No. 12-579

In The

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005, the Center for Competitive Politics (or CCP) is a non-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. CCP's mission, through litigation, public engagement, and scholarly research, is to defend the constitutional rights of speech, assembly, and petition, and to ensure a more free and competitive electoral process.

CCP participated in the proceedings below as *amicus curiae,* and has continued interest in this case because it involves a restriction on political participation that, in CCP's view, violates the First Amendment.

SUMMARY OF ARGUMENT

The Federal Election Campaign Act's prohibition on corporate contributions, 2 U.S.C. § 441b(a), P.L. 92-225, is unconstitutional unless it is, at a minimum, "closely drawn" to further a "sufficiently important" government interest. [2]

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[1] This brief is filed with the written consent of all parties. 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.

[2] *Amicus* agrees with Petitioner that contribution limits should be subject to strict scrutiny. Nonetheless, the challenged provision should be reviewed regardless of the scrutiny imposed.

Beaumont v. FEC, 539 U.S. 146, 161-62 n. 8 (2003). *See also*, U.S. C.A. Br. at 39, 26. The proffered government interest in this case is preventing actual or apparent corruption. *See, e.g., id.; see generally Buckley v. Valeo*, 424 U.S. 1, 45 (1976); *McConnell v. FEC*, 540 U.S. 93, 136 (2003).

This case is ripe for review because, as noted by the district court below, there is substantial tension between the holding in *Beaumont* and the reasoning of *Citizens United v. FEC*, 558 U.S. 310; 130 S.Ct. 876 (2010). Indeed, this tension has been noted by a number of the courts of appeals. But because only this Court may revisit *Beaumont,* only this Court can address this issue. Until it does so, the continued viability of *Beaumont,* and the First Amendment rights of citizens acting through the corporate form, will be in doubt.

Amicus writes to bring evidence of the states' experience with corporate contributions and attribution systems to the Court's attention. The states—as laboratories of democracy [3] —have experimented with various regulatory regimes, and their experience suggests two conclusions. First, it highlights the lack of evidence for an empirical link between corporate contributions and actual or

[3] The concept of states as laboratories for democracy is deeply rooted in our nation's federalist tradition. This concept was perhaps best encapsulated by Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[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; and try novel social and economic experiments without risk to the rest of the country.")

apparent corruption. Second, it demonstrates the possibility of preventing circumvention through use of the corporate form, suggesting that the government may be wholly mistaken in its assertion that Section 441b(a) furthers any federal interest whatsoever.

ARGUMENT

I. Each circuit to have considered this question has noted the tension between *Beaumont* and *Citizens United*, a tension only this Court can resolve.

The district court recognized that in light of *Citizens United, Beaumont* is a "gravely wounded" case. *United States v. Danielczyk*, 791 F. Supp. 2d 513, 516 (E.D. Va. 2011) *rev'd*, 683 F.3d 611 (4th Cir. 2012). The circuit courts that have addressed *Beaumont* since *Citizens United* have all acknowledged the tension between the two cases, but have stressed that only this Court can reconcile them under *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("if 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").

The rationales that sustained *Beaumont* are either no longer recognized by this Court, or otherwise do not withstand scrutiny. This case

presents the ideal opportunity for this Court to reconcile *Beaumont* and *Citizens United.*

A. Multiple circuits have recognized the tension between *Beaumont* and *Citizens United*.

Since *Citizens United*, multiple circuit courts of appeal have revisited the issue of bans and limitations on corporate contributions. While all of the courts have upheld the challenged contribution limits, they have also acknowledged that *Citizens United* rendered certain elements of *Beaumont* uncertain.

Recently, the Eighth Circuit considered a state corporate contribution ban in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (rehearing *en banc*). The court rejected the plaintiffs' assertion that *Beaumont* did not control in light of *Citizens United*, noting that "rightly or wrongly decided, *Beaumont* dictates the level of scrutiny and the potential legitimacy of the interests Minnesota advances." *Id.* at 879 (citing *Agostini*, 521 U.S. at 237). The Eighth Circuit then explicitly noted that *Citizens United* "cast doubt on *Beaumont,* leaving its precedential value on shaky ground." *Id.* at n. 12.

