No.

IN THE

Supreme Court of the United States

WILLIAM P. DANIELCZYK, JR. AND EUGENE R. BIAGI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Election Campaign Act ("FECA") provides that "no person"—including individuals, partnerships, limited liability companies, and corporations—may contribute in excess of prescribed limits (currently $2,500 per election) to candidates for federal office. 2 U.S.C. §§ 441a(a), 431(11). Another provision of FECA, however, categorically bans corporations from contributing any sum. 2 U.S.C. § 441b(a). Thus, while individuals, partnerships, and many limited liability companies may contribute up to $2,500 to the candidates of their choosing, corporations are prohibited from giving even a cent.

The district court held that absolute ban unconstitutional in light of *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010). Under *Citizens United*, the government cannot prohibit First Amendment activity based solely on the speaker's corporate identity. The district court thus reasoned that corporations cannot be barred from contributing in the same limited amounts as individuals and unincorporated associations absent a showing that corporate contributions pose a greater risk of *quid pro quo* corruption. The Fourth Circuit reversed, concluding that *FEC* v. *Beaumont*, 539 U.S. 146 (2003), required it to uphold the ban even though *Citizens United* concededly had rejected much of *Beaumont*'s rationale.

The questions presented are:

1. Whether § 441b's ban on campaign contributions by corporations violates the First Amendment.

2. Whether restrictions or bans on the right to make campaign contributions should be reviewed under strict scrutiny, as other restrictions on political expression are, or instead under a less protective standard.

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PETITION FOR A WRIT OF CERTIORARI

William P. Danielczyk, Jr. and Eugene R. Biagi respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-13a) is reported at 683 F.3d 611. The district court's opinion (App., *infra*, 30a-71a) is reported at 788 F. Supp. 2d 472. The district court's opinion on reconsideration (App., *infra*, 14a-26a) is reported at 791 F. Supp. 2d 513.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 28, 2012, App., *infra*, 1a-13a, and denied rehearing on August 10, 2012, App., *infra*, 72a-73a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment of the U.S. Constitution, and relevant provisions of the Federal Election Campaign Act and implementing regulations, are set forth in the Appendix. App., *infra*, 74a-134a.

STATEMENT

This case arises from the criminal prosecution of two businessmen for allegedly causing a corporation to make campaign contributions in violation of 2 U.S.C. §441b. The district court held that §441b's ban on corporations making contributions in the same limited amounts as individuals, partnerships, and other entities treated corporations differently simply because of their corporate identity, in contravention of the First Amendment and *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010). The Fourth Circuit reversed. It concluded that *FEC* v. *Beaumont*, 539 U.S. 146 (2003), required it to uphold §441b even though *Citizens United* concededly had rejected much of *Beaumont*'s rationale.

I. STATUTORY AND REGULATORY FRAMEWORK

A. The Federal Election Campaign Act

The Federal Election Campaign Act ("FECA") regulates campaign contributions in federal elections.

1. Under FECA, "no person" may make a contribution in excess of prescribed limits. 2 U.S.C. §441a(a)(1). For contributions to candidates or their authorized political committees, the limit is currently $2,500 per candidate per election, up to $46,200 total to all candidates biennially. *Id.* §§441a(a)(1)(A), (c); 76 Fed. Reg. 8368, 8370 (2011). Individuals thus can contribute up to $2,500 per election to the candidates of their choosing. So too can partnerships and limited liability companies ("LLCs")

that elect partnership tax treatment, so long as their contributions are also attributed to individual partners or members and counted toward their individual limits. 11 C.F.R. § 110.1(e), (g)(2).

Corporations, however, cannot contribute anything. Although corporations fall within FECA's definition of "person," 2 U.S.C. § 431(11)—and thus are otherwise subject to the same $2,500 limit as individuals, partnerships, and other organizations, *id.* § 441a(a)(1)—a separate provision makes it "unlawful * * * for any corporation * * * to make a contribution * * * in connection with any [federal] election." *Id.* § 441b(a). Violations of § 441b's corporate contribution ban can be prosecuted as felonies, punishable by a fine and imprisonment up to five years. *Id.* § 437g(d)(1)(A).

The ban on corporate campaign contributions "grew out of a 'popular feeling' in the late 19th century 'that aggregated capital unduly influenced politics, an influence not stopping short of corruption.'" *FEC* v. *Beaumont*, 539 U.S. 146, 152 (2003) (quoting *United States* v. *Auto. Workers*, 352 U.S. 567, 570 (1957)). There was "popular sentiment" against "'big money' campaign contributions," with commentators decrying "'the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.'" *Auto. Workers*, 352 U.S. at 571-572 (quoting Elihu Root, *Addresses on Government and Citizenship* 143-144 (Bacon & Scott eds., 1916)). In response to such concerns, the 1907 Tillman Act "banned 'any corporation whatever' from making 'a money contribution in connection with' federal elections." *Beaumont*, 539 U.S. at 152, 153 (quoting Act of Jan. 26, 1907, ch. 420, 34 Stat. 864, 864-865).

"Today, as in 1907," the corporate contribution ban "focuses on the special characteristics of the corporate structure." *Beaumont*, 539 U.S. at 153 (quotation marks omitted). Section 441b reflects a belief that corporations' "'state-created advantages'"—including "'limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets'"—justify special restrictions on their political activity. *Id.* at 154 (quoting *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990)). In *Austin*, this Court explained that, under that view, such advantages "permit [corporations] to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." 494 U.S. at 659.

2. FECA allows corporations to establish, administer, and solicit contributions to "separate segregated funds"—commonly called political action committees or "PACs." 2 U.S.C. § 441b(b)(2)(C).[1] A PAC cannot contribute corporate funds to candidates. *Id.* § 441b(b)(3)(A). It may contribute only funds solicited from others—the corporation's stockholders, personnel, and their families. *Id.* § 441b(b)(4)(A), (B). Those individuals may each contribute up to $5,000 to the PAC each year, on top of the $2,500 they can each contribute to a candidate directly. *Id.* § 441a(a)(1)(A), (C).

A PAC generally may give candidates at least as much as individuals can, *i.e.*, $2,500 per candidate per election. 2 U.S.C. § 441a(a)(1). If a PAC qualifies as a "multican-

[1] A corporate PAC is a "political committee" under FECA, 2 U.S.C. § 431(4)(B), that must register with the Federal Election Commission ("FEC"), *id.* § 433, appoint a treasurer, *id.* § 432(a), keep records of contributions and disbursements, *id.* § 433(c)-(d), and file reports detailing its receipts and disbursements, *id.* § 434(a)(1), (4)(A)(i)-(iv), (4)(B).

didate political committee," it may contribute twice that—up to $5,000 per candidate per election. *Id.* §441a(a)(2)(A); see *id.* §441a(a)(4) (defining "multicandidate political committee").

The FEC has issued regulations to ensure those limits cannot be evaded through the creation of multiple PACs. For example, PAC contributions are subject to an aggregation rule: If a corporation, "including any parent, subsidiary, branch, division, department, or local unit," has more than one PAC, "all contributions" made by those PACs "shall be considered to have been made by a single political committee." 2 U.S.C. §441a(a)(5). FEC regulations likewise provide that "affiliated [political] committees" "shar[e] a single contribution limit," and provide standards for determining whether committees are "affiliated"—considering, among other things, "the relationship between organizations that sponsor [them]." 11 C.F.R. §100.5(g)(2), (3), (4).

B. Legal Developments

This Court has repeatedly addressed the rationales undergirding that regulatory framework.

1. In *FEC* v. *Beaumont*, 539 U.S. 146 (2003), this Court addressed the claim of a nonprofit advocacy corporation, North Carolina Right to Life ("NCRL"), that §441b's corporate contribution ban could not constitutionally be applied to it. NCRL did not dispute §441b's constitutionality with respect to for-profit corporations, but argued that nonprofits like itself were sufficiently different to warrant special First Amendment treatment. NCRL thus did not wage a "broadside attack" on the corporate contribution ban, but instead challenged "§441b only to the extent the law places nonprofit advocacy corporations like itself under the general ban on direct [corporate] contributions." *Id.* at 156. Rejecting that "fo-

cused challenge," *ibid.*, this Court identified four rationales supporting § 441b's corporate contribution ban that, according to the Court, applied with sufficiently similar force to nonprofits like NCRL, *id.* at 154-156, 159-160.

First, the ban was designed to counteract perceived distortion of the political process caused by the "'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.'" *Beaumont*, 539 U.S. at 154. This Court had previously relied on that anti-distortion rationale in *Austin*, referring to "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." 494 U.S. at 660. Invoking *Austin*, *Beaumont* stated that corporations would have "'an unfair advantage in the political marketplace'" if permitted "'to use resources amassed in the economic marketplace'" toward political ends. 539 U.S. at 154 (quoting *Austin*, 494 U.S. at 659) (additional quotation marks omitted). Section 441b's contribution ban addressed that putative distortion by "restrict[ing] the influence of political war chests funneled through the corporate form." *Ibid.* (quotation marks omitted).

Second, the ban was "intended to prevent corruption or the appearance of corruption." *Beaumont*, 539 U.S. at 154 (quotation marks and brackets omitted). "[C]orruption," the Court stated, must be "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *Id.* at 156 (quotation marks omitted).

Third, the ban protected shareholders, shielding "individuals who have paid money into a corporation * * * for purposes other than the support of candidates from having that money used to support political candidates to

whom they may be opposed." *Beaumont*, 539 U.S. at 154; cf. *Austin*, 494 U.S. at 663.

Fourth, the Court stated that banning contributions by corporations "hedges against their use as conduits for circumvention of valid contribution limits." *Beaumont*, 539 U.S. at 155 (quotation marks and brackets omitted). When the corporate contribution ban was enacted in 1907, federal law did not limit individual contributions; those limits appeared decades later. See *McConnell* v. *FEC*, 540 U.S. 93, 118 (2003). That rationale, *Beaumont* thus stated, had "emerged" more "recent[ly]." 539 U.S. at 155.

The Court also rejected NCRL's argument that § 441b's flat ban was not "closely drawn" to the government's asserted interests. It is "simply wrong," the Court stated, to view § 441b as "a complete ban," because § 441b "permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses" of PACs. *Beaumont*, 539 U.S. at 162-163 (quotation marks omitted). "The PAC option," the Court opined, "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders." *Id.* at 163. The Court reiterated that analysis in *McConnell*: "Because corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [FECA's corporate independent expenditure prohibition] as a 'complete ban' on expression rather than a regulation." 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162).

2. This Court revisited § 441b in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010). There, the Court considered the provision's ban on independent corporate expendi-

tures for "electioneering communication[s]." 2 U.S.C. §§441b(a), (b)(2); *Citizens United*, 130 S. Ct. at 887. Holding that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity," the Court struck down the ban. *Citizens United*, 130 S. Ct. at 903, 913.

In doing so, the Court overruled *Austin* and rejected its "antidistortion" rationale for restricting corporations' political expression. *Citizens United*, 130 S. Ct. at 903-913. "*Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace." *Id.* at 904 (quotation marks omitted). But this Court held that, just as "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity," "political speech cannot be limited based on a speaker's wealth." *Id.* at 905. The Court also rejected *Austin*'s view that corporations' state-conferred advantages justified treating them differently, declaring that "'the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'" *Ibid.* (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

The Court also rejected the "shareholder-protection interest" identified in *Beaumont* and *Austin*. *Citizens United*, 130 S. Ct. at 911. That rationale could not justify a ban that applied to "all corporations, including nonprofit corporations and for-profit corporations with only single shareholders." *Ibid.* In any event, the appropriate "remedy is not to restrict speech but to consider and explore other regulatory mechanisms." *Ibid.*

Turning to "prevent[ing] corruption or its appearance," the Court noted that *Buckley* v. *Valeo*, 424 U.S. 1,

25 (1976), had "found this interest 'sufficiently important' to allow limits on contributions," because "large direct contributions * * * could be given to secure a political *quid pro quo*." *Citizens United*, 130 S. Ct. at 908. But the Court held that corporations' perceived "influence over or access to elected officials" did not qualify as "corruption" that could justify restricting political activity. *Id.* at 910. "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance or corruption," the Court emphasized, "that interest was limited to *quid pro quo* corruption." *Id.* at 909. "Ingratiation and access," by contrast, "are not corruption." *Id.* at 910. Finding no support for the claim that independent expenditures create a risk of *quid pro quo* corruption, the Court held the ban unconstitutional. *Id.* at 913.

Finally, the Court "overrule[d] the part of *McConnell*" holding that PACs provide a means for corporate First Amendment activity. *Citizens United*, 130 S. Ct. at 913 (citing *McConnell*, 540 U.S. at 203-209). The Court held that a "PAC is a separate association from the corporation" that established it, and thus "the PAC exemption from § 441b's expenditure ban does not allow corporations to speak." *Id.* at 897 (citation omitted). "Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *Ibid.* (citing *McConnell*, 540 U.S. at 330-333 (opinion of Kennedy, J.)). "The law before [it]," the Court held, "is an outright ban, backed by criminal sanctions." *Ibid.*

II. PROCEEDINGS BELOW

A. Background

This case arises from two fundraisers for Hillary Clinton that petitioner William Danielczyk co-hosted in 2006 and 2007. The first, in September 2006, was for Clinton's

2006 Senate campaign; the second, in March 2007, was for her 2008 Presidential campaign. App., *infra*, 2a & n.1; C.A. App. 17. Petitioners were officers of Galen Capital Group, LLC ("Galen LLC") and Galen Capital Corporation ("Galen Corporation"). The indictment alleges that petitioners caused the two companies to reimburse employees for contributions made to allow them to attend those fundraisers. App., *infra*, 2a; C.A. App. 19. The reimbursements for the 2006 fundraiser were allegedly made using money from Galen LLC, while the 2007 reimbursements were allegedly paid from Galen Corporation's funds. C.A. App. 20-21.

The government brought a seven-count indictment in February 2011, alleging (among other things) violations of FECA and conspiracy to commit the same. For both fundraisers, the indictment charged petitioners with making contributions in the name of another in violation of 2 U.S.C. §441f. C.A. App. 27-28. Because the purported reimbursements for the 2007 fundraiser were made using Galen *Corporation's* funds, the indictment included an additional charge relating to that fundraiser alone: Count 4 charged petitioners with "knowingly and willfully causing contributions of corporate money to a candidate for federal office," in violation of 2 U.S.C. §441b. App., *infra*, 3a.

B. Proceedings Before the District Court

The district court granted petitioners' motion to dismiss Count 4, holding that §441b's ban on corporate campaign contributions is unconstitutional.

1. The district court explained that, in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), this Court "combin[ed]" its decisions in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), to strike down §441b's ban on corporate

independent expenditures. App., *infra*, at 65a. "*Buckley* found that independent expenditures by human beings do not corrupt" and therefore cannot be restricted. *Ibid.* And "*Bellotti* held that 'the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.'" *Ibid.* (quoting *Citizens United*, 130 S. Ct. at 903). As a result, "corporations cannot be banned from making the same independent expenditures as individuals." *Ibid.*

The district court found the same logic compelling here. Congress had determined that contributions of $2,500 or less are not corrupting when made by individuals. App, *infra*, 64a. The court saw no reason an identical contribution would be corrupting simply because it came from a corporation. "If human beings can make direct campaign contributions *within* FECA's limits without risking *quid pro quo* corruption or its appearance," under *Citizens United* "corporations must also be able to contribute within FECA's limits." *Id.* at 65a.

2. Five days later, the district court *sua sponte* ordered briefing on whether to reconsider its decision in light of *FEC* v. *Beaumont*, 539 U.S. 146 (2003), and *Agostini* v. *Felton*, 521 U.S. 203 (1997). App., *infra*, 4a. Although the government had not cited either case in opposing petitioners' motions to dismiss, see *id.* at 24a; C.A. App. 174, the government on reconsideration "argued that *Beaumont* directly controlled the case and must be applied even if *Citizens United* may have eroded *Beaumont*'s reasoning," App., *infra*, 4a. "[T]he *Agostini* principle requires lower courts to apply Supreme Court precedent that directly controls the case before it despite subsequent Supreme Court case law that may have affected the precedent by implication." *Id.* at 4a-5a.

The district court denied reconsideration. App., *infra*, 14a-29a. On "[c]lose examination," it ruled, *Beaumont* does not "directly control[]" this case. *Id.* at 19a. In *Beaumont*, "§ 441b and the regulations implementing it" were challenged "'*only* so far as they apply to'" nonprofit advocacy corporations like NCRL. *Ibid.* (quoting *Beaumont*, 539 U.S. at 150). Accordingly, this Court "made only assumptions as to [the ban's] general constitutionality," and "explicitly limited [its holding] to nonprofit advocacy corporations." *Ibid.* (citing *Beaumont*, 539 U.S. at 149). *Beaumont*, the district court concluded, "does not *directly control* * * * whether the corporate contribution ban is constitutional as applied to Defendants' for-profit corporation." *Id.* at 22a.

"*Beaumont*'s *reasoning* can still inform [a lower court's] analysis," the district court continued, but "following *Citizens United*, *Beaumont*'s reasoning is no longer viable." App, *infra*, 22a; see *id.* at 23a (*Beaumont*'s reasoning is "gravely wounded"). For example, *Citizens United* "explicitly overruled" *Austin*, on which "*Beaumont* relie[d] significantly," and dismissed shareholder-protection concerns like those asserted in *Beaumont*. *Id.* at 22a (citing *Citizens United*, 130 S. Ct. at 911, 913). As for alleged corruption concerns, the district court found that "worry again foreclosed here by *Citizens United*'s ruling that corporations have equal political speech rights to individuals, who can directly contribute *within FECA's limits* without risking corruption or its appearance." *Ibid.* Likewise, potential circumvention of individual contribution limits could not justify § 441b's flat ban. *Id.* at 23a. Such concerns could be addressed instead through attribution rules "like those [the FEC] already uses for unincorporated entities such as partnerships and limited liability companies." *Ibid.* (citing 11

C.F.R. § 110.1(e), (g)); see pp. 2-3, *supra*. *Citizens United*, the court held, "leaves no logical room for an individual to be able to donate $2,500 to a campaign while a corporation like Galen cannot donate a cent." *Ibid.*

C. The Fourth Circuit's Decision

The Fourth Circuit reversed. App., *infra*, 1a-13a. The court acknowledged that *Beaumont* involved a challenge to § 441b's corporate contribution ban only "as it applied to nonprofit advocacy corporations." *Id.* at 6a. But it nonetheless concluded that "*Beaumont* makes clear that § 441b(a)'s ban on direct corporate contributions is constitutional as applied to all corporations." *Id.* at 7a. The court therefore held that *Beaumont* required it to uphold the ban, despite contrary reasoning in *Citizens United*. *Id.* at 5a.

The Fourth Circuit opined that it would reach the same conclusion even if *Beaumont* were not controlling. App., *infra*, 7a-12a. It emphasized that, although the independent-expenditure restrictions at issue in *Citizens United* are subject to strict scrutiny, contribution restrictions are subject to "the 'lesser demand of being closely drawn to match a sufficiently important interest.'" *Id.* at 9a (quoting *Beaumont*, 539 U.S. at 162). The court acknowledged that *Beaumont* identified "four government interests that supported the ban on direct corporate contributions: anti-corruption, anti-distortion, dissenting-shareholder, and anti-circumvention." *Id.* at 7a. And it recognized that *Citizens United* had since rejected the anti-distortion and dissenting-shareholder interests, and had "limited" the "anti-corruption interest * * * to actual quid pro quo corruption or the appearance of it, as opposed to the appearance of influence or access." *Id.* at 10a n.3., 11a; contrast *Beaumont*, 539 U.S. at 156 (defining "corruption" "not only as *quid pro quo* agreements,

but also as undue influence"). Nevertheless, the court held that anti-corruption and anti-circumvention survived as permissible government interests (in some form). App., *infra*, 10a-12a. Stating that those interests were "all that is required for closely drawn scrutiny," the Fourth Circuit refused to consider "whether § 441b(a) is closely drawn to support the government interests asserted," because, in its view, "*Beaumont* forecloses this inquiry." *Id.* at 11a, 12a n.5.

REASONS FOR GRANTING THE PETITION

This case involves Congress's criminalization of activity that lies at the core of the First Amendment's protections. "Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association." *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001). The Federal Election Campaign Act ("FECA") allows any person—including individuals, partnerships, and many limited liability companies ("LLCs")—to contribute up to $2,500 per candidate per election. But 2 U.S.C. § 441b bars corporations from contributing even a cent. That defies logic. As the district court observed, it cannot be that allowing the wealthiest American to donate $2,500 creates no intolerable risk of corruption, but allowing the most impecunious corporation to donate a penny would. Nor can Congress single out corporations for unfavorable treatment just because they are corporations: The First Amendment protects corporations' political activity no less than that of individuals. *Citizens United* v. *FEC*, 130 S. Ct. 876, 913 (2010); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 778 n.14 (1978).

In *Citizens United*, this Court struck down § 441b's ban on corporate independent expenditures for precisely

those reasons. The Court held that, because independent expenditures by individuals do not create a sufficient risk of *quid pro quo* corruption, independent expenditures by corporations do not either. *Citizens United*, 130 S. Ct. at 909. Following *Bellotti*, the Court reaffirmed that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Id.* at 903. That same logic compels invalidation of § 441b's ban on corporate contributions. It disposes of the government's claim that corporate contributions raise special concerns about *quid pro quo* corruption. If a $2,500 limit is sufficient to prevent corruption by individuals, partnerships, and LLCs, it is likewise sufficient to prevent corruption by corporations. The government's putative concern that corporations might be used to circumvent valid contribution limits is unsupported by any evidence. And the FEC already has rules—applied to partnerships, LLCs, and PACs—that would readily address such concerns in any event.

The Fourth Circuit nevertheless upheld § 441b's contribution ban, holding that this Court's decision in *Beaumont* v. *FEC*, 539 U.S. 146 (2003), tied its hands. App., *infra*, 5a-7a, 12a n.5. That confirms the need for this Court's review. *Beaumont* invoked the same rationales for singling out corporations that *Citizens United* rejected: alleged "distortion" from aggregated wealth; the putative need to protect potentially dissenting shareholders; and an expansive view of "corruption" encompassing not only *quid pro quo* but also mere influence and access. *Citizens United* thus swept away *Beaumont*'s logical underpinnings and scrapped most of the government interests that case described. *Citizens United*, moreover, rejected *Beaumont*'s view that corporations can engage in political expression through PACs,

holding that PACs are separate associations that do not allow corporations to speak. As the district court observed, *Beaumont*'s reasoning is not merely "gravely wounded"; virtually none of it is "viable" after *Citizens United*. App., *infra*, 22a-23a. Yet court after court, just like the Fourth Circuit, has concluded that *Beaumont* constrains them to uphold contribution bans like §441b nonetheless. Absent this Court's review, First Amendment freedoms will continue to be abridged based on a gravely wounded precedent at odds with current law.

