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

UNITED STATES OF AMERICA v. WILLIAM P. DANIELCZYK JR. and EUGENE R. BIAGI, Defendants.	Criminal No. 1:11 CR 85 (JCC) Hearing: June 3, 2011

SUPPLEMENTAL BRIEF OF DEFENDANT WILLIAM P. DANIELCZYK, JR. PURSUANT TO THIS COURT'S MAY 31, 2011 ORDER

Jeffrey A. Lamken (admitted *pro hac vice*)
Michael G. Pattillo, Jr. (admitted *pro hac vice*)
Martin V. Totaro (admitted *pro hac vice*)
MOLOLAMKEN LLP
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000 (phone)

Timothy J. McEvoy
CAMERON/MCEVOY PLLC
11325 Random Hills Road
Suite 200
Fairfax, VA 22030
(703) 273-8898 (phone)
(703) 273-8897 (fax)
tmcevoy@cameronmcevoy.com

Counsel for William P. Danielczyk, Jr.

Defendant William P. Danielczyk, Jr., through counsel, respectfully submits this supplemental brief in response to this Court's May 31, 2011 Order requesting that the parties address whether the Court should reconsider paragraph 1 of its May 26, 2011 Order in light of *FEC v. Beaumont*, 539 U.S. 146 (2003), and *Agostini v. Felton*, 521 U.S. 203 (1997). *See* Doc. 63. Paragraph 1 dismissed the portion of the indictment charging the defendants with violating 2 U.S.C. § 441b's categorical ban on corporate contributions. *See* Doc. 62 ¶ 1.

INTRODUCTION AND SUMMARY

In its May 26 Memorandum Opinion, this Court explained that the logic of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), pointed "inescapabl[y]" to the conclusion that "there is no distinction between an individual and a corporation with respect to political speech." *See* Doc. 60 at 44, 46. The Court therefore held that FECA's complete ban on contributions could not be sustained: "[B]ecause individuals can directly contribute to federal election campaigns within FECA's limits" but corporations cannot, the Court held that Section 441b's categorical ban "is unconstitutional." *Id.* at 46. Although the United States never identified in its briefs or at argument *any* governmental interest to justify the absolute ban, the Court explained that the traditional *quid pro quo* corruption rationale "does not justify *flatly* banning *corporations* from making direct donations while permitting *individuals* to make such donations within FECA's limits." *Id.* at 45-46.

Neither *Beaumont* nor *Agostini*—which Defendants Danielczyk and Biagi addressed in their briefs but the government never cited—requires reconsideration (even apart from the issues of waiver that arise from the government's failure to invoke those cases or the principles underlying them). *Agostini* stands for the principle that federal courts cannot pronounce otherwise controlling Supreme Court holdings implicitly overruled by later Supreme Court decisions; authority to do so is reserved for the Supreme Court alone. But that principle has no

application here because *Beaumont* did not resolve the issue before this Court. The sole question in *Beaumont* was whether the First Amendment requires courts to create a *special exception* to Section 441b's ban on corporate contributions for nonprofit advocacy corporations. The case did not involve a direct challenge to the ban itself, as the Supreme Court repeatedly emphasized. *Beaumont* may assume the constitutionality of the ban (as the parties there did), but *Agostini* applies to holdings, not assumptions or *dicta*—particularly where later cases deprive the assumptions or *dicta* of persuasive value.

Simply put, because *Beaumont* does not expressly decide the issue this Court has before it, *Agostini* is of no relevance. Instead, the Court must apply its best understanding of current law in light of all existing precedent—precisely as it did in its May 26, 2011 opinion. If the government disagrees with that ruling, this Court's adherence to its Order affords the government the opportunity to file an immediate appeal and bring this issue before the Fourth Circuit and potentially the Supreme Court. *See* 18 U.S.C. § 3731. Changing course, by contrast, would require this Court to subject Mr. Danielczyk to a criminal trial on a charge that, as this Court has already explained, cannot be reconciled with the First Amendment.

To the extent the Court would prefer to avoid ruling on this issue altogether, Congress has created a means for achieving that result as well. The Court can stay these proceedings and afford Mr. Danielczyk the opportunity to file a declaratory judgment action under 2 U.S.C. § 437h. Under that provision, the Court would then immediately certify the constitutionality of the corporate contribution ban to the en banc court of appeals. That too would speed the issue through the appellate process and prevent this Court from subjecting Mr. Danielczyk to a costly trial on a charge this Court has found unconstitutional.

