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

REPLY FOR PETITIONERS

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The government never explains how, if a $2,500 campaign contribution by an individual, partnership, or LLC presents no impermissible danger of *quid pro quo* corruption, the same $2,500 contribution poses an intolerable risk of corruption simply because it comes from a corporation. Pet. 17-20. The government thus abandons its theory below that corporate contributions "pose a heightened risk of corruption" because "corporations pursue economic interests through entry into the political arena." Gov't C.A. Br. 41; see Pet. 19-20. The government instead urges (at 10) that *FEC* v. *Beaumont*, 539 U.S. 146 (2003), eliminates any need for review. But *Beaumont* is precisely why review is warranted. It rests on the same premises from *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that this Court rejected in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), including the now-discredited notion that Congress may

restrict corporations' political activity to counteract perceived "distortion" caused by their amassed wealth. After *Citizens United*, *Beaumont* cannot sustain § 441b's speaker-based criminalization of core First Amendment activity.

The government asserts (at 12) that "*Citizens United* does not cast doubt on *Beaumont*," but courts disagree. "*Citizens United*'s outright rejection of the government's anti-distortion rationale * * * casts doubt on *Beaumont*, leaving its precedential value on shaky ground." *Minnesota Citizens Concerned for Life, Inc.* v. *Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (en banc). The court below acknowledged that *Citizens United* "reject[ed]" two of *Beaumont*'s central rationales. Pet. App. 10a n.3. The government now attempts to sustain *Beaumont* on alternate theories. But the need to reconceptualize *Beaumont* itself underscores the need for review.

The government invokes the absence of a circuit conflict (at 19-20), but none is likely to develop given the government's position that *Beaumont* precludes any court but this one from revisiting the corporate contribution ban's validity. And notwithstanding the government's request to defer review, a trial would add no new insights into the questions presented. The government itself deemed those issues sufficiently important to warrant an interlocutory appeal, which was briefed and argued by the Office of the Solicitor General. There is no reason to defer review of a sweeping restriction on core political expression that stifles not merely petitioners' activities but those of myriad entities subject to § 441b.

I. REVIEW OF THE CORPORATE CONTRIBUTION BAN'S VALIDITY IS WARRANTED AFTER *CITIZENS UNITED*

The government concedes (at 15-16) that *Citizens United* "repudiated" *Austin*'s notion that Congress can

restrict political activity to counteract perceived corruption or distortion caused by "corporations' use of state-created advantages to amass wealth in the economic marketplace that they then translated into unfair political advantages." The government nevertheless urges that *Austin*'s overruling does not call *Beaumont*'s "anti-corruption rationale" into question because "*Beaumont* did not depend on *Austin*." *Id.* at 15.

A. The government is mistaken. In *Beaumont*, "the Court explicitly relied on *Austin* and quoted from it at length." *Citizens United*, 130 S. Ct. at 956 n.62 (Stevens, J., dissenting) (citing *Beaumont*, 539 U.S. at 153-155, 158, 160, 163). *Beaumont* invoked—verbatim—*Austin*'s concern that corporations' "'state-created advantages * * * permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.'" 539 U.S. at 154 (quoting *Austin*, 494 U.S. at 659). It invoked corporations' "'aggregated capital,'" "'political war chests,'" "'potential for distortion,'" "'state-created advantages,'" and "use [of] corporate funds for political influence." *Id.* at 152, 154, 158, 160, 163. If that is not "depend[ence] on *Austin*," Br. in Opp. 15, nothing is.[1]

The government fares no better in asserting (at 16) that "*Beaumont* remains fully justified" by "the government's interest in combating *quid pro quo* corruption and

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[1] Justice Kennedy's *Beaumont* concurrence (see Br. in Opp. 16) confirms the point. Justice Kennedy declined to join the Court's opinion *because* it depended on *Austin*. See 539 U.S. at 163-164 (Kennedy, J., concurring in judgment). And he concurred in the judgment solely because "the distinction between contributions and expenditures under the whole scheme of campaign finance regulation" was not before the Court. *Id.* at 164. That distinction is at issue here. Pet. 30-35.

its appearance." The government cites nothing in *Beaumont* that invokes *quid pro quo* corruption as a justification for §441b's contribution ban, and for good reason: The opinion refers to *quid pro quo* only once, where it stresses that "corruption" should be "'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.'" 539 U.S. at 156. That is the overbroad conception of corruption—not just *quid pro quo* but also "influence over or access to elected officials"—that *Citizens United* repudiated. 130 S. Ct. at 910. *Beaumont* thus does not merely lack the "justification" the government now champions; *Beaumont* disclaims it. The government effectively requests that the Court "give precedential sway to reasoning that it has never accepted, simply because [in the government's estimation] that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited." *Id.* at 924 (Roberts, C.J., concurring). That supports granting review, not denying it.