The Ninth Circuit confronted a similar corporate contribution statute in *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1113 (9th Cir. 2011). *Thalheimer* concerned a challenge to San Diego's campaign finance laws, including the city's contribution limits. *Id.* The court noted that while

Beaumont relied on several rationales from the since-overturned case of *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *Austin's* anti-corruption and anti-circumvention rationales were still good law. *Thalheimer* at 1124. Although the Ninth Circuit upheld San Diego's contribution limits under *Beaumont*, the court also recognized that *Citizens United* put campaign finance law in a "state of flux". *Id.* at 1113.

The Second Circuit has twice considered the application of *Beaumont,* and reached a conclusion similar to the Eighth Circuit's. First, *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 194 (2d Cir. 2010), addressed a contribution ban on certain groups such as state contractors and lobbyists. The court concluded that, "[a]lthough the [Supreme] Court's campaign-finance jurisprudence may be in a state of flux (especially with regard to campaign-finance laws regulating corporations), *Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law." *Id.* at 199 (parentheses in original). Consequently, the court upheld the state contribution limitations under the "closely drawn" standard for contributions. *Id.*

The Second Circuit revisited *Beaumont* in *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011), a case concerning "pay-to-play" rules and contribution limits. There, the court attempted to harmonize *Citizens United*, *Arizona Free Enterprise*, and *Garfield*. *Id.* at 183 ("[t]his Court must consider three important decisions that have issued subsequent to the district court's opinion") (citing *Citizens United*, 130 S.Ct. 876; *Arizona Free*

Enterprise Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806 (2011); *and Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010)). Noting the trend toward liberalization of campaign finance laws—with particular emphasis on *Citizens United*—the *Ognibene* court nonetheless found a distinction between levels of scrutiny for campaign expenditures and campaign contributions. *Id.* at 184. The court noted that, "the Supreme Court has repeatedly stated that the Circuit Courts are to apply the law as it exists, unless it is expressly overruled." *Id.* (citing *Agostini*, 521 U.S. at 237). Thus, the court refused to "stretch *Citizens United*," and maintained a distinction between levels of scrutiny for corporate expenditures and corporate contributions, again highlighting the tension between *Citizens United* and *Beaumont*.

The case we urge this Court to review, *United States v. Danielczyk*, further demonstrates that *Beaumont* is now of questionable value. In the district court, the Petitioners challenged, *inter alia*, the federal ban on corporate contributions. *Id.* at 514. The district court, having requested additional briefing on *Agostini* and *Beaumont*, found that *Beaumont* did not apply because it "expressly 'h[e]ld that applying [§ 441b] to *nonprofit advocacy corporations* is consistent with the First Amendment'…[and] Defendant's corporation – Galen – is not a nonprofit advocacy corporation." *Id.* at 514, 517 (emphasis in original). Furthermore, the district court found that *Citizens United* invalidated §441b(a)'s ban on direct corporate contributions. *Id.* The Fourth Circuit reversed, acknowledging that *Agostini* did apply because *Beaumont* "makes clear

that § 441b(a)'s ban on direct corporate contributions is constitutional as applied to all corporations." *Danielczyk,* 683 F.3d at 615-16. Therefore, *Agostini* required the court of appeals to apply *Beaumont* and uphold the challenged law, in spite of erosion of *Beaumont* implicit in *Citizens United*. *Id.* at 616.

Thus, the Second, Fourth, Eighth and Ninth Circuits have examined this issue and concluded that *Beaumont* is in tension with *Citizens United*. The district court in *Danielczyk* called *Beaumont* "gravely wounded." But it falls on this Court to review the question and clarify the law of the land. The courts of appeals have implied, but hesitated to directly state, the inevitable conclusion of this Court's recent jurisprudence: *Beaumont* lacks support, and should be revisited.

B. Much of the reasoning in *Beaumont* has already been invalidated by *Citizens United*.

Beaumont found that the ban on non-profit corporate contributions served anti-circumvention, anti-corruption, shareholder protection, and anti-distortion purposes. *Beaumont*, 539 U.S. at 154. The Court's decision in *Citizens United v. FEC*, 130 S.Ct. 876, plainly eliminates some of these justifications, and undercut the others.