This case also presents the Court with an opportunity to reevaluate its two-tiered approach to First Amendment protection of political activity. Since *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court has required laws restricting independent campaign expenditures, like other laws impinging on political expression, to satisfy strict scrutiny. But laws limiting (even banning) political contributions have been subject to a lesser standard. Several Members of this Court have recognized that such a bifurcated approach makes little sense and inadequately protects core First Amendment freedoms.

I. THE COURT SHOULD RESOLVE WHETHER THE FEDERAL BAN ON CORPORATE CAMPAIGN CONTRIBUTIONS VIOLATES THE FIRST AMENDMENT

A. Section 441b's Corporate Contribution Ban Improperly Abridges Core First Amendment Rights

Under this Court's current doctrine—first announced in *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976)—burdens on "the right to contribute" to political candidates are subject to "heightened scrutiny," also called "closely drawn" scrutiny. *McConnell* v. *FEC*, 540 U.S. 93, 231 (2003). The government must demonstrate that the restriction serves a "'sufficiently important interest'" and "is 'closely

drawn' to avoid unnecessary abridgment of First Amendment freedoms." *Id.* at 232.

To establish a "sufficiently important" interest, the government cannot rely on "mere conjecture." *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000). It must present some "quantum of empirical evidence" that the asserted threat is real. *Id.* at 391. Likewise, the government must show that a contribution restriction is properly tailored. A restriction cannot "burden[ ] First Amendment interests in a manner that is disproportionate to the public purposes [it was] enacted to advance." *Randall* v. *Sorrell*, 548 U.S. 230, 262 (2006) (plurality opinion). Far from being closely drawn to address *quid pro quo* corruption or any other permissible interest, § 441b bans corporations from First Amendment activities simply because they are corporations, contravening *Citizens United*.

1. The principal justification for § 441b's absolute ban on corporate campaign contributions is preventing "actual quid pro quo corruption or the appearance of it." App., *infra*, 11a. But there is no basis for thinking corporate contributions in the limited amounts permitted to individuals are corrupting at all—much less more corrupting than individual contributions.

This Court has recognized a legitimate *quid pro quo* concern only with respect to "*large* financial contributions." *Buckley*, 424 U.S. at 25 (emphasis added); see also *id.* at 26. *Buckley* expressly recognized that "the problem of *large* campaign contributions" was the "*narrow aspect* of political association where the actuality and potential for corruption have been identified." *Id.* at 28 (emphasis added); see also *Citizens United*, 130 S. Ct. at 908 ("With regard to *large* direct contributions, *Buckley* reasoned that they could be given 'to secure a political

quid pro quo.'" (emphasis added)). Indeed, it was *large* contributions that prompted the Tillman Act's original ban (at a time when there were no limits on other contributions). The ban was intended to curb "'big money' campaign contributions," such as "the giving of $50,000 or $100,000 by a great corporation toward political purposes." *United States* v. *Auto. Workers*, 352 U.S. 567, 571, 572 (1957) (quotation marks omitted).

Congress, however, has since addressed concerns about large contributions by imposing contribution *limits*. Under 2 U.S.C. § 441a, no "person"—including individuals, partnerships, LLCs, and corporations—may contribute more than $2,500 per candidate per election. See pp. 2-3, *supra*. Section 441b, by contrast, is not "focuse[d] precisely on the problem of *large* campaign contributions." *Buckley*, 424 U.S. at 28 (emphasis added). It imposes a categorical ban on *all* corporate contributions, no matter their size.

The government has no legitimate interest in banning corporate contributions in the modest sums permitted of individuals and unincorporated associations. The government has never shown a genuine danger that a $2,500 donation from a corporation would be more corrupting than one from someone else. It has never explained—let alone proved by credible evidence—how a $2,500 contribution from the wealthiest individual or unincorporated association poses no intolerable risk of corruption, while the same $2,500 contribution—or even a dollar—from the smallest corporation poses such a danger of *quid pro quo* as to warrant an outright ban. Twenty-nine States allow corporations to contribute to candidates.[2] But "[t]he Gov-

[2] See Nat'l Conference of State Legislatures, *State Limits on Contributions to Candidates, 2011-2012 Election Cycle* (June 1, 2012),

ernment does not claim that these [contributions] have corrupted the political process in those States." *Citizens United*, 130 S. Ct. at 909.

The government claimed below that "corporations pursue economic interests through entry into the political arena," and that "[t]he corporate form is particularly suited to pursue such economically motivated behavior to seek official favors." Gov't C.A. Br. 41. But *all* contributors seek to advance their interests—whether social, environmental, economic, or otherwise—in the political arena. And this Court has made clear that that is *not* corruption: "It is well understood that a substantial and legitimate reason * * * to make a contribution * * * is that the candidate will respond by producing those political outcomes the supporter favors." *Citizens United*, 130 S. Ct. at 910 (quotation marks omitted). There is no basis for singling out corporations' "economic interests" for disfavored treatment. The government's own theory confirms that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at 899.

Economic motives, moreover, fail to distinguish corporations from countless businesspersons, partnerships, and LLCs who pursue similar interests through politics, yet may contribute up to $2,500 to a candidate. The government urges that the "corporate form is particularly suited" to such ends. Gov't C.A. Br. 41. But there is nothing magical about a corporate charter that makes a corporation more likely to receive *quid pro quo* political favors for a $2,500 contribution. The government's theory is just a repackaged version of the claim that sup-

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http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012v2.pdf (collecting state laws).

posed advantages of the corporate form justify special restrictions on corporations' political expression—a notion *Citizens United* rejected. See 130 S. Ct. at 903-905. The government cannot penalize "certain disfavored associations of citizens" "for engaging in the same political speech" as others solely because they "have taken on the corporate form." *Id.* at 908. An association does not shed its First Amendment rights simply because it chooses to incorporate.

This case illustrates the perversity of the distinction. Petitioners are accused of using two companies, Galen LLC and Galen Corporation, to reimburse campaign contributors. For each, they have been indicted for allegedly making contributions in the names of others. See p. 10, *supra*. But they have been charged with *another* federal felony with respect to the alleged reimbursements from Galen *Corporation's* treasury solely because that company is a corporation rather than an LLC. Whatever harm Congress may have intended to address, it is plain that singling out corporations bears little if any relation to it. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963)—particularly where, as here, the government wields the heavy hammer of criminal enforcement.

2. The Fourth Circuit also asserted that §441b serves an "anti-circumvention interest" because, absent a ban, individuals might use corporations to exceed their own contribution limits. App., *infra*, at 11a-12a.[3] But there is nothing to suggest *Congress* imposed the ban for

[3] The government has similarly claimed that a ban is needed because corporations could evade their own contribution limits by spawning numerous subsidiaries. Gov't C.A. Br. 43-45.

that reason. See p. 7, *supra*. And *McConnell* forecloses it.

In *McConnell*, this Court addressed a ban on campaign contributions by minors. 540 U.S. at 231-232. The government claimed the ban was necessary to prevent parents from circumventing their own contribution limits by donating through their children. *Id.* at 232. But the government "offer[ed] scant evidence of this form of evasion," leading the Court to conclude that the "claimed evil" was "simply too attenuated for [the ban] to withstand heightened scrutiny." *Ibid.* The ban, moreover, was not closely drawn. Looking to the experience of the States, the Court noted that they had "adopted a variety of more tailored approaches," including counting minors' contributions toward their parents' limits and imposing aggregate, per-family limits. *Ibid.* The availability of narrower solutions demonstrated that the ban "swe[pt] too broadly" and improperly "impinge[d] on the protected freedoms of expression and association." *Id.* at 231-232.

McConnell's analysis applies with even greater force here. More than half the States allow corporations to make campaign contributions, see p. 18 & n. 2, *supra*, yet the government has presented *no* evidence that corporations have been abused to circumvent contribution limits. The solitary "example" it offered below involved the use of multiple *LLCs* to contribute to a candidate for state office. See Gov't C.A. Br. 43 (citing Md. Att'y Gen.'s Advisory Comm. on Campaign Finance, *Campaign Finance Report* 30 (2011), http://www.oag.state.md.us/Reports/campaignfinance.pdf ("*Maryland Report*")). But § 441b does not ban LLCs from contributing; it applies only to corporations. That is why the alleged reimbursements by Galen *Corporation* were charged under § 441b but the

ones by Galen *LLC* were not. The government cannot justify a speaker-based ban on political expression with evidence pertaining to *different* speakers.

Even if a single anecdote were sufficient, § 441b would still sweep too broadly because "a variety of more tailored approaches" are available. *McConnell*, 540 U.S. at 232. As in *McConnell*, Congress could require that corporate contributions be attributed toward their officers' or directors' individual limits, or it could require parent and subsidiary corporations to share a single contribution limit. The FEC *already* administers similar rules for partnership, LLC, and PAC contributions. See pp. 2-3, 5, *supra*. So do many States that allow corporate contributions. See Pet'rs C.A. Br. 35 & n.6. Indeed, the source of the government's LLC-circumvention example explained that the scheme would *not* have worked with *corporations* because, under that State's law, "corporations with multiple subsidiaries and affiliates, or multiple corporations with the same stockholders, are treated as a single entity" subject to a single contribution limit. *Maryland Report*, *supra*, at 28 & n.63 (citing Md. Code Ann., Elec. Law § 13-226(e)). Given those widespread and tailored solutions at both the federal and state levels, § 441b's absolute ban "sweeps too broadly" to be sustained. *McConnell*, 540 U.S. at 232.

3. The government has also insisted that corporations can "contribute" to campaigns through PACs. Gov't C.A. Br. 34-35. That argument fails on every level—and ultimately defeats itself.

First, *Citizens United* made clear that a PAC's political activity is not the political activity of the corporation that created it. "A PAC is a separate association from the corporation," and thus "the PAC exemption from § 441b's expenditure ban does not allow corporations to

speak." 130 S. Ct. at 897 (citation omitted). Likewise, § 441b bans corporations from contributing "notwithstanding the fact that a PAC created by a corporation" can contribute. *Ibid.* That logic applies with particular force to contributions. A corporation could dictate the content of PAC advertisements, even though it must use funds solicited from others (see p. 4, *supra*). But a PAC contributing *other people's money* expresses a very different message than the corporation putting its *own* money on the line to support a candidate.

Second, if PACs *did* allow corporations to "contribute," as the government contends, that would simply deprive § 441b's ban of rationality. The theory underlying § 441b is that corporate contributions pose such a "heightened risk of corruption" that a ban is warranted. Gov't C.A. Br. 41. If that were true, it would make no sense to allow corporations to "contribute" not merely the amount individuals may give, but potentially twice as much through a PAC. But that is exactly what the PAC option allows: A corporation's multicandidate PAC can give up to $5,000 to each candidate, whereas (absent § 441b's ban) the corporation could contribute only $2,500. See pp. 3, 4-5, *supra*. Nowhere has the government explained how $5,000 from a corporate PAC is less likely to result in a *quid pro quo* than $2,500 from the corporate treasury.

Moreover, if circumvention is a concern, PACs allow individuals to "exceed the bounds imposed on their own contributions" more effectively than corporate contributions alone could. App., *infra*, 11a (quotation marks omitted). An individual who has already donated the maximum $2,500 can also give up to $5,000 to a PAC, which in turn can contribute $5,000 to a candidate. See pp. 4-5, *supra*. Using a PAC thus allows contributions *three*

times the individual limit. If a corporation were permitted to contribute the same $2,500 as everyone else, by contrast, individuals controlling corporate contributions could at most give *twice* the normal limit. And if Congress employed mandatory attribution rules like those already used for partnerships and LLCs, see pp. 2-3, *supra*, individuals would not be able to exceed personal limits at all.

Far from establishing a system that is "closely drawn" to anti-corruption and anti-circumvention interests, the PAC option eviscerates them. "The operation of [§ 441b] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 190 (1999). The so-called PAC option "is squarely at odds with the governmental interests asserted" here, *id.* at 191, producing an "irrational[ ]" system that "ensures that the [contribution] ban will fail to achieve [those] end[s]," *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 489 (1995). It cannot be sustained.

B. The Fourth Circuit's Reliance on *Beaumont* Demonstrates the Need for Review

Despite § 441b's infirmities, the Fourth Circuit concluded that *Beaumont* bound it to uphold the ban. App., *infra*, 8a, 12a n.5.[4] But *Beaumont* rests on premises that,

[4] As the district court recognized, *Beaumont* concerned only a nonprofit advocacy corporation's bid for a special *exemption* from § 441b's general ban on corporate contributions. App., *infra*, 19a. The challenger did not dispute the ban's validity generally or with respect to other corporations; this Court correspondingly did not face a "broadside attack" on corporate contribution restrictions. *Beaumont*, 539 U.S. at 156. This Court "assumed—but never held"—that § 441b could be constitutionally applied to corporations generally. App., *infra*, 19a (emphasis omitted).

after *Citizens United*, are no longer valid. The Fourth Circuit's (and other courts') invocation of *Beaumont* as "binding" underscores the need for review.

1. As the Fourth Circuit recognized, *Beaumont* identified four government interests supporting § 441b's corporate contribution ban: anti-corruption, anti-distortion, shareholder protection, and anti-circumvention. App., *infra*, at 7a; pp. 6-7, 13, *supra*. *Citizens United*, however, flatly rejected anti-distortion and shareholder protection as grounds for restricting corporate political expression. See 130 S. Ct. at 903-905, 911; p. 8, *supra*. The Fourth Circuit and the government thus abandoned those two interests in defending § 441b here. App., *infra*, 10a n.3; Gov't C.A. Br. 39-40.[5]

Beaumont, however, cannot stand without those interests. Like *Austin*, *Beaumont*'s driving principle was that corporations' "'state-created advantages'" "'permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.'" 539 U.S. at 154 (quoting *Austin*, 494 U.S. at 659) (additional quotation marks omitted). *Beaumont* rested directly on *Austin*'s now-rejected anti-distortion rationale, repeatedly invoking "political war chests" and "aggregations of wealth." *Id.* at 154, 160. It likewise invoked the

[5] To the extent the government might contend that anti-distortion or shareholder-protection interests remain valid in this context, that would confirm the need for review. *Austin*'s anti-distortion rationale was "an aberration," *Citizens United*, 130 S. Ct. at 907, and the government did "little to defend it" even in *Citizens United*, *id.* at 904. As for shareholder protection, this Court made clear that "the remedy is not to restrict speech" but to "explore other regulatory mechanisms," *id.* at 911; that holding applies equally to campaign contributions, a form of political speech. This Court should leave no doubt that those interests cannot support a ban on political expression.

now-repudiated rationale of protecting dissenting shareholders, both in recounting the reasons for § 441b's contribution ban and in identifying PACs—which contribute funds from donors, not the corporation—as an alternative. See *id.* at 154, 163.

Beaumont did invoke an interest in combating corruption that, according to the Fourth Circuit, *Citizens United* did not overrule. App., *infra*, 11a. But *Citizens United* concededly eliminated broad swaths of *Beaumont*'s (and *Austin*'s) conception of "corruption." *Citizens United* made clear that the "governmental interest in preventing corruption or the appearance of corruption * * * was limited to *quid pro quo* corruption," and did not extend to mere "influence" or "access." 130 S. Ct. at 909-910. By contrast, *Beaumont* relied on a "corruption" interest that included the "conversion [of corporate earnings] into political 'war chests'"—*i.e.*, *Austin*'s anti-distortion interest—and emphasized that corruption was *not* limited to "*quid pro quo* agreements, but also [included] undue influence on an officeholder's judgment." 539 U.S. at 154, 156; see *Austin*, 494 U.S. at 660 (describing the "distorting effect of immense aggregations of wealth" in corporations as a "type of corruption"). *Citizens United* effectively overturned that portion of *Beaumont*'s reasoning as well. *Beaumont* thus is not merely "gravely wounded." App., *infra*, 23a. Its conception of three of the four interests it invoked has been repudiated.

The one *Beaumont* interest *Citizens United* did not wipe away is preventing circumvention. But that slender reed cannot support an outright ban on corporate campaign contributions. This Court made no effort in *Beaumont* to determine whether that rationale by itself justified § 441b. And the one time this Court *did* consider cir-

cumvention as the sole justification for a contribution ban, it found the ban unconstitutional. See *McConnell*, 540 U.S. at 231-232; p. 21, *supra*. The same must be true here. There is *no* evidence of circumvention. And no court has disputed that the government could devise attribution and aggregation rules for corporate contributions, just as it has for other entities. See pp. 2-3, 5, 12-13, *supra*. Yet *Beaumont* did not even consider such alternatives.[6]

2. Even *Beaumont*'s analysis of PACs has collapsed. That decision's sole response to the claim that § 441b imposes a "complete ban" on corporate contributions was that corporations may contribute through PACs, 539 U.S. at 162-163, a view later repeated in *McConnell*, 540 U.S. at 204. But *Citizens United* overruled that part of *McConnell* and held that PACs do *not* speak for the corporations that create them. 130 S. Ct. at 897; see p. 9, *supra*. Because that conclusion applies equally in the contribution context, see pp. 22-23, *supra*, the critical premise of *Beaumont*'s tailoring analysis has evaporated as well. To sustain § 441b today, this Court would have to hold that an *outright ban* on corporate contributions, backed by criminal sanctions, is "closely drawn" to the government's asserted interests despite the narrower alternatives readily available to Congress.

The Fourth Circuit refused to conduct full First Amendment scrutiny on the belief that *Beaumont* (or its remnants) remained controlling. App., *infra*, 12a n.5.

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[6] In a footnote, *Beaumont* dismissed the argument that circumvention could be addressed by requiring individuals to disclose when money given to a corporation is "earmarked" for a particular candidate. 539 U.S. at 160 n.7. The Court did not consider a rule that *all* corporate contributions be attributed, as partnership and LLC contributions are.

But First Amendment liberties should not be truncated on the basis of theories since discredited and tailoring analysis this Court has never undertaken. If § 441b's corporate contribution ban is to survive, it must be on grounds other than those articulated in *Beaumont*. The need for such "reconceptualizing" of the issues deprives *Beaumont* of any remaining *stare decisis* effect. *Citizens United*, 130 S. Ct. at 924 (Roberts, C.J., concurring). "There is * * * no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited." *Ibid.*

C. This Court's Review Is Critical

1. The government cannot deny that the First Amendment rights at issue here are important. Seeking to downplay the issue nonetheless, the government urges that corporations are still free to launch independent "multimillion-dollar advertising campaigns" under *Citizens United*. Gov't C.A. Br. 45. But "[r]hetoric ought not obscure reality." *Citizens United*, 130 S. Ct. at 907. As *Citizens United* recognized, most corporations are small, "without large amounts of wealth." *Ibid.* They cannot realistically conduct the lavish media campaigns the government imagines; even a single television spot may be outside a small corporation's budget. A modest $2,500 contribution thus may be many corporations' *only* way of joining the political fray. Yet § 441b denies them even that opportunity, giving the advantage to large and powerful companies that *can* afford independent campaigns. Cf. *id.* at 908 (noting that, under § 441b's expenditure ban, "wealthy corporations could still lobby elected officials, although smaller corporations may not have the re-

sources to do so"). That government-imposed limit on the public debate underscores the need for review.

"Close examination" is all the more essential because "the legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley*, 424 U.S. at 40-41. Even if the government may otherwise prosecute violations of contribution rules, see p. 20, *supra*, it cannot pile on *additional* felony charges that reflect impermissible speaker-based discrimination. Cf. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382-385 (1992) (even speech generally lacking First Amendment protection cannot be proscribed based on its expressive content).

2. Relief can come from this Court alone. While acknowledging that *Citizens United* narrowed the interests that can be invoked to restrict political expression, App., *infra*, 10a n.3, 11a, the Fourth Circuit refused even to consider whether § 441b is closely drawn to the few interests that remain viable, concluding that *Beaumont* "foreclose[d]" any such inquiry. *Id.* at 12a n.5. In case after case, courts have reached similar conclusions, holding that *Beaumont* requires them to uphold contribution bans like § 441b, despite *Citizens United*. See, *e.g.*, *Minnesota Citizens Concerned for Life, Inc.* v. *Swanson*, 692 F.3d 864, 877-879 (8th Cir. 2012) (en banc) (upholding state ban on corporate contributions because "[r]ightly or wrongly decided, *Beaumont* dictates" that result); *Ognibene* v. *Parkes*, 671 F.3d 174, 194-197 & n.21 (2d Cir.) (holding court was required to uphold New York City's extension of its corporate contribution ban to partnerships, LLCs, and LLPs, unless this Court were "to overrule" *Beaumont*), cert. denied, 2012 WL 950086 (U.S. 2012); *Thalheimer* v. *City of San Diego*, 645 F.3d 1109, 1124-1125 (9th Cir. 2011) (upholding ban on contributions

by all artificial entities because "*Beaumont* [had not] been overruled by *Citizens United*"). Those courts recognize that *Citizens United* rejected the anti-distortion and shareholder-protection rationales on which *Beaumont* was based, see *Ognibene*, 671 F.3d at 195 n.21; *Thalheimer*, 645 F.3d at 1124, and ruled that "a corporation cannot be required to speak through a PAC," *Swanson*, 692 F.3d at 878. As the Eighth Circuit explained, "*Citizens United*'s outright rejection of the government's anti-distortion rationale, as well as the Court's admonition 'that the State cannot exact as the price of [state-conferred corporate] advantages the forfeiture of First Amendment rights,' casts doubt on *Beaumont*, leaving its precedential value on shaky ground." *Id.* at 879 n.12 (quoting *Citizens United*, 130 S. Ct. at 905) (citation omitted). But those courts have nevertheless held that the remnants of *Beaumont* bind them—"[r]ightly or wrongly"—to uphold contribution bans. *Id.* at 879.

Consequently, only this Court can determine *Citizens United*'s implications for the continued vitality of § 441b's corporate contribution ban. Unless and until this Court steps in, that ban will continue to abridge First Amendment interests without further scrutiny. This Court has reserved to itself "'the prerogative of overruling its own decisions.'" *Agostini*, 521 U.S. at 237; see *Swanson*, 692 F.3d at 879. It should exercise that prerogative where one of its gravely undermined precedents prevents lower courts from applying their best understanding of current law in light of this Court's more recent pronouncements.

II. THIS COURT SHOULD REVISIT THE LEVEL OF SCRUTINY APPLIED TO CONTRIBUTION RESTRICTIONS

In upholding § 441b's contribution ban, the Fourth Circuit invoked the "principle that independent expenditures and direct contributions are subject to different

standards of scrutiny." App., *infra*, 9a. The government likewise has argued that the contribution ban can be sustained, despite *Citizens United*, because contribution restrictions are subject to more lenient review. Gov't C.A. Br. 26-30, 36, 39. In particular, limits on expenditures are subject to strict scrutiny: They are invalid unless the government shows they are "justified by a compelling state interest." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986); see *Buckley*, 424 U.S. at 44-45. By contrast, contribution restrictions are currently subject to the "lesser demand" of being "closely drawn" to "a sufficiently important interest." *Beaumont*, 539 U.S. at 162; see *Buckley*, 424 U.S. at 25.