I. The Government Has Waived Any Argument That This Court's Ruling Is Foreclosed By *Beaumont* And *Agostini*

Although Defendants Danielczyk and Biagi both specifically addressed *Beaumont* and *Agostini* in their briefs—explaining why they lack relevance[1]—the government offered no response. It never argued that *Beaumont* applies directly here (because it does not). *See generally* Doc. 37 (Government Omnibus Response to Defendants' Motion to Dismiss). It did not claim that *Agostini* compels the Court to reject the challenge to Count 4 despite the reasoning in *Citizens United* that points decidedly the other way (because *Agostini* does not). *See generally id.* Indeed, the government did not even cite *Beaumont* or *Agostini*. Instead, the government argued that Section 441b's categorical ban is justified by *Buckley v. Valeo*, 424 U.S. 1 (1976)—which did not involve the ban on corporate contributions—and the ban's origins in early 20th century legislation. *See* Doc. 37 at 31-33. But this Court properly rejected those arguments in light of *Citizens United*, which flatly rejected categorical distinctions "between an individual and a corporation with respect to political speech"—precisely the sort of categorical distinction that Section 441b draws. Doc. 60 at 46. Because the government chose not to argue that *Beaumont* and *Agostini* foreclose that ruling, this Court can and should deem any such contention waived.

Our adversarial system requires parties to raise issues at the earliest available opportunity. For example, "criminal defendants often waive substantive constitutional rights by their failure to make a timely assertion of the right." *United States v. Arnoldt*, 947 F.2d 1120, 1123 (4th Cir. 1991) (discussing the defendant's "fail[ure] to object to the delegation of authority to

[1] Mr. Danielczyk's brief observed that "[t]he government may urge that this case is governed not by *Citizens United* but rather by *FEC v. Beaumont*, 539 U.S. 146 (2003)," and then explained why *Beaumont* is not controlling. Doc. 28 at 26. Mr. Biagi likewise addressed *Beaumont* in his opening brief. Doc. 23 at 19-21; *see also* Doc. 46 at 14-16; Doc. 49 at 5-7. Mr. Danielczyk, moreover, cited *Agostini* for the principle that "[t]ypically, district courts must refrain from ruling that one Supreme Court decision has overruled another by implication," and explained why that principle does not apply here. Doc. 28 at 26-27; *see also* Doc. 23 at 20 n.5, 21.

the magistrate to preside over the return of the jury's verdict" that resulted in waiver of an objection to "any resulting constitutional error"). In civil practice, moreover, a Rule 59(e) motion for reconsideration "may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). The government's failure to rely on *Beaumont* and *Agostini* in any fashion whatsoever prior to this Court's May 26 Order is ample grounds for refusing to consider them now.

Waiver, of course, is case-specific. In the event the government chooses to raise the *Agostini* principle in future matters—urging that, despite *Citizens United*, *Beaumont* controls cases like this one until expressly overruled—this Court and others will have opportunity enough to address that (mistaken) contention. Because the government did not raise the issue prior to this Court's May 26 Order, this Court would be well within its discretion in holding the government to the arguments it timely made before. "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

II. Neither *Beaumont* Nor *Agostini* Is Controlling Here

Fundamentally, and beyond the issue of waiver, neither *Agostini* nor *Beaumont* provides reason for this Court to reconsider its decision. The rule announced by *Agostini* is that "lower courts should follow the case which *directly controls*, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 207 (emphasis added). But a case of the Supreme Court "directly controls" only if its *holding* is on point. *See, e.g.*, *United States v. Acosta*, 502 F.3d 54, 60 (2d Cir. 2007); *United States v. Bruno*, 487 F.3d 304, 306 (5th

Cir. 2007); *see also Wilson v. Johnson,* 535 F.3d 262, 267, 270 (4th Cir. 2008). If a Supreme Court decision lacks a holding on a particular issue—such as where that issue was not actually before the Supreme Court—*Agostini* is beside the point.

In this case, *Beaumont* does not "directly control." To the contrary, the Supreme Court specifically acknowledged that the issue now before this Court was not being pressed. As the Supreme Court explained, the respondent there had not challenged Section 441b across-the-board, declining to mount a "broadside attack on corporate campaign finance regulation or regulation of corporate contributions." *Beaumont*, 539 U.S. at 156. Instead, the respondent assumed the ban on corporate contributions was constitutional and urged only that the Constitution required *an exception* for nonprofit advocacy organizations like itself, challenging Section 441b "*only to the extent* the law places nonprofit advocacy corporations like itself under the general ban on direct contributions." *Id.* (emphasis added). The Supreme Court thus had before it only the narrow question of whether applying the then-presumptively constitutional prohibition on corporate contributions "*to nonprofit advocacy organizations* is consistent with the First Amendment." *Id.* at 149 (emphasis added). Indeed, the briefing and the question presented were clear: Both addressed whether the First Amendment required an *exception*—not whether the ban itself was facially unconstitutional.[2]

