United States District Court
for the Eastern District of Virginia
Alexandria Division

United States, *v.* **William Danielczyk, Jr., & Eugene Biagi**, *Defendants*.	1:11cr85 (JCC) Judge James C. Cacheris

Brief of The James Madison Center for Free Speech As Amicus Curiae Supporting the Defendants

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Interest of Amicus Curiae[1]

The interest of the amicus curiae The James Madison Center for Free Speech, and the qualifications of its counsel, have been set out in its Motion to File An Amicus Brief, filed contemporaneously with this brief.

Argument

This Court ordered briefing regarding whether, in light of *FEC v. Beaumont*, 539 U.S. 146 (2003), and *Agostini v. Felton*, 521 U.S. 203 (1997), the Court should reconsider its ruling that the federal ban on direct corporate contributions, codified at 2 U.S.C. § 441b(a), is unconstitutional. (Doc. 63.) For the reasons explained below, this Court therefore should not reconsider its ruling.

I. *Beaumont* Does Not "Directly Control," And This Court Did Not Hold That *Beaumont* Had Been Implicitly Overruled.

Agostini is not remarkable in its counsel that lower courts follow Supreme Court decisions that "directly control," and should not take it upon themselves to decide which Supreme Court decisions have been "overruled" "by implication." *Agostini*, 521 U.S. at 237. It is a rule of common law jurisprudence that courts are bound by precedent. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (noting "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts"). However, the "precedent" that must be followed includes only those statements of the Court necessary for the disposition of the question presented. *See, e.g.*, *Carroll v. Carroll's Lessee*, 57 U.S. 275, 287 (1853) (noting that courts need

[1]No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

not follow any part of an opinion "which was not needful to the ascertainment of the right or title in question between the parties."); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342 n.9 (4th Cir. 1996) (explaining that parts of an opinion that are not essential to its holding are dicta and need not be followed). Everything not necessary for the disposition of the question presented is dicta, which one court has explained is "'any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.'" *Branch v. Coca-Cola Bottling Co.*, 83 F.Supp.2d 631, 634 n.12 (D.S.C.2000) (quoting Black's Law Dictionary 454 (6th ed.1990)).

The Fourth Circuit has clarified that "only *holdings* of the Supreme Court, not dicta, constitute part of the clearly established Federal law" for interpreting the meaning and constitutionality of federal statutes. *Frazer v. South Carolina*, 430 F.3d 696, 732 (4th Cir. 2005) (emphasis in original). Dicta, especially that of the Supreme Court, may be persuasive, *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005), but it is not binding.

If *Beaumont* had held that the federal ban on contributions was facially constitutional, this Court would be bound to follow it. However, *Beaumont* did not consider the facial constitutionality of the ban, because that issue was not before the Court. Rather, all the Court considered was whether MCFL-type advocacy corporations[2] must be given an exemption from a generally applicable corporate contribution limit, as the Fourth Circuit Court of Appeals had held. *Beaumont*, 539 U.S. at 151. It ruled that they did not. *Id*. at 163 (ruling that the argument that "a ban on an advocacy corporation's direct contributions is bad tailoring" was not persuasive, and so reversing the judgment

[2]The description, *MCFL-type corporation*, refers to nonprofit, non-stock, non-business advocacy corporations. *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986). The Supreme Court held that Section 441b(b)'s ban on corporate independent expenditures could not constitutionally be applied to such corporations. *Id*. at 263.

of the Fourth Circuit that it was).

The procedural history of *FEC v. Beaumont* is instructive. The respondent in *Beaumont*, a non-profit advocacy corporation known as North Carolina Right to Life, had challenged Section 441b(a)'s ban on corporate contributions only as applied to itself. *Beaumont v. FEC*, 137 F.Supp.2d 648, 650 (E.D.N.C. 2000). The district court agreed with North Carolina Right to Life that the government lacked a constitutionally cognizable interest in its ban as applied to advocacy corporations, *id*. at 656, and ruled that the federal ban was unconstitutional as applied to North Carolina Right to Life, *id*. at 656-57. The district court took the additional step of ordering the parties to brief whether Section 441b(a)'s corporate contribution ban was facially unconstitutional as well. *Id*. at 658. The court ultimately ruled that the ban was not unconstitutional on its face. *Beaumont v. FEC*, 278 F.3d 261, 264 (4th Cir. 2002).