That two-tiered approach is not merely dubious in light of intervening law. It has also "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts." *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (quotation marks omitted). It is now ripe for reconsideration—particularly where the case involves not a limit but a flat ban.

A. "[P]olitical speech in the course of elections" is "the speech upon which democracy depends." *Shrink Missouri*, 528 U.S. at 405 (Kennedy, J., dissenting). Campaign contributions are a vital means of expressing support for candidates and assisting the dissemination of their views. Yet *Buckley*'s "closely drawn" standard often offers "only tepid protection to the core speech and associational rights that our Founders sought to defend." *Colorado Republican*, 533 U.S. at 466 (Thomas, J., dissenting). The rationales for offering only lesser protection, moreover, have been overtaken by precedent in other First Amendment contexts.

Beaumont rationalized providing less protection for campaign contributions based on "the importance of the

'political activity at issue' to effective speech or political association." 539 U.S. at 161. That effort to weaken First Amendment protections based on judicial assessment of the expression's value has since been abandoned by this Court. See, *e.g.*, *United States* v. *Alvarez*, 132 S. Ct. 2537, 2543 (2012) (plurality opinion) ("exacting scrutiny" for false claims of military honors); *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (strict scrutiny for violent video games sold to minors). Indeed, this Court expressly rejected the notion that expression can be restricted because it "lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value.'" *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010) (depictions of animal cruelty). Where speech implicates "matters of public concern," moreover, it "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection"—even if "its contribution to public discourse may be negligible." *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1215, 1220 (2011) (quotation marks omitted) (funeral protesters). Surely expressions of support for candidates for public office are among those matters of the highest public concern.

Nor can the rights at issue here be downplayed as merely "associational" because "'the transformation of contributions into political debate involves speech by someone other than the contributor.'" *Beaumont*, 539 U.S. at 161-162 (quoting *Buckley*, 424 U.S. at 21); see *Buckley*, 424 U.S. at 24-25. This Court rejected efforts to minimize similar First Amendment interests last Term: In *Knox* v. *Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012), the Court held that a public-sector union cannot impose a "special assessment billed for use in electoral campaigns" on nonmembers unless they affirmatively elect to contribute. *Id.* at 2291.

Under *Buckley* and *Beaumont*'s logic, that arrangement should have been subject only to a lower level of review because it involved speech by someone else (*i.e.*, the union), and so primarily implicated nonmembers' associational rights. *Knox*, however, applied strict scrutiny and invalidated the assessment because it was not "'carefully tailored'" to serve a "'compelling interest.'" 132 S. Ct. at 2291 & n.3. There is no reason why laws (like § 441b) that *forbid* association through contributions that fund political speech should be subject to a lower standard of scrutiny than laws (like that in *Knox*) that *compel* such association. To the contrary, the rights to speak and associate and the rights *not* to speak and associate are two sides of the same coin. See, *e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 713-715 (1977); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984).

The suggestion that *Buckley*'s lower standard "reflects the importance of the interests that underlie contribution limits," *McConnell*, 540 U.S. at 136, likewise has not withstood the test of time. The "interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption,'" *ibid.*, may qualify as important, perhaps even compelling. But that means only that some contribution limits might meet strict scrutiny's requirements. It is not a reason for *lowering* the standard of scrutiny in the first place. That is particularly true where Congress has imposed not merely a limit but a ban, and has subjected different associations to unequal treatment based solely on whether they have taken the corporate form.

B. Finally, and perhaps most important, *Buckley*'s "sufficiently important"/"closely drawn" standard has evaded predictable application. This Court has variously

described the standard as "exacting" and "rigorous," *Buckley*, 424 U.S. at 16, 29, yet "relatively complaisant," *Beaumont*, 539 U.S. at 161. Even within a single case the standard's stringency has fluctuated: One portion of *McConnell* (addressing BCRA Titles I and II) characterizes closely drawn scrutiny as a "lesser demand" that gives "deference" to Congress, 540 U.S. at 136, 137, but another (addressing BCRA Title III), characterizes it as "heightened scrutiny" that demands consideration of "more tailored approaches," *id.* at 232. Lower federal courts have also been inconsistent in applying *Buckley*'s standard. Contrast *Green Party of Connecticut* v. *Garfield*, 616 F.3d 189, 206 n.14 (2d Cir. 2010), cert. denied, 131 S. Ct. 3090 (2011) (invalidating lobbyist-contribution ban because the standard "requires some measure of tailoring" and thus a "ban is not closely drawn" if a "limit would suffice"), with *Preston* v. *Leake*, 660 F.3d 726, 733, 735-736 (4th Cir. 2011) (invoking "'relatively complaisant'" review to uphold lobbyist-contribution ban and rejecting argument that $25 limit would suffice).

Members of this Court have repeatedly called for reconsideration of the two-tiered approach to campaign regulation. *E.g.*, *Beaumont*, 539 U.S. at 164 (Thomas, J., joined by Scalia, J., dissenting); *id.* at 163-164 (Kennedy, J., concurring in the judgment); *Colorado Republican*, 533 U.S. at 465 (Thomas, J., joined by Scalia & Kennedy, JJ., dissenting); *Shrink Missouri*, 528 U.S. at 405-410 (Kennedy, J., dissenting); *id.* at 410-430 (Thomas, J., joined by Scalia, J., dissenting). This case presents an excellent vehicle for reconsidering that standard. The issue is preserved, App., *infra*, 9a n.2; potentially outcome-determinative, see *id.* at 9a (refusing to apply *Citizens United* because of the "different standards of scru-

tiny"); and fully ripened. The time for reconsideration is now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2012

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11-4667

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM P. DANIELCZYK, JR., a/k/a Bill Danielczyk;
EUGENE R. BIAGI, a/k/a Gene Biagi,
Defendants-Appellees.

CAMPAIGN LEGAL CENTER; DEMOCRACY 21,
Amici Supporting Appellant,

REPUBLICAN NATIONAL COMMITTEE; CENTER FOR COMPETITIVE POLITICS; JEFFREY D. MILYO, PH.D; DAVID M. PRIMO, PH.D.,
Amici Supporting Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Senior District Judge.
(1:11-cr-00085-JCC-1; 1:11-cr-00085-JCC-2)

ARGUED: MAY 18, 2012
DECIDED: JUNE 28, 2012

Before TRAXLER, Chief Judge, and GREGORY and DIAZ, Circuit Judges.

Reversed by published opinion. Judge Gregory wrote the opinion, in which Chief Judge Traxler and Judge Diaz joined.

OPINION

GREGORY, Circuit Judge:

The Government appeals the district court's grant of William P. Danielczyk, Jr. and Eugene R. Biagi's (the "Appellees") motion to dismiss count four and paragraph 10(b) of the indictment, alleging that they conspired to and did facilitate direct contributions to Hillary Clinton's 2008 presidential campaign in violation of 2 U.S.C. § 441b(a) of the Federal Election Campaign Act of 1971 ("FECA"), and 18 U.S.C. § 2.[1] The district court reasoned that in light of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), § 441b(a) is unconstitutional as applied to the Appellees. We disagree for the following reasons and thus reverse the district court's grant of the motion to dismiss count four and paragraph 10(b) of the indictment.

I.

Danielczyk and Biagi were officers of Galen Capital Group, LLC, and Galen Capital Corporation (together, "Galen"). At the time of the charged conduct, Danielczyk was Galen's chairman, while Biagi was Galen's secretary. In March of 2007, Danielczyk co-hosted a fundraiser for Clinton's campaign and had individuals, including Biagi, give donations to the campaign with the promise that they would be reimbursed by Galen. Danielczyk and Bi-

[1] The indictment also alleges that Danielczyk co-hosted a fundraiser for Clinton's 2006 Senate campaign. These allegations support counts that are not at issue in this appeal.

agi concealed Galen's reimbursements by writing "consulting fees" on the reimbursement checks' memorandum lines, by issuing the checks for amounts larger than the actual contributions, and by creating false back-dated letters to the individual donors that characterized the reimbursement payments as "consulting fees." In total, Danielczyk and Biagi reimbursed the donors for $156,400 in contributions made to Clinton's 2008 campaign, and the campaign in turn reported the contributions to the Federal Election Commission.

Danielczyk and Biagi were indicted on seven counts for this contribution scheme. Count four and paragraph 10(b) respectively charged the Appellees with knowingly and willfully causing contributions of corporate money to a candidate for federal office, aggregating $25,000 or more, in violation of § 441b(a) and 2 U.S.C. § 437g(d)(1)(A)(i), and conspiring to do so. On April 6, 2011, Danielczyk and Biagi moved to dismiss count four, contending that § 441b(a) is unconstitutional as applied to them in light of *Citizens United*.

Prior to the Supreme Court's decision in *Citizens United*, § 441b(a) made it unlawful for corporations to make both direct contributions to political candidates and independent expenditures on speech that expressly advocates for or against the election or defeat of a candidate. However, the FECA permitted individuals to make independent expenditures and direct contributions within limits. *See*, *e.g.*, 2 U.S.C. § 441a(a). The act also allowed corporations wanting to make either type of expenditure to form political action committees ("PACs"), which were entities separate from the corporations subject to regulatory requirements. *See* 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. §§ 114.1(a)(2)(iii), (b), and 114.5(d). *Citizens United* struck down § 441b(a)'s

prohibition against corporate independent expenditures, reasoning in part that the ban was not supported by the interest in preventing quid pro quo corruption, 130 S. Ct. at 908–09, and further that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity," *id.* at 903. *Citizens United* left untouched § 441b(a)'s ban on direct corporate contributions.

Relying on *Citizens United*, the district court held that § 441b(a)'s ban on direct corporate contributions as applied to Galen is unconstitutional because it impermissibly treats corporations and individuals unequally for purposes of political speech. The district court rejected the Government's contention that the differential treatment of corporations in the context of direct contributions fulfills legitimate governmental interests, such as the prevention of quid pro quo corruption. It concluded that the interest in preventing quid pro quo corruption could be fulfilled by requiring corporations to comply with the act's contribution limits for individual donors.

Five days after it granted the motion to dismiss, the district court sua sponte ordered the parties to file briefs on whether, in light of *Agostini v. Felton*, 521 U.S. 203 (1997), and *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), the court should reconsider its decision. In *Beaumont*, the Supreme Court rejected an as-applied challenge to § 441b(a)'s ban on direct corporate contributions. 539 U.S. at 163. The Government argued that *Beaumont* directly controlled the case and must be applied even if *Citizens United* may have eroded *Beaumont*'s reasoning. This is because the *Agostini* principle requires lower courts to apply Supreme Court precedent that directly controls the case before it despite subse-

quent Supreme Court case law that may have affected the precedent by implication. 521 U.S. at 237.

After considering the briefs, the district court denied reconsideration of its dismissal. It reasoned that *Beaumont* did not directly control the case because it addressed an as-applied challenge of § 441b(a)'s ban on direct corporate contributions against a nonprofit corporation and not, as in this case, a for-profit corporation like Galen. The district court further affirmed the rationale in its earlier ruling that § 441b(a) violated *Citizens United* by treating corporations and individuals unequally. Accordingly, it concluded that count four and paragraph 10(b) remained dismissed. The Government timely appealed.

II.

For the following reasons, we hold that § 441b(a) is not unconstitutional as applied to the Appellees. *Beaumont* clearly supports the constitutionality of § 441b(a) and *Citizens United*, a case that addresses corporate independent expenditures, does not undermine *Beaumont*'s reasoning on this point. The district court erred when it granted the Appellees' motion to dismiss.

A.

The *Agostini* principle provides that in circumstances when Supreme Court precedent has "direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the line of cases which directly controls, leaving to [the Supreme] Court the prerogative of overturning its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Thus, lower courts should not conclude that the Supreme Court's "more recent cases have, by implication, overruled [its] earlier precedent." *Id.*

In *Beaumont*, the Supreme Court addressed a First Amendment challenge to § 441b(a) as it applied to nonprofit advocacy corporations. *Federal Election Commission v. Beaumont*, 539 U.S. 146, 156 (2003). In that case, North Carolina Right to Life, Inc. ("NCRL"), a nonprofit corporation organized to provide counseling to pregnant women and to promote alternatives to abortion, brought an as-applied challenge to § 441b(a)'s ban on direct corporate contributions and independent expenditures. *Id.* at 150. A panel of this Circuit found the ban on both independent expenditures and direct contributions unconstitutional as applied to NCRL. *Beaumont v. FEC*, 278 F.3d 261, 279 (4th Cir. 2002), *rev'd by Beaumont*, 539 U.S. 146.

With respect to direct contributions, the panel reasoned that the ban was unjustified in light of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238, 259 (1986), a decision in which the Supreme Court held that § 441b(a)'s ban on independent expenditures was unconstitutional as applied to a nonprofit corporation that, in many respects, was similar to NCRL. *Id.* at 275. As a result, the panel extended *MCFL*'s holding that solely addressed § 441b(a)'s ban on independent expenditures to the context of the provision's ban on direct contributions, concluding that "[i]n neither case is there the threat of quid pro quo, monetary influence, or distortion corruption that the prohibitions seek to prevent." *Id.* After this Circuit denied a rehearing en banc, the Federal Election Commission petitioned the Supreme Court for certiorari only on the issue of whether the ban on direct contributions was constitutional. *Beaumont*, 539 U.S. at 151.

In a 7–2 decision, the Supreme Court reversed this Circuit's opinion. 539 U.S. at 163. In doing so, the Su-

preme Court thoroughly explained its longstanding jurisprudence upholding Congress's "original, core prohibition on direct corporate contributions" and warned that this jurisprudence "would discourage any broadside attack on corporate campaign finance regulation of corporate contributions." *Id.* at 153, 156. It remarked that it had previously held that § 441b(a) had "broad applicability" to both corporations and labor unions regardless of their financial disposition and rejected NCRL's various arguments to limit this applicability, including that the ban did not adequately consider the variations between corporations with respect to affluence and diversity of corporate form. *Id.* at 157. It then recognized four government interests that supported the ban on direct corporate contributions: anti-corruption, anti-distortion, dissenting-shareholder, and anti-circumvention (preventing the evasion of valid individual contribution limits). *Id.* at 153–55. The Supreme Court rejected NCRL's position that these government interests are implicated only by for-profit corporations, reasoning that non-profits, just like for-profits, benefit from state-created advantages, can amass political war chests, and are susceptible to corruption and misuse as conduits for circumventing individual contribution limits. *Id.* at 160. Thus, in addressing § 441b(a)'s applicability to a nonprofit advocacy corporation, the Court based its conclusion on a century of law that has supported bans on direct contributions against for-profit corporations. *Id.* at 157. Overall, *Beaumont* makes clear that § 441b(a)'s ban on direct corporate contributions is constitutional as applied to all corporations.

B.

The Appellees contend that *Beaumont* does not govern our inquiry here because its holding was limited to

nonprofit corporations. For the reasons expressed above, we do not read *Beaumont* so narrowly. *Beaumont* stands for the proposition that a nonprofit corporation does not differ from a for-profit corporation for purposes of § 441b(a) because all corporations implicate the asserted government interests, and § 441b(a) is closely drawn to further those interests. However, even if we did agree with the Appellees, we cannot ignore *Beaumont*'s extensive discussion of Congress's legitimate interests in regulating direct contributions made by *all* corporations. As the Supreme Court has stated, "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). Nor should we forget that NCRL recognized the uphill battle it faced in challenging the general ban on direct contributions and thus did not request complete upheaval of the law, but only that non-profits, like it, be exempt. *Beaumont*, 539 U.S. at 156. Thus, at the very least, *Beaumont*'s discussion of the ban as it applies to all corporations informs our inquiry here.

C.

The Appellees would have this Court hold that *Citizens United* repudiated *Beaumont*'s entire reasoning; this we cannot do. *Citizens United* held that in the context of independent expenditures, the Government could not suppress political speech on the basis of the speaker's corporate identity. In reaching its decision, the Court did not discuss *Beaumont* and explicitly declined to address the constitutionality of the ban on direct contributions. *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 909 (2010). Nor did the opinion indicate that its "corporations-are-equal-to-people" logic necessarily ap-

plies in the context of direct contributions. *Id.* at 903. Leaping to this conclusion ignores the well-established principle that independent expenditures and direct contributions are subject to different standards of scrutiny and supported by different government interests. *See Preston v. Leake*, 660 F.3d 726, 735 (4th Cir. 2011) (concluding that *Citizens United* did not overrule "*Buckley* [*v. Valeo*, 424 U.S. 1 (1976)], *Nixon v.* [*Shrink Mo. Gov't PAC*, 528 U.S. 373 (2000)], *Beaumont*, or other cases applying 'closely drawn' scrutiny to contribution restrictions").

Independent expenditure limitations are "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19. "By contrast . . . a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20–21, and thus "lie[s] closer to the edges than to the core of political expression," *Beaumont*, 539 U.S. at 161. The "markedly greater burden" on basic freedoms imposed by independent expenditure limitations requires that these limitations survive "exact scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44.

Direct contribution limitations, on the other hand, require the "lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (internal quotation marks omitted).[2] The reason for

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[2] The Appellees contest this standard of review only for the purpose of preserving the right to challenge it upon any later review by the Supreme Court. Appellee Br. 18. We note that this challenge has been rejected previously by the Supreme Court. *See Beaumont*, 539 U.S. at 161.

this difference in scrutiny is clear: independent expenditures, by definition, are direct means by which political speech enters into the marketplace, *see Citizens United*, 130 S. Ct. at 898; direct contributions, conversely, do not necessarily fund political speech but must be transformed into speech by an individual other than the contributor, *see Beaumont*, 539 U.S. at 161-62. To minimize the constitutional differences between regulations that govern independent expenditures and regulations that ban direct contributions by applying *Citizens United* to this case would repeat the same error this Circuit committed in *Beaumont*. *See Beaumont*, 539 U.S. at 151 (rejecting this Circuit's conclusion that "the rationale utilized by the Court in [*MCFL*] to declare prohibitions on independent expenditures unconstitutional as applied to MCFL-type corporations is equally applicable in the context of direct contributions." (internal quotation marks omitted)).

As recently recognized by the Second and Ninth Circuits, *Citizens United* preserved two of the four important government interests recognized in *Beaumont*: anti-corruption and anti-circumvention.[3] *Ognibene v. Parkes*, 671 F.3d 174, 195 (2d Cir. 2011) (declining to hold that *Beaumont* was overruled by *Citizens United*, and determining that *Citizens United* preserved the anti-corruption and anti-circumvention interests); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011) (holding that *Citizens United* did not disapprove of the

[3] The *Citizens United* court did reject the anti-distortion rationale as it was used to support the ban on independent expenditures when it overturned *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). 130 S. Ct. at 913. The Court also disapproved of the dissenting-shareholder interest as justification for the ban on independent expenditures. *Id.* at 911.

anti-circumvention interest); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) ("*Beaumont* . . . remain[s] good law. Indeed, in the recent *Citizens United* case, the Court . . . explicitly declined to reconsider its precedent involving campaign *contributions* by corporations to candidates for elected office.").

Prevention of actual and perceived corruption and the threat of circumvention are firmly established government interests that support regulations on campaign financing. *See Beaumont*, 539 U.S. at 154; *Nixon*, 528 U.S. at 390 ("Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interest[ ] [of preventing corruption and the appearance of it] [ ], which, after all, underlie[s] bribery and anti-gratuity statutes."); *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements [through contributions] is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse."). While clarifying that the anti-corruption interest is limited to actual quid pro quo corruption or the appearance of it, as opposed to the appearance of influence or access, *Citizens United* did not deny that anti-corruption was a sufficiently important governmental interest, which is all that is required for closely drawn scrutiny. 130 S. Ct. 909-10. Instead, it held that the interest did not justify a ban on corporate independent expenditures under strict-scrutiny review. *Id.* at 911.

With respect to the anti-circumvention interest, the *Beaumont* court explained that without limitations on corporate contributions, individuals "could exceed the bounds imposed on their own contributions by diverting money through the corporation." 539 U.S. at 155. Thus the interest in preventing such evasion is grounded in the

"experience" of "candidates, donors, and parties [that] test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *Id.* (internal quotation marks and citations omitted).[4] *Citizens United* did not undercut *Beaumont*'s endorsement of this interest. Indeed, the majority opinion did not even discuss this interest when it struck down the independent expenditure ban, and thus prior Supreme Court precedent affirming this interest remains the law this Court must follow. *See e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197–98 (1981).

III.

For the foregoing reasons, we hold that the district court erred in granting the Appellees' motion to dismiss count four and paragraph 10(b) of the indictment.[5] The

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[4] The Appellees point to *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), a case decided after *Beaumont*, to support their challenge to the anti-circumvention interest. In *McConnell*, the Supreme Court found unconstitutional § 318 of the Bipartisan Campaign Reform Act of 2002, which prohibited minors from making direct contributions to candidates, and contributions or donations to political parties. 2 U.S.C. § 441K. *Id.* at 232. In doing so, the Court rejected the Government's argument that the provision protected against use of minors as conduits to circumvent individual-contribution limitations because there was "scant evidence" to support this form of evasion. *Id.* *McConnell* did not address *Beaumont*'s endorsement of the anti-circumvention interest in the context of a corporate contribution ban, which remains good law. And unlike *McConnell*, the result in *Beaumont* is supported by the separate interest in preventing quid pro quo corruption.

[5] Consequently, we do not address the parties' arguments regarding whether § 441b(a) is closely drawn to support the government interests asserted. We find that *Beaumont* forecloses this inquiry. *See*, *e.g.*, 539 U.S. at 160, n.7 (rejecting NCRL's suggestion that an

district court's grant of the motion to dismiss with respect to count four and paragraph 10(b) is reversed.

REVERSED

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earmark rule would be a better-tailored approach than the ban on direct contributions to fulfill the anti-circumvention interest).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

NO. 1:11CR85 (JCC)

UNITED STATES,

v.

WILLIAM DANIELCZYK, JR., & EUGENE BIAGI,
Defendants.

JUNE 7, 2011

MEMORANDUM OPINION

The issue before the Court is whether, in the wake of *Citizens United v. FEC*, 130 S. Ct. 876, (2010), Defendants can be charged with directing corporate money to a political campaign. Finding that *Citizens United* precludes such charges, on May 26, 2011, this Court dismissed Count Four and Paragraph 10(b) of the Indictment. [Dkts. 60, 62.] Following that decision, because this Court "owes no deference to itself"[1] and can correct its own opinions, this Court requested additional briefing and argument as to 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.

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[1] *Vosdingh v. Qwest Dex, Inc.*, No. Civ. 03-4284, 2005 WL 1323007, at *1 (D. Minn. Jun. 2, 2005).

[Dkt. 63.] The Government contemporaneously moved for reconsideration on the same grounds. [Dkt. 68.]