[2] The question presented was whether the ban on corporate contributions is constitutional "*if it is applied to a nonprofit corporation* whose primary purpose is to engage in political advocacy." Brief for Petitioner at i, *Beaumont*, 539 U.S. 146 (No. 02-403) (emphasis added). And the respondent argued *not* that the ban on corporate contributions was facially unconstitutional, but rather that none of the rationales that had been articulated in support of that ban applied to the type of nonprofits at issue. *See* Brief for Respondent at *21, *Beaumont*, 539 U.S. 146 (No. 02-403) (2003 WL 301151) (urging that there is no *quid pro quo* corruption because nonprofits formed for political advocacy "are more akin to an individual or an unincorporated advocacy group than a for-profit corporation because *MCFL*-type corporations do not avail themselves of the state-conferred advantages associated with the corporate form, which is the rationale for regulating corporate activity in the first place") (quotation marks omitted); *id.* at *22-23, *36

The Supreme Court's *ratio decidendi* likewise addressed whether the First Amendment (and the Court's cases) required an *exception*. The Court explained that its precedents seemed to foreclose exceptions based "on details of corporate form or the affluence of particular corporations." *Beaumont*, 539 U.S. at 157. And it invoked *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and other cases, for the notion that Congress could establish "a broad prophylactic rule" without making exceptions for particular types of corporations that do not "exhibit all of the evil[s]" the prohibition was meant to address. *Beaumont*, 539 U.S. at 157-58. It is of course not this Court's "role to read the jurisprudential tea leaves" where there is a Supreme Court decision on point that is merely called into question by intervening precedent. *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 174 (4th Cir. 1998) (Wilkinson, C.J., dissenting). But *Beaumont*'s narrow holding that the Constitution does not require an *exception* for non-profits is not directly controlling here.

To be sure, *Beaumont* clearly *assumes* the corporate contribution ban is constitutional and includes a "historical prologue" that recounts many of the asserted rationales for the ban. 539 U.S. at 156; *see id.* at 152-156.[3] In explaining why the respondents in *Beaumont* had declined to

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(concern that corporations have "state-conferred advantages" that allow them to "amass war chests" inapplicable because nonprofit advocacy organizations "do not avail themselves of the state-conferred advantages associated with the corporate form, and must rely on donations rather than profits"); *id.* at *24-25 (urging that non-profits that rely on donations do not "distort[ ]" the political process because their revenues reflect popular support); *id.* at *26-27 (no "potential" for corruption because of nature of *MCFL*-type corporations).

[3] The Supreme Court often decides issues without resolving antecedent premises or assumptions. *See, e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 452-53 (2002) (Kennedy, J., concurring in judgment) (supplying fifth vote to uphold zoning ordinance based on assumption that "original ordinance . . . not challenged here . . . is constitutional"); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) ("We have not yet decided whether influence-dilution claims such as appellees' are viable under § 2 . . . . [W]e assume for the purpose of resolving this case that appellees in fact have stated a cognizable § 2 claim."); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148-49, 3151 (2010) (holding "dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members" unconstitutional based on

bring a facial challenge and instead had demanded only an exception for nonprofits, the Court characterized that "historical prologue" as "discourag[ing]" efforts to invalidate the ban in its entirety. *Id.* at 156. Admittedly, absent contrary authority, such statements can be persuasive: The "*dicta* of the U.S. Supreme Court, although non-binding, should have 'considerable persuasive value in the inferior courts.'" *In re Bateman*, 515 F.3d 272, 282 (4th Cir. 2008) (quoting *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 406 (4th Cir. 2005)). But *dictum* from one Supreme Court case has no more exalted status than the reasoning of another Supreme Court case. In this case, *Beaumont*'s *dictum* does not survive the reasoning of *Citizens United*. To the contrary, the Court's "historical prologue" in *Beaumont* repeatedly quotes the *Austin* decision that *Citizens United* overturned and invokes precisely the rationales for treating corporations differently that *Citizens United* rejects.

For example, *Beaumont*'s background discussion cites *Austin* for the proposition that "[t]oday, as in 1907, the law focuses on the 'special characteristics of the corporate structure' that threaten the integrity of the political process." 539 U.S. at 153 (citing, *inter alia*, *Austin*, 494 U.S. at 658-59). *Beaumont*'s background discussion likewise invokes *Austin* for the proposition that "'[s]tate law grants corporations special advantages'" that "'enhance their ability to attract capital'" and "'permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."'" *Id.* (quoting *Austin*, 494 U.S. at 658-59). But *Citizens United*, in overruling *Austin*, held that those rationales are insufficient to sustain

