

NO. 11-4667

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM P. DANIELCZYK, JR., AND EUGENE R. BIAGI,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Case No. 1:11-cr-00085
(The Honorable James C. Cacheris, District Judge)

**BRIEF OF THE CENTER FOR COMPETITIVE POLITICS,
AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEES AND
IN SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

The Center for Competitive Politics (CCP) is a not-for-profit corporation, and is not a publicly held corporation or other publicly held entity. CCP has no parent corporation and no publicly held corporation has any form of ownership interest in CCP. Furthermore, CCP is not aware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.

This case does not arise out of a bankruptcy proceeding.

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I. IDENTITY AND INTEREST OF AMICUS

The Center for Competitive Politics (“CCP”) is a non-profit 501(c)(3) organization founded in 2005. CCP seeks to educate the public about the actual effects of money in politics, and the benefits of a more free and competitive electoral process. CCP works to defend the constitutional rights of speech, assembly, and petition through legal briefs and academic studies.

CCP has a strong interest in defending the District Court’s constitutional reasoning. *Amicus* has participated in many of the notable cases concerning campaign finance laws and restrictions on corporate political speech, including *Citizens United v. FEC*, 130 S. Ct. 876 (2010), *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), and *Carey v. FEC*, 791 F.Supp2d 121 (D.D.C. 2011).

All parties to this appeal have stipulated that CCP can participate in this appeal as *amicus curiae*, and all parties have consented to the filing of this brief. No contributions of money were made to fund the preparation or submission of this brief, which was authored entirely by counsel for *Amicus*. See Fed. R. App. P. 29(a); Fed. R. App. P. 29(c)(5).

II. ARGUMENT

The United States concedes that Section 441b(a) is unconstitutional unless it is “closely drawn” to further a “sufficiently important” government interest. U.S. Br. at 39, 26 (citing *Beaumont v. Fed. Election Comm’n*, 539 U.S. 146 at 161-62 & n. 8). The government’s asserted interest is a familiar one in campaign finance cases: the prevention of corruption and the appearance of corruption. U.S. Br. at 39. The government correctly states that these interests have been found sufficient in several notable instances. *Id.*

Appellees, in turn, point out the government’s thin evidence that limited corporate contributions cause corruption. In particular, they take issue with the government’s reliance upon and characterization of two pieces of academic work. App. Br. at 27-30.

But while Appellees adequately refute the government’s minimal evidentiary support, their argument does not provide this Court with the full picture. That the government fails to provide a persuasive quantity or quality of evidence supporting its corruption rationale is unsurprising: at least one obvious set of data strongly suggests that there is no correlation between public corruption and the laws governing corporate contributions.

A. There is no correlation between whether a state allows corporate contributions to candidate committees and the prevalence of corruption convictions in that state.

While the Federal government has enacted a complex and far-reaching system of campaign finance regulation, that system does not function in a vacuum. Rather, each of the states has also enacted a system of campaign finance laws that regulate its internal elections. There is broad diversity in how these state systems treat direct corporate contributions to candidates.

These fifty experiments provide a wealth of experience far greater than that provided by the government's two studies. As Justice Brandeis famously wrote: "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386-87 (1932).

While Federal law prohibits corporations from contributing to candidate committees, twenty-eight states currently permit such contributions. National Conference of State Legislatures, "State Limits on Contributions to Candidates: 2011-2012 Election Cycle," September 30, 2011.¹ Put differently, a majority of the States seem untroubled by the government's claim of a "real danger of *quid pro*

¹ Available at:

http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012.pdf; (last accessed: January 10, 2012).

quos—the exchanges of legislative favors for campaign money” inherent in direct corporate contributions to candidates. U.S. Br. At 40. This may be because a majority of the states are unconcerned by the specter of corruption conjured by the government. Or it may be because there is no connection between corporate contributions and *quid pro quo* corruption.

Measuring public corruption is concededly difficult – *Amicus* is unaware of a widely-accepted corruption index covering the fifty states.² But one data set does suggest itself: the public corruption conviction information maintained by the U.S. Department of Justice.³

By taking the population of each state, and dividing it by the number of corruption convictions therein, it is possible to obtain a comparative view of the

² Although a fifty-state corruption risk index, dubbed the “State Integrity Investigation,” is forthcoming from a cooperative effort by the Center for Public Integrity, Global Integrity, and Public Radio International. Available at: <http://www.stateintegrity.org/about>; (last accessed: January 10, 2012).

³ This data is particularly attractive, as Federal cases are prosecuted in Federal court, creating a reasonably uniform standard of prosecution across the states. “The judicial power of the United States is vested in the federal courts, and extends to prosecutions for violations of the criminal laws of the United States... [t]he Attorney General is [tasked with] taking care that the laws of the United States in legal proceedings and the prosecution of offenses, be faithfully executed.” *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965). See e.g. Executive Office of United States Attorneys, *United States Attorneys’ Manual*, Section 9-2.000 et seq. (setting a national policy for Federal criminal prosecutions). Available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm; (last accessed: January 10, 2012).

rate of corruption convictions per capita.⁴ This data can then be compared against each state's laws concerning corporate contributions to candidates.

