UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	Criminal No. 1:11CR85
vs.	)	
	)	Hon. James C. Cacheris
WILLIAM P. DANIELCZYK JR. and EUGENE R. BIAGI	)	
	)	
Defendants,	)	

GOVERNMENT'S MOTION AND MEMORANDUM TO RECONSIDER THE COURT'S DISMISSAL OF COUNT FOUR AND PARAGRAPH 10(b) OF THE INDICTMENT

The United States of America, by and through undersigned counsel, files this Motion and Memorandum to Reconsider the Court's Dismissal of Count Four and Paragraph 10(b) of the Indictment. The government respectfully requests that this Court reinstate Count Four of the indictment and the corresponding conspiracy object found at Paragraph 10(b) of Count One. As detailed below, the government respectfully submits that this Court should revisit its analysis under controlling law and regrets omitting from its initial brief the specific Supreme Court opinion in *FEC v. Beaumont*, 539 U.S. 146 (2003), upholding the ban on corporate campaign contributions. Even if this Court were to view later Supreme Court authority as undermining the rationale of *Beaumont*, the Court should continue to follow the holding of that on-point precedent, "leaving to [the Supreme] Court the prerogative of" reaffirming or "overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Accordingly, under prevailing and governing Supreme Court law, the government respectfully submits that this Court should reinstate Count Four and the related conspiracy object based on corporate contributions.

I. Background

In Counts One and Four, the grand jury charged the defendants with conspiring to make and with actually making contributions of corporate funds to a candidate for federal office. Defendant Danielczyk was chairman of the corporation at issue, and defendant Biagi was its secretary. (Indictment, Doc. 1).

On May 26, 2011, this Court entered a Memorandum Opinion and Order upholding the indictment against various challenges, but dismissing Count Four and Paragraph 10(b), which charged the contribution of corporate funds. (Doc. 60 & 62). In support, the Court concluded that the reasoning of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which dealt with independent corporate *expenditures*, logically should be extended to render unconstitutional 2 U.S.C. § 441b(a), the provision of the Federal Election Campaign Act (FECA) of 1971, as amended, prohibiting *contributions* of corporate funds to federal candidates. (Memorandum Op. at 42-46). On May 31, 2011, however, the Court directed the parties to brief whether the Court should reconsider its May 26, 2011, order, in light of specific Supreme Court precedent upholding the ban on corporate campaign contributions and the Supreme Court's ruling that preserves for the Court alone the power to overturn its own precedent. (Order, Doc. 63) (citing *Beaumont* and *Agostini*). The government submits that, under those precedents, reconsideration is warranted.

II. *FEC v. Beaumont Is Controlling Supreme Court Precedent*.

In *FEC v. Beaumont*, 539 U.S. 146 (2003), the Supreme Court reaffirmed its longstanding rule that Congress's ban on corporate contributions to candidates for federal office does not

impermissibly infringe on First Amendment freedoms.[1] In accord with the Supreme Court's seminal campaign finance precedent, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), *Beaumont* specifically upheld§ 441b against First Amendment challenges – even where the corporate money at issue was accumulated for purposes of non-profit political advocacy, as opposed to the profit-seeking business of the defendants in this case. 539 U.S. at 152 ("Any attack on the federal prohibition of direct corporate political contributions goes against the current century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,' which we have canvassed a number of times before.") (citations omitted); *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 206-10 (1982) (upholding§ 441b provision restricting solicitation of PAC contributions). *Beaumont* thus left no doubt that, regardless of the form of the corporation in question, Congress's longstanding ban on contributing corporate money for use directly by federal candidates is constitutionally valid. *See also Mariani v. United States*, 212 F.3d 761 (3rd Cir. 2000) (upholding ban on corporate contributions).