The FEC appealed the district court's ruling that Section 441b(a) was unconstitutional as applied to North Carolina Right to Life. *Beaumont*, 278 F.3d at 265. The Fourth Circuit upheld the district court, holding that the First Amendment required that advocacy corporations like North Carolina Right to Life be exempt from Section 441b(a)'s ban on direct corporate contributions. *Id*. at 275. After the Fourth Circuit denied the FEC's petition for rehearing en banc, the FEC petitioned for *certiorari* as to the Fourth Circuit's ruling that MCFL-type corporations must be exempt from generally applicable bans on direct corporate contributions. *Beaumont*, 539 U.S. at 151. *See also id*. at 150 (noting that the respondent challenged the federal corporate contribution ban only as it applied to them). The Court granted cert as to that question, *id*. at 151, and that was the only question the Court ruled on, *id*. at 163.

Thus, even though *Beaumont* at times seems to paint with a broad brush, its holding is

actually quite limited. It did not consider the constitutionality of Section 441b(a)'s ban on direct corporate contributions to candidates, because that issue was not before it. Rather, it only considered whether certain types of advocacy corporations must be given an exemption to generally applicable corporate contribution limits. *Beaumont*'s holding may therefore be summarized as follows: where a limit on corporate contributions applies, MCFL-type corporations need not be given exemptions. Anything else *Beaumont* says about the federal ban on direct corporate contributions is dicta.

Because *Beaumont* did not uphold the federal ban on corporate contributions that this Court ruled unconstitutional, it does not "directly control" and this Court is not bound to follow it. Nor does this Court's decision indicate that *Beaumont* has been "overruled" "by implication," which *Agosini* forbids. *Agosini*, 521 U.S. at 237. This Court considered whether Section 441b(a)'s ban on direct corporate contributions was *facially* constitutional in its entirety, an issue not considered in *Beaumont*. (Doc. 60, Mem. Op., at 42) ("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.") *Beaumont* did not consider the constitutionality of the ban itself, but only whether an exemption must be available to certain corporations. *Agostini*'s rule that lower courts cannot decide former Supreme Court decisions have been implicitly overruled by later decisions thus has no bearing on this case.[3]

II. *Beaumont* Does Not "Directly Control," But *Citizens United* Does.

Agostini requires lower courts to follow Supreme Court cases that directly control. *Agostini*, 521 U.S. at 237. As explained *supra*, *Beaumont* does not directly control because it did not consider

[3]This point is underscored by the fact that this Court did not feel the need to mention *Beaumont* in its holding. It did not, therefore, hold that *Beaumont* had been implicitly overruled. The Court's silence as to *Beaumont* points to its recognition that *Beaumont* was not on point.

whether the ban on direct corporate contributions was constitutional, but only whether an exemption for certain corporations was constitutionally required. Two rulings of *Citizens United*, however, "directly control." This Court properly followed those rulings and so reconsideration is unwarranted.

A. This Court Properly Followed *Citizens United*'s Holding That Bans On Political Speech Are Impermissible.

Citizens United ruled that PACs cannot speak for corporations, because they are separate entities, and so laws requiring corporations to employ PACs are bans on corporate political speech. *Citizens United*, 130 S. Ct. at 897-98. But bans on political speech are impermissible. *Id*. at 911. This includes bans on corporate political speech, for Government may not ban political speech simply because the speaker is a corporation. *Id*. at 913. Speech may be limited, if the limit satisfies constitutional scrutiny. *Id*. at 898 (holding that laws that "burden speech" are subject to scrutiny). *See also Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (finding that contribution *limits* are permissible under scrutiny because a limit still "permits the symbolic expression of support evidenced by a contribution"). But political speech may not be completely banned. *Citizens United*, 130 S. Ct. at 911. Consequently, laws that ban political speech, including *corporate* political speech, are unconstitutional. *Id*. (holding that such laws are "not a permissible remedy"); *see also id*. (explaining that "categorical bans" on speech and association are, by their nature, "asymmetrical" to the interest in preventing quid pro quo corruption, which is the only constitutionally cognizable interest in restricting political speech); *id*. at 913 (holding that the requirement that corporations make independent expenditures through PACs is unconstitutional).

Section 441b(a) requires corporations to make contributions through PACs. Under *Citizens United*'s holding, it is thus a ban on corporate political speech, for the Supreme Court has repeatedly

held that the act of making a contribution is an act of political expression. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (holding that contribution limits implicate both the freedoms of political expression and political association); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) (ruling that contributions are "a very significant form of political expression"); *Buckley*, 424 U.S. at 14-15 (1976) (holding that both contribution and expenditure limits implicate political expression). The Supreme Court has sometimes referred to the speech-value of contributions as "symbolic" speech and "general expression[s] of support," *Buckley*, 424 U.S. at 21. And it has explained that contributions "lie closer to the edges than to the core of political expression." *Beaumont*, 539 U.S. at 148. But the Court has never implied that contributions are not speech nor held that contribution limits do not implicate political speech freedoms. They do. A contribution limit imposes "marginal restriction[s] upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. But a ban completely removes a contributor's ability to offer political speech. And such bans are impermissible. *Citizens United*, 130 S. Ct. at 911.

