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

UNITED STATES OF AMERICA,

v. **Criminal No. 1:11-cr-085 (JCC)**

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

Defendants.

DEFENDANT BIAGI'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF DISMISSAL OF COUNT FOUR

Defendant Eugene R. Biagi, by and through his attorneys, hereby submits this brief in response to the Court's Order dated May 31, 2011 [docket # 63]. In that Order, the Court requested supplemental briefing on the following question:

> 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 with respect to paragraph (1) of this Court's May 26, 2011 Order [which dismissed Count 4 and Paragraph 10(b) of the Indictment upon finding that the ban on corporate contributions to federal candidates in 2 U.S.C. § 441b violates the First Amendment].

For the *Agostini* rule to apply, the *holding* of *Beaumont* must answer all questions presented in this case. It does not. The *Beaumont* Court did not rule upon the constitutionality of the ban on corporate contributions. Rather, it *assumed* the ban to be constitutional. Indeed, the majority in *Beaumont* noted that the question in this case was not presented, and a concurring Justice wrote separately for the express purpose of explaining that he might have ruled differently had the constitutionality of banning corporate speech been before the Court (and, in fact, he later did rule differently when that question was presented). The upshot is that, because the facial constitutional

challenge before this Court was not decided in *Beaumont*, the *Beaumont* decision does not control here. Likewise, Mr. Biagi relies upon more recent precedent that struck contribution limits and thereby limited *Beaumont*, and challenges the corporate contribution ban under the Due Process Clause, which was not addressed in *Beaumont*. Thus *Beaumont* is not controlling in this case, but is relevant only to the extent that its reasoning remains persuasive. The reasoning of *Beaumont*, however, is irreconcilably inconsistent with the Court's current reasoning as expressed in *Citizens United*. And as this Court has recognized, the logic of *Citizens United* is "inescapable" as applied here.

ARGUMENT

I. The Rule of *Agostini v. Felton* Applies Only to Holdings of the Supreme Court, Not to Assumptions

The Court in *Agostini v. Felton* admonished lower courts that "'[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.'" 521 U.S. at 237 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). But that admonition has no application where, as here, the prior holding does not "directly control." Indeed, the Fourth Circuit has recognized as much in the context of potentially conflicting Supreme Court decisions in deciding a case involving an action for damages for wrongful imprisonment under 42 U.S.C. § 1983. *See Wilson v. Johnson*, 535 F.3d 262, 267, 270 (4th Cir. 2008) (declining to follow Supreme Court precedent where case does not fit "squarely within the holdings" of those cases, over dissent's objection that *Agostini* requires adherence to them); *see also White v. Phillips*, 34 F.Supp.2d 1038,

1041 n. 8 (W.D. La. 1998) (declining, in light of *Agostini*, to follow Supreme Court decision that, upon review of its precise holding, was not "directly applicable precedent").[1]

Moreover, the *Agostini* rule has no application where the precedent at issue is an assumption rather than the court's holding, because "assumptions are not holdings," and do not have the binding force of precedent. *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006) (Easterbrook, J.); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952) (assumption that was not "raised in the briefs or argument" is not binding because "it was not questioned and it was passed *sub silentio*."). Even where a long line of precedents all state, observe, or assume a legal point without expressly deciding it, those longstanding assumptions do not have the force of precedent and are not binding. *See, e.g. Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n. 4 (1989) (party's citation to "a number of cases from this Court that . . . have 'assumed' that a State is a person" is unavailing to establish binding precedent because "this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case brings the . . . issue before us.") (internal quotations and citation omitted); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("We do not view those cases as controlling precedent on the applicability of the commerce clause to Guam. In those cases, this court simply assumed that the commerce clause applied, but the issue was never raised or discussed.").

---

[1] Mr. Biagi's Motion to Dismiss cited and discussed *Agostini's* admonition, and the *Rodriguez de Quijas* case from which *Agostini* derived this rule. *See* Motion to Dismiss [docket # 23] at 20 n. 5. There, as here, Mr. Biagi showed that *Beaumont* does not "directly control" the result of this case, and that this Court is therefore not bound to follow *Beaumont*. Rather, *Beaumont* is relevant to this case only to the extent that its reasoning remains persuasive. In light of the Supreme Court's evisceration of *Beaumont's* underlying rationale in *Citizens United*, it does not.

