green Party v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010), cert. denied, 131 S. Ct. 3090 (2011). And the court “reject[ed]” the argument that strict scrutiny applies to “*bans*, as opposed to mere *limits* [on contributions]. Such an argument was explicitly rejected in *Beaumont* (which, as discussed above, remains binding precedent).” *Ibid.*; accord *In re Cao*, 619 F.3d 410, 422-423 (5th Cir. 2010) (en banc) (“[W]e do not read *Citizens United* as changing how this court should evaluate contribution limits on political parties and PACs.”), cert. denied, 131 S. Ct. 1718 (2011); *Siefert v. Alexander*, 608 F.3d 974, 988 (7th Cir. 2010) (applying “closely drawn” scrutiny and “not[ing] that *Citizens United*, rather than overrul-

¹¹ Similarly, an Eighth Circuit panel sustained a state ban on corporate-treasury contributions that did allow a PAC option. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 316-319 (8th Cir. 2011). The panel held that *Beaumont* remains controlling law on that subject even after *Citizens United*. *Id.* at 317-318. The plaintiff sought rehearing en banc on other issues resolved by the panel; rehearing en banc was granted and the case was reargued en banc on September 21, 2011. Whether the en banc court will address the ban on corporate-treasury contributions is not yet clear.

ing *Buckley*, noted and reinforced the distinction between independent expenditures on behalf of candidates and direct contributions to candidates”), cert. denied, 131 S. Ct. 2872 (2011).¹²

Even before *Beaumont*, challenges to Section 441b(a) were universally rejected. See *Mariani v. United States*, 212 F.3d 761, 771-773 (3d Cir.) (en banc), cert. denied, 531 U.S. 1010 (2000); *Athens Lumber Co. v. FEC*, 718 F.2d 363, 363 (11th Cir. 1983) (en banc), appeal dismissed and cert. denied, 465 U.S. 1092 (1984); accord *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645-646 (6th Cir.) (upholding comparable state law), cert. denied, 522 U.S. 860 (1997). This statute, in short, has been on the books for more than 100 years, yet until the district court’s decision, it has never been held unconstitutional—except in the decision in *Beaumont* that the Supreme Court reversed.

The district court’s decision to break from that consensus rested on a fundamental misinterpretation of the Supreme Court’s cases. The court both over-read *Citizens United* as reaching issues the Court expressly disavowed, and under-read *Beaumont* as confined by its facts rather than its reasoning. *Beaumont* rests on precedent that “generally approv[ed] the § 441b prohibition on direct contributions, even by nonprofit corporations.” 539 U.S. at 157. *Beaumont* reaffirmed that precedent and squarely rejected any

¹² See also *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir.) (en banc) (finding it unnecessary to resolve the plaintiffs’ argument that *Citizens United* requires applying strict scrutiny to contribution limits), cert. denied, 131 S. Ct. 553 (2010).

exceptions to it. *Beaumont* remains the controlling precedent here, and this Court should apply it.

II. Section 441b(a) Is Constitutional Because It Is Closely Drawn To Promote Important Government Interests

Even apart from *Beaumont*'s holding, Section 441b(a) is a valid contribution regulation. Under the proper standard of scrutiny, the question is whether the statute is “closely drawn” to further a “sufficiently important” government interest. Under that standard of scrutiny, which the district court never acknowledged, Section 441b(a) is consistent with the First Amendment.