Amicus used this methodology to determine the five most corrupt, and the five least corrupt, states in the Union as measured by corruption convictions per 100,000 residents. We then analyzed those states' laws concerning direct contributions to candidate committees. Any correlation would help determine whether corporate contributions affect the level of corruption.

The results are below. Convictions data was available for the period from 2001 to 2010.⁵ During that period there was no correlation between any particular legislative approach to corporate contributions and whether a state was likely to have among the most, or conversely least, corrupt governments.

⁴ *Amicus* amalgamated convictions across the period covered by the U.S. Justice Department's reports for each state. See Public Integrity Section, Criminal Division, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2010*, U.S. DEPARTMENT OF JUSTICE. Available at: <http://www.justice.gov/criminal/pin/docs/arpt-2010.pdf> (last accessed: January 10, 2012). This number was then compared with the most recent population of that state to yield a ratio of convictions over the relevant period to the state's population. See U.S. Census Bureau, Population Estimates Program, *United States – States – 2009 Population Estimates*, U.S. CENSUS BUREAU. Available at: http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1&-ds_name=PEP_2009_EST&-_lang=en&-format=US-40&-_sse=on (last accessed: January 10, 2012).

⁵ *Id.*

State Convictions on Public Corruption Charges Per Capita Versus Corporate Contribution Limits

The 5 Most Corrupt States (2010)			
Rank	State	Corruption Index (2010)	Corporate Contributions?
1	Louisiana	8.55	Set at individual limits. ⁶
2	North Dakota	8.50	Prohibited. ⁷
3	South Dakota	7.3	Prohibited. ⁸
4	Alaska	6.9	Prohibited. ⁹

⁶ LA. REV. STAT. ANN. § 18:1505.2 (2011). The current statute was enacted in 1980, and has been subject to numerous amendments, such as a ban on contributions by corporations participating in post-hurricane rebuilding efforts. 2006 La. Sess. Law Serv. Act 849 (H.B. 850) (West). However, the state has continuously permitted corporate contributions under the modern statute.

⁷ N.D. CENT. CODE ANN. § 16.1-08.1-03.3 (West 2011). The modern ban on corporate campaign contributions has been in place since 1995 in North Dakota with only superficial modifications. Examples include: a 2001 amendment which asserted that the definition of corporation included non-profits, and a 2011 amendment permitting corporate donations to “measure committees” for initiatives and referendums. 2001 North Dakota Laws Ch. 202 (H.B. 1426), 2011 North Dakota Laws Ch. 155 (S.B. 2073).

⁸ S.D. CODIFIED LAWS § 12-27-18 (2011). The most recent statute was enacted in 2007. The state’s previous ban on corporate contributions, formerly S.D. CODIFIED LAWS § 12-25-2, was still in effect from at least 1995 to 2007. James Bopp, Jr., “All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars”, 49 Cath. U.L. Rev. 11, 27 n. 68 (Fall 1999); Bruce A. Schoenwald, “A Conundrum in a Quagmire: Unraveling North Dakota’s Campaign Finance Law”, 82 N. Dak. L. Rev. 1, 11 n. 48 (2006) (listing South Dakota’s statute as one of twenty-four states that then prohibited corporate contributions).

⁹ ALASKA STAT. ANN. § 15.13.074 (West 2011). The current statute prohibiting corporate contributions was enacted in 1996, and the ban has remains in place. The law has undergone minor amendments since enactment, such as a 2002 addition stating that an “entity recognized as tax-exempt” by the Internal Revenue

5	Kentucky	6.5	Prohibited. ¹⁰
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The 5 Least Corrupt States (2010)			
Rank	State	Corruption Index (2010)	Corporate Contributions?
1	Oregon	0.97	Unlimited. ¹¹
2	South Carolina	1.16	Set at individual limits. ¹²
3	New Hampshire	1.21	Set at individual limits. ¹³
4	Kansas	1.24	Set at individual limits. ¹⁴

Code was also prohibited from contributing to a candidate. 2002 Alaska Session Laws Ch. 1 (H.B. 177).

¹⁰ KY. REV. STAT. ANN. § 121.025 and 121.035 (West 2011) together prohibit corporate contributions to candidate committees. The most recent amendment to either statute was enacted in 1996.

¹¹ In *Vannatta v. Keisling*, 931 P.2d 770, 787 (Or. 1997), the state's supreme court ruled that the relevant contribution limits violated the state's freedom of speech clause. Since 1997, no law has been enacted in Oregon which placed any limitation on contributions from any source, corporate or otherwise.

¹² S.C. CODE ANN. § 8-13-1314 (2011). Modern statute took effect on January 1, 1992, and permits persons, defined so as to include 'corporations' under S.C. CODE ANN. § 8-13-1300 (2011), to contribute. An advisory opinion established that separately incorporated corporations were each different "persons." Op. S.C. St. Ethics Comm., SEC AO95-005, Nov. 16, 1994.

¹³ In *Kennedy v. Gardner*, 1999 WL 814273, at *4 (D.N.H. Sept. 30, 1999), the district court held that New Hampshire's total ban on corporate contributions "fail[ed] to survive constitutional scrutiny." Since then, corporations have been permitted to contribute up to the limit imposed on individuals.