The government's new *quid pro quo* justification also fails on the merits. The government abandons any claim that corporate contributions are inherently more corrupting than those by individuals, partnerships, and LLCs. See p. 1, *supra*. It offers no reason why already applicable contribution limits would not amply address the issue: It cannot be that $2,500 from the wealthiest individual presents no intolerable risk of corruption, but a similarly limited contribution from a corporation would. Pet. 17-18. Nor does the government explain how—if corporations did pose special *quid pro quo* concerns—it would make sense to allow corporate PACs to contribute *double* the amount individuals may. See *id.* at 23.

B. *Citizens United* also rejected *Beaumont*'s rationale for finding § 441b "closely drawn" to the government's asserted interests. *Beaumont* concluded that it was "simply wrong" to "characteriz[e] § 441b as a complete ban" because, in the Court's view, corporations could still contribute through PACs. 539 U.S. at 162-163. *Citizens United*, however, held that § 441b *is* "an outright ban" because PACs "do[] not allow corporations to speak." 130 S. Ct. at 897. The government's claim (at 16) that contributions are different because they primarily implicate "an 'associational' freedom," not pure speech, makes no sense. *Citizens United* held that a PAC does not speak for a corporation because "[a] PAC is a *separate association* from the corporation." 130 S. Ct. at 897 (emphasis added). That rationale applies with even greater force to associational rights. Nor does a PAC contribution "serve[] the same symbolic function as a contribution by the corporation itself." Br. in Opp. 16. A separate association contributing *other people's money* conveys an inherently different message than the corporation putting its *own* money where its mouth is. Pet. 23. That does not change just because the separate association's name includes the corporation's.

The government's assertion (at 16-17) that "anti-corruption and anti-circumvention interests would themselves sufficiently justify a ban" on corporate contributions likewise fails. The "premise" of *Beaumont*'s tailoring analysis—since discarded by *Citizens United*—was that § 441b was not "a complete ban." 539 U.S. at 162. The Court did not hold that an *outright ban* on corporate contributions would be constitutional. The government's

assertion that a ban is nonetheless justified asks the Court not to follow *Beaumont* but to rewrite it.[2]

C. Unable to show that a $2,500 corporate contribution poses greater *quid pro quo* corruption risks than the same contribution from an individual, partnership, or LLC, the government defends § 441b almost exclusively on anti-circumvention grounds. Br. in Opp. 14-15, 17-18. But *Beaumont* nowhere suggests that § 441b's ban would survive constitutional scrutiny on that ground alone. The Court observed that preventing individuals from "exceed[ing] the bounds imposed on their own contributions" was "another reason for *regulating* corporate electoral involvement," 539 U.S. at 155 (emphasis added), and even that was a secondary concern. Anti-circumvention did not inform Congress's adoption of the corporate contribution ban in 1907, which predated "restrictions on individual contributions." *Ibid.*; see Pet. 7, 20-21. Nor did *Beaumont* consider whether attribution and affiliation

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[2] The government's reliance (at 13-14) on the two-word summary affirmance in *Republican National Committee* v. *FEC*, 130 S. Ct. 3544 (2010), is nonsense. The appellants in *RNC* challenged FECA's imposition of *federal* contribution limits on funds raised by national political parties for *state* elections and by state parties for federal elections. J.S. in No. 09-1287, at 4-5 (citing 2 U.S.C. § 441i(a)-(b)). That those federal limits happen to "treat corporations and individuals differently," Br. in Opp. 13, was not at issue. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance precedential only for "precise issues presented and necessarily decided"). Nor do petitioners argue "that corporations and individuals must always be subject to identical contribution limits." Br. in Opp. 14. The petition acknowledges that corporations may sometimes warrant contribution rules—*e.g.*, attribution and affiliation rules, Pet. 22—that individuals may not. Such restrictions, however, must be based on more than the contributor's corporate identity, and properly tailored. See *id.* at 16-20. Section 441b's categorical ban on corporate contributions is neither.