Having considered the positions of parties and amici, this Court will deny the Government's motion except to clarify that 2 U.S.C. § 441b(a)'s flat ban on direct corporate contributions to political campaigns is unconstitutional as applied to the circumstances of *this case*, as opposed to being unconstitutional as applied to all corporate donations.[2]

I. Analysis

The Government alleges that Mr. Danielczyk, as Chairman of Galen Capital Group, LLC, and Galen Capital Corporation (together, "Galen"), and Mr. Biagi, as a Galen executive, subverted federal campaign contribution laws by reimbursing their employees' costs of attending two fundraisers Mr. Danielczyk co-hosted for Hillary Clinton's 2006 Senate and 2008 Presidential campaigns. Count Four of the Indictment [Dkt. 1] charges Defendants with directing contributions of corporate money to Hillary Clinton's 2008 Presidential Campaign in violation of 2 U.S.C. § 441b(a) of the Federal Election Campaign Act of 1971 ("FECA"), which prohibits direct corporate contributions to federal campaigns.[3]

Defendants claim that, under the logic of *Citizens United*, the corporate direct donations ban violates the First Amendment and that Count Four and Paragraph

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[2] Although this Court is denying the Government's motion, to the extent there is any inconsistency between this Memorandum Opinion and Part C of the Court's May 26, 2010 Memorandum Opinion [Dkt. 60], this Opinion supersedes Part C.

[3] This alleged corporate donation is also listed in Count One, Paragraph 10(b), as an object of Defendants' alleged conspiracy under 18 U.S.C. § 371.

10(b) must therefore be dismissed. The Government responds that *Citizens United*'s ruling is limited to independent political expenditures, as opposed to direct campaign contributions, and that the constitutionality of the corporate direct donations ban is a settled question under *FEC v. Beaumont*, 539 U.S. 146 (2003).

To review, *Citizens United* involved a nonprofit corporation that produced a highly critical film about Hillary Clinton during her 2008 presidential campaign. Because the film was in effect "a feature-length narrative advertisement that urges viewers to vote against Senator Clinton," it was subject to 2 U.S.C. § 441b's provision barring corporations or unions from making independent expenditures as defined by 2 U.S.C. § 431(17) or expenditures for "electioneering communications" as defined by 2 U.S.C. § 431(f)(3). The Supreme Court held the ban unconstitutional because it found that *independent expenditures* do not trigger the government's interest in preventing *quid pro quo* corruption or its appearance.

This ruling stemmed largely from the Supreme Court's opinions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *Buckley* involved FECA's limits on *direct* campaign contributions and on *independent* election-related expenditures. Dealing first with direct contribution limits, the Court found a "sufficiently important" government interest in "the prevention of corruption and the appearance of corruption" that justified limiting the amount a person could contribute to a federal campaign. *Id.* at 25. The Court was concerned that large direct contributions, *i.e.*, those *above* the limits, could be used "to secure a political *quid pro quo*." *Id.* But the Court found less *quid pro quo* risk for independent expenditure limits "because [of] the absence of prearrangement and coordi-

nation" between the donor and any specific candidate. *Id.* at 47-48.

Importantly, because of the strong government interest in preventing *quid pro quo* corruption or its appearance, *Buckley* permitted FECA's limits on direct contributions even though those limits implicate fundamental First Amendment interests. *Id.* at 23. It follows that contributions *within FECA's limits* do not create a risk of *quid pro quo* corruption or its appearance—indeed, that is the point of the limits. *Id.* at 25.

Two years after *Buckley*, the Supreme Court in *Bellotti* considered a Massachusetts ban on corporate contributions or expenditures to influence the outcome of any state referendum. On one hand, the Court explicitly declined to rule on the constitutionality of the ban. *Id.* at 787 n.26. On the other hand, the Court stated that the identity of a corporation as "speaker," especially in the context of political speech, is of no consequence to the First Amendment protection its speech is afforded. *Id.* at 784-85.

The Supreme Court seized on the latter point in *Citizens United*, linking it with *Buckley* to strike down a ban on independent corporate expenditures. The Court's logic was that, because *Buckley* found that independent contributions by individuals do not corrupt, and because *Bellotti*'s "central principle" was that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity," 130 S. Ct. at 903, corporations cannot be banned from making the same independent expenditures as individuals, *id.* at 899-903.

That logic remains inescapable. If human beings can directly contribute *within FECA's limits* without risking *quid pro quo* corruption or its appearance, and if "the First Amendment does not allow political speech restric-

tions based on a speaker's corporate identity," *Citizens United*, 130 S. Ct. at 903, then corporations like Galen must be able to do the same.

Despite *Citizens United*, the Government argues that this Court is compelled by the Supreme Court's ruling in *FEC v. Beaumont* to apply § 441b in this case. The Eighth Circuit recently took the same view in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304 (8th Cir. 2011). *Swanson* involved a challenge under *Citizens United* to a Minnesota law banning direct corporate campaign contributions. The Eighth Circuit read *Beaumont* as holding that "the government could prohibit even non-profit, advocacy corporations from making direct contributions." *Id.* at *10. The *Swanson* court reasoned that *Beaumont* is "controlling precedent" for the constitutionality of the corporate contributions ban and that *Beaumont* must therefore be applied, even if *Citizens United* seemed to overrule *Beaumont* by implication. *Id.* at *10-11. The Eighth Circuit's reasoning is persuasive but not controlling in this Circuit, and this Court reaches a different conclusion for the reasons explained below.

This Court is bound to apply controlling Supreme Court precedent, even where later Supreme Court rulings erode that precedent's logical underpinnings. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (internal

quotation marks and alteration omitted). In other words, a lower court cannot reach a result that would require overruling a Supreme Court case. Still, while there is no question that this Court must apply directly controlling Supreme Court precedent, there *is* a question of whether *Beaumont* "directly controls" this case. Close examination of *Beaumont* shows that it does not.

Beaumont involved a First Amendment challenge by North Carolina Right to Life, Inc. ("NCRL"), a nonprofit advocacy corporation, against § 441b and the regulations implementing it "*only* so far as they apply to NCRL." 539 U.S. at 150 (emphasis added). The Supreme Court found § 441b constitutional *as applied to nonprofit advocacy corporations* but made only assumptions as to its general constitutionality. Indeed, it is clear from *Beaumont*'s second sentence that its holding is explicitly limited to nonprofit advocacy corporations:

> We hold that *applying the prohibition to nonprofit advocacy corporations* is consistent with the First Amendment.

Id. at 149 (emphasis added).

Describing the case's history, the Court noted that "[t]he District Court granted summary judgment to NCRL and held § 441b unconstitutional *as applied to the corporation*," *id.* at 150 (emphasis added), and that "the Court of Appeals went on to hold the ban on direct contributions likewise unconstitutional *as applied to NCRL*," *id.* (emphasis added).

The Court then *assumed—but never held*—that the extensive "historical prologue [behind § 441b] would discourage any broadside attack on corporate campaign finance" (in a pre-*Citizens United* world, of course). Because of this historical prologue, the Court next noted

that "NCRL accordingly questions § 441b *only to the extent the law places nonprofit advocacy corporations like itself* under the general ban on direct contributions." *Id.* at 156 (emphasis added). The Court went on to list a number of reasons for banning direct contributions from nonprofit advocacy corporations, *id.* at 159-60, and to consider whether nonprofit advocacy corporations deserve constitutional exemption from § 441b, *id.* at 163, before ultimately reversing the Fourth Circuit's decision below, *id.*

Beaumont's holding, upholding the constitutionality of § 441b's ban on direct contributions from nonprofit advocacy corporations, certainly can be logically extended to support § 441b's ban on all corporate contributions. "There is, however, a difference between following a precedent and extending a precedent." *Jefferson Cnty. v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000). "The difference, as it relates to a lower court's duty to follow moribund Supreme Court decisions, is manifest in the words 'which directly controls' [from *Agostini*]." *Id.* "[I]f the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us—if it cannot be said that decision 'directly controls' this case—then we are free to apply the reasoning in later Supreme Court decisions to the case at hand." *Id.*; *see also, e.g., Lambrix v. Singletary*, 520 U.S. 518, 529 n.3 (1997) ("While . . . two cases can be called 'controlling authority' in the sense that the two propositions they established . . . were among the 'givens' from which any decision in [the later case] had to be derived, they assuredly were not 'controlling authority' in the sense we obviously intend: that *they compel the outcome* in [that later case].") (emphasis added); *United States v. Acosta*, 502 F.3d 54, 60 (2d Cir. 2007) (stating that, where "neither [of two Supreme

Court cases], stands as direct precedent requiring" an outcome, "*no* Supreme Court precedent stands in the way of [the Second Circuit's] holding"); *United States v. Bruno*, 487 F.3d 304, 306 (5th Cir. 2007) (stating that because two Supreme Court cases "are not direct precedents . . . [the cases] do not preclude [the Fifth Circuit] from" its holding because "[i]n neither did the [Supreme] Court analyze the precise question [a later case] squarely addressed").

Beaumont's facts and holding do not compel an outcome in this case. Simply put, *Beaumont* expressly "h[e]ld that applying [§ 441b] *to nonprofit advocacy corporations* is consistent with the First Amendment." 539 U.S. at 149.[4] Defendants' corporation—Galen—is not a nonprofit advocacy corporation.[5] *Beaumont* therefore did not hold that § 441b is constitutional as applied to this case and is therefore not "directly controlling" here for *Agostini* purposes.

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[4] The Government agreed in Open Court that *Beaumont* was an "as applied" ruling, but argued that *Beaumont* is necessarily implicated in this case.

[5] The Government argued in Open Court that Defendants' assertion that *Beaumont* does not apply to Galen is like ConAgra Foods arguing that the Supreme Court's landmark Commerce Clause case, *Wickard v. Filburn*, 317 U.S. 111 (1942), applied only to the individual wheat farmer in that case and not to a large company like ConAgra. Among other reasons, that analogy fails in light of *Wickard*'s plainly broad holding: "Even if [wheat farming] be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress *if it exerts a substantial economic effect* on interstate commerce." *Id.* at 125 (emphasis added). This holding by its terms would apply to ConAgra, whereas *Beaumont*'s holding, by its terms, excludes Galen. Indeed, had *Beaumont*'s as-applied holding been closer to *Wickard*'s holding, for example by addressing corporations "whatever [their] nature," it would directly control this case.

Beaumont remains good law, but it does not *directly control* the issue at hand: whether the corporate contributions ban is constitutional as applied to Defendants' for-profit corporation. *Beaumont* is no different from *Citizens United* in that neither case's *holding* "directly controls" this case, though both cases' *analyses* are strongly implicated by it. *Beaumont*'s *reasoning* can still inform this Court's analysis, but only so far as the Court can square *Beaumont* with the Supreme Court's more recent decision in *Citizens United*. And, following *Citizens United*, *Beaumont*'s reasoning is no longer viable on several fronts.

First, *Beaumont* relies significantly on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which the Supreme Court explicitly overruled in *Citizens United*, 130 S. Ct. at 913. Second, *Beaumont* cites Congress's concern for preventing corruption and its appearance, 539 U.S. at 154-55, a worry again foreclosed here by *Citizens United*'s ruling that corporations have equal political speech rights to individuals, who can directly contribute *within FECA's limits* without risking corruption or its appearance. Third, though *Beaumont* notes that the ban protects individuals who have paid money into a corporation from having that money used to support candidates they may oppose, *id.* at 154, *Citizens United* dismisses this problem too, stating that shareholders can address it "through the procedures of corporate democracy," 130 S. Ct. at 911.

Finally, both *Beaumont* and the Government cite fears that corporations could be used to hide conduit (or "pass-through") contributions by those wishing to circumvent individual contribution limits. 539 U.S. at 155. For instance, an individual wanting to donate more money than the law allows could incorporate a number of

corporations and use the corporations as fronts for her own contributions to a candidate. This sort of behavior already is illegal under the same campaign finance laws used to bring this very case: 2 U.S.C. § 441f, making it illegal to "make a contribution in the name of another person,"[6] and 18 U.S.C. § 1001, making it illegal to "make[ ] any false, fictitious, or fraudulent statement or representation" to the Government, as discussed at length in this Court's May 26, 2011 Memorandum Opinion. *See also McConnell v. FEC*, 540 U.S. 93, 136-38 (2003). The FEC moreover seems capable of addressing such concerns through rules like those it already uses for *un*incorporated entities such as partnerships and limited liability companies ("LLCs"), which attribute their contributions to partners' or members' individual contribution limits. *See* 11 C.F.R. §§ 110.1(e), (g) (regulating, respectively, partnerships and LLCs). Regardless, this concern does not permit this Court to escape the logical implications of *Citizens United*, which are clear.

This Court has little choice between *Beaumont*'s now-"gravely wounded" reasoning and that of the case that struck the blow: *Citizens United*. Again, for better or worse, *Citizens United* held that the First Amendment treats corporations and individuals equally for purposes of political speech. 130 S. Ct. at 913. This leaves no logical room for an individual to be able to donate $2,500 to a campaign while a corporation like Galen cannot donate a cent. Thus, *as applied here*, § 441b(a) is unconstitutional.

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[6] As discussed below, a "person" is defined in FECA as including a "corporation," among other things. *See* 2 U.S.C. § 431(11).

This finding does not, as the Government argued, "equat[e] apples and oranges"[7] by equating independent expenditures with direct contributions. Taken seriously, *Citizens United* requires that corporations and individuals be afforded equal rights to political speech, unqualified. 130 S. Ct. at 913 ("We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity."). Thus, following *Citizens United*, individuals and corporations must have equal rights to engage in *both* independent expenditures *and* direct contributions. They must have the same rights to *both* the "apple" *and* the "orange."

To be clear, this Court is well aware of its duty to follow Supreme Court precedent, and it does not purport to overrule *Beaumont*.[8] *Beaumont* remains good law, and the prerogative remains with the Supreme Court to overrule *Beaumont* (or to overrule or limit *Citizens United*) should it so choose. *Agostini*, 521 U.S. at 237. This Court moreover again recognizes that it must strive to avoid rendering constitutional rulings except where absolutely necessary. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936).

This Court simply reads *Beaumont*'s holding for what it says: "[w]e hold that applying the prohibition to non-

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[7] Government's Omnibus Response to Defendant's Motion to Dismiss [Dkt. 37] at 33.

[8] Indeed, although Defendants argue compellingly that the Government waived this issue by failing to argue on the motions to dismiss that *Beaumont* forecloses a constitutional challenge to § 441b as applied to this case, Defendants also acknowledge that this Court retains discretion to consider the issue. This Court chooses to exercise that discretion here to ensure that its ruling conforms to controlling Supreme Court precedent.

profit advocacy corporations is consistent with the First Amendment." 539 U.S. at 149. Galen is not a nonprofit advocacy corporation, so *Beaumont* informs but does not directly control this case. Had *Beaumont* held that "applying the prohibition to ~~nonprofit advocacy~~ corporations is consistent with the First Amendment," this Court would follow it, *despite* its logical inconsistency with the later-decided *Citizens United*. But because that is not what *Beaumont* held, the Court is left with two persuasive decisions, one more recent than the other.

It is also worth repeating something else this Court is *not* doing. Even if applied to all corporations, this Court's holding hardly gives corporations a blank check (so to speak) to directly contribute *unlimited amounts* of money to federal campaigns. Rather, corporations would be immediately subject to the same contribution limits as individuals, under 2 U.S.C. § 441a(a), which sets limits on contributions from a "person," and 2 U.S.C. § 431(11), which defines the term "person" as it is used in FECA as "includ[ing] an individual, partnership, committee, association, *corporation*, labor organization, or any other organization or group of persons." (emphasis added). Meanwhile, corporations can make *unlimited* independent political expenditures because of *Citizens United*, 130 S. Ct. at 913, and can form political action committees ("PACs") to facilitate corporate political participation far beyond any personal contribution limit, *see Beaumont*, 539 U.S. at 163 (discussing PACs). In other words, as a practical matter, this Court's ruling adds a small drop to what is already a very large bucket.

II. Conclusion

For these reasons, the Court will deny reconsideration except to clarify its May 26, 2011 ruling to state that 2 U.S.C. § 441b(a)'s flat ban on direct corporate contribu-

tions to political campaigns is unconstitutional as applied to the circumstances *of this case*, as opposed to being unconstitutional as applied to *all corporate donations*. Accordingly, Count Four and Paragraph 10(b) of Count One of the Indictment will remain dismissed.

An appropriate Order will issue.

/s/

June 7, 2011
Alexandria, Virginia

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

NO. 1:11CR85 (JCC)

UNITED STATES,

v.

WILLIAM DANIELCZYK, JR., & EUGENE BIAGI,
Defendants.

JUNE 7, 2011

ORDER

Keeping in mind that "this Court owes no deference to itself"[1] and can correct its own opinions, this Court sought briefing and argument as to whether it should reconsider its dismissal of Indictment Count Four and Paragraph 10(b) in light of the Supreme Court's decisions in *FEC v. Beaumont*[2] and *Agostini v. Felton*[3] [63]. The Government contemporaneously moved to reconsider [68]. For the reasons more fully explained in the accompanying Memorandum Opinion, this Court maintains its ruling that, following *Citizens United*,[4] the flat

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[1] *Vosdingh v. Qwest Dex, Inc.*, No. Civ. 03-4284, 2005 WL 1323007, at *1 (D. Minn. Jun. 2, 2005).

[2] 539 U.S. 146 (2003).

[3] 521 U.S. 203 (1997).

[4] *Citizens United v. FEC*, — U.S. —, 130 S. Ct. 876 (2010).

ban on corporate contributions[5] is unconstitutional, but clarifies that its holding is limited to this case.

In short, this Court will not reinstate the dismissed counts first because *Beaumont*'s *holding* applies only to nonprofit advocacy corporations, meaning that it does not "directly control" this case for *Agostini* purposes, and second because *Beaumont*'s *reasoning* was supplanted by *Citizens United*.

On the first point, only the Supreme Court can overrule its own cases, and this Court must follow any Supreme Court case that "directly controls" the question before it.[6] *Beaumont* remains good law, but its "hold-[ing,] that applying the prohibition to *nonprofit advocacy corporations* is consistent with the First Amendment,"[7] does not directly control this case because Defendants' corporation is not a "nonprofit advocacy corporation."

Second, *Beaumont*'s *reasoning* can still inform this Court's analysis, but only as far as this Court can square it with the more recent *Citizens United* decision, which this Court cannot. The Supreme Court reasoned in *Citizens United* that because individuals can make independent political expenditures without risking corruption, corporations must be allowed to do so as well because "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."[8] It follows that, because individuals can make direct donations within limits without risking corruption, and because the government cannot restrict political speech

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[5] 2 U.S.C. § 441b(a).

[6] *Agostini*, 521 U.S. at 237.

[7] 539 U.S. at 149.

[8] *Citizens United*, 130 S. Ct. at 903

based on a speaker's corporate identity, corporations must be allowed to donate subject to the same limits.[9]

This is a straightforward application of *Citizens United*'s logic. Absent directly controlling precedent to the contrary (which *Beaumont* is not here), if corporations and individuals have equal political speech rights, then they must have equal direct donation rights.

It is therefore hereby ORDERED that:

(1) the Government's Motion to Reconsider [68] is DENIED, except that this Court clarifies its May 26, 2011 ruling to state that 2 U.S.C. § 441b(a)'s flat ban on direct corporate contributions to political campaigns is unconstitutional as applied to *this case*, as opposed to being unconstitutional as applied to *all corporate donations*;

(2) Count Four and Paragraph 10(b) of Count One of the Indictment shall remain DISMISSED; and

(3) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

/s/

June 7, 2011
Alexandria, Virginia

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

[9] *See* 2 U.S.C. § 431(11), which defines the term "person" as used in the Federal Election Campaign Act of 1971's personal contribution limits as "includ[ing] . . . corporation[s]."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

NO. 1:11CR85 (JCC)

UNITED STATES,

v.

WILLIAM DANIELCZYK, JR., & EUGENE BIAGI,

Defendants.

MAY 26, 2011

MEMORANDUM OPINION

This case involves an alleged scheme of recruiting donors and reimbursing their contributions to Hillary Clinton's 2006 and 2008 Senate and Presidential Campaigns. Defendants' motions to dismiss raise significant questions of statutory construction, *mens rea*, and Congress's ability to ban direct corporate contributions in the wake of the Supreme Court's decision in *Citizens United v. FEC*, 130 U.S. 876 (2010). For the following reasons, the Court will grant in part and deny in part Defendants' motions.

I. Background

On February 16, 2011, a grand jury sitting in the Eastern District of Virginia returned a seven-count indictment against William P. Danielczyk, Jr. and Eugene R. Biagi (together, "Defendants"), charging them with illegally soliciting and reimbursing contributions to Hillary

Clinton's 2006 Senate Campaign ("Senate Campaign") and 2008 Presidential Campaign ("Presidential Campaign"). (Indictment [Dkt. 1] ("Indict.").) The Government alleges that Mr. Danielczyk, as Chairman of Galen Capital Group, LLC, and Galen Capital Corporation (together, "Galen") and Mr. Biagi, as an executive at Galen, subverted federal campaign contribution limits by reimbursing their employees' costs of attending two fundraisers Mr. Danielczyk co-hosted for the two campaigns.

Count One charges conspiracy in violation of 18 U.S.C. § 371, Counts Two and Three charge making campaign contributions in the name of another in violation of 2 U.S.C. § 441f and 18 U.S.C. § 2, Count Four charges corporate contributions in violation of 2 U.S.C. § 441b and 18 U.S.C. § 2, Count Five charges obstruction of justice in violation of 18 U.S.C. §§ 1519 and Two, and Counts Six and Seven charge causing false statements in violation of 18 U.S.C. §§ 1001(a)(2) and 2 and are directed solely towards Mr. Danielczyk. Joint trial is set for July 6, 2011.

Defendants filed motions to dismiss a number of these counts on April 6, 2011. [Dkt. 23 ("Biagi MTD"); Dkt. 28 ("Danielczyk MTD").] The Government filed a brief in opposition on April 19, 2011 [Dkt. 37 ("Opp.")], and Defendants filed briefs in reply on April 25, 2011 [Dkt. 46 ("Danielczyk Reply"); Dkt. 49 ("Biagi Reply")]. Defendants' motions are before the Court.

II. Standard of Review

Federal Rule of Criminal Procedure 12(b)(3)(B) permits a defendant to move for dismissal pre-trial (or at any time while the case is pending) if an indictment fails to state an offense. "[A]n indictment need merely contain a 'plain, concise, and definite written statement of the essential facts constituting the offense charged.'" *United*

States v. Rendelman, [641 F.3d 36, 43], No. 08-4486, 2011 WL 1335781, at *5 (4th Cir. Apr. 8, 2011) (quoting Fed. R. Crim. P. 7(c)(1)).

An indictment is legally sufficient if (i) it contains the elements of the offense charged and informs the defendant of the charges he must meet, and (ii) it identifies the offense conduct with sufficient specificity to allow the defendant to plead double jeopardy should there be a later prosecution based on the same facts. *United States v. Jefferson*, 562 F. Supp. 2d 687, 690 (E.D. Va. 2008) (citing *Russell v. United States*, 369 U.S. 749, 763-64 (1962)). The first prong of this standard tests the "legal sufficiency" of a charged offense, "namely whether the facts alleged satisfy each of the requisite statutory elements of a[n] . . . offense." *Jefferson*, 562 F. Supp. 2d at 690.