This Court has rejected the shareholder-protection rationale, *Citizens United,* 130 S.Ct. at 911, noting that the procedures of corporate democracy were sufficient to address shareholder interests in the context of independent expenditures.

Id. (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)); s*ee also, Danielczyk*, 791 F. Supp. 2d at 517-18. Justice Kennedy further noted that, even if shareholder protection were a sufficient government interest, it should be furthered via regulation rather than outright prohibition. *See id.* This rationale should be extended to corporate contributions: there is nothing inherent in the distinction between contributions and expenditures that affects their relative ability to be governed through corporate democracy.

Likewise, this Court rejected the anti-distortion rationale as an attempt by the government to favor certain speakers over others. *Citizens United*, 130 S.Ct. at 913-14. Examining *McConnell v. FEC*, 540 U.S. 93, 203-209 (2003), this Court found that to the extent the *McConnell* opinion relied on *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) for the anti-distortion rationale, it ought to be overruled. *Citizens United*, 130 S.Ct. at 913. Again, this holding logically extends to corporate contributions.

Therefore, four different circuit courts of appeal have recognized and grappled with the tension between *Beaumont* and *Citizens United*. This tension exists because half of the *Beaumont* rationales were invalidated in *Citizens United*. The remaining *Beaumont* rationales – the anti-circumvention and anti-corruption interests – have been adequately addressed by both the states and, to some extent, the Federal Election Commission, via attribution regimes that are less repugnant to the First Amendment. Consequently, the government's

attempt to rely on these interests to justify § 441b(a) is logically dubious.

II. Attribution regimes have proven successful on the federal and state levels in resolving the anti-circumvention concern, as evidenced by the regulations of the FEC and various states.

The only remaining rationales for corporate contribution bans are the government's anti-circumvention and anti-corruption interests. These two interests are essentially empirical claims. Yet there is little evidence that corporate contributions are so difficult to attribute that an outright prohibition is a properly-tailored response. State (and in some respects, FEC) use of attribution regimes demonstrates a dearth of support for the severity of § 441b(a)'s prohibition.

This Court has found that there is a threat that the corporate form might be used to circumvent contribution limits. *Beaumont*, 539 U.S. at 155. The essence of this concern is that individuals can set up "sham" corporations, and funnel money through those entities, thereby contributing well beyond the individual limits. U.S. C.A. Br. 43. But the case against Petitioner Danielczyk helps demonstrate that the FEC has successfully drafted rules that can prevent such circumvention without imposing a ban.

Unincorporated entities like partnerships and limited liability companies attribute their organizational donations to their partners' or members' individual limits. 11 C.F.R. § 110.1(e) and (g). The FEC's partnership attribution regime

successfully monitors and properly attributes contributions from such entities—ranging from two-member partnerships to multinational, multi-billion dollar ones like PricewaterhouseCoopers and Blackstone. *See* PricewaterhouseCoopers "2012 Transparency Report" 1, 14; [4] *see also* The Blackstone Group L.P., Quarterly Report (Form 10-Q) 1, 4 (Nov. 2, 2012). Indeed, a limited liability partnership may elect to be taxed like a corporation, thereby altering the way their political activity is regulated by the FEC.[5] Such partnerships can be larger and more complex, and certainly better funded, than many corporations, as the cases of PricewaterhouseCoopers and Blackstone demonstrate.

The United States claims preventing corporate circumvention of contribution limits would be "an enormous and impracticable undertaking." U.S. C.A. Br. at 47. But this is simply not so. The government has yet to articulate a reason *why* the corporate form is more difficult to police than partnerships. In fact, before the circuit court, the government proffered only a single piece of evidence for their otherwise conclusory assertion. But that piece of evidence actually undermines the government's point.

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[4] *Available at* http://www.pwc.com/en_US/us/about-us/assets/pwc-llp-fy12-transparency-report.pdf.