rules, see Pet. 22, would adequately address circumvention concerns.[3]

Any anti-circumvention rationale would have to survive *McConnell* v. *FEC*, 540 U.S. 93 (2003), which illustrates the proper analysis where—as here but not in *Beaumont*—a contribution ban is defended solely on circumvention grounds. There, the Court invalidated a ban on minors' contributions for two independent reasons: (a) there was an insufficient showing that adults used minors to circumvent their own limits, and (b) the ban was "overinclusive" given "more tailored" alternatives. *Id.* at 232. The government has shown no circumvention problems here. See Pet. 21-22. And § 441b's ban fails anyway because less drastic alternatives are available—namely, attribution and affiliation rules like those already used for PACs, partnerships, and LLCs. *Id.* at 22.[4]

The government denies (at 14) that it could "devise and enforce rules for attributing one corporation's contributions to another," but devotes zero words to the FEC's *existing* rules for testing affiliation and aggregating contributions by affiliated corporate PACs. Pet. 5 (citing 2 U.S.C. § 441a(a)(5); 11 C.F.R. § 100.5(g)(2)-(4)). Nor does it mention the States' rules. See *id.* at 22; Cen-

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[3] *Beaumont* considered an "earmarking" rule where contributions would count against individuals who gave corporations money and *directed* the money be given to a particular candidate. 539 U.S. at 160 n.7. The Court did not consider rules, like those applicable to partnerships and LLCs, requiring attribution of *all* corporate contributions.

[4] The government suggests (at 17-18) that *McConnell* is irrelevant because one can create corporations, but not children, over the Internet. One could just as easily use the Internet to recruit *other individuals* as conduits for excess contributions. That, by contrast, would be difficult to uncover, since it would not produce the paper trail that filing myriad articles of incorporation would.

ter for Competitive Politics Br. 11-12. Echoing Deputy Solicitor General Dreeben's argument below, the government also asserts that corporations present "complexities of attribution" that partnerships and LLCs do not because ownership and management may be separated. Br. in Opp. 15 n.*; see Oral Arg. in No. 11-4667, at 36:34-37:00 (4th Cir. May 18, 2012). As with partnerships and LLCs, however, the government could easily set a default rule (*e.g.*, attribution to directors) while permitting corporations to allocate differently so long as they "provide information to the recipient committee as to how the contribution is to be attributed." 11 C.F.R. §110.1(g)(5) (LLC rule); see *id.* §110.1(e) (partnership rule). Bureaucratic indecision cannot justify abridging First Amendment freedoms.

II. This Court Should Determine Whether Campaign Contributions Merit Full First Amendment Protection

The government's defense of §441b hinges on its view that, because contribution restrictions are not subject to strict scrutiny under *Buckley* v. *Valeo*, 424 U.S. 1 (1976), even a categorical ban for disfavored entities may be sustained on the flimsiest of showings. See Br. in Opp. 12 (listing *Beaumont*'s "central premises," all of which relate to lesser scrutiny for contribution restrictions); *id.* at 10-11, 13, 15, 18-19 (invoking lesser standard). Even under *Buckley*, however, a contribution restriction must "avoid unnecessary abridgement of First Amendment freedoms," and is invalid where "more tailored approaches" prove it "sweeps too broadly." *McConnell*, 540 U.S. at 232. If *Buckley*'s two-tiered scrutiny of campaign-finance restrictions permits entire categories of speakers to be silenced on conjecture alone, that underscores the need for reconsideration. Pet. 30-35.

That *Buckley* dates to 1976, Br. in Opp. 18, is no defense. "'This Court has not hesitated to overrule decisions offensive to the First Amendment.'" *Citizens United*, 130 S. Ct. at 912. Indeed, in overruling *Austin*, this Court rejected reasoning that "trace[d] back to the *Automobile Workers* Court's flawed historical account of campaign finance laws." *Ibid.* (citing *United States* v. *Auto. Workers*, 352 U.S. 567 (1957)). *Buckley*'s innovation of two-tiered scrutiny is two decades younger and no less flawed. It cannot be justified on the ground that "contribution limits primarily affect associational rights." Br. in Opp. 18. This Court's recent precedents apply strict scrutiny to both associational and speech rights. See Pet. 32-33. The government therefore retreats to the position that strict scrutiny *can* apply to associational rights—just not here, because contribution restrictions leave open "other means of association." Br. in Opp. 19. But the only support the government offers is *Buckley* itself. *Ibid.* And that rationale has been overtaken by other precedent. This Court now "consistently refuse[s] to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *California Democratic Party* v. *Jones*, 530 U.S. 567, 581 (2000).