In testing the sufficiency of an indictment, the indictment's statement of facts controls the inquiry, not the statutory citations for the underlying offenses. *United States v. Hooker*, 841 F.2d 1225, 1227 (4th Cir. 1988). "[E]very ingredient of crime must be charged in the bill, a general reference to the provisions of the statute being insufficient." *Id.* at 1228 (quoting *Hale v. United States*, 89 F.2d 578, 579 (4th Cir. 1937)). Generally, an indictment is sufficient if it alleges an offense in the words of the statute, as long as the words used in the indictment "'fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence.'" *United States v. Brandon*, 298 F.3d 307, 310 (4th Cir. 2002) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Moreover, each count of an indictment must itself be legally sufficient. *Hooker*, 841 F.2d at 1230-31. Thus, a missing element from a challenged count cannot be borrowed from another count if it is not incorporated by reference. *Id.* at 1231. None-

theless, the determination of an indictment's validity is based on practical not technical concerns. *United States v. Matzkin*, 14 F.3d 1014, 1019 (4th Cir. 1994).

III. Analysis

Defendants argue the following in favor of dismissal. First, that Counts Two and Three cannot apply to their charged conduct as a matter of statutory construction. Second, that Defendants could not have had the requisite *mens rea* for Counts Two and Three, as well as Six and Seven. Third, that the statute underlying Count Four was rendered unconstitutional by the Supreme Court's recent decision in *Citizens United v. FEC*, 130 U.S. 876 (2010). Fourth, that a bill of particulars is required for Count Six. And fifth, that the objects of the conspiracy alleged in Count One that rely on Counts Two, Three, and Four must be dismissed.

The Court considers these arguments in turn.

A. Statutory Construction of § 441f (Counts Two & Three)

Counts Two and Three charge the Defendants with violating 2 U.S.C. § 441f, which states in relevant part:

> No person shall make a contribution in the name of another person.

The *mens rea* for § 441f is stated in 2 U.S.C. § 437g(d)(1)(D), and applies to

> [a]ny person who knowingly and willfully commits a violation of § 441f.

2 U.S.C. § 437g(d)(1)(D). In addition, Counts Two and Three involve 18 U.S.C. § 2(b), which states,

> Whoever willfully causes an act to be done which if directly performed by him or another would be an

offense against the United States, is punishable as a principal.

The Indictment alleges that, in connection with fundraisers held on September 18, 2006, for the Senate Campaign and March 27, 2007, for the Presidential Campaign, Mr. Danielczyk "recruited individuals to make contributions" to Clinton's campaigns "and assured contributors that they would be reimbursed for their contributions." Indict. ¶ 12.a.i. Mr. Danielczyk's assistant allegedly "collected certain contributions from the contributors," which were "transmitted to the authorized campaign committees." Indict. ¶ 12.a.ii. Defendants then allegedly caused Galen to "reimburse[ ] [the] contributions." Indict. ¶ 12.a.iii.[1]

Count Two alleges that Defendants "caused $30,200 in contributions to the 2006 Senate [C]ampaign using" the names of others and "caused the reimbursement of those contributions" using money from Galen. Indict. ¶ 13.a. Count Three alleges that Defendants "caused $156,400 in contributions to the 2008 Presidential [C]ampaign using" the names of others and "caused the reimbursement of those contributions" using money from Galen. Indict. ¶ 13.b.

Defendants argue that Counts Two and Three fail to state a violation of 2 U.S.C. § 441f. (Danielczyk MTD at 8.) According to Defendants, "[r]eimbursing another for his or her contribution is not the same thing as making a contribution in the name of another. (Danielczyk MTD at

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[1] The Court notes that paragraph 12 of the Indictment is set forth in Count One of the Indictment. Indict. at pp. 4-6. Counts Two and Three of the Indictment each incorporate the Indictment's General Allegations and incorporate Paragraphs 13(a) and 13(b), respectively, but *do not* incorporate Count One. Indict. at pp. 13-14.

9 (emphasis removed).) Section 441f, on Defendants' read, "prohibits making a contribution to a campaign by falsely using the name of another person, such as by using an assumed name to make a contribution," but "[i]t does not prohibit reimbursing others for contributions they made in their own names." *Id.*

The Government counters that Defendants offer an "unreasonably narrow reading of the text," and that "[i]n fact, the statutory text and the legislative history all make it plain that a pass-thru scheme using straw donors to conceal the identity of the actual donor, as alleged in the indictment, is unambiguously criminalized by § 441f." (Opp. at 3 (internal quotation marks and citation removed).)

The issue before the Court, then, is whether § 441f[2] proscribes *only* (1) a donor making a contribution to a campaign but representing himself to the campaign as someone else, which the Court will refer to as a "false-name contribution," or whether it proscribes *also* (2) a donor arranging for another person to contribute funds to the campaign in that other person's name with the agreement to reimburse that other person, which the Court will refer to as a "pass-through contribution."

Defendants cite four reasons for limiting § 441f to false-name contributions: (1) the statute's text, (2) the statute's structure, (3) the need to avoid superfluity in

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[2] Counts Two and Counts Three charge violations § 441f together with 18 U.S.C. § 2(b) and 2 U.S.C. § 437g(d)(1)(D). The Court's analysis in addressing § 441f reads it in context with 18 U.S.C. § 2(b) and 2 U.S.C. § 437g(d)(1)(D) except where the Court addresses § 441f's language standing alone.

statutory construction, and (4) the rule of lenity and constitutional concerns. The Court considers each in turn.

i. Statutory Text

Defendants first argue that § 441f's text does not prohibit pass-through contributions. (Danielczyk MTD at 11.) In support, Defendants state that Congress addressed the issue of making contributions "directly or indirectly," and through "intermediaries or conduits," in other provisions of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431, *et seq.*, such as § 441a(a)(8) and § 441b(b)(2),[3] but omitted that language from § 441f. *Id.* Because the words "directly or indirectly" and through "intermediaries or conduits" are not in § 441f, Defendants argue, § 441f bans only false-name contributions, not pass-through contributions. (Danielczyk MTD at 12.)

In interpreting a statute, courts begin with the text of the provision at issue. *N.Y. State Conference v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). The "preeminent canon of statutory interpretation requires [courts] to 'presume that the legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The Court is mindful that "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the stat-

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[3] 2 U.S.C. § 441b(b)(2) provides that "[f]or purposes of this section . . . the term 'contribution or expenditure' includes a contribution or expenditure, as those terms are defined in section 431 . . . , and also includes any *direct* or *indirect* payment . . . to any candidate." (emphasis added).

ute's meaning, in all but the most extraordinary circumstance, is finished." *Ramey v. Director, Office of Workers' Comp. Program*, 326 F.3d 474, 476 (4th Cir. 2003) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). A court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd.*, 541 U.S. at 183 (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)).

To review, § 441f states in relevant part that "[n]o person shall make a contribution in the name of another person." According to Defendants, the Court would have to "rewrite § 441f to include terms that Congress deliberately excluded" for § 441f to reach to the conduct charged here. (Danielczyk MTD at 11-12.) The Court disagrees.

As Defendants note, FECA is a comprehensive, reticulated statute. (Danielczyk MTD at 9.) As such, it has a comprehensive definitional section, 2 U.S.C. § 431. "Person" is defined to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11). "Contribution" is defined as including "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Defendants are clearly "persons" and the donations to Clinton's campaigns were clearly "contributions." The issue, then, is what "make" and "in the name of another" mean for purposes of § 441f.

As written, § 441f plainly embraces Defendants' charged conduct. In § 441f, the action happens, literally, with the verb "make." FECA, though comprehensive and reticulated, does not define "make." "When a word is not defined by statute, [courts] normally construe it in

accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). As for the ordinary or natural meaning of "make," the American Heritage Dictionary defines "make" as, among other things, "[t]o cause to exist or happen; bring about; create." American Heritage Dictionary of the English Language 1085 (3d ed. 1992). Black's Law Dictionary defines "make," among other things, as "[t]o cause (something) to exist." Black's Law Dictionary 975 (8th ed. 2004). Thus, the inquiry is whether the indictment charges Defendants with having "caused a contribution to exist in the name of another person."

The Court finds that it does. Defendants allegedly recruited individuals to make contributions to Clinton's campaigns under agreements with those individuals that Defendants would reimburse their donations. Indict. §§ 11-12ai. A common sense, logical reading of § 441f holds that this conduct "made" contributions in the names of those individuals because the conduct caused those contributions to exist or happen. *Accord United States v. Boender*, 691 F. Supp. 2d 833, 838-39 (N.D. Ill. 2010) ("In many areas of law and life, a person can 'make' something happen though various forms of action."). Because the contributions Defendants made, by causing the contributions to happen, were not in Defendants' names but in the names of the individuals they recruited, the contributions were "in the name of another." Under Defendants' reading, the only person who "makes" a contribution is the person who transfers the contribution to the campaign. That, however, does not account for the person who caused that contribution to exist or happen, who, under "ordinary or natural meaning" also "made" the contribution. *Smith v. United States*, 508 U.S. at 228.

The natural meaning of "make" renders § 441f unambiguous.

In common usage, one who causes something to happen or brings it about, for instance by funding money, "made" it happen just the same as the person who executed the action, for instance by transferring that money. As the *Boender* court noted, "the law is no stranger to th[is] concept. One of the most obvious examples in criminal law relates to the law of murder, which attaches liability where a person causes the death of another even without physically delivering the deathblow." 691 F. Supp. 2d at 838-39. Indeed, this Court is not the first to apply this reading of § 441f to the conduct charged here. *See*, *e.g.*, *United States v. O'Donnell*, 608 F.3d 546 (9th Cir. 2010) ("*O'Donnell II*"); *Boender*, 691 F. Supp. 2d 833; *United States v. Hsu*, 643 F. Supp. 2d 574, 576 (S.D.N.Y. 2009) (upholding sufficiency of evidence for a conviction under § 441f where witnesses testified that, at defendant's request, they made contributions to political campaigns that were contemporaneously or subsequently reimbursed by the defendant); *but see United States v. O'Donnell*, No. CR 08-00872 (C.D. Cal. June 8, 2009) (*O'Donnell I*) (finding that § 441f does not prohibit soliciting and reimbursing contributions), overruled by *O'Donnell II*.[4]

Defendants argue that because § 441f does not include the term "indirectly," the Court cannot disregard that Defendants' alleged reimbursing transaction was separate from the recruited-individuals' donation transaction. (Danielczyk MTD at 13-14.) But the common meaning of

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[4] *O'Donnell I* is the only case cited by Defendants or found by this Court interpreting § 441f as *not* applying to the conduct charged here.

"make" permits the Court to consider Defendants' alleged role within the totality of the transaction. Because "make" means "[t]o cause to exist or happen; bring about; create," American Heritage, *supra*, at 1085, it is not necessary to "merge" the two transactions to bring Defendants' conduct within § 441f. "To cause to exist or happen; bring about; create," *id.*, is broad enough to encompass a number of means, including "indirect" or "conduit" means. As the Ninth Circuit stated:

> to identify the individual who has made the contribution, we must look past the intermediary's essentially ministerial role to the substance of the transaction. Accordingly, the statutory language applies when a defendant's funds go to a campaign either directly from him or through an intermediary. In either case, for purposes of § 441f, the defendant has made that contribution—and he has violated the statute if his own name was not provided as the source.

O'Donnell, 608 F.3d at 550. Though the Court does not find it necessary to "look past the intermediary's essentially ministerial role to the substance of the transaction," *id.*, for Defendants' charged conduct to come within § 441f, because of the breadth of the term "make," doing so would be proper here. Nonetheless, though *O'Donnell II* is not controlling in this Court, the Court agrees with its reasoning. Ultimately, the person who "makes" something is the person who caused it to exist or happen, brought it about, or created it. Thus, Defendants' charged conduct fits squarely within § 441f.

Defendants would have the absence of "directly or indirectly" and "intermediary or conduit," contained [in] § 441a(a)(8) and other FECA provisions but not § 441f, decide the issue. According to Defendants, § 441f would

have to read to the effect of "no person shall make, directly or indirectly, a contribution in the name of another person" or "no person shall make a contribution, including one directed through an intermediary or conduit, in the name of another person." Although these versions may be clearer in Defendant's view, the issue is not whether Congress could have better drafted § 441f, but whether § 441f as written embraces Defendants' charged conduct here. *See Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989) (stating that a court's "task is to apply the text, not to improve upon it"). And, given the meaning of the word "make," the words "directly or indirectly" and "intermediary or conduit" are unnecessary for § 441f to capture the conduct charged here.

Though Defendants contend the Government (and this Court) would "rewrite § 441f to include terms that Congress deliberately excluded," (Danielczyk MTD at 11-12), it is actually Defendants' interpretation of the statute that would force a rewrite. "Make" means "to cause to exist or happen; bring about; create," such that the person who brought something about or caused something to happen "made" that thing. To read § 441f as Defendants suggest would *limit* the common meaning of "make." The statute would have to read to the effect of "no person shall make, *by transferring the contribution directly from herself to the contributee*, a contribution in the name of another person," or "no person shall execute a contribution in the name of another person." That, however, is not what § 441f says. A statute "says . . . what it means and means . . . what it says," *Germain*, 503 U.S. at 253-54, and § 441f says "make," unqualified.

Under the ordinary or natural meaning of "make," Defendants allegedly caused the contributions to exist or happen just the same as if they had turned over the

donations to the campaigns themselves. Accordingly, the charged conduct falls within the text of § 441f.

ii. Statutory Structure

Defendants also argue that FECA's structure precludes reading § 441f as proscribing pass-through contributions, as alleged here. (Danielczyk MTD at 9-11.) According to Defendants, reading § 441f in this manner expands the scope of § 441f "beyond its text in an effort to reach conduct that FECA expressly regulates elsewhere." (Danielczyk MTD at 10.) Specifically, Defendants argue that FECA regulates pass-through contributions in 2 U.S.C. § 441a(a)(8), and because pass-through contributions are regulated in § 441a(a)(8), they are not proscribed by § 441f. *Id.* § 441a(a)(8) states:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.

The subsection § 441a(a) is titled[5] "[d]ollar limits on contributions." Section § 411a itself is entitled "[l]imitations on contributions and expenditures."

The Court disagrees that, as a matter of FECA's *structure*, the existence of § 441a(a)(8) forecloses reading

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[5] A heading or title of a statute cannot substitute for the operative text of that statute, so the Court looks to these titles only as informative. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("We find it informative that Congress placed § 1146(a) in a subchapter entitled, "POSTCONFIRMATION MATTERS.").

§ 441f as prohibiting pass-through contributions, given that § 441f's plain text dictates the reading set forth above. *See BedRoc Ltd.*, 541 U.S. at 183 (stating that a court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous"). Nonetheless, the Court agrees with Defendants that statutes should be construed to "fit, if possible, all parts into an harmonious whole," *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959), but sees this guidance as counseling an opposite result.

Sections 441a(a)(8) and 441f serve different functions in FECA and do different work. Section 441a(a)(8) dictates *how much* one can "contribute" and against whose contribution limits a "contribution" is counted. Section 441f dictates *whether* one can "contribute" in a particular manner. Indeed, whether one is "contributing" at all, for purposes of FECA, is governed by § 431(8)(A)(i), which defines the term "contribution" (yet another provision with a different function). Reading these provisions in harmony as a whole, one sets forth whether there is a "contribution" (§ 431(8)(A)(i)), the next sets forth against whose account that "contribution" is credited (§ 441a(a)(8)), and the next sets forth whether one can even make a particular type of "contribution" at all (§ 441f). That is not to say that § 441f's *role* in FECA, in prohibiting a certain kind of "contribution," *in itself* provides that Defendants' charged conduct is that kind of prohibited conduct. § 441f's *text* does that. This is only to say that "fit[ting] . . . [these] parts [of FECA] into an harmonious whole," *Mandel Brothers*, 359 U.S. at 389, the *structure* of FECA does not foreclose the textual reading of § 441f set forth above.

In support of their structural argument, Defendants contend that reading § 441f as prohibiting the charged

conduct here "conflat[es]" § 441f and § 441a, and "categorically ban[s] innocent conduct that Congress intended to allow." (Danielczyk MTD at 11.) Defendants propose a hypothetical to illustrate that Congress addressed false-name contributions and pass-through contributions separately and differently. (Danielczyk MTD at 10.) Suppose, say Defendants, a proud parent of a politically active college student reimbursed that student for her purchase of a ticket to a political fundraiser out of the belief that the daughter could not afford to attend. *Id.* According to Defendants, the parent's conduct in this scenario is not barred by § 441f, even though the money donated by the daughter to the campaign came not from the daughter, but from the parent. (Danielczyk MTD at 11.) Defendants argue that, instead of § 441f, that scenario is regulated by § 441a, which guards against any abuse in such a scenario by counting the daughter's donation against the parent's § 441a contribution limits. *Id.*

That is not the conduct Defendants are charged with here. Using Defendants' hypothetical and inserting the facts here, the scenario would be one where a proud parent of a politically active college student called his daughter *and, to conceal the amount and the source of his contribution*, recruited her to make a donation to a political campaign with the assurance that he would repay her for the donation. Indict. §§ 11-12ai. Under the Court's and the Government's reading of § 441f, that conduct would fall within § 441f. Significantly, for the parent's conduct to be a *criminal* violation of § 441f, the parents would not only have to engage in the proscribed conduct, but do so with the requisite *mens rea*, which the Court addresses below.

The Supreme Court, in *dicta*, has addressed this very scenario. In *McConnell v. FEC*, 540 U.S. 93 (2003), the

Court held that a provision of FECA prohibiting minors from making political contributions violated the First Amendment. *Id.* at 231. The Government, in arguing its position that the prohibition on minor's contributions did not violate the First Amendment, "assert[ed] that the provision protects against corruption by conduit; that is, donations by parents through their minor children to *circumvent contribution limits applicable to the parents*." *Id.* at 232 (emphasis added). The Court concluded that "the Government offer[ed] scant evidence of this form of evasion," reasoning that "[p]erhaps the Government's slim evidence results from *sufficient deterrence of such activities* by § 320 of FECA, which prohibits any person from 'mak[ing] a contribution in the name of another person,' 2 U.S.C. § 441f." *Id.* (emphasis added). The Court plainly contemplated that § 441f applied to Defendants' hypothetical, if the parent intended to circumvent his contribution limits via his daughter.[6]

As is clear from this Court's discussion of *mens rea* below, Defendants' proud-parent hypothetical would only implicate § 441f where the parent's purpose was to circumvent his contribution limits through his daughter. That is § 441f's function in the structure of FECA. Section 431(8)(A)(i) determines whether there is a "contribution," § 441a(a)(8) determines against whose account that "contribution" is credited, and § 441f determines whether one can even make a particular type of "contribution" at all. Defendants argue that § 441a guards against any *abuse* by the hypothetical proud parent by counting the daughter's donation against the parent's § 441a contribution limits. (Danielczyk MTD at 11.)

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[6] As discussed more fully below, this does not read an additional element into § 441f, but only illustrates an example of facts upon which the requisite *mens rea* could be found.

Section 441a certainly guards against that abuse, but § 441f does something else—it determines whether a certain type of contribution can be made *at all*, regardless of whether the amount complies with § 441a. In other words, even if the proud parent donated $10.00 through his daughter, it *could* implicate § 441f (but not § 441a) if he did so with the requisite *mens rea*.

iii. Superfluity

Defendants next argue that reading § 441f as banning pass-through contributions renders the "entire provision of FECA—1 U.S.C. § 441a(a)(8) superfluous." (Danielczyk MTD at 12.) This refers to the canon "against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010) (internal citations omitted).

Because, as set forth above, the plain text of § 441f says what it says, any overlap in the Court's reading of § 441f with § 441a(a)(8) may lead to some superfluity, but does not, in light of the Court's review of § 441f's plain text, counsel against this reading. Although avoiding superfluity is "a cardinal principle" of statutory construction, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), the "*preeminent* canon" of statutory interpretation is that "the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd.*, 541 U.S. at 183 (emphasis added, internal quotation marks and citation omitted). Moreover, "[g]iven [the] fundamental difference in purpose [between § 441f and § 441a(a)(8)], evident from the text of the provisions as well as the context in which they were passed, the overlap is less troublesome than it would be if the two provisions purported to address the same matter." *O'Donnell*, 608 F.3d at 554-55. Because the preeminent canon of statutory construction leads the Court to read

§ 441f as above, and given the different functions of § 441f and § 441a(a)(8) within FECA and the fact that § 441f reaches conduct that 441a(a)(8) does not, the partial overlap and resulting superfluity between the two does not, in itself, foreclose the Court's reading of § 441f.

iv. The Rule of Lenity, the First Amendment, and Due Process

Defendants next argue that the rule of lenity, the First Amendment, and due process concerns compel dismissal of Counts Two and Three. (Danielczyk MTD at 22.) The rule of lenity "leads [courts] to favor a more lenient interpretation of a criminal statute 'when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)). For the reasons set forth above, after consulting traditional canons of statutory construction, *id.*, § 441f unambiguously prohibits the conduct alleged here. Moreover, to the extent the statute is ambiguous, that ambiguity is not sufficiently grievous to warrant the rule of lenity. *See Dolan v. United States*, 130 S. Ct. 2533, 2544 (2010) ("[A]fter considering the statute's text, structure, and purpose, we nonetheless cannot find a statutory ambiguity sufficiently 'grievous' to warrant [the rule of lenity's] application in this case.").

Defendants argue for an alternative construction of § 441f's text. Even granting this alternative construction, however, "'[i]t is not the case . . . that a provision is 'ambiguous' for purposes of lenity merely because it [is] possible to articulate a construction more narrow than that urged by the Government." *United States v. Ehsan*, 163 F.3d 855, 857-58 (4th Cir. 1998) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quota-

tion marks omitted)). Accordingly, because § 441f "unambiguously *include[s]*" the charged conduct, the rule of lenity does not dictate dismissal here. *See United States v. Groce*, 398 F.3d 679, 681-82 (4th Cir. 2005) (finding that because the statutory term "d[id] not unambiguously include the situation at issue, rule of lenity did not require a sentence enhancement") (emphasis removed); *see also O'Donnell II*, 608 F.3d at 555; *Boender*, 691 F. Supp. 2d at 842.

Defendants next argue that the void-for-vagueness doctrine compels dismissal. (Danielczyk MTD at 23.) "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982)). Again, § 441f defines the offense unambiguously and in plain terms, such that ordinary people can understand what is prohibited conduct.