Finally, the Fourth Circuit has, in circumstances similar to those presented here, found a Supreme Court case, though not formally overruled, to have been superseded by intervening Supreme Court precedent. In *Columbia Union College v. Oliver*, 254 F.3d 496 (2001), the Fourth Circuit – in its second opinion in the same litigation – found a directly applicable Supreme Court case, *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976), to have been effectively overruled by an intervening Supreme Court case *that did not explicitly overrule it.* In its first *Columbia Union College* opinion, the Fourth Circuit found that it was bound by *Roemer* to rule that the "pervasively sectarian" test applied to whether a school was properly denied state funds under the Establishment Clause. *Columbia Union College v. Clarke*, 159 F.3d 151, 162 (4th Cir. 1998) (holding that *Roemer* "remains good law, and we, absent a clear directive from the Supreme Court, are duty bound to enforce it."). In its second *Columbia Union College* opinion, however, the Fourth Circuit found that it was no longer bound to apply *Roemer* because the Supreme Court, in an intervening case (*Mitchell v. Helms*, 530 U.S. 793 (2000)), had "significantly altered the Establishment Clause landscape." 254 F.3d at 501.[2] The *Mitchell* case did not, however, overrule *Roemer*; indeed, *Mitchell* cited *Roemer* on a number of occasions without once exercising the Court's prerogative to overrule it. The second *Columbia Union College* opinion, therefore, establishes that even where there is a previously-binding Supreme Court case directly on point that lower courts are "duty bound" to enforce, later cases may so "significantly alter the landscape" of the jurisprudence in question that *Agostini* no longer applies.

[2] The court noted, in the alternative, that it would have reached the same conclusion even if *Roemer* still controlled. 254 F.3d at 508.

II. *Beaumont* Did Not Hold the Ban on Corporate Contributions Constitutional, But Assumed that it Was in the Course of Deciding A Related Question

Because the Court in *Beaumont* did not decide – but instead assumed – the constitutionality of 2 U.S.C. § 441b, any claim that this Court's May 26 Memorandum Opinion is contrary to the holding of *Beaumont* is misplaced. The holding of *Beaumont* does not find a ban on corporate political contributions constitutional. Rather, *Beaumont* began from the unexamined premise that such a ban was constitutional. Assuming but not considering that unchallenged premise, *Beaumont* determined whether the First Amendment mandated an exception to the presumably-constitutional corporate-speech ban for "nonprofit advocacy corporations." *See Beaumont*, 539 U.S. at 156. Indeed, the *Beaumont* majority flatly says that the case did not present a "broadside attack on . . . regulation of corporate contributions," but only presented the question whether the First Amendment required an *exception* to the corporate-speech ban for nonprofit advocacy corporations. *Id.*

Moreover, of the three Justices in the *Beaumont* majority who remain on the Court, one of them wrote separately in *Beaumont* to make pellucidly clear that he did not believe *Beaumont* to have ruled upon the constitutionality of banning corporate political speech. Specifically, Justice Kennedy wrote a three paragraph concurrence which began by reiterating his disagreement with the Court's campaign-finance jurisprudence, which he believed "misapprehended basic First Amendment principles." 539 U.S. at 163-64. As an example, he cited his own dissent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in which he had called distinctions based on the corporate form of the speaker "the rawest form of censorship." 494 U.S. at 700. Despite his disagreement with that premise, he noted that he concurred in the *Beaumont* result because the case

was not revisiting the *Austin* holding: "were we presented with a case in which the distinction between contributions and expenditures under the whole scheme of campaign finance regulation were under review, I might join Justice Thomas' dissenting opinion [in which Justice Thomas, joined by Justice Scalia, argued that the corporate-speech ban in 2 U.S.C. § 441b was unconstitutional.]" 539 U.S. at 164. The majority and concurrence in *Beaumont* thus *both* observed that the constitutionality of the ban on corporate political contributions was not before the Court. It is therefore unsurprising that the government in this case declined to rely on *Beaumont* despite the extensive discussion of it in Mr. Biagi's Motion to Dismiss.[3]