Section 441b(a) is a valid means of preventing both corruption and the appearance of corruption. “The Supreme Court has regularly recognized” that that interest is not just important (as required to survive “closely drawn” scrutiny), but “compelling.” *Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 442 (4th Cir. 1999) (collecting cases); see, e.g., *Citizens United*, 130 S. Ct. at 908 (the Court in *Buckley* “sustained limits on direct contributions in order to ensure against the reality or appearance of corruption”); *North Carolina Right to Life*, 525 F.3d at 291 (“[T]he state’s interest in the prevention of corruption—and, therefore, its power to impose contribution limits—is strongest when the state limits contributions made directly to political candidates.”). Section 441b(a) is an appropriate legislative effort to combat both actual and apparent corruption, for two reasons. First, direct contributions by corporations to

federal officeholders and aspiring officeholders present a real danger of *quid pro quos*—the exchanges of legislative favors for campaign money—that both corrupt the political system and undermine public confidence in that system. Second, allowing nonhuman entities like corporations to donate money in their own right allows individuals to funnel money through those entities and evade the limits on individual contributions that the Supreme Court upheld in *Buckley*.¹³

A. Section 441b(a) Is Closely Drawn To Prevent Corruption And The Appearance Of Corruption

The Supreme Court in *Citizens United* described limits on direct contributions as “an accepted means to prevent *quid pro quo* corruption.” 130 S. Ct. at 909; accord *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2827 (2011) (applying strict scrutiny to a law that burdened expenditures, including independent expenditures,

¹³ In *Beaumont*, the Supreme Court sustained the ban on corporate-treasury contributions based on the “concern about the corrupting potential” of such contributions, coupled with the concern that corporations are “susceptible . . . to misuse as conduits for circumventing the contribution limits imposed on individuals.” 539 U.S. at 159-160. The Court therefore did not rely on any interest in protecting members or shareholders against the use of corporate funds to “support[] causes that some of the[m] . . . would not approve.” *Id.* at 159. In *Citizens United*, the Court determined that, under strict scrutiny, the interest in protecting shareholders did not support a ban on independent expenditures from treasury funds, reasoning that “the procedures of corporate democracy” were a less restrictive means to protect shareholders. 130 S. Ct. at 911. Because Section 441b’s corporate-contribution restriction is justified without consideration of shareholder-protection interests, it is unnecessary to consider whether those interests carry weight under the “closely drawn to match a sufficiently important interest” standard, *Beaumont*, 539 U.S. at 162 (internal quotation marks and citations omitted).

and concluding that contribution limits were a valid, less restrictive means of “alleviating the corrupting influence of large contributions”) (quoting *Buckley*, 424 U.S. 55).

The Court has long recognized that limits on direct contributions are valid even though not every contributor seeks to exchange cash for favors. See, e.g., *Buckley*, 424 U.S. at 26-28; accord *Citizens United*, 130 S. Ct. at 908; *North Carolina Right to Life*, 525 F.3d at 291. That is both because instances of outright bribery take place surreptitiously and are relatively hard to detect, see *Buckley*, 424 U.S. at 27-28, and because large contributions give rise to “the appearance of corruption,” *id.* at 27.

Direct contributions of corporate-treasury funds pose a heightened risk of corruption. In a business context, corporations pursue economic interests through entry into the political arena. Cf. *McConnell v. FEC*, 251 F. Supp. 2d 176, 509 (D.D.C.) (three-judge court) (opinion of Kollar-Kotelly, J.) (“Evidence from the corporate world demonstrates that major nonfederal donors give to both political parties in order to ensure access to lawmakers from both political parties.”), *aff’d in part and rev’d in part on other grounds*, 540 U.S. 93 (2003); *id.* at 484 (“The main reasons corporate America makes political contributions, [corporate executives said in a random survey by the Committee for Economic Development,] is fear of retribution and to buy access to lawmakers.”). The corporate form is particularly suited to pursue such economically motivated behavior to seek official favors. See Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1112-1113 (2002); cf. *Citizens*

United, 130 S. Ct. at 907 (noting the opportunities for “corporations, including those with vast wealth, [to] cooperat[e] with the Government” in “unknown and unseen” settings, perhaps involuntarily “at the demand of a Government official”).