Section 441b(a)'s requirement that corporations employ PACs to make contributions is therefore a ban on political speech. *Citizens United*, 130 S. Ct. at 897-98 (ruling that a requirement that corporations speak through a PAC is a ban on political speech notwithstanding the fact that the PAC could speak). Such bans are unconstitutional under *Citizens United*. *Id*. at 911 and 913. This Court therefore followed *Citizens United*'s controlling precedent in holding Section 441b(a) unconstitutional, and reconsideration is not warranted.

B. This Court Properly Followed *Citizens United*'s Holding That Government May Not Suppress Political Speech Because The Speaker Is A Corporation.

Citizens United also held that there is no inherent danger in the corporate form, *Citizens*

United, 130 S. Ct. at 904, so the Government may not restrict nor ban political speech simply because the speaker is a corporation, *id*. at 913. In fact, the only constitutionally cognizable interest in restricting political speech is the interest in preventing quid pro quo corruption or its appearance, which can arise as a result of *large* contributions. *Id*. at 901, 909.

The *Citizens United* Court explained that the interest in curbing quid pro quo corruption was the only interest that would support limits on political speech. In doing so, it specifically rejected all other interests including any interest in (1) suppressing speech on the basis of the corporate identity of the speaker, *id*. at 913, (2) preventing distortion in election-speech that might be caused by corporate speech, *id*. at 903-08, (3) protecting dissenting shareholders, *id*. at 911, and (4) preventing influence or access with candidates, *id*. at 910. The *Citizens United* decision also undermined the anticircumvention interest, declaring that campaign finance laws are always underinclusive to the anticircumvention interest, because speakers find ways to circumvent them. *Id*. at 912.

Citizens United ruled that there is only *one* constitutionally cognizable interest in limiting First Amendment political speech and associational freedoms, and that is the interest in curbing the financial, quid pro quo corruption that can arise as a result of *large* contributions. *Id*. at 901, 909. In rejecting any interest in curbing political speech because of the corporate identity of the speaker, the Court announced: "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." *Id*.

Section 441b(a), however, bans corporate contributions on no other basis than the corporate identity of the speaker. Everyone else is allowed to make contributions to candidates up to the limits codified at 2 U.S.C. 441a(a). Only corporations are singled out for special treatment in the form of a ban of their political speech. As the *Citizens United* Court recognized, "Speech restrictions based

on the identity of the speaker are all too often simply a means to control content." 130 S. Ct. at 899. Such restrictions are not permissible. *Id*. at 911.

This Court properly recognized that *Citizens United*'s logic is "inescapable." (Mem. Op. 44.) As this Court stated, "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." (*Id*. 44-45.) This Court properly followed *Citizens United*.

Further, this Court is not the only court to have followed *Citizens United* when considering contribution limits. The District Court for the District of Washington did the same thing when it found that *Citizens United* required it to apply strict scrutiny to a contribution limit. Tr. of Summ. J. Oral Argument and Ruling From The Bench at 43, *Family PAC v. Reed*, No. C09-5662RBL (D. Wash. September 1, 2010) (*attached as* Ex. 1). That court accurately described *Citizens United* as "a game changer." *Id*. at 39. The Honorable Ronald B. Leighton explained, "I firmly believe that the law that has evolved and as finally enunciated in *Citizens United* stands for the proposition that bans and limits are bad and disclosure is good." *Id*. Following *Citizens United*, the court subjected a limit on contributions (which the court construed as a ban on contributions larger than the limit) to strict scrutiny and found it unconstitutional. *Id*. at 48.

This Court therefore followed *Citizens United*'s controlling precedent that Government may not restrict political speech solely because the speaker is an association that has chosen to incorporate. Reconsideration is not warranted.

Conclusion

As explained *supra*, *FEC v. Beaumont*, 539 U.S. 146 (2003), does not "directly control." Further, this Court did not take it upon itself to decide that *Beaumont* had been "overruled" "by implication." *Beaumont* was not on point, because it considered a different question than the one presented for this Court. Therefore, this Court's ruling that 2 U.S.C. 441b(a) is unconstitutional does not run afoul of *Agostini v. Felton*, 521 U.S. 203 (1997), and so reconsideration is unwarranted. This Court should therefore decline to reconsider its decision.

June 1, 2011

Respectfully Submitted,

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I hereby certify that the foregoing document was served electronically on June 1, 2011, upon the following counsel via the court's electronic filing system:

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