Beaumont is simply the most recent decision upholding a pattern of legislation that dates back more than a century. As the government's initial briefing in this matter demonstrated (U.S. Response, Doc. 37, at 31-35), American law has consistently held that government may prohibit the contribution of corporate money directly to candidates for federal office. *Id*. at 33. The government noted the "century of jurisprudence" attesting to this principle, and it cited that

[1] The Court noted that the ban was not absolute to the extent that it permitted contributions through political action committees. 539 U.S. at 162-63. The Court was unequivocal, however, in holding that Congress's ban on the use of corporate funds to make direct contributions is constitutional, regardless of whether the corporation was a "traditional business corporation" or an "advocacy corporation." *Id.* at 159.

history as the Supreme Court had traced it in federal law to The Tillman Act of 1907. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 115-16 (2003)); *see also Citizens United*, 130 S. Ct. at 900 ("At least since the latter part of the 19th century, the laws of some states and of the United States imposed a ban on corporate direct contributions to candidates.") (citation omitted). The government also cited the ultimate touchstone for this principle in the modern federal law of campaign finance as articulated by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *Buckley* drew a critical distinction in First Amendment analysis between independent expenditures and campaign contributions – the latter of which the Court held subject to regulation under a less stringent standard of review. *See id.* at 22 ("[A] limitation upon the amount that a [natural] person may contribute to a candidate . . . entails only a marginal restriction upon . . . free communication."). *Beaumont* reaffirmed that fundamental distinction in the context of corporate contributions. 539 U.S. at 161-62 (describing the lesser value, and reduced constitutional scrutiny, given to campaign contributions). Indeed, *Beaumont* further stated that "[w]ithin the realm of contributions generally, corporate contributions are furthest from the core of political expression." *Id.* at 161 n.8.[2]

The holding of *Beaumont* fully accords with the Supreme Court's later decision in *Citizens United.* The Court in *Citizens United* took pains to distinguish its holding on the

[2] Confirming the Court's established constitutional distinction between independent expenditures and direct contributions in First Amendment analysis, Justice Kennedy concurred in the judgment in *Beaumont*, noting the Court was not presented with an invitation to reconsider "the distinction between contributions and expenditures under the whole scheme of campaign finance review." 539 U.S. at 164 (Kennedy, J., concurring). Accordingly, he adhered to "language [in Supreme Court cases] supporting the Court's holding here that corporate contributions can be regulated more closely than corporate expenditures." *Id.* That critical distinction remains governing law in Supreme Court precedent, and it controls the outcome of this case.

constitutional rules applicable to independent expenditures (at issue in *Citizens United*) from the regulation of candidate contributions (at issue here, in *Beaumont*, and in critical portions of *Buckley*). 130 S. Ct. at 908 ("The *Buckley* Court . . . sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and this Court does not do so here."); *id*. at 910 ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.") (citing *Buckley*). Moreover, the *Citizens United* Court demonstrated that the Court knew how to expressly overrule a prior opinion in the face of *stare decisis* arguments, as it did by overturning parts of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (prohibiting corporate independent expenditures), and *McConnell* (prohibiting certain corporate electioneering communications). The Supreme Court, however, did not overturn *Beaumont* or *Buckley*, which remain the salient and binding precedent. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, 2011 WL 1833236 at *10 (8th Cir. May 16, 2011) ("While the Supreme Court's decision in *Citizens United* implicates the holding and rationale in *Beaumont*, we do not believe the Court overruled *Beaumont*."). Indeed, this Court recognized that "*Citizens United* did not overrule *Buckley*," 5/26/11 Order at 45, and of course, this Court did not suggest that the Supreme Court had overruled *Beaumont*.

Although the government did not cite *Beaumont*, and regrets its omission, the defendants have nevertheless previously conceded that the relevant Supreme Court precedents include *Beaumont*. (Biagi Br., Doc. 23, at 14-21; Danielczyk Br., Doc 29, at 26-27). Although the defendants dispute the validity of its holding as First Amendment law, that disagreement does not detract from the character of *Beaumont* as binding precedent. As such, *Beaumont* and the

principle that it announces – that corporation contributions may be regulated by Congress consistent with the First Amendment – remains controlling authority.

III. Only the Supreme Court May Overrule *FEC v. Beaumont*.

Regardless of the Court's views on whether *Citizens United*'s logic concerning independent corporate expenditures should be extrapolated to the corporate-contribution context, *Beaumont* remains controlling Supreme Court authority. As such, it is binding on this Court.