Contributions by corporations also heighten public perceptions that government is corrupt. In one analysis of state-level data, public confidence in state government’s responsiveness to individual citizens—the belief that ordinary people have a say in government—showed a “statistically significant” relationship with the presence of limits on contributions by organizations, *e.g.*, corporations and unions. See David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence From the States*, 5 Election L.J. 23, 33, 35 (2006). Cf. *McConnell*, 251 F. Supp. 2d at 517 (opinion of Kollar-Kotelly, J.) (analyzing effect on public opinion of soft-money contributions, which could come from corporations, unions, or large individual donors).¹⁴ The same public understanding motivated the original enactment of Section 441b(a)’s predecessor. See 41 Cong. Rec. 1452 (1907) (statement of Rep. Gaines) (stating that the prohibition on corporate-treasury contributions “tend[s] to remedy an evil which has been very much

¹⁴ Because direct corporate contributions to federal candidates have been unlawful for more than 100 years, little recent empirical evidence exists on the federal level. But that the law has worked for a century in no way detracts from its constitutionality. Cf. *Colorado II*, 533 U.S. at 457 (noting that the absence of “recent experience with unlimited coordinated spending” between parties and candidates required the Court to consider whether experience under the current law “confirms a serious threat of abuse”).

complained of in the country,” and emphasizing the need for future legislation to give federal courts the power “to indict and convict for those offenses”).

The district court concluded that allowing each corporation to contribute as much as an individual would not pose any risk of corruption. The district court was incorrect to conclude that a donation at the maximum limit for individuals categorically poses *no* risk of corruption. See pp. 32-33, *supra*. But even if the district court were right that individuals pose no threat of corruption when they donate \$2500, a limit of \$2500 per corporation would still pose significant problems. New corporations can be formed and their treasuries filled merely by filing some papers. Nevada, where Galen was incorporated, will form a new corporation for as little as \$75. See Nevada Sec’y of State, *Profit Corporation Fee Schedule* (July 1, 2008), <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1050>. A single corporation can spawn multiple new corporations; under the district court’s reasoning, each member of the corporate hierarchy can donate \$2500. The district court therefore was incorrect to conclude (JA 232) that the \$2500 limit would prevent corporations from donating “*unlimited amounts*”; a corporation could generate as many checks as it had subsidiaries. This problem is far from hypothetical. In one instance, despite a \$4000 state contribution limit, “one business owner was able to contribute \$62,000 to a gubernatorial candidate using 16 different LLCs [limited liability companies] he controlled.” Maryland Att’y Gen.’s Advisory Comm. on Campaign Finance, *Campaign Finance Report* 30 (Jan. 4, 2011).

The district court dismissed that concern by suggesting that the FEC should instead develop rules for attributing one corporation's contributions to another. JA 230; cf. 2 U.S.C. § 441a(a)(5). But corporations could often be structured to avoid formal affiliation, no matter what test for affiliation were devised. And proving common control as a practical matter can be daunting. Even with disclosure of corporate contributions, multiple corporations with unrelated names would not appear related, and getting beneath the surface to probe ownership or control would be extraordinarily resource-intensive and in many instances virtually impossible. Those realities would complicate, if not frustrate altogether, the ability of corporate attribution rules to preserve contribution limits.¹⁵

Congress thus had valid and important reasons to preclude contributions of treasury funds rather than impose a dollar limit on contributions of treasury funds. At the same time, Section 441b(a) leaves open ample avenues for First Amendment activity by corporations and their executives, directors, and stockholders. Corporations are not restricted from engaging in independent political advocacy. Following *Citizens United*, corporations are free to spend their treasury funds on independent electoral advocacy,

¹⁵ In any event, Congress was not required to explore speculative and potentially complex alternative means of addressing the problem. No “narrow[] tailor[ing]” requirement applies to the regulation of contributions. *Beaumont*, 539 U.S. at 162; pp. 27-28, *supra*. Accordingly, hypothetical less-restrictive means, such as disclosure or attribution rules, do not invalidate Congress's more direct and straightforward approach.

including potentially on multimillion-dollar advertising campaigns urging the electorate to support or oppose a particular candidate for President or Congress. The difference between those fully protected independent expenditures and the subject-to-regulation direct candidate contributions is not the dollar amount; it is the risk of corruption when the candidate is the direct recipient of the funds. Cf. *North Carolina Right to Life*, 525 F.3d at 292. And because the corporation may spend unlimited amounts on speech to the public, on whatever issues it deems important, the prohibition on direct contributions with treasury funds is both closely drawn and minimally burdensome. See *Thalheimer*, 645 F.3d at 1125.