[5] Indeed, even LLPs that opt for corporate tax treatment are treated as partnerships for contribution purposes. 2 U.S.C. § 441a(a)(1). However, the FEC is considering altering this rule to treat such organizations as corporations for contribution purposes. http://www.fec.gov/agenda/2012/mtgdoc_1280.pdf

Specifically, the United States cited a single anecdote from a report issued by the Maryland Attorney General. One person circumvented individual contribution limits by passing $62,000 through sixteen different LLCs he controlled. U.S. C.A. Br. at 43 (citing Maryland Att'y Gen.'s Advisory Comm. on Campaign Finance, *Campaign Finance Report* 30 (Jan. 4, 2011) ("*Maryland Report*"). But the government ignores the fact that this was only possible because of a quirk of Maryland law.

Corporate contributions are legal in Maryland. Md. Code Ann., Elec. Law § 13–226(e) (LexisNexis 2012). And the state has an attribution rule for corporations. Maryland *did not have such a rule for LLCs*.[6] In fact, the report the government cited recommended applying the corporate attribution rule to LLCs. The only reason that Maryland has a "loophole" for LLCs is that the state created LLCs *after* its campaign finance statute, and so LLCs were not addressed by Maryland campaign finance law. *Id.* at 30-31. In short, the Maryland Attorney General's report simply suggests that LLC's be subject to an already-extant corporate attribution regime.

This should not be surprising. Twenty-eight states currently permit corporate contributions. The possibility of an individual person forming shell corporations to pass money through to candidates is an obvious scenario. State law reflects this concern. A review of other states and the District of Columbia

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[6] The Maryland Attorney General treated "Corporations" and "Limited Liability Corporations" as distinguishable entities.

shows that attribution regimes are not rare. *See, e.g.,* D.C. Code § 1-1131.02 (partnerships attribution) *and* D.C. Code § 1-1101.01(8) (corporate subsidiaries), Wis. Admin. Code GAB §§ 1.32; Ky. Rev. Stat. Ann. §§ 121.150(10) *and* Ky. Reg. of Election Finance AO 2010-004 (interpreting the Kentucky Revised Statutes to allow attribution of LLC contributions to individual law firm members).

Similarly, the FEC has for decades been tasked with policing circumvention of contribution limits through robust reporting and disclosure requirements backed up by serious enforcement penalties. *Buckley* states that:

> [t]here is no indication that the substantial criminal penalties for violating the contribution ceilings, combined with the political repercussion of such violations, will be insufficient to police the contribution provisions. Extensive reporting, auditing, and disclosure requirements applicable to *both contributions and expenditures* by political campaigns are designed to facilitate the detection of illegal contributions. *Buckley*, 424 U.S. at 56 (emphasis added).

In a similar context, the FEC monitors every corporate contribution to independent expenditure committees via disclosure requirements backed by the threat of legal action. It also manages and polices the data related to the direct independent expenditures of corporations. And contributions to

candidates must be reported by the candidates themselves—providing another check on circumvention. *See* 2 U.S.C. § 432 (2012). These tasks are functionally similar to those required to properly attribute direct corporate contributions. If the federal government is already monitoring corporate contributions and expenditures in other contexts, there is little reason to believe it cannot do so for direct contributions to candidates.

III. Data from the states demonstrate that corporate contributions do not pose a sufficient threat of actual or apparent corruption.

Significantly, one piece of evidence that the government presents in the context of apparent corruption is a citation to an academic paper by professors David Primo and Jeffrey Milyo. U.S. C.A. Br.at 42 (citing David M. Primo and Jeffrey Milyo, Campaign Finance Laws and Political Efficacy: Evidence from the States, 5 Election L.J. 23, 33, 35 (2006)). The United States so mischaracterized this research before the court of appeals that Doctors Primo and Milyo felt compelled to file an amicus brief clarifying that their research proves *the exact opposite point* of what the government claimed. Primo & Milyo C.A. br. at 2. Specifically, Milyo and Primo emphasize that their research demonstrates no substantively significant link between state corporate contribution regimes and public perception. *Id.* at 6. The FEC was tasked with showing that corporate contributions prevent the appearance of corruption. The research they cited shows the opposite.