Defendants argue that "Congress cannot, consistent with the First Amendment, turn political activities like otherwise permissible campaign contributions into an uncharted minefield of criminal liability." (Danielczyk MTD at 23.) Whatever makes the alleged contributions here "otherwise permissible," the Supreme Court has held that, to combat corruption and there appearance thereof, Congress *can* make campaign contributions exceeding certain limits *impermissible*. *Buckley v. Valeo*, 424 U.S. 1 (1976). In approving such limits, the Court no doubt also approved of Congress's right to sanction those who *intentionally try to evade* its limits. To the extent such sanctions create a minefield, § 441f's *mens rea* require-

ment ensures that only those who intend to behave unlawfully find themselves in it. Accordingly, due process and First Amendment principles are not implicated by the Court's reading of § 441f.[7]

B. *Mens Rea* (Counts Two, Three, Six, and Seven)

Defendants next argue that Counts Two and Three (as well as Six and Seven) must be dismissed because the statutes involved are so ambiguous that they could not be "knowingly and willfully" violated. The Government responds that the statutes' meanings are clear, "not vague or debatable," and this Court has found the same with respect to Counts Two and Three. (Opp. at 27.) Both these arguments take as a given, though, Defendants' claim that, to fulfill the requisite *mens rea* for these counts, Defendants "must have been specifically aware of the

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[7] Count Six charges Mr. Danielczyk with causing the candidate's campaign to submit a report to the FEC "that was materially false in reporting the source and amount of contributions to the campaign by a corporation" in violation of 18 U.S.C. § 1001(a)(2). Indict. 28. Defendants argue that to the extent the Government's theory as to the falsity of the statement is that Mr. Danielczyk or Galen "made contributions in the name of another, and that the contributions were falsely reported to the FEC in the name of another, that fails for the same reasons as the § 441f counts," *i.e.*, Counts Two and Three, because the individual contributors are the people who "made" the contributions to the campaign, not Mr. Danielczyk. (Mot. at 27.) This argument fails for the same reasons set forth above with respect to Counts Two and Three. Mr. Danielczyk allegedly "made" the contributions just the same as the persons who transferred money to the campaign. As the Government stated, "[i]n this case, the [Clinton] campaign filed the required quarterly finance report with the FEC in April 2007 which falsely included the names of the conduit contributors as the actual sources of the funds to the Clinton presidential campaign." (Opp. at 38.) Mr. Danielczyk allegedly "made" these contributions in the name of another, and by doing so allegedly caused the candidate's campaign to submit a materially false report to the FEC.

law[s'] commands and have intended to violate them," (Danielczyk MTD at 16). This seems an odd premise to take at face-value, given the common maxim, "familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 7 Pet. 404, 411 (1833); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1611 (2010) (quoting *Barlow*). This Court will therefore address the surprisingly thorny question of what *mens rea* applies for these counts.

Counts Two and Three, again, charge the Defendants with violating 2 U.S.C. § 441f, which states in relevant part:

> No person shall make a contribution in the name of another person.

The *mens rea* requirement for § 441f is again stated in 2 U.S.C. § 437g(d)(1)(A)(i), and applies to

> [a]ny person who *knowingly* and *willfully* commits a violation of any provision of this Act.

437g(d)(1)(A)(i) (emphasis added). In addition, Counts Two and Three involve 18 U.S.C. § 2(b), which states,

> Whoever *willfully* causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Counts Six and Seven very similarly also involve § 2(b) as well as 18 U.S.C. § 1001(a)(2), which applies, in relevant part, to:

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, *knowingly* and *willfully* . . . makes any false, fictitious, or fraudulent statement or representation.

Thus, Counts Two, Three, Six, and Seven involve *mens rea* standards of acting "knowingly" and "willfully."

All agree that "knowingly" is a "general intent" *mens rea* standard requiring "knowledge of the facts that constitute the offense." *Dixon v. United States*, 548 U.S. 1, 5 (2006) (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998)); *United States v. George*, 386 F.3d 383, 389 n.6 (2d Cir. 2004) ("In contrast [to 'willingly'], the criminal statutory term 'knowingly' has attained a largely settled interpretation.").

The meaning of "willfully," however, "has long bedeviled American courts." *George*, 386 F.3d at 389. Indeed, "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan*, 524 U.S. at 191. This "chameleon word"[8] seems describe three levels of intent, as then-Judge Sotomayor observed in *United States v. George*.[9]

i. The Highest Level of Intent: *Ratzlaf* and *Cheek*

In select, rare instances, willfulness requires a finding that the defendant actually knew that he was violating a particular statute. For instance, *Ratzlaf v. United*

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[8] *United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009) (citations omitted).

[9] *See also United States v. Kay*, 513 F.3d 432, 447 (5th Cir. 2007) ("The definition of 'willful' in the criminal context remains unclear despite numerous opinions addressing this issue. Three levels of interpretation have arisen that help to clear up the haze."). *Kay* went on to explain that the lowest level merely required that the defendant act intentionally, the intermediate level required knowledge of general unlawfulness (citing *Bryan*), and the highest level required specific knowledge of the terms of the statute being violated. *Id.* at 447-48.

States, 510 U.S. 135 (1994), involved the crime of "structuring" cash deposits to evade federal deposit reporting requirements. The Court observed that breaking single transactions into two or more segments of less than $10,000 is not intuitively nefarious and held that a defendant could only be liable where he actually knew of the anti-structuring law he was breaking. *Id.* at 144-46. Likewise, in *Cheek v. United States*, 498 U.S. 192 (1991), the Court noted that because the tax laws are so overwhelmingly complex, "Congress . . . softened the impact of the common law presumption [that ignorance of the law is no excuse] by making specific intent to violate the law an element of certain federal criminal tax offenses." *Id.* at 199-200. Like *Ratzlaf*, the Court held that in criminal tax cases, willfulness could only be found where the law imposed a duty, "the defendant knew of this duty, and . . . he voluntarily and intentionally violated [it]." *Id.* at 201.

Thus, *Ratzlaf* and *Cheek* stand for the proposition that, in circumstances "where the obscurity or complexity" of a criminal statute "may prevent individuals from realizing that seemingly innocent acts are, in fact, criminal," willfulness requires the defendant to have known that he was violating a specific law. *George*, 386 F.3d at 390.

ii. The Intermediate Level of Intent: *Bryan*

The second category of willfulness was most prominently articulated in *Bryan v. United States*, 524 U.S. 184 (1998). There, the petitioner faced charges under 18 U.S.C. § 922(a)(1)(A), which forbids trading in or transporting firearms in interstate commerce without the appropriate license. The petitioner argued that the *Ratzlaf*/*Cheek* standard for willfulness applied, such that his guilt would depend on his awareness of the federal licens-

ing requirement when he violated it. 524 U.S. at 189-90. The Court declined to extend *Ratzlaf* and *Cheek*, distinguishing them as "involv[ing] highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Id.* at 194. The Court instead held that "the willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required." *Id.* at 196.

Many courts, including the Supreme Court and the Fourth Circuit, have since repeated this language with the intimation that it represents the general standard for willfulness in criminal law. For instance, in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007), the Supreme Court cited *Ratzlaf*, *Bryan*, and *Cheek* for the proposition that, "when the term 'willful' or 'willfully' has been used in a criminal statute [as opposed to a civil one], we have regularly read the modifier as limiting liability to knowing violations." *Id.* at 58 n.9. It further cited *Bryan* (and no other cases) in stating, "[t]hus, we have consistently held that a defendant cannot harbor such criminal intent unless he 'acted with knowledge that his conduct was unlawful.'" *Id.* (quoting *Bryan*, 524 U.S. at 193).

The Fourth Circuit used similar language in *United States v. Bursey*, 416 F.3d 301, 308-09 (4th Cir. 2005). There, the defendant was convicted of "willfully and knowingly" entering and remaining in a restricted area during a visit by the President. *Id.* at 303. The defendant argued that he could not have possessed the requisite *mens rea* because, although he was advised that he was in a restricted area and required to leave he was never told that the area was a "federally restricted zone, so designated by the secret service." *Id.* at 308. He

argued, in other words, for the rule from *Cheek* and *Ratzlaf* (that he had to be aware of the law he was violating). What he got instead was *Bryan*; the Court again repeated the language that "for a defendant to have acted willfully, he must merely have 'acted with knowledge that his conduct was unlawful.'" *Id.* at 308-09 (citing *Bryan*).

Bursey is typical of cases applying *Bryan*, in that it seems to treat *Bryan* as the alternative to *Ratzlaf* and *Cheek*,[10] when in fact *Bryan* is an alternative, and an atypical one at that.[11] Indeed, then-Judge Sotomayor wrote in *George* that the significance of *Cheek*, *Ratzlaf*, and *Bryan*, "lies in their atypicality." 386 F.3d at 392. As outlined below, her opinion explains at length that the baseline for criminal willfulness remains simple intentionality, that ignorance of the law is still (usually) no excuse, and that the standard is heightened solely for conduct that is wrongful only because a statute makes it so.

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[10] *See, e.g.*, *United States v. Roth*, 628 F.3d 827, 833-35 (6th Cir. 2011) (citing *Bryan* and invoking its standard in finding that the defendant did not need to know that particular items being exported are specifically listed on a "munitions list" prohibiting their export); *United States v. Mousavi*, 604 F.3d 1084, 1092-94 (9th Cir. 2010) (same, with respect to alleged violations of the International Economic Emergency Powers Act); *United States v. Bell*, 598 F.3d 366, 370-71 (7th Cir. 2010) (same, with respect to violations of the Deadbeat Parents Punishment Act of 1998); *United States v. Starnes*, 583 F.3d 196, 211-12 (3d Cir. 2009) (same, with respect to violations of §§ 2(b) and 1001 (the same statutes at issue in Counts Six and Seven in this case)).

[11] Tellingly, this Court has not located a single case where *Bryan* was applied to a defendant's *benefit*, *i.e.*, where a defendant was able to obtain a favorable ruling from invoking *Bryan* as requiring a *heightened mens rea* above the baseline.

iii. The Baseline Level of Intent: the Standard Case

As noted in *George*, Judge Learned Hand explained nearly a century ago that the term "willful" "means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law."[12] *Id.* at 393 (citing *American Surety Co. of New York v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925)). Recognizing that "*Bryan's* discussion of the content of the *mens rea* term 'willfully' in the challenged statute [was] not accompanied by a discussion of the basis for this definition," then-Judge Sotomayor cited a litany of Supreme Court cases in explaining that, in fact, *Ratzlaf*, *Cheek*, and *Bryan* merely reflect the Supreme Court's concern that "the obscurity or complexity of [a] particular criminal statute may prevent individuals from realizing that seemingly innocent acts are, in fact, criminal." *Id.* at 392 (citing *Carter v. United States*, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.") (internal quotation marks omitted); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-73 (1994) (child pornography conviction required proof of knowledge that children depicted were minors); *Staples v. United States*,

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[12] Judge Hand also remarked to Herbert Wechsler, then the Reporter for the Model Penal Code, that "[willfully] is a very dreadful word. . . . It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'willful' would lead all the rest in spite of its being at the end of the alphabet." *United States v. Hayden*, 64 F.3d 126, 129 n.5 (3d Cir. 1995) (quoting ALI Proceedings 160 (1955), quoted in Model Penal Code and Commentaries § 2.02, at 249 n.47 (Official Draft and Revised Comments 1985)) (internal quotation marks omitted).

511 U.S. 600 (1994) (conviction for possession of unregistered machine gun required knowledge of the features of the gun that brought it within the scope of the statute); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (conviction for unauthorized use of food stamps requires knowledge that use of food stamps was illegal, because absent that requirement, the statute would "criminalize a broad range of apparently innocent conduct")).

Thus, "knowledge of general unlawfulness is unnecessary under statutes criminalizing conduct whose wrongfulness is obvious from the surrounding context." *United States v. Kelly*, 368 Fed. Appx. 194, 198 (2d Cir. 2010). Indeed such knowledge is unnecessary where the behavior proscribed is wrongful in and of itself, because in such instances, the defendant is on notice that, in intentionally engaging in that behavior, he or she probably broke the law. *George*, 386 F.3d at 395. Only conduct that is wrongful solely because it is proscribed by statute and that seemingly could be innocent warrants *Bryan*'s heightened *mens rea* protection, and even then, only those laws that are abnormally technical or obscure, such as the tax code, warrant *Cheek* and *Ratzlaf*'s strictest *mens rea*.

iv. The Requisite *Mens Rea* in this Case

Here, Defendants argue they cannot have met the *mens rea* for Counts Two, Three, Six, and Seven because the statutes at issue were subject to multiple reasonable interpretations, such that they could not be "knowingly and willfully" violated. (Danielczyk MTD at 16.) Putting aside this Court's having found those statutes to be unambiguous, Defendants' argument depends upon this Court adopting a *Cheek*/*Ratzlaf* view of *mens rea* for the statutes charged in this case, because only under *Cheek* and *Ratzlaf* would Defendants' have needed to be

"specifically aware of the law's commands and [to] have intended to violate them." *Id.* This Court will not adopt that view.

Beginning with Counts Two and Three, compared with anti-structuring or tax laws, as in *Ratzlaf* or *Cheek*, individual campaign contribution laws are more intuitive and less complex. As the Supreme Court explained *Ratzlaf*, "currency structuring is not inevitably nefarious . . . . Nor is a person who structures a currency transaction invariably motivated by a desire to keep the Government in the dark." 510 U.S. at 144-45. Likewise in *Cheek*, the Court explained

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This *special treatment* of criminal tax offenses is largely due to the complexity of the tax laws.

498 U.S. at 199-200 (emphasis added). That distinguishes the tax cases Defendants present in support of their *mens rea* claims, all of which are, in essence, predecessors to *Cheek*.

In *United States v. Critzer*, the Court reversed a conviction for willful tax evasion where the law under which the Defendant was charged was "so uncertain that even co-ordinate branches of the United States government plausibly reach directly opposing conclusions." 498

F.2d 1160, 1162 (4th Cir. 1974). The Court noted that, "[e]ven if [the defendant] had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required." *Id.* As a result, "the element of willfulness could not be proven" in that case. *Id.* at 1163. *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), and *United States v. Pomponio*, 429 U.S. 10 (1976), likewise involved vague and highly-debatable theories of tax law. *Pomponio*, cited by Defendants along with *Ratzlaf*, explicitly limited its analysis to the tax laws at issue in that case. 429 U.S. at 12 ("The Court, in fact, has recognized that the word 'willfully' *in these statutes* generally connotes a voluntary, intentional violation of a known legal duty.") (emphasis added).

Many areas of federal law are "complex," including laws governing campaign contributions.[13] In this Court's view, however, such laws are not at the level of the tax code in their likelihood of ensnaring innocent conduct through sheer bewilderment. Campaign contributions laws are not so complex or surprising that the average citizen would likely be trapped by them. Thus, this Court will not extend *Ratzlaf* and *Cheek*'s highest *mens rea* standard to the field of election law and will not dismiss Counts Two and Three for inability to prove *mens rea*.

As for *Bryan*'s intermediate standard, as explained in *George*, the critical question is whether the law in question risks capturing otherwise seemingly innocent conduct. If, as in *George*, there is no conceivably meritorious

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[13] *See* Steve Simpson & Paul Sherman, Op-Ed., *Stephen Colbert's Free Speech Problem*, Wall St. J., May 19, 2011, at A15 (quoting Stephen Colbert lamenting on the difficulty of forming a political action committee, "Why does it get so complicated to do this. I mean, this is page after page of legalese. . . . All I'm trying to do is affect the 2012 Election. It's not like I'm trying to install iTunes").

justification for the alleged *actus reus*, then *Bryan*'s concern for capturing seemingly innocent conduct is not implicated. 386 F.3d at 395. Here, however, it appears that seemingly innocent conduct *could* be captured by § 441f. Returning to the proud-parent hypothetical, the parent reimbursing his daughter's fundraiser ticket is not intuitively "bad," yet his actions would meet the *actus reus* for § 441f. Because § 441f could capture seemingly innocent conduct, it calls for *Bryan*'s heightened *mens rea*.

Thus, for Counts Two and Three, the Government must prove that Defendants intended to violate the law (whatever the law was); but it need not prove Defendants' awareness of the specific law's commands. *See Bryan*, 524 U.S. at 196. Because Defendants could have intended to act unlawfully while being unaware of exactly what the law required, this Court disagrees with Defendants' argument that Counts Two and Three require dismissal due to ambiguity.

As for Counts Six and Seven, a split appears to exist between the Third and D.C. Circuits as to the requisite *mens rea* for Sections 2(b) and 1001 combined.

The Third Circuit applied *Ratzlaf* to a criminal charge linking Sections 2(b) and 1001 in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994). The Defendant in *Curran* asked a number of his employees to write personal checks to several campaigns for federal office, then reimbursed them in cash. *Id.* at 562-63. Considering the proper charge for "willfulness" under the statutes at issue—then an issue of first impression, *see id.* at 568—the court found three similarities between the statutes discussed in *Ratzlaf* and those charged in that case:

> (1) The disclosure obligations imposed by the Election Campaign Act correspond with those dictated by the currency reporting statute. This similarity

> involves the defendant's knowledge of a third party's duty to disclose information to a government agency.
>
> (2) The underlying conduct is not "obviously 'evil' or inherently 'bad.'" We see little difference between breaking a cash transaction into segments of less than $10,000 and making a contribution in the name of another.
>
> (3) The conduct at issue in both cases was made illegal by a regulatory statute.

Id. at 569.

Because of these findings, the Court held that the Government was required to prove that (1) the defendant was aware that campaign treasurers were legally bound to accurately report the sources of their contributions, (2) that the defendant's actions were taken with the specific intent to cause the treasurer to submit false reports, and (3) that the defendant knew that his actions were unlawful. *Id.* at 570-71.

More recently, though, the Third Circuit backpedaled from a *Ratzlaf*-like standard to a *Bryan*-like one. Citing *Bryan*, it held in *United States v. Starnes* that the required *mens rea* for Sections 2(b) and 1001 was "knowledge of the general unlawfulness of the conduct at issue." 583 F.3d 196, 211 (2009). Thus, it now seems that no circuit courts currently invoke a *Ratzlaf* or *Cheek* level of *mens rea* with respect to Sections 2(b) and 1001.

The D.C. Circuit considered and expressly rejected *Curran*, requiring no heightened *mens rea* for these statutes. In *United States v. Hsia*, 176 F.3d 517 (D.C. Cir. 1999), the Court found that *Curran* "extend[ed] *Ratzlaf* too far." *Id.* at 522. The Court noted that the anti-structuring statute in *Ratzlaf* explicitly applied to

persons "willfully violating" that statute. *Id.* This language, the Court held, created a narrow exception inapplicable to the *mens rea* required by Sections 2(b) and 1001, which do not explicitly require their "willful violat[ion]." *Id.* Thus, the Court held that "the government may show *mens rea* simply by proof (1) that the defendant knew that the statements to be made were false (the *mens rea* for the underlying offense, § 1001), and (2) that the defendant intentionally caused such statements to be made by another (the additional *mens rea* for § 2(b))." *Id.*; *see also United States v. Gabriel*, 125 F.3d 89, 99-102 (2d Cir. 1997), *abrogated on other grounds by Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Fieger*, No. 07-cr-20414, 2008 WL 996401, at *5-6 (E.D. Wis. Apr. 8, 2008) (following *Hsia*); *United States v. Pierce O'Donnell*, No. CR 08-872 (C.D. Cal. Jun. 8, 2009) (following *Hsia*, cited by *Defendants* here).

Hsia's ruling rests on an analysis that seems no longer valid. It focused on the absence of the words "willfully violat[es]" in Section 2(b), which instead applies where a person "willfully causes" an act to be done that happens to violate a statute. But the Supreme Court made clear, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA* that the combination of a *mens rea* requirement with the word "violation" does not create a mistake of law defense. 130 S. Ct. 1605, 1613 (2010). Thus, *Hsia*'s grounds for distinguishing *Ratzlaf* are no longer persuasive. *See also United States v. Moore*, 612 F.3d 698 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (noting that "*Hsia* referenced a 1994 Third Circuit opinion [*Curran*] that predated the Supreme Court's clarifying decisions in *Bryan* and later cases," and that, as a result, *Hsia*'s *mens rea* ruling may need to be reconsidered).

With the Fourth Circuit never having spoken on this issue, this Court applies the same analysis as with Counts Two and Three. First, in considering whether to apply *Ratzlaf* and *Cheek*'s strictest *mens rea* standard, this Court again considers whether the law reaches a tax-like level of complexity or obscurity. That is a more difficult question with respect to Sections 2(b) and 1001 because those sections embrace a far broader range of conduct that Sections 2(b) and 441f.

The act of causing a false, fraudulent, or fictitious statement to be made to an executive agency *could* easily apply in a tax case like *Cheek*, *see, e.g.*, *Clancy v. United States*, 365 U.S. 312, 313 (1961) (defendants charged with making false statements under § 1001 and with tax evasion under § 7201 (the same tax statute as in *Cheek*)), *as well as* a firearms dealing case like *Bryan*, *see, e.g.*, *United States v. Kubowski*, 85 Fed. Appx. 686 (10th Cir. 2003) (defendants charged with making false statements under § 1001 and with dealing firearms without a license under 18 U.S.C. § 924(d) (the same statute as in *Bryan*)).

Thus, because *Cheek* and *Bryan*'s *mens rea* standards are different, § 1001 cannot apply a uniform *mens rea* standard; the *mens rea* to be applied must depend on the conduct charged (*i.e.*, the law (if any) that makes the statement at issue allegedly false, fraudulent, or fictitious). Here, the Court has already found that *Bryan*'s *mens rea* applies to the law proscribing the making of a campaign contribution in the name of another. The hypothetical innocent proud-parent is equally capable of meeting the *actus reus* for Sections 2(b) and 1001 as he was for Counts Two and Three. *Bryan*'s *mens rea* standard must therefore apply to a false-statements charge based on a charge of making a campaign contribution in the name of another.

* * *

Thus, for the reasons explained in Parts A and B of this Memorandum Opinion, Defendants' arguments as to statutory construction and *mens rea* do not provide a basis for dismissing Counts Two, Three, Six, and Seven.

C. Count Four and *Citizens United*

Count Four charges Defendants with directing contributions of corporate money to the 2008 Presidential Campaign in violation of 2 U.S.C. § 441b(a), 2 U.S.C. § 437g(d)(1)(A)(i), and 18 U.S.C. § 2. Section 441b(a) of FECA bans direct corporate contributions to campaigns for federal office. Defendants claim that under the logic of the Supreme Court's decision in *Citizens United v. FEC*, 130 U.S. 876 (2010), this ban violates the First Amendment and that Count Four must therefore be dismissed.

Citizens United involved a non-profit corporation that produced a highly critical film about Hillary Clinton during her 2008 presidential candidacy. Because the film was in effect "a feature-length narrative advertisement that urges viewers to vote against Senator Clinton," it was subject to 2 U.S.C. § 441b's provision barring corporations or unions from making *independent expenditures* as defined by 2 U.S.C. § 431(17) or expenditures for "electioneering communications" as defined by 2 U.S.C. § 431(f)(3). The Court held the independent expenditure ban unconstitutional because it found that independent expenditures do not trigger the government's interest in preventing *quid pro quo* corruption or the appearance of corruption.