B. Section 441b(a) Is Closely Drawn To Prevent Circumvention Of Valid Contribution Limits

In addition to serving anticorruption interests, the corporate-contribution ban serves compelling anticircumvention interests. Individual U.S. citizens and individual lawful permanent residents may contribute money to candidates, subject to the statutory limits. 2 U.S.C. 441a. The prohibition on corporate-treasury contributions does not interfere with an individual's ability to contribute within those limits. But it does provide an important check on circumvention.

1. The Supreme Court and this Court have recognized that “it is constitutional for [Congress and the] states to apply contribution limits to political committees that make contributions directly to candidates.” *North Carolina Right to Life*, 525 F.3d at 292; see

California Med. Ass'n, 453 U.S. at 197-199 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in the judgment); pp. 33-34, *supra*. Without those limits, individuals could evade the limitations on the amounts they could personally contribute by channeling unlimited funds to candidates through those political committees.

The prohibition on corporate-treasury contributions serves an anticircumvention purpose even more directly. Absent such a ban, individuals have a ready means to evade their individual contribution limit. Once they reached their personal limit, individual officers, directors, and employees could exceed it by channeling contributions through corporations that they effectively control. The Supreme Court recognized this precise phenomenon in *Beaumont*, explaining 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. Persons with managerial influence or control over a corporation could funnel their funds through corporate contributions with virtually no fear of detection. Executives would have an abundance of means to disguise their provision of personal funds in order for the corporation to make political contributions—for example, they could simply forgo salary or bonuses. And given the ease of creating corporations, and the millions of corporations that already exist, the opportunities for subterfuge are vast. See p. 44, *supra* (describing a business owner’s use of multiple LLCs he controlled to contribute far in excess of individual contribution

limits); *Citizens United*, 130 S. Ct. at 898 (noting that 5.8 million for-profit corporations filed tax returns in 2006).

In this case, the defendants were forced to undertake a far more clumsy scheme. The indictment alleges that the defendants “caused \$156,400 in contributions to the 2008 Presidential campaign” to be made in the names of individuals, subject to “reimbursement . . . using money of Corporation A [Galen Capital Corporation] through its wholly owned subsidiary [Galen Capital LLC].” JA 21. The defendants thus had to rely on numerous individuals to make the contributions with corporate money, thus increasing the risks that a weak link in the chain would eventually lead to detection. Even then, the investigation that led to the indictment originated only after a *Wall Street Journal* article raised questions concerning the underlying contributions. But corporate executives would have a much greater chance of eluding detection altogether if they could use a variety of corporations they controlled to make the contributions directly, thereby cutting out the individual middlemen. For that reason as well, the ban on corporate contributions is critical to avoid the erosion of individual limits.¹⁶

¹⁶ The circumvention problem is in no way solved by limiting corporations to the same contribution amount as individuals, as the district court thought. See pp. 36, 46-47, *supra*. And the district court’s view that corporations have a First Amendment right to contribute in the same amount as individuals has, in any event, no connection with this case. At the time of the corporate contributions alleged in the indictment, federal law limited individual contributions to \$2300 per candidate for the primary and general election campaigns, for a total of \$4600. JA 16; note 1, *supra*. Count 4, however, charges the defendants with “knowingly and willfully caus[ing] contributions of corporate money, aggregating \$25,000 and more during the 2007 calendar year.” JA 29. Even under the

2. The district court suggested that Congress could treat contributions by corporations the way the FEC treats contributions by “pass-through” entities like partnerships, in which contributions are attributed to the limits of partners or members. JA 229-230 (citing 11 C.F.R. § 110.1(e), (g)). But in corporations, unlike partnerships, the executive authority may reside with individuals who are not owners; such “pass-through” rules would therefore present enormous complexities of attribution (for example, to whom would the contributions be attributed? Shareholders? Executives—and, if so, which ones? The board of directors?). Congress could reasonably conclude that corporations require a different rule. See *California Med. Ass’n*, 453 U.S. at 201 (majority opinion) (“The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress 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.”).