CCP also filed an *amicus curiae* brief before the court of appeals. CCP's research demonstrates that there is little, if any, evidence that corporate contributions cause corruption at the state level. CCP C.A. Br. at 3. While measuring public corruption is difficult, CCP used the public corruption conviction information maintained by the United States Department of Justice ("DOJ").[7] Using DOJ statistics on the uniform federal prosecution standards is particularly useful for comparing states. CCP divided the population of each state and by the number of public corruption convictions therein,[8] allowing for fair comparison of states that do not forbid corporate contributions versus those that ban them. CCP measured corruption as a function of public corruption convictions per 100,000 residents between 2001 and 2010.

Currently, twenty-eight states permit corporate contributions. National Conference of State Legislatures, "State Limits on Contributions to Candidates: 2011-2012 Election Cycle," September

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[7] 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).

[8] For population size, CCP used data provided by the 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).

30, 2011.[9] Evidently a majority of states have found that corporate contributions do not pose an intolerable threat to democracy. The following two charts show the five most and five least corrupt states, and demonstrate no clear link between corporate contributions and corruption.

Table: State Convictions on Public Corruption 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[10]
2	North Dakota	8.50	Prohibited[11]

[9] Available at: http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012.pdf

[10] 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 corporate participation in post-Katrina rebuilding efforts via contributions. 2006 La. Sess. Law Serv. Act 849 (H.B. 850) (West). But the state has continuously permitted corporate contributions under the modern statute.

[11] N.D. CENT. CODE ANN. § 16.1-08.1-03.3 (West 2011). North Dakota's modern ban on corporate campaign contributions has been in place since 1995 with only superficial modifications, such as a 2001 amendment specifying 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).

3	South Dakota	7.3	Prohibited[12]
4	Alaska	6.9	Prohibited[13]
5	Kentucky	6.5	Prohibited[14]

The 5 Least Corrupt States (2010)			
Rank	State	Corruption Index (2010)	Corporate Contributions ?
1	Oregon	0.97	Unlimited[15]

[12] S.D. CODIFIED LAWS § 12-27-18 (2011). The most recent statute was enacted in 2007. The state's ban on corporate contributions, formerly S.D. CODIFIED LAWS § 12-25-2, was still in effect from 1999 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).

[13] ALASKA STAT. ANN. § 15.13.074 (West 2011). The current statute prohibiting corporate contributions was enacted in 1996, and the ban has remained in place. The law has undergone minor amendments since enactment, such as a 2002 addition that an "entity recognized as tax-exempt" by the Internal Revenue Code was also prohibited from contributing to a candidate. 2002 Alaska Session Laws Ch. 1, H.B. 177.

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

[15] In *Vannatta v. Keisling*, 931 P.2d 770, 787 (Or. 1997), the state supreme court ruled that the Oregon's contribution limits violated its 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.

2	South Carolina	1.16	Set at individual limits[16]
3	New Hampshire	1.21	Set at individual limits[17]
4	Kansas	1.24	Set at individual limits[18]
5	Minnesota	1.25	Prohibited[19]

During the time period CCP analyzed, there was no correlation between corporate contributions and the level of public corruption in the states. In fact, many states allow corporate contributions, in some case without limit. Many of these states have low levels of measurable corruption. Yet, the most corrupt states tend to ban corporate contributions. The contrast suggests that corporate contributions

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[16] S.C. CODE ANN. § 8-13-1314 (2011). The modern statute took effect on January 1, 1992, and permits persons—defined 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.

[17] 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.

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

[19] 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.

directly to candidates do not inexorably lead to corruption.

CONCLUSION

As Petitioners and various courts of appeals have noted, *Citizens United* explicitly eliminated two of the four constitutional justifications for contribution limits articulated in *Beaumont*. That decision left open the question of whether corporate contributions create a constitutionally-adequate threat of actual or apparent corruption, either on their face or via circumvention of other anti-corruption laws. The First Amendment demands more than deference to the speculations of the government, especially as substantial evidence suggests that corporate contributions do not pose an outsized danger of corruption, its appearance, or circumvention of other laws. Consequently, this Court should grant the Petition.

Respectfully submitted,

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