This ruling stemmed largely from the Supreme Court's opinions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *Buckley* involved FECA's limits on *direct* cam-

paign contributions and on *independent* election-related expenditures. Dealing first with direct contribution limits, the Court found a "sufficiently important" government interest in "the prevention of corruption and the appearance of corruption" that justified limiting the amount a person could contribute to a federal campaign. *Id.* at 25. The Court was concerned that large direct contributions, *i.e.*, those *over* the limits, could be used "to secure a political *quid pro quo*." *Id.* As for independent expenditure limits, however, the Court found less *quid pro quo* risk "because [of] the absence of prearrangement and coordination" between the donor and any specific candidate. *Id.* at 47-48.

Importantly, because of the strong government interest in preventing *quid pro quo* corruption or its appearance, *Buckley* permitted FECA's limits on direct contributions even though the contributions implicate fundamental First Amendment interests. *Id.* at 23. It follows that contributions *within FECA's limits* do not create a risk of corruption or its appearance—indeed, that is the point of the limits. *Id.* at 25.

Two years after *Buckley*, the Supreme Court in *Bellotti* considered a Massachusetts statute prohibiting corporate contributions or expenditures to influence the outcome of a vote on any referendum. On one hand, the Court explicitly declined to rule on the constitutionality of the statute's ban on "corporate contributions or expenditures" for the purpose of supporting or opposing a campaign for political office. *Id.* at 787 n.26. On the other hand, the Court found that the identity of a corporation as "speaker," especially in the context of political speech, is of no consequence to the First Amendment protection its speech is afforded. *Id.* at 784-85.

The Supreme Court seized on the latter point in *Citizens United*, combining it with *Buckley* to strike down a ban on independent corporate expenditures. The Supreme Court's logic was that because *Buckley* found that independent contributions by human beings do not corrupt, and because *Bellotti* held that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity," 130 S. Ct. at 903, corporations cannot be banned from making the same independent expenditures as individuals. 130 S. Ct. at 899-903.

That logic is inescapable here. If human beings can make direct campaign contributions *within* FECA's limits without risking *quid pro quo* corruption or its appearance, and if, in *Citizens United*'s interpretation of *Bellotti*, corporations and human beings are entitled to equal political speech rights, then corporations must also be able to contribute within FECA's limits.

Only one other court appears to have ruled on this issue since *Citizens United*. In *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, the plaintiffs challenged a state-law ban on corporate contributions to candidates and political parties, arguing that the ban was unconstitutional under *Citizens United*. 741 F. Supp. 2d 1115 (D. Minn. 2010). The court disagreed, finding that *Citizens United*'s holding was limited to corporate independent expenditures and was not a repudiation of *Buckley*'s limitations on direct contributions to candidates. Because *Citizens United* did not overrule *Buckley*, the court held, a ban on direct corporate contributions remained constitutional. *Id.* at 1132-34.

This Court agrees that *Citizens United* did not overrule *Buckley*. Indeed, *Citizens United* noted that limits on direct contributions to candidates, "unlike limits on

independent expenditures, have been an accepted means to prevent *quid pro quo* corruption." *Citizens United*, 130 S. Ct. at 909 (citing *McConnell v. FEC*, 540 U.S. 93, 136-38 (2003)). But this Court respectfully disagrees with the *Swanson* court as to the import of these facts. That *Citizens United* did not overrule *Buckley* and that it reaffirmed *Buckley*'s concern with preventing *quid pro quo* corruption does not justify *flatly* banning *corporations* from making direct donations while permitting *individuals* to make such donations within FECA's limits.

This Court recognizes that it must strive to avoid rendering constitutional rulings except where absolutely necessary. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936). But for better or worse, *Citizens United* held that there is no distinction between an individual and a corporation with respect to political speech. Thus, if an individual can make direct contributions within FECA's limits, a corporation cannot be banned from doing the same thing. So because individuals can directly contribute to federal election campaigns within FECA's limits, and because § 441b(a) does not allow corporations to do the same, § 441b(a) is unconstitutional and Count Four must be dismissed.[14]

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[14] Importantly, this finding hardly gives corporations a blank check (so to speak) to directly contribute *unlimited amounts* to federal campaigns. Rather, corporations are subject to the same FECA contribution limits as individuals. *See* 2 U.S.C. § 441a(a) (listing limits on contributions from a "person"); 2 U.S.C. § 431(11) ("When used in this Act . . . [t]he term 'person' includes an individual, partnership, committee, association, *corporation*, labor organization, or any other organization or group of persons." (emphasis added)).

D. Bill of Particulars as to Count Six

Mr. Danielczyk argues that the Count Six of the Indictment fails to set forth a false statement to an executive agency that he caused to be made and seek a bill of particulars identifying the document allegedly containing false statements, as well as the allegedly false statements itself.

Pursuant to Rule 7(f), the Court may direct the Government to file a bill of particulars. The decision whether to grant or deny a motion for a bill of particulars is within the sound discretion of the trial court. *United States v. Anderson*, 481 F.2d 685, 690 (4th Cir. 1973). The purpose of a bill of particulars is "to enable a defendant to obtain sufficient information on the nature of the charge against him so that he may prepare for trial, minimize the danger of surprise at trial, and enable him to plead his acquittal or conviction in bar of another prosecution for the same offense." *United States v. Schembari*, 484 F.2d 931, 934-935 (4th Cir. 1973) (citing *United States v. Dulin*, 410 F.2d 363, 364 (4th Cir. 1969)). It "is not to be used to provide detailed disclosure of the government's evidence in advance of trial." *United States v. Automated Medical Labs., Inc.*, 770 F.2d 399, 405 (4th Cir. 1985) (citing *Anderson*, 481 F.2d at 690). Instead, a bill of particulars "merely amplifies the indictment by providing missing or additional information so that the defendant can effectively prepare for trial." *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996) (citations omitted). If "the indictment adequately details the charges, or the information requested is otherwise available, then no bill of particulars is required." *United States v. Esquivel*, 755 F. Supp. 434, 436 (D.D.C. 1990) (citing *United States v. Butler*, 822 F.2d 1191, 1193 (D.C. Cir. 1987)).

Courts have found a bill of particulars unnecessary where the Government opens its files to the defendant. *See, e.g.*, *Schembari*, 484 F.2d at 935 (upholding the trial judge's denial of a bill of particulars because "the underlying objectives of a Rule 7(f) motion were fully satisfied by the government's voluntary disclosure of its file"); *United States v. Duncan*, 598 F.2d 839, 849 (4th Cir. 1979) (finding that the "appraisal function of an indictment" may be satisfied if the Government opens its investigative file for the Defendant's inspection). "Open file" discovery, however, is not required. *See United States v. Cuong Gia Le*, 310 F. Supp. 2d 763, 782 (E.D. Va. 2004) (finding a bill of particulars unwarranted where the government had provided and would continue to provide the facts and circumstances of the offense through ongoing discovery).

Here, it seems that the Government made clear in its Opposition brief precisely the document and false statements at issue. The Government said: "In this case, the [Clinton] campaign filed the required quarterly finance report with the FEC in April 2007 which falsely included the names of the conduit contributors as the actual sources of the funds to the Clinton presidential campaign." (Opp. at 38.) This statement informed Mr. Danielczyk as to the document containing the allegedly false statements, as well as the false statements themselves. Because the April 2007 FEC Report was turned over in discovery, no bill of particulars is needed here.

E. Sufficiency of Count Seven

Count Seven of the Indictment alleges that Mr. Danielczyk "knowingly and wilfully caused the submission of a materially false, fictitious, and fraudulent statement and representation" in violation of 18 U.S.C. § 1001(a)(2). Indict. ¶ 31. That allegedly false statement is contained

in a December 2007 letter that Galen's outside counsel sent the FEC detailing the conduct underlying the FECA counts of the indictment, specifically the statement that the reimbursements of contributions to the Presidential Campaign were bonus payments. Indict. ¶¶ 13b, 13e. Mr. Danielczyk argues that the statements contained in it were not false and, even if they were false, were not "material" for purposes of § 1001. (Danielczyk MTD at 28.)

In terms of actual falsity, Mr. Danielczyk essentially argues that Count Seven misrepresents the statement he made to the FEC. Whereas Count Seven alleges that the letter falsely represented to the FEC that "reimbursements of contributions . . . were bonus payments for work performed," (Indict. ¶ 31), Mr. Danielczyk notes that the letter's executive summary actually states that "*some* of the reimbursements *were associated* with a planned bonus related to the consummation of a corporate transaction." Thus, Mr. Danielczyk argues, "[t]o the extent Count 7 rests on the premise that [his letter] denies the payments were reimbursements and represents them to be bonuses instead, that is simply incorrect," because his letter in fact admits that the payments were reimbursements and that they were improper. (Danielczyk MTD at 28-29.)

In this Court's view, Count Seven rests on the much simpler premise that, in fact, the reimbursements were not bonus payments at all and that it was a lie to tell the FEC otherwise. That premise is not negated by the statement that "some" of the reimbursements were associated with bonuses, as that means "some" were not. Moreover, the body of the letter states that "Mr. Danielczyk stated that the checks provided" to employees "at or about the time of the" 2007 campaign event "were the

first installment on a series of bonus payments [Danielczyk] intended to make as a result of the [corporate] transaction, although [Danielczyk] acknowledges that the payments were timed to allow employees and others to attend" the 2007 campaign event. *Id.* at 6. This statement flatly provides that the payments "were the first installment on a series of bonus payments," something that may or may not be true. The Indictment simply charges that it was not.

Mr. Danielczyk next argues that Count Seven's allegedly false statement is immaterial. (Danielczyk MTD at 29.) Materiality is an element of a § 1001 violation, and the allegedly false statement must have had "'a natural tendency to influence agency action or [be] capable of influencing agency action.'" *United States v. Ismail*, 97 F.3d 50, 60 (4th Cir. 1996) (quoting *United States v. Norris*, 749 F.2d 1116, 1122 (4th Cir. 1984)). Mr. Danielczyk argues that the letter "disclosed to the FEC the entire course of conduct and [Galen's outside counsel's] conclusion that campaign laws had been civilly violated." (Danielczyk MTD at 29.) He claims that "the additional statement that reimbursements were *also* associated with bonus payments was not 'capable of influencing' how the FEC chose to handle the matter." *Id.* (emphasis in original).

"Materiality, as an element of a criminal offense, is a question of fact (or at the very least, a mixed question of law and fact) to be resolved by the fact finder." *United States v. Garcia-Ochoa*, 607 F.3d 371, 376 (4th Cir. 2010). And here, as Mr. Danielczyk's letter devotes a significant amount of time to discussing this bonus claim, this Court finds sufficient ground to leave it to the jury whether that bonus claim was material to the FEC.

F. The Objects of the Conspiracy Alleged in Count One Corresponding to Counts Two, Three, and Four

Finally, Defendants argue that Counts Two, Three, and Four must be dismissed from the Indictment as the objects of Defendants alleged conspiracy. Because this Court is dismissing Count Four but not Counts Two and Three, this Court agrees solely with respect to Count Four. As this Court finds that 2 U.S.C. § 441b(a) is unconstitutional following *Citizens United*, a violation of that statute can no longer serve as the object of a conspiracy. *United States v. Burgos*, 94 F.3d 849, 860 (4th Cir. 1996) ("[T]he essence of [a conspiracy] is an agreement to commit an *unlawful act*.") (emphasis added). Thus, Paragraph 10(b), which repeats Count Four's allegations as an object of the conspiracy, must be struck.

IV. Conclusion

For these reasons, the Court will grant dismissal with respect to Count Four and Paragraph 10(b) from the Indictment, and will deny dismissal as to the remaining counts.

/s/

May 26, 2011
Alexandria, Virginia

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

APPENDIX E
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11-4667

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

WILLIAM P. DANIELCZYK, JR., a/k/a Bill Danielczyk;
EUGENE R. BIAGI, a/k/a Gene Biagi
Defendants-Appellees

CAMPAIGN LEGAL CENTER; DEMOCRACY 21
Amici Supporting Appellant

REPUBLICAN NATIONAL COMMITTEE; CENTER FOR COMPETITIVE POLITICS; JEFFREY D. MILYO, PH.D; DAVID M. PRIMO, PH.D.
Amici Supporting Appellee

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Senior District Judge.
(1:11-cr-00085-JCC-1; 1:11-cr-00085-JCC-2)

AUGUST 10, 2012

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Gregory and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX F
RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

* * * * *

2. The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended and codified at 2 U.S.C. §§ 431 *et seq.*, provides in relevant part as follows:

§ 431. Definitions

When used in this Act:

(1) The term "election" means—

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual

shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

(3) The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

(5) The term "principal campaign committee" means a political committee designated and authorized by a candidate under section 432(e)(1) of this title.

(6) The term "authorized committee" means the principal campaign committee or any other political committee authorized by a candidate under section 432(e) (1) of this title to receive contributions or make expenditures on behalf of such candidate.

(7) The term "connected organization" means any organization which is not a political committee but which directly or indirectly establishes, administers or financially supports a political committee.

(8)(A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include—

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises or in the church or community

room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by

such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan—

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii) any legal or accounting services rendered to or on behalf of—

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which

directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(ix) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(x) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information

on or referenced to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): *Provided*, That such payments are made from contributions subject to the limitations and prohibitions of this Act;

(xi) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

(xii) payments made by a candidate or the authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access;

(xiii) any honorarium (within the meaning of section 441i of this title); and

(xiv) any loan of money derived from an advance on a candidate's brokerage account, credit card, home

equity line of credit, or other line of credit available to the candidate, if such loan is made in accordance with applicable law and under commercially reasonable terms and if the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business.

(9)(A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or

defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b) of this title, but all such costs shall be reported in accordance with section 434(b) of this title;

(vii) the payment of compensation for legal or accounting services—

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

(10) The term "Commission" means the Federal Election Commission.

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

(12) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of

Puerto Rico, or a territory or possession of the United States.

(13) The term "identification" means—

(A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and

(B) in the case of any other person, the full name and address of such person.

(14) The term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission.

(15) The term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission.

(16) The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

(17) INDEPENDENT EXPENDITURE.—The term "independent expenditure" means an expenditure by a person—

(A) expressly advocating the election or defeat of a clearly identified candidate; and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

(18) The term "clearly identified" means that—

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

(19) The term "Act" means the Federal Election Campaign Act of 1971 as amended.

(20) FEDERAL ELECTION ACTIVITY.—

(A) IN GENERAL.—The term "Federal election activity" means—

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of

that individual's compensated time during that month on activities in connection with a Federal election.

(B) EXCLUDED ACTIVITY.—The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

(21) GENERIC CAMPAIGN ACTIVITY.—The term "generic campaign activity" means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

(22) PUBLIC COMMUNICATION.—The term "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.

(23) MASS MAILING.—The term "mass mailing" means a mailing by United States mail or facsimile of more than

500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.

(24) TELEPHONE BANK.—The term "telephone bank" means more than 500 telephone calls of an identical or substantially similar nature within any 30-day period.

(25) ELECTION CYCLE.—For purposes of sections 441a(i) and 441a-1 of this title and paragraph (26), the term "election cycle" means the period beginning on the day after the date of the most recent election for the specific office or seat that a candidate is seeking and ending on the date of the next election for that office or seat. For purposes of the preceding sentence, a primary election and a general election shall be considered to be separate elections.

(26) PERSONAL FUNDS.—The term "personal funds" means an amount that is derived from—

(A) any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had—

(i) legal and rightful title; or

(ii) an equitable interest;

(B) income received during the current election cycle of the candidate, including—

(i) a salary and other earned income from bona fide employment;

(ii) dividends and proceeds from the sale of the candidate's stocks or other investments;

(iii) bequests to the candidate;

(iv) income from trusts established before the beginning of the election cycle;

(v) income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary;

(vi) gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and

(vii) proceeds from lotteries and similar legal games of chance; and

(C) a portion of assets that are jointly owned by the candidate and the candidate's spouse equal to the candidate's share of the asset under the instrument of conveyance or ownership, but if no specific share is indicated by an instrument of conveyance or ownership, the value of ½ of the property.

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State

political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of Title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a la-

bor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate,

his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and[1]

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 434(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or con-

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[1] So in original. The word "and" probably should not appear.

duit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) Dollar limits on expenditures by candidates for office of President of United States

(1) No candidate for the office of President of the United States who is eligible under section 9003 of Title 26 (relating to condition for eligibility for payments) or under section 9033 of Title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000, in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) Increases on limits based on increases in price index

(1)(A) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period.

(B) Except as provided in subparagraph (C), in any calendar year after 2002—

(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) of this section shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h) of this section, increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means—

(i) for purposes of subsections (b) and (d) of this section, calendar year 1974; and

(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h) of this section, calendar year 2001.

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2), (3), and (4) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the

principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(4) INDEPENDENT VERSUS COORDINATED EXPENDITURES BY PARTY.—

(A) IN GENERAL.—On or after the date on which a political party nominates a candidate, no committee of the political party may make—

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle at any time after it

makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) APPLICATION.—For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) TRANSFERS.—A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

(e) Certification and publication of estimated voting age population

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) Prohibited contributions and expenditures

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or em-

ployee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) Attribution of multi-State expenditures to candidate's expenditure limitation in each State

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Senatorial candidates

Notwithstanding any other provision of this Act, amounts totaling not more than $35,000 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

(i) Increased limit to allow response to expenditures from personal funds

(1) Increase

(A) In general

Subject to paragraph (2), if the opposition personal funds amount with respect to a candidate for election to the office of Senator exceeds the threshold amount, the limit under subsection (a)(1)(A) of this section (in this subsection referred to as the "applicable limit")

with respect to that candidate shall be the increased limit.

(B) Threshold amount

(i) State-by-State competitive and fair campaign formula

In this subsection, the threshold amount with respect to an election cycle of a candidate described in subparagraph (A) is an amount equal to the sum of—

(I) $150,000; and

(II) $0.04 multiplied by the voting age population.

(ii) Voting age population

In this subparagraph, the term "voting age population" means in the case of a candidate for the office of Senator, the voting age population of the State of the candidate (as certified under subsection (e) of this section).

(C) Increased limit

Except as provided in clause (ii), for purposes of subparagraph (A), if the opposition personal funds amount is over—

(i) 2 times the threshold amount, but not over 4 times that amount—

(I) the increased limit shall be 3 times the applicable limit; and

(II) the limit under subsection (a)(3) of this section shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution;

(ii) 4 times the threshold amount, but not over 10 times that amount—

(I) the increased limit shall be 6 times the applicable limit; and

(II) the limit under subsection (a)(3) of this section shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution; and

(iii) 10 times the threshold amount—

(I) the increased limit shall be 6 times the applicable limit;

(II) the limit under subsection (a)(3) of this section shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution; and

(III) the limits under subsection (d) of this section with respect to any expenditure by a State or national committee of a political party shall not apply.

(D) Opposition personal funds amount

The opposition personal funds amount is an amount equal to the excess (if any) of—

(i) the greatest aggregate amount of expenditures from personal funds (as defined in section 434(a)(6)(B) of this title) that an opposing candidate in the same election makes; over

(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

(E) Special rule for candidate's campaign funds

(i) In general

For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (D)(ii), such amount shall include the gross receipts advantage of the candidate's authorized committee.

(ii) Gross receipts advantage

For purposes of clause (i), the term "gross receipts advantage" means the excess, if any, of—

(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

(2) Time to accept contributions under increased limit

(A) In general

Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make

any expenditure, under the increased limit under paragraph (1)—

(i) until the candidate has received notification of the opposition personal funds amount under section 434(a)(6)(B) of this title; and

(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 110 percent of the opposition personal funds amount.

(B) Effect of withdrawal of an opposing candidate

A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

(3) Disposal of excess contributions

(A) In general

The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

(B) Return to contributors

A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

(j) Limitation on repayment of personal loans

Any candidate who incurs personal loans made after the effective date of the Bipartisan Campaign Reform Act of 2002 in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election.

§ 441b. 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

(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of Title 15[2], 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

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[2] See References in Text note below.

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 segre-

gated 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.

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this

title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) of this section if an entity described in subsection (a) of this section directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) of this section shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 434(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection—

(A) the term "section 501(c)(4) organization" means—

(i) an organization described in section 501(c)(4) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determina-

tion of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with Title 26

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of Title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 434(f)(3)(C) of this title.

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3. Title 11 of the Code of Federal Regulations provides in relevant part as follows:

§ 110.1 Contributions by persons other than multicandidate political committees (2 U.S.C. 441a(a)(1)).

(a) *Scope.* This section applies to all contributions made by any person as defined in 11 CFR 100.1, except multicandidate political committees as defined in 11 CFR 100.5(e)(3) or entities and individuals prohibited from making contributions under 11 CFR 110.20 and 11 CFR parts 114 and 115.

(b) *Contributions to candidates; designations; and redesignations.*

(1) No person shall make contributions to any candidate, his or her authorized political committees or agents with respect to any election for Federal office that, in the aggregate, exceed $2,000.

(i) The contribution limitation in the introductory text of paragraph (b)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17.

(ii) The increased contribution limitation shall be in effect for the 2–year period beginning on the first day following the date of the last general election in the year preceding the year in which the contribution limitation is increased and ending on the date of the next general election. For example, an increase in the contribution limitation made in January 2005 is effective from November 3, 2004 to November 7, 2006.

(iii) In every odd numbered year, the Commission will publish in the Federal Register the amount of the contribution limitation in effect and place such information on the Commission's Web site.

(2) For purposes of this section, *with respect to any election* means—

(i) In the case of a contribution designated in writing by the contributor for a particular election, the election so designated. Contributors to candidates are encouraged to designate their contributions in writing for particular elections. *See* 11 CFR 110.1(b)(4).

(ii) In the case of a contribution not designated in writing by the contributor for a particular election, the next election for that Federal office after the contribution is made.

(3)(i) A contribution designated in writing for a particular election, but made after that election, shall be made only to the extent that the contribution does not exceed net debts outstanding from such election. To the extent that such contribution exceeds net debts outstanding, the candidate or the candidate's authorized political committee shall return or deposit the contribution within ten days from the date of the treasurer's receipt of the contribution as provided by 11 CFR 103.3(a), and if deposited, then within sixty days from the date of the treasurer's receipt the treasurer shall take the following action, as appropriate:

(A) Refund the contribution using a committee check or draft; or

(B) Obtain a written redesignation by the contributor for another election in accordance with 11 CFR 110.1(b)(5); or

(C) Obtain a written reattribution to another contributor in accordance with 11 CFR 110.1(k)(3).

If the candidate is not a candidate in the general election, all contributions made for the general election shall be either returned or refunded to the contributors or re-

designated in accordance with 11 CFR 110.1(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate.