Absent adherence to *Beaumont* out of *Agostini*-mandated deference – which is unnecessary because *Beaumont* itself made clear that it assumed without deciding the question presented here – there is no other reason to rely on *Beaumont*. This is true for a number of reasons. First, as Mr. Biagi argued in his Motion to Dismiss [docket # 23, at pp. 18-21], "the guiding principles on which *Beaumont* relied . . . were expressly overruled by *Citizens United.*" Indeed, *Beaumont's* analysis was premised upon the "special advantages" of corporations that had been recognized in *Austin*. 539 U.S. at 153-54. *Austin*, however, was expressly overruled in *Citizens United*. 130 S.Ct. at 913. At bottom, therefore, because the reasoning and precedent upon which *Beaumont* rests has been recently and thoroughly rejected by the Supreme Court, there is no good reason to rely upon it unless it were found to "directly control" the result here –which, for the reasons set forth above, it does not.

---

[3] As one commentator has observed regarding this Court's decision, "The Justice Department, in defending the constitutionality of the ban on corporate giving, did not mention the *Beaumont* precedent. In a way, that may have given the judge a kind of implicit permission to look beyond that ruling, and focus only on *Citizens United*." *See* Posting of Lyle Denniston to SCOTUSBlog, http://www.scotusblog.com/2011/05/expanding-citizens-united (May 28, 2011).

III. The Government Acknowledged that *Beaumont* is No Longer Good Law By Abandoning it in this Litigation

Agostini deference is not required where the government itself has abandoned all reliance on the *Beaumont* decision. Because the rationale of *Beaumont* was abandoned by *Citizens United*, the government abandoned *Beaumont* and its rationale before this Court in response to Mr. Biagi's Motion to Dismiss. To fill the vacuum, the government identified no governmental justification for banning all corporations from making limited contributions under the same rules as unincorporated associations, limited liability companies, partnerships, business proprietorships and individuals.[4] By the end of oral argument on May 20, it was clear that the government was unable to proffer or even articulate a governmental interest that could justify criminalization of a corporate contribution. Yet it is the government's burden to justify a ban on free speech in each case where it attempts to enforce a ban on speech. As of now, the government in this litigation has not identified a single governmental interest, compelling or otherwise, that allegedly supports the speech-ban it is asking this Court to criminally enforce.[5]

---

[4] In the case of contributions by any of these unincorporated entities, the FEC has promulgated rules attributing the contributions to specific individuals, such that a contribution by a partnership, for example, will count against an individual partner's (or group of partners') aggregate contribution limit. *See, e.g.,* 11 C.F.R. §110.1(e) (partnerships); 11 CFR §110.1(g) (LLCs). In this way, Congress allows these entities to participate in the political process without risking circumvention of the aggregate contribution limits by individuals who might contribute personally and then form partnerships, LLCs, or other entities to give additional sums above the individual contribution limit. Thus, the "circumvention" argument alluded to in *Beaumont*, *see* 539 U.S. at 155, is a plainly insufficient justification for a categorical ban on speech by corporations, because it is neither "carefully drawn" nor "narrowly tailored" to prevent circumvention. Such a conspicuous First Amendment violation cannot be countenanced to justify disparate treatment of this one category of speaker when the same circumvention concern is so easily addressed in the case of other similarly-situated speakers.

[5] Should the government at this late date, and for the first time in this litigation, identify a governmental interest that it contends would support the outright ban on speech at issue here,

IV. Mr. Biagi's Motion to Dismiss is Based on Another, More Recent Supreme Court Holding

Mr. Biagi's motion to dismiss is based upon a decision of the Supreme Court issued three years after *Beaumont*. Not only was *Beaumont's* rationale abandoned by *Citizens United*, but its holding was limited by *Randall v. Sorrell*, 548 U.S. 230 (2006). Relying on *Buckley v. Valeo*, the Court in *Randall* held that a contribution limit must be "'closely drawn' to match a 'sufficiently important interest'" and that "in determining whether a particular contribution limit was 'closely drawn,' the amount, or level, of that limit could make a difference." *Id.* at 247. "Distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* The Court held a $400 contribution limit to be "so sufficiently low as to generate suspicion that [the limit was] not closely drawn," *id.* at 249, or "narrowly tailored." *Id.* at 261. Here, Mr. Biagi is alleged to have facilitated a contribution in violation of a contribution limit of *zero.* This clearly is the "difference in kind" the Court identified in *Randall v. Sorrell*, three years after *Beaumont*. There is no reason why this Court should grant greater deference to *Beaumont* than to *Randall*.