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the parties' assumption that Board members and SEC Commissioners are both removable only for cause); *id.* at 3182-84 (Breyer, J., dissenting) (disputing that assumption); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (rejecting claim that Court is "bound by [prior] cases, by way of stare decisis," because the prior cases "never squarely addressed the issue, and ha[d] at most assumed the applicability of the [relevant] standard"); *cf. Baze v. Rees*, 553 U.S. 35, 63-64 (2008) (Alito, J., concurring) (voting to uphold lethal-injection method "on the assumption that the death penalty is constitutional"); *id.* at 107 (Breyer, J., concurring in judgment) (similar).

differential treatment of corporations under the First Amendment: "The First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker." 130 S. Ct. at 913; *see also* Doc. 28 at 26. Yet that is exactly what Section 441b does. It categorically prevents a corporation from contributing a single dollar to a campaign while at the same time allowing a natural person to donate $2,500. Under *Citizens United*, "if an individual can make direct contributions within FECA's limits, a corporation cannot be banned from doing the same thing." *See* Doc. 60 at 46. Indeed, it simply cannot be that allowing the wealthiest American to contribute $2,500 creates no risk of political corruption, but allowing the poorest corporation to pitch in a penny does.

In the end, any appeal to *Agostini* here is a request that this Court subject Mr. Danielczyk to a lengthy trial for violating a statute that this Court has already held—based on its understanding of current law—to violate the First Amendment. Because *Agostini* does not compel that result, no such trial should occur. To the extent there is any doubt, moreover, it should be resolved in favor of dismissal. By dismissing Count 4, the Court avoids the necessity of conducting a trial on charges inconsistent with the First Amendment under current Supreme Court precedent. It likewise avoids subjecting Mr. Danielczyk to the burdens and expense of defending those charges. That course, moreover, affords the government the option of filing an immediate appeal, *see* 18 U.S.C. § 3731, so that this issue can be reviewed by the court of appeals and potentially the U.S. Supreme Court.

III. This Court Should Consider The Alternative Of Issuing A Stay And Allowing The Court Of Appeals To Decide The Issue Pursuant To 2 U.S.C. § 437h

Cognizant of the First Amendment issues FECA raises, Congress enacted a special provision as part of FECA to expedite judicial review of challenges to its constitutionality. As relevant here, Section 437h provides:

> *[A]ny individual* eligible to vote in any election for the office of President may institute *such actions* in the appropriate district court of the United States, *including actions for declaratory judgment*, as may be *appropriate to construe the constitutionality of any provision of this Act*. The district court *immediately shall certify all questions of constitutionality* of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

2 U.S.C. § 437h (emphasis added). To the extent this Court would prefer to avoid ruling on the constitutional issue itself but permit prompt review, that provision provides a mechanism for doing so. This Court could vacate its prior decision and stay these proceedings so that Mr. Danielczyk can file a declaratory judgment action pursuant to Section 437h. This Court (or the court to which the action is assigned) would then "immediately . . . certify" any questions concerning Section 441b's constitutionality to the Fourth Circuit, "which shall hear the matter sitting en banc."

Like dismissal of Count 4—which enables the government to appeal and seek a stay of trial pending appeal—utilizing Section 437h would ensure prompt appellate review of this important First Amendment issue. And like dismissal of Count 4, it would avoid forcing Mr. Danielczyk to endure a trial for an alleged violation of a provision that this Court has already held unconstitutional. Although this Court need not consider Section 437h because *Beaumont* and *Agostini* provide no reason for it to reconsider its Order, Congress has provided the Court with one avenue of avoiding the issue while ensuring that it is expeditiously resolved.

CONCLUSION

This Court should not reconsider its ruling with respect to paragraph 1 of its May 26, 2011 Order.

June 1, 2011

Respectfully submitted,

/s/ Timothy J. McEvoy

Timothy J. McEvoy
CAMERON/MCEVOY PLLC
11325 Random Hills Road
Suite 200
Fairfax, VA 22030
(703) 273-8898 (phone)
(703) 273-8897 (fax)
tmcevoy@cameronmcevoy.com

Jeffrey A. Lamken (admitted *pro hac vice*)
Michael G. Pattillo, Jr. (admitted *pro hac vice*)
Martin V. Totaro (admitted *pro hac vice*)
MOLOLAMKEN LLP
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000 (phone)

Counsel for William P. Danielczyk, Jr.

CERTIFICATE OF SERVICE

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

/s/ Timothy J. McEvoy
Timothy J. McEvoy
CAMERON/MCEVOY PLLC
11325 Random Hills Road
Suite 200
Fairfax, VA 22030
(703) 273-8898 (phone)
(703) 273-8897 (fax)
tmcevoy@cameronmcevoy.com
Counsel for William P. Danielczyk, Jr.