III. IMMEDIATE REVIEW IS WARRANTED

A. The government—having appealed before trial—now asserts (at 9) that review should be deferred because the case is interlocutory. But this "Court has unquestioned jurisdiction to review interlocutory judgments of federal courts." E. Gressman *et al.*, *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007). As the government itself has urged, "this Court frequently grants review of interlocutory court of appeals decisions that would qualify for review except for their non-final posture." Pet.

Reply in *United States* v. *Philip Morris USA, Inc.*, No. 05-92, at 7. Review is particularly appropriate where the decision below "definitively addressed" a "purely legal question" and there is no indication its holding "might be subject to revision." Pet. Reply in *Norton* v. *S. Utah Wilderness Alliance*, No. 03-101, at 2. That is the case here. The Fourth Circuit has held that it *cannot* overturn the corporate contribution ban because only this Court can reconsider *Beaumont*. Pet. App. 5a-9a & n.2.

The government identifies nothing that makes this case an "unsuitable vehicle," Br. in Opp. 8, and nowhere suggests that further developments might illuminate the issues presented. The government speculates (at 9) that petitioners could (if convicted) file a second petition that also raises other claims, but nowhere explains why cluttering the First Amendment issues with unrelated claims would provide a better vehicle. This Court will grant review where criminal charges are dismissed by the trial court but reinstated on the government's interlocutory appeal, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 28-29 (1997); *Solorio* v. *United States*, 483 U.S. 435, 437-438 (1987), when immediate review will resolve an "important and clear-cut issue of law that is fundamental to the further conduct of the case," Gressman, *supra*, at 281. There is no reason to force defendants to endure a lengthy and expensive criminal trial for violating a ban on First Amendment activity that rests on grounds this Court has disavowed. Nor is there good reason for allowing that ban to continue burdening the First Amendment rights of countless others.

B. The government observes (at 19-20) that there is no circuit conflict. As the government has urged elsewhere, however, no conflict is necessary if the federal issue is sufficiently important, Sup. Ct. R. 10(c), especially

where "no conflict is likely ever to develop," Pet. Reply in *United States* v. *Bormes*, No. 11-192, at 3, cert. granted, 132 S. Ct. 1088, vacated, 133 S. Ct. 12 (2012). The vitality of § 441b's ban after *Citizens United* is plainly important; it implicates core political activity. And no conflict is likely to develop. That is not because lower courts uniformly consider *Beaumont* "good law," Br. in Opp. 19—they do not. See *Swanson*, 692 F.3d at 879 n.12 (*Beaumont*'s "precedential value [is] on shaky ground"). It is because every court to have considered the issue after *Citizens United* has concluded that, no matter how moth-eaten *Beaumont*'s rationale has become, "the *Agostini* principle" precludes lower courts from reconsidering it. Pet. App. 4a-5a (citing *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)); see Pet. 29-30. As the government argued below, "[o]nly [this] Court [m]ay [r]evisit" § 441b's constitutionality. Gov't C.A. Reply 14.[5]

The time for revisiting § 441b is now. *Citizens United* reshaped this Court's "understanding of the criteria used to assess whether" campaign-finance restrictions are justified by legitimate government interests, *Agostini*, 521 U.S. at 223, leaving *Beaumont*'s "conceptual foundations gravely weakened," *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997), if not eviscerated entirely. While the government offers an empty plea for "stability," Br. in Opp. 20, "[n]o serious reliance interests are at stake" where "parties have been prevented from acting—corporations have been banned from" a form of political participation. *Citizens United*, 130 S. Ct. at 913. That "[l]egislatures may

[5] Indeed, this Court recently granted certiorari absent a circuit split in *Alleyne* v. *United States*, 133 S. Ct. 420 (2012), which asks the Court to reconsider *Harris* v. *United States*, 536 U.S. 545 (2002), in light of more recent Sixth Amendment decisions. See Pet. in No. 11-9335, at 7-12. For similar reasons, review is warranted here.

have enacted bans * * * believing that those bans were constitutional * * * is not a compelling interest for *stare decisis*." *Ibid.* If the government wants to criminally prosecute citizens for core First Amendment activity, it should stand ready to justify that action under a faithful reading of this Court's current precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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