The district court also thought that other provisions of law would prevent individuals from funneling their own money through corporations. JA 229-230. For example, the court noted that existing campaign-finance law prohibits “mak[ing] a contribution in the name of another person,” 2 U.S.C. § 441f, and general criminal law prohibits making false material statements in a matter within federal jurisdiction, 18 U.S.C. § 1001. But

court’s own (incorrect) theory, that conduct was not protected.

reliance on those provisions “ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions.” *Beaumont*, 539 U.S. at 161 n.7 (quoting *Colorado II*, 533 U.S. at 462). In most instances, contributions must be reported by recipients, not the contributor. See 2 U.S.C. § 434 (2006 & Supp. IV 2010). Only a corporation that qualified as a political committee would have a reporting obligation. *Ibid.* For-profit corporations, whose “major purpose” is not campaign activity, would not qualify as a political committee and therefore would not have to report their contributions. See *McConnell*, 540 U.S. 170 n.64. Tracking contributions made in the names of different corporations, and then investigating whether a single individual contributor controlled those entities or otherwise used them as conduits to make contributions, would be an enormous and impracticable undertaking. Like the statutory provision that treats contributions that are “in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate” as contributions to the candidate, 2 U.S.C. § 441a(a)(8), the provisions the district court cited “would reach only the most clumsy attempts to pass contributions through to candidates”; accordingly, “[t]o treat [those provisions] as the outer limit of acceptable tailoring would disarm any serious effort to limit circumvention.” *Beaumont*, 539 U.S. at 161 n.7 (quoting *Colorado II*, 533 U.S. at 462) (brackets omitted).

Because attempts to trace the origins of every dollar in a corporation’s general treasury would pose insuperable difficulties, corporate executives could therefore find a

myriad of ways to direct their corporations to make donations that would not be traceable to the executives' own funds. Yet the executives would be able to obtain credit, and possibly repayment through official action, from the candidates who received the funds. Investigations to expose the illegal *quid pro quo* would often be frustrated by the secrecy with which such corrupt deals takes place. Thus, such surreptitious contributions would present all of the difficulties posed by excessive contributions, amplified by the lack of disclosure of the actual provider of the funds.

* * *

In light of all of those considerations, Section 441b(a) is a “closely drawn” method of protecting individual limits against evasion. Accordingly, even setting aside the controlling force of *Beaumont* on this issue—a Supreme Court holding that binds the lower federal courts unless and until the Court reconsiders it—the corporate contribution ban is well tailored to serve Congress’s important interests and is valid under the First Amendment.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The United States respectfully requests oral argument in this case.

CONCLUSION

The district court's dismissal of Count 4 and of the corporate-contribution object of Count 1 should be reversed.

Respectfully submitted,

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October 19, 2011

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ADDENDUM

Relevant statutes:	Page:
1. 2 U.S.C. 441b	2a
2. 2 U.S.C. 437g	5a

1. Title 2, United States Code, Section 441b provides in pertinent part:

Contributions or expenditures by national banks, corporations, or labor organizations

(a) In general

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) Definitions; particular activities prohibited or allowed

* * * * *

(2) For purposes of this section and section 791(h) of title 15, the term “contribution or expenditure” includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political

purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine

who makes a contribution of \$50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term “executive or administrative personnel” means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

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2. Title 2, United States Code, Section 437g provides in pertinent part:

Enforcement

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(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating \$25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating \$2,000 or more (but less than \$25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

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