¹⁴ KAN. STAT. ANN. § 25-4153 (2011) established that contribution limits affect 'persons'. KAN. STAT. ANN. § 25-4143(j) (2011) has defined "person" to include "any...corporation" since at least 1991.

5	Minnesota	1.25	Prohibited. ¹⁵
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In fact, the data show that the state with the lowest rates of convictions for public corruption (Oregon) has opted to permit unlimited corporate contributions. Similarly, only one of the five least corrupt states bans corporate contributions, with the remaining three states opting for limited contributions similar to those envisioned by the District Court in this case. Conversely, four of the five *most* corrupt states *ban* corporate contributions.

The data show no correlation between states permitting corporations to give directly to candidate committees and those states' indices of public corruption. In fact, many states both allow corporate contributions (in some cases without limit) and also enjoy low rates of measureable corruption. And the most corrupt states, by and large, ban all corporate contributions. This contrast strongly suggests that contributions from groups that happen to take the corporate form do not, *ipso facto*, lead to public corruption.

¹⁵ MINN. STAT. ANN. § 211B.15 (West 2011). Minnesota's modern prohibition on corporate contributions was enacted and has remained in place, with minor amendments, since 1988.

B. The states within the Fourth Circuit already largely permit corporate contributions, and certainly permit corporate money to be used politically.

Of course, there are five states within the Fourth Circuit. And, while this case concerns a Federal statute, this Court's decision will also determine the constitutionality of those states' election regimes. *See, e.g. In re Interrogatories*, 227 P.3d 892, 894 (Col. 2010) (holding that the *Citizens United* decision invalidated the state's prohibition on corporate independent expenditures).

But a ruling against Section 441b(a) would not be particularly disruptive to local elections; largely because the states affected by this case are, generally, among those that have permitted corporate contributions. Indeed, all of the states in this circuit have already permitted a certain amount of corporate money in politics.

For instance, in Virginia there is no limit on the amount of money that any individual group may give to a candidate. VA. ST. § 24.2-900 et seq. (2011). In fact, both corporations and unions are permitted to contribute, without any limits, directly to candidates. *Id.* This is in addition to the ability of corporations and unions to form political committees, which may also contribute unlimited amounts to candidates. *Id.*

In two other states, South Carolina and Maryland, corporations and unions are permitted to contribute directly to candidates. S.C. CODE ANN. § 8-13-1314 (2011); MD CODE, ELECTION LAW § 13-226 (2011). However, unlike Virginia,

both of these states have imposed contribution limits on corporate giving. *Id.* In both states, the limit on corporate giving is exactly the same as the limit on individual contributions. *Id.* In South Carolina, corporations may give up to \$3,500 to statewide candidates and up to \$1,000 to legislative candidates. S.C. CODE ANN. § 8-13-1300, 8-13-1314 (2011). The limits are applied per election contest, so the Acme Corporation may give \$3,500 to a gubernatorial candidate during the primary, and then donate another \$3,500 during the general election. *Id.* In Maryland, corporations are permitted to donate up to \$4,000 per four-year election cycle, but cannot give more than \$10,000 in aggregate. MD CODE, ELECTION LAW § 13-226 (2011). Both states' limits are comparable to the limits placed on individual contributions to candidate committees at the Federal level.

The remaining two states in the Circuit, West Virginia and North Carolina, do not currently permit corporations to give directly to candidates, although both permit corporations to form political committees. W.V. CODE § 3-8-8 (2011),), N.C. GEN. STAT. ANN. § 163-278.19 (West 2011). But if the District Court's ruling is upheld, both states would experience only modest changes.

In West Virginia, labor unions are already permitted to give up to the individual limit of \$1,000 to candidates during both the primary and general elections. W.V. CODE § 3-8-8 (2011). Affirming the lower court would simply apply that same limit to for-profit corporations. In North Carolina, individuals are

permitted to give up to \$4,000 per candidate during both the primary and general elections. N.C. GEN. STAT. ANN. § 163-278.13 (West 2011). Affirming the lower court would simply apply that modest limit to for-profit corporations.¹⁶

Permitting for-profit corporations to contribute up to the individual limit would not distort or disrupt state elections. To the contrary, most states in the Fourth Circuit already permit direct contributions by corporations.

¹⁶ We note that this would create a contribution regime in North Carolina where corporations were permitted to contribute, and unions are not. Such a system already exists in New Hampshire, the third least corrupt state in America according to U.S. Department of Justice data. N.H. Rev. Stat. Ann. § 664:4 (West 2011).

III. Conclusion

The United States has failed to provide persuasive evidence that limited corporate contributions to candidates cause corruption or the appearance of corruption. This is unsurprising. The citizens of a majority of states have enacted laws allowed such contributions. The state with the lowest level of public corruption convictions allows such contributions without monetary limit, while four of the five states with the highest conviction rates ban all corporate contributions. The experiences of the fifty states undermine the government's arguments, and strengthen the case for affirmance.

January 10, 2012

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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