V. *Beaumont* is Irrelevant to 2 U.S.C. § 441b's Violation of the Due Process Clause

Citizens United held that corporations are associations of individuals that have identical First Amendment rights as other associations. 130 S.Ct. at 913. Indeed, that central point is a refrain throughout the *Citizens United* opinion. How then does the government justify disparate treatment of one form of association over other forms of association? Unincorporated businesses, business proprietorships, business partnerships, limited liability companies, clubs – all can make direct, limited contributions to federal campaigns. Media corporations – singled out by the Supreme Court in *Citizens United* – are even permitted to make unlimited contributions to federal campaigns in the

---

defendant respectfully requests the opportunity to file a supplemental brief in response.

form of coordinated expenditures.[6] At least one court has held such discrimination in the distribution of First Amendment rights to violate the Equal Protection Clause of the Fourteenth Amendment. *See Dallman v. Ritter*, 225 P.3d 610 (Col. 2010) (striking disparate treatment of labor unions versus corporations). Likewise, such arbitrary and disparate treatment among differing forms of associations violates the Due Process Clause of the Fifth Amendment. Strict scrutiny is applied to disparate restrictions of a fundamental right and the government has not met this demanding test here. But more to the point, *Beaumont* offers no ruling or analysis of the Equal Protection and Due Process arguments raised by Mr. Biagi in this case (*see* Motion to Dismiss at 23-24). Equal Protection and Due Process challenges were not presented or ruled upon in *Beaumont*. Thus, *Beaumont* is not binding precedent on those issues.

CONCLUSION

That *Beaumont* does not control the result here is perhaps best illustrated, again, by reference to Justice Kennedy's *Beaumont* concurrence. As noted, Justice Kennedy made clear that he was concurring only because the case began from (and did not re-examine) a premise with which he disagreed – that corporate political speech may be banned – and cited his full-throated dissent in *Austin* to illustrate his disagreement with that premise. Thus, it is beyond question that Justice Kennedy's contemporary understanding of *Beaumont* was that it did not revisit *Austin*, but only decided whether – under the law as it then stood – non-profit advocacy corporations should be

[6] "[E]xpenditures 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." 2 U.S.C. § 441a(a)(7)(B)(i). But media corporations are exempted from this contribution ban. 2 U.S.C. § 431(9)(B). *Citizens United* held that media corporations are not entitled to greater First Amendment rights, and that all corporations must be treated alike. 130 S.Ct. at 905-06.

treated differently than for-profit corporations. But when the occasion to revisit *Austin* later came before the Court, in *Citizens United*, Justice Kennedy wrote for the Court. There, he expressly overruled *Austin* and effectively transformed his *Austin* dissent into the holding of the Court. There could be no better illustration of the fact that *Beaumont* did not decide – but rather assumed – the constitutionality of banning corporate political speech.

Respectfully submitted,
EUGENE R. BIAGI
By Counsel,

Michael S. Nachmanoff,
Federal Public Defender

By: /s/
Todd M. Richman
Va. Bar # 41834
Assistant Federal Public Defender
Attorney for Eugene R. Biagi
1650 King Street, Suite 500
Alexandria, Virginia 22314
(703) 600-0800 (telephone)
(703) 600-0880 (facsimile)
Todd_Richman@fd.org (email)

/s/
Lee E. Goodman
Va. Bar # 31695
Chris Ashby
Va. Bar # 46618
Pro-Bono Counsel for Eugene R. Biagi
LeClair Ryan
1101 Connecticut Ave. NW, Suite 600
Washington, DC 20036
(202) 659-4140 (telephone)
(202) 659-4130 (facsimile)
Lee.Goodman@leclairryan.com (email)

CERTIFICATE OF SERVICE

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

Mark Lytle
Assistant United States Attorney
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314

Pursuant to the Electronic Case Filing Policies and Procedures, a courtesy copy of the foregoing pleading will be delivered to Chambers within one business day of the electronic filing.

/s/

Todd M. Richman
Va. Bar # 41834
Assistant Federal Public Defender
Attorney for Eugene R. Biagi
1650 King Street, Suite 500
Alexandria, Virginia 22314
(703) 600-0800 (telephone)
(703) 600-0880 (facsimile)
Todd_Richman@fd.org (email)