As the Supreme Court has clearly held, "[i]f 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." *Agostini*, 521 U.S. at 237-38 (internal quotation marks omitted). That principle resolves this case and, respectfully, should compel this Court to grant reconsideration. *Beaumont* remains on point and may not be overruled by any lower court. As the government previously noted, the defendants necessarily "anticipate a ruling the Supreme Court has not made." (U.S. Response at 32).

While the defendants may make good faith arguments to change the law as a means of preserving such arguments for review by the Supreme Court, and while a "trial court [acts] within its discretion" to entertain such arguments, only the Supreme Court is at liberty to overturn its precedents. *Id.*; *State v. Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("It is the Supreme Court's prerogative alone to overrule one of its precedents."). Indeed, the Eighth Circuit has recognized that fundamental point concerning the binding force of Supreme Court precedent in rejecting arguments that it could disregard *Beaumont*. *See Minnesota Citizens Concerned for Life, Inc.*, 2011 WL 1833236 at *11 ("[E]ven assuming that the Supreme Court *implicitly*

overruled portions of *Beaumont* in *Citizens United*, we must still follow *Beaumont* until the Supreme Court holds to the contrary."); *accord United States v. Jeffery*, 631 F.3d 669, 677-78 (4th Cir. 2011) (court of appeals bound by controlling Supreme Court precedent absent a decision by the Supreme Court overruling such case law). The same principle should control this Court's analysis on reconsideration.[3]

Accordingly, under the controlling rule that the Supreme Court clearly announced in *Agostini,* and that was followed by the Eighth Circuit in *Minnesota Citizens Concerned for Life* in the specific context at issue here, the government respectfully requests that this Court allow the entire indictment to proceed to trial. Upon a conviction on Counts One or Four, the defendants will doubtless retain an appropriate opportunity on appeal and through a writ of certiorari to present their constitutional argument to the Supreme Court. But those issues are for that Court alone to resolve.

[3] The government continues to believe that 2 U.S.C. § 441b(a) is constitutionally valid and that the reasoning of *Citizens United* does not suggest that the ban on direct corporate contributions infringes the First Amendment. Because any consideration of that issue, however, is for the Supreme Court alone and because this Court's order requested briefing on the applicability of *Beaumont* and *Agostini* rather than a reconsideration of the underlying First Amendment merits, the government will not repeat those arguments here.

IV. Conclusion

For the reasons detailed above, the government respectfully requests that this Court reinstate Count Four of the indictment, and the corresponding conspiracy object found at Paragraph 10(b) of Count One, and proceed to trial in this case.

Respectfully Submitted,

Neil H. MacBride
United States Attorney

By: /s/
Mark D. Lytle
Assistant United States Attorney
Counsel for the United States
2100 Jamieson Avenue
Alexandria, VA 22314
Phone: 703-299-3700
Fax: 703-299-3981
Mark.Lytle@usdoj.gov

Jack Smith
Chief, Public Integrity Section
Criminal Division
U.S. Department of Justice

By: /s/
Richard C. Pilger
Director, Election Crimes Branch &
Special Assistant United States Attorney
Richard.Pilger@usdoj.gov
Eric L. Gibson
Trial Attorney &
Special Assistant United States Attorney
Eric.Gibson2@usdoj.gov
1400 New York Avenue, NW
Washington, DC 20005
Phone: 202-514-1412
Fax: 202-514-3003

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2011, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Timothy J. McEvoy
Counsel for Defendant William P. Danielczyk, Jr.
Cameron McEvoy, PLLC
11325 Random Hills Road, Suite 200
Fairfax, VA 22030
(703) 460-9341
tmcevoy@cameronmcevoy.com

Todd M. Richman
Counsel for Defendant Eugene R. Biagi
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Todd_Richman@fd.org

By: /s/
Mark D. Lytle
Assistant United States Attorney
Counsel for the United States
2100 Jamieson Avenue
Alexandria, VA 22314
Phone: 703-299-3700
Fax: 703-299-3981
Mark.Lytle@usdoj.gov@usdoj.gov