(ii) In order to determine whether there are net debts outstanding from a particular election, the treasurer of the candidate's authorized political committee shall calculate net debts outstanding as of the date of the election. For purposes of this section, *net debts outstanding* means the total amount of unpaid debts and obligations incurred with respect to an election, including the estimated cost of raising funds to liquidate debts incurred with respect to the election and, if the candidate's authorized committee terminates or if the candidate will not be a candidate for the next election, estimated necessary costs associated with termination of political activity, such as the costs of complying with the post-election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries and office supplies, less the sum of:

(A) The total cash on hand available to pay those debts and obligations, including: currency; balances on deposit in banks, savings and loan institutions, and other depository institutions; traveler's checks; certificates of deposit; treasury bills; and any other committee investments valued at fair market value;

(B) The total amounts owed to the candidate or political committee in the form of credits, refunds of deposits, returns, or receivables, or a commercially reasonable amount based on the collectibility of those credits, refunds, returns, or receivables; and

(C) The amount of personal loans, as defined in 11 CFR 116.11(b), that in the aggregate exceed $250,000 per election.

(iii) The amount of the net debts outstanding shall be adjusted as additional funds are received and expenditures are made. The candidate and his or her authorized political committee(s) may accept contributions made after the date of the election if:

(A) Such contributions are designated in writing by the contributor for that election;

(B) Such contributions do not exceed the adjusted amount of net debts outstanding on the date the contribution is received; and

(C) Such contributions do not exceed the contribution limitations in effect on the date of such election.

(iv) This paragraph shall not be construed to prevent a candidate who is a candidate in the general election or his or her authorized political committee(s) from paying primary election debts and obligations with funds which represent contributions made with respect to the general election.

(4) For purposes of this section, a contribution shall be considered to be designated in writing for a particular election if—

(i) The contribution is made by check, money order, or other negotiable instrument which clearly indicates the particular election with respect to which the contribution is made;

(ii) The contribution is accompanied by a writing, signed by the contributor, which clearly indicates the particular election with respect to which the contribution is made; or

(iii) The contribution is redesignated in accordance with 11 CFR 110.1(b)(5).

(5)(i) The treasurer of an authorized political committee may request a written redesignation of a contribution by the contributor for a different election if—

(A) The contribution was designated in writing for a particular election, and the contribution, either on its face or when aggregated with other contributions from the same contributor for the same election, exceeds the limitation on contributions set forth in 11 CFR 110.1(b)(1);

(B) The contribution was designated in writing for a particular election and the contribution was made after that election and the contribution cannot be accepted under the net debts outstanding provisions of 11 CFR 110.1(b)(3);

(C) The contribution was not designated in writing for a particular election, and the contribution exceeds the limitation on contributions set forth in 11 CFR 110.1(b)(1); or

(D) The contribution was not designated in writing for a particular election, and the contribution was received after the date of an election for which there are net debts outstanding on the date the contribution is received.

(ii)(A) A contribution shall be considered to be redesignated for another election if—

(*1*) The treasurer of the recipient authorized political committee requests that the contributor provide a written redesignation of the contribution and informs the contributor that the contributor may request the refund of the contribution as an alternative to providing a written redesignation; and

(*2*) Within sixty days from the date of the treasurer's receipt of the contribution, the contributor provides the treasurer with a written redesignation of the contribution for another election, which is signed by the contributor.

(B) Notwithstanding paragraph (b)(5)(ii)(A) of this section or any other provision of this section, the treasurer of the recipient authorized political committee may treat all or part of the amount of the contribution that exceeds the contribution limits in paragraph (b)(1) of this section as made with respect to the general election, provided that:

(*1*) The contribution was made before the primary election;

(*2*) The contribution was not designated for a particular election;

(*3*) The contribution would exceed the limitation on contributions set forth in paragraph (b)(1) of this section if it were treated as a contribution made for the primary election;

(*4*) Such redesignation would not cause the contributor to exceed any of the limitations on contributions set forth in paragraph (b)(1) of this section;

(*5*) The treasurer of the recipient authorized political committee notifies the contributor of the amount of the contribution that was redesignated and that the contributor may request a refund of the contribution; and

(*6*) Within sixty days from the date of the treasurer's receipt of the contribution, the treasurer shall provide notification required in paragraph (b)(5)(ii)(B)(5) of this section to the contributor by any written method including electronic mail.

(C) Notwithstanding paragraph (b)(5)(ii)(A) of this section or any other provision of this section, the treasurer of the recipient authorized political committee may treat all or part of the amount of the contribution that exceeds the contribution limits in paragraph (b)(1) of this

section as made with respect to the primary election, provided that:

(*1*) The contribution was made after the primary election but before the general election;

(*2*) The contribution was not designated for a particular election;

(*3*) The contribution would exceed the limitation on contributions set forth in paragraph (b)(1) of this section if it were treated as a contribution made for the general election;

(*4*) Such redesignation would not cause the contributor to exceed any of the limitations on contributions set forth in paragraph (b)(1) of this section;

(*5*) The contribution does not exceed the committee's net debts outstanding for the primary election;

(*6*) The treasurer of the recipient authorized political committee notifies the contributor of how the contribution was redesignated and that the contributor may request a refund of the contribution; and

(*7*) Within sixty days from the date of the treasurer's receipt of the contribution, the treasurer shall provide notification required in paragraph (b)(5)(ii)(C)(6) of this section to the contributor by any written method, including electronic mail.

(iii) A contribution redesignated for another election shall not exceed the limitations on contributions made with respect to that election. A contribution redesignated for a previous election shall be subject to the requirements of 11 CFR 110.1(b)(3) regarding net debts outstanding.

(6) For the purposes of this section, a contribution shall be considered to be made when the contributor re-

linquishes control over the contribution. A contributor shall be considered to relinquish control over the contribution when it is delivered by the contributor to the candidate, to the political committee, or to an agent of the political committee. A contribution that is mailed to the candidate, or to the political committee or to an agent of the political committee, shall be considered to be made on the date of the postmark. *See* 11 CFR 110.1(1)(4). An in-kind contribution shall be considered to be made on the date that the goods or services are provided by the contributor.

(c) *Contributions to political party committees.* (1) No person shall make contributions to the political committees established and maintained by a national political party in any calendar year that in the aggregate exceed $25,000.

(i) The contribution limitation in paragraph (c)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17.

(ii) The increased contribution limitation shall be in effect for the two calendar years starting on January 1 of the year in which the contribution limitation is increased.

(iii) In every odd-numbered year, the Commission will publish in the Federal Register the amount of the contribution limitation in effect and place such information on the Commission's Web site.

(2) For purposes of this section, *political committees established and maintained by a national political party means*—

(i) The national committee;

(ii) The House campaign committee; and

(iii) The Senate campaign committee.

(3) Each recipient committee referred to in 11 CFR 110.1(c)(2) may receive up to the $25,000 limitation from a contributor, but the limits of 11 CFR 110.5 shall also apply to contributions made by an individual.

(4) The recipient committee shall not be an authorized political committee of any candidate, except as provided in 11 CFR 9002.1(c).

(5) On or after January 1, 2003, no person shall make contributions to a political committee established and maintained by a State committee of a political party in any calendar year that, in the aggregate, exceed $10,000.

(d) *Contributions to other political committees.* No person shall make contributions to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(e) *Contributions by partnerships.* A contribution by a partnership shall be attributed to the partnership and to each partner—

(1) In direct proportion to his or her share of the partnership profits, according to instructions which shall be provided by the partnership to the political committee or candidate; or

(2) By agreement of the partners, as long as—

(i) Only the profits of the partners to whom the contribution is attributed are reduced (or losses increased), and

(ii) These partners' profits are reduced (or losses increased) in proportion to the contribution attributed to each of them.

A contribution by a partnership shall not exceed the limitations on contributions in 11 CFR 110.1(b), (c), and (d).

No portion of such contribution may be made from the profits of a corporation that is a partner.

(f) *Contributions to candidates for more than one Federal office.* If an individual is a candidate for more than one Federal office, a person may make contributions which do not exceed $2,000 to the candidate, or his or her authorized political committees for each election for each office, as long as—

(1) Each contribution is designated in writing by the contributor for a particular office;

(2) The candidate maintains separate campaign organizations, including separate principal campaign committees and separate accounts; and

(3) No principal campaign committee or other authorized political committee of that candidate for one election for one Federal office transfers funds to, loans funds to, makes contributions to, or makes expenditures on behalf of another principal campaign committee or other authorized political committee of that candidate for another election for another Federal office, except as provided in 11 CFR 110.3(c)(4).

(g) *Contributions by limited liability companies* ("*LLC*")—(1) *Definition.* A limited liability company is a business entity that is recognized as a limited liability company under the laws of the State in which it is established.

(2) A contribution by an LLC that elects to be treated as a partnership by the Internal Revenue Service pursuant to 26 CFR 301.7701–3, or does not elect treatment as either a partnership or a corporation pursuant to that section, shall be considered a contribution from a partnership pursuant to 11 CFR 110.1(e).

(3) An LLC that elects to be treated as a corporation by the Internal Revenue Service, pursuant to 26 CFR 301.7701–3, or an LLC with publicly-traded shares, shall be considered a corporation pursuant to 11 CFR Part 114.

(4) A contribution by an LLC with a single natural person member that does not elect to be treated as a corporation by the Internal Revenue Service pursuant to 26 CFR 301.7701–3 shall be attributed only to that single member.

(5) An LLC that makes a contribution pursuant to paragraph (g)(2) or (g)(4) of this section shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution.

(h) *Contributions to committees supporting the same candidate.* A person may contribute to a candidate or his or her authorized committee with respect to a particular election and also contribute to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as—

(1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee;

(2) The contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election; and

(3) The contributor does not retain control over the funds.

(i) *Contributions by spouses.* The limitations on contributions of this section shall apply separately to

contributions made by each spouse even if only one spouse has income.

(j) *Application of limitations to elections.* (1) The limitations on contributions of this section shall apply separately with respect to each election as defined in 11 CFR 100.2, except that all elections held in a calendar year for the office of President of the United States (except a general election for that office) shall be considered to be one election.

(2) An election in which a candidate is unopposed is a separate election for the purposes of the limitations on contributions of this section.

(3) A primary or general election which is not held because a candidate is unopposed or received a majority of votes in a previous election is a separate election for the purposes of the limitations on contributions of this section. The date on which the election would have been held shall be considered to be the date of the election.

(4) A primary election which is not held because a candidate was nominated by a caucus or convention with authority to nominate is not a separate election for the purposes of the limitations on contributions of this section.

(k) *Joint contributions and reattributions.* (1) Any contribution made by more than one person, except for a contribution made by a partnership, shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing.

(2) If a contribution made by more than one person does not indicate the amount to be attributed to each contributor, the contribution shall be attributed equally to each contributor.

(3)(i) If a contribution to a candidate or political committee, either on its face or when aggregated with other contributions from the same contributor, exceeds the limitations on contributions set forth in 11 CFR 110.1(b), (c) or (d), as appropriate, the treasurer of the recipient political committee may ask the contributor whether the contribution was intended to be a joint contribution by more than one person.

(ii)(A) A contribution shall be considered to be reattributed to another contributor if—

(*1*) The treasurer of the recipient political committee asks the contributor whether the contribution is intended to be a joint contribution by more than one person, and informs the contributor that he or she may request the return of the excessive portion of the contribution if it is not intended to be a joint contribution; and

(*2*) Within sixty days from the date of the treasurer's receipt of the contribution, the contributor provides the treasurer with a written reattribution of the contribution, which is signed by each contributor, and which indicates the amount to be attributed to each contributor if equal attribution is not intended.

(B)(*1*) Notwithstanding paragraph (k)(3)(ii)(A) of this section or any other provision of this section, any excessive portion of a contribution described in paragraph (k)(3)(i) of this section that was made by a written instrument that is imprinted with the names of more than one individual may be attributed among the individuals listed unless a different instruction is on the instrument or in a separate writing signed by the contributor(s), provided that such attribution would not cause any contributor to exceed any of the limitations on contributions set forth in paragraph (b)(1) of this section.

(*2*) The treasurer of the recipient political committee shall notify each contributor of how the contribution was attributed and that the contributor may request the refund of the excessive portion of the contribution if it is not intended to be a joint contribution.

(*3*) Within sixty days from the date of the treasurer's receipt of the contribution, the treasurer shall provide such notification to each contributor by any written method, including electronic mail.

(*l*) *Supporting evidence*. (1) If a political committee receives a contribution designated in writing for a particular election, the treasurer shall retain a copy of the written designation, as required by 11 CFR 110.1(b)(4) or 110.2(b)(4), as appropriate. If the written designation is made on a check or other written instrument, the treasurer shall retain a full-size photocopy of the check or written instrument.

(2) If a political committee receives a written redesignation of a contribution for a different election, the treasurer shall retain the written redesignation provided by the contributor, as required by 11 CFR 110.1(b)(5) or 110.2(b)(5), as appropriate.

(3) If a political committee receives a written reattribution of a contribution to a different contributor, the treasurer shall retain the written reattribution signed by each contributor, as required by 11 CFR 110.1(k).

(4)(i) If a political committee chooses to rely on a postmark as evidence of the date on which a contribution was made, the treasurer shall retain the envelope or a copy of the envelope containing the postmark and other identifying information; and

(ii) If a political committee chooses to rely on the redesignation presumption in 11 CFR 110.1(b)(5)(ii)(B) or

(C) or the reattribution presumption in 11 CFR 110.1(k)(3)(ii)(B), the treasurer shall retain a full-size photocopy of the check or written instrument, of any signed writings that accompanied the contribution, and of the notices sent to the contributors as required by 11 CFR 110.1(b)(5)(ii)(B) and (k)(3)(ii)(B).

(5) If a political committee does not retain the written records concerning designation required under 11 CFR 110.1(l)(1), the contribution shall not be considered designated in writing for a particular election, and the provisions of 11 CFR 110.1(b)(2)(ii) or 11 CFR 110.2(b)(2)(ii) shall apply. If a political committee does not retain the written records concerning redesignation or reattribution required under 11 CFR 110.1(*l*)(2), (3), (4)(ii) or (6), including the contributor notices, the redesignation or reattribution shall not be effective, and the original designation or attribution shall control.

(6) For each written redesignation or written reattribution of a contribution described in paragraph (b)(5) or paragraph (k)(3) of this section, the political committee shall retain documentation demonstrating when the written redesignation or written reattribution was received. Such documentation shall consist of:

(i) A copy of the envelope bearing the postmark and the contributor's name, or return address or other identifying code; or

(ii) A copy of the written redesignation or written reattribution with a date stamp indicating the date of the committee's receipt; or

(iii) A copy of the written redesignation or written reattribution dated by the contributor.

(m) *Contributions to delegates and delegate committees.* (1) Contributions to delegates for the purpose of

furthering their selection under 11 CFR 110.14 are not subject to the limitations of this section.

(2) Contributions to delegate committees under 11 CFR 110.14 are subject to the limitations of this section.

(n) *Contributions to committees making independent expenditures.* The limitations on contributions of this section also apply to contributions made to political committees making independent expenditures under 11 CFR Part 109.

§ 110.3 Contribution limitations for affiliated committees and political party committees; Transfers (2 U.S.C. 441a(a)(5), 441a(a)(4)).

(a) *Contribution limitations for affiliated committees.* (1) For the purposes of the contribution limitations of 11 CFR 110.1 and 110.2, all contributions made or received by more than one affiliated committee, regardless of whether they are political committees under 11 CFR 100.5, shall be considered to be made or received by a single political committee. *See* 11 CFR 100.5(g). Application of this paragraph means that all contributions made or received by the following committees shall be considered to be made or received by a single political committee—

(i) Authorized committees of the same candidate for the same election to Federal office; or

(ii) Committees (including a separate segregated fund, *see* 11 CFR part 114) established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof. For the purposes of this section, *local unit* may include, in appropriate cases, a franchisee, licensee, or State or regional association.

(2) Affiliated committees sharing a single contribution limitation under paragraph (a)(1)(ii) of this section include all of the committees established, financed, maintained or controlled by—

(i) A single corporation and/or its subsidiaries;

(ii) A single national or international union and/or its local unions or other subordinate organizations;

(iii) An organization of national or international unions and/or all its State and local central bodies;

(iv) A membership organization, (other than political party committees, *see* paragraph (b) of this section) including trade or professional associations, *see* 11 CFR 114.8(a), and/or related State and local entities of that organization or group; or

(v) The same person or group of persons.

(3)(i) The Commission may examine the relationship between organizations that sponsor committees, between the committees themselves, or between one sponsoring organization and a committee established by another organization to determine whether committees are affiliated.

(ii) In determining whether committees not described in paragraphs (a)(2) (i)–(iv) of this section are affiliated, the Commission will consider the circumstantial factors described in paragraphs (a)(3)(ii) (A) through (J) of this section. The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization. Such factors include, but are not limited to:

(A) Whether a sponsoring organization owns a controlling interest in the voting stock or securities of the sponsoring organization of another committee;

(B) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, by-laws, contracts, or other rules, or through formal or informal practices or procedures;

(C) Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decisionmaking employees or members of another sponsoring organization or committee;

(D) Whether a sponsoring organization or committee has a common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(E) Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(F) Whether a sponsoring organization or committee has any members, officers or employees who were members, officers or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees, or which indicates the creation of a successor entity;

(G) Whether a sponsoring organization or committee provides funds or goods in a significant amount or on an

ongoing basis to another sponsoring organization or committee, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(H) Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(I) Whether a sponsoring organization or a committee or its agent had an active or significant role in the formation of another sponsoring organization or committee; and

(J) Whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees.

(b) *Contribution limitations for political party committees.* (1) For the purposes of the contribution limitations of 11 CFR 110.1 and 110.2, all contributions made or received by the following political committees shall be considered to be made or received by separate political committees—

(i) The national committee of a political party and any political committees established, financed, maintained, or controlled by the same national committee; and

(ii) The State committee of the same political party.

(2) Application of paragraph (b)(1)(i) of this section means that—

(i) The House campaign committee and the national committee of a political party shall have separate limitations on contributions under 11 CFR 110.1 and 110.2.

(ii) The Senate campaign committee and the national committee of a political party shall have separate limitations on contributions, except that contributions to a senatorial candidate made by the Senate campaign committee and the national committee of a political party are subject to a single contribution limitation under 11 CFR 110.2(e).

(3) All contributions made by the political committees established, financed, maintained, or controlled by a State party committee and by subordinate State party committees shall be presumed to be made by one political committee. This presumption shall not apply if—

(i) The political committee of the party unit in question has not received funds from any other political committee established, financed, maintained, or controlled by any party unit; and

(ii) The political committee of the party unit in question does not make its contributions in cooperation, consultation or concert with, or at the request or suggestion of any other party unit or political committee established, financed, maintained, or controlled by another party unit.

(c) *Permissible Transfers.* The contribution limitations of 11 CFR 110.1 and 110.2 shall not limit the transfers set forth below in 11 CFR 110.3(c) (1) through (6)—

(1) Transfers of funds between affiliated committees or between party committees of the same political party whether or not they are affiliated or by collecting agents to a separate segregated fund made pursuant to 11 CFR 102.6;

(2) Transfers of joint fundraising proceeds between organizations or committees participating in the joint fund-raising activity provided that no participating committee or organization governed by 11 CFR 102.17 received more than its allocated share of the funds raised;

(3) Transfers of funds between the primary campaign and general election campaign of a candidate of funds unused for the primary;

(4) Transfers of funds between a candidate's previous Federal campaign committee and his or her current Federal campaign committee, or between previous Federal campaign committees, provided that the candidate is not a candidate for more than one Federal office at the same time, and provided that the funds transferred are not composed of contributions that would be in violation of the Act. The cash on hand from which the transfer is made shall be considered to consist of the funds most recently received by the transferor committee. The transferor committee must be able to demonstrate that such cash on hand contains sufficient funds at the time of the transfer that comply with the limitations and prohibitions of the Act to cover the amount transferred.

(i) *Previous Federal campaign committee* means a principal campaign committee, or other authorized committee, that was organized to further the candidate's campaign in a Federal election that has already been held.

(ii) *Current Federal campaign committee* means a principal campaign committee, or other authorized committee, organized to further the candidate's campaign in a future Federal election.

(iii) For purposes of the contribution limits, a contribution made after an election has been held, or after an individual ceases to be a candidate in an election, shall be aggregated with other contributions from the same contributor for the next election unless the contribution is designated for the previous election, or is designated for another election, and the candidate has net debts outstanding for the election so designated pursuant to 11 CFR 110.1(b)(3).

(iv) For purposes of this section, an individual ceases to be a candidate in an election as of the earlier of the following dates—

(A) The date on which the candidate publicly announces that he or she will no longer be a candidate in that election for that office and ceases to conduct campaign activities with respect to that election; or

(B) The date on which the candidate is or becomes ineligible for nomination or election to that office by operation of law;

(5) Transfers of funds between the principal campaign committees of an individual seeking nomination or election to more than one Federal office, as long as the conditions in 11 CFR 110.3(c)(5)(i), (ii) and (iii) are met. An individual will be considered to be seeking nomination or election to more than one Federal office if the individual is concurrently a candidate for more than one Federal office during the same or overlapping election cycles.

(i) The transfer shall not be made when the individual is actively seeking nomination or election to more than one Federal office. An individual will not be considered to be actively seeking nomination or election to a Federal office if:

(A) The individual publicly announces that he or she will no longer seek nomination or election to that office and ceases to conduct campaign activities with respect to that election, except in connection with the retirement of debts outstanding at the time of the announcement;

(B) The individual is or becomes ineligible for nomination or election to that office by operation of law;

(C) The individual has filed a proper termination report with the Commission under 11 CFR 102.3; or

(D) The individual has notified the Commission in writing that the individual and his or her authorized committees will conduct no further campaign activities with respect to that election, except in connection with the retirement of debts outstanding at the time of the notification;

(ii) The limitations on contributions by persons shall not be exceeded by the transfer. The cash on hand from which the transfer is made shall be considered to consist of the funds most recently received by the transferor committee. The transferor committee must be able to demonstrate that such cash on hand contains sufficient funds at the time of the transfer that comply with the limitations and prohibitions of the Act to cover the amount transferred. A contribution shall be excluded from the amount transferred to the extent that such contribution, when aggregated with other contributions from the same contributor to the transferee principal campaign committee, exceeds the contribution limits set forth at 11 CFR 110.1 or 110.2, as appropriate; and

(iii) The candidate has not elected to receive funds under 26 U.S.C. 9006 or 9037 for either election; or

(6) [Reserved]

(7) The authorized committees of a candidate for more than one Federal office, or for a Federal office and a nonfederal office, shall follow the requirements for separate campaign organizations set forth at 11 CFR 110.8(d).

(d) *Transfers from nonfederal to federal campaigns.* Transfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election are prohibited. However, at the option of the nonfederal committee, the nonfederal committee may refund contributions, and may coordinate arrangements with the candidate's principal campaign committee or other authorized committee for a solicitation by such committee(s) to the same contributors. The full cost of this solicitation shall be paid by the Federal committee.