No. 09-50296

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PIERCE O'DONNELL,

Defendant-Appellee.

GOVERNMENT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GEORGE S. CARDONA
Acting United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

ERIK M. SILBER
Assistant United States Attorney
Criminal Appeals Section

1200 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-2231
Facsimile: (213) 894-8513
E-mail: Erik.Silber@usdoj.gov

Attorneys for Plaintiff-Appellant
UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

PAGE

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

PAGE(s)

CASES

TABLE OF AUTHORITIES (continued)

PAGE(s)

CASES

TABLE OF AUTHORITIES (continued)

PAGE(s)

CASES

TABLE OF AUTHORITIES (continued)

PAGE(s)

CASES

TABLE OF AUTHORITIES (continued)

PAGE(s)

CASES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

PAGE(s)

STATUTES (ENACTED)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

PAGE(s)

STATUTES (CODIFIED)

Current Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

PAGE(s)

TABLE OF AUTHORITIES (continued)

No. 09-50296

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PIERCE O'DONNELL,

Defendant-Appellee.

GOVERNMENT'S OPENING BRIEF

I

ISSUE PRESENTED

Whether the district court erred by holding that the prohibition that "[n]o person shall make a contribution in the name of another person," 2 U.S.C. § 441f, did not apply where defendant solicited others to purportedly contribute in their names to a presidential candidate, with defendant actually providing them the money (by reimbursement or advancement), resulting in defendant secretly contributing $26,000 in the names of 13 other people.

II

STATEMENT OF THE CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

On July 24, 2008, the grand jury charged defendant Pierce O'Donnell ("defendant") in a three-count indictment. (CR 1).[1] Defendant moved to dismiss. (CR 20). After briefing and argument (CR 30-31, 53, 56, 60), on June 8, 2009, the district court (the Honorable S. James Otero) dismissed the two counts involving 2 U.S.C. § 441f (CR 61). The government appeals, arguing that the plain wording of Section 441f, the purpose of the Federal Election Campaign Act ("FECA"), a Federal Election Commission ("FEC") regulation, and precedent demonstrate that Section 441f prohibits defendant's conduct.

B. JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 18 U.S.C. § 3731. The government filed a timely notice of appeal on June 15, 2009. (CR 70). Defendant is not in custody.

C. STATEMENT OF FACTS

1. Indictment

The indictment alleges that defendant and a co-conspirator solicited others to purportedly contribute to a presidential

[1] "CR" refers to the clerk's record and is followed by the docket number. "GER" refers to the government's excerpts of record and is followed by the page number.

candidate, with defendant advancing or reimbursing them the money. (GER 15-18). From March 27-31, 2003, at defendant's and his co-conspirator's direction, 13 people purported to contribute $2,000 in their names with defendant actually providing the $26,000. (GER 18). Defendant and his co-conspirator collected and provided the money to the candidate.[2] (GER 16).

Based on this conduct, the grand jury charged defendant with conspiring to contribute in the names of others, 18 U.S.C. § 371 (count one); contributing in the names of others, 2 U.S.C. § 441f, 18 U.S.C. § 2(b), and doing so knowingly, willfully, and in amounts exceeding $10,000, 2 U.S.C. § 437g(d) (felony) (count two); and causing the candidate's committee to make false statements to the FEC by reporting others as the source of contributions, 18 U.S.C. §§ 1001, 2(b) (count three). (GER 15-

---

[2] A motion to dismiss is generally decided on the facts alleged in the indictment, presuming those facts are true. United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996). Although such facts are sufficient here, one of the motions in limine provides context by explaining the evidence the government expected to prove at trial. (GER 128-40). Defendant is an attorney and was a named-partner in O'Donnell & Shaeffer. (GER 131). He agreed to raise $50,000 by March 31, 2003, for then-Senator John Edwards' presidential campaign. (GER 131, 158). Defendant personally contributed the maximum amount ($2,000) and attempted to raise the rest legitimately but was unable to do so. (Id.). Shortly before the deadline, to make up the difference, defendant asked his secretary to find people who submit contributions in their names if defendant reimbursed or advanced them the money. (GER 131). Defendant similarly personally solicited two sisters and a brother-in-law, promising to reimburse them. (GER 132). From March 27-31, 13 people purported to contribute $2,000 in their names with defendant actually providing the $26,000. (GER 18, 132-33).

19).

2. Motion to Dismiss

Defendant moved to dismiss counts one and two,[3] arguing 2 U.S.C. § 441f did not apply. (GER 20-83). That section states:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

According to defendant, Section 441f "only prohibits a person from making a contribution and providing a false name; it does not proscribe reimbursing a contribution made by another" using a "true name." (GER 33). Defendant noted that Congress used "indirect" in other provisions (2 U.S.C. §§ 441a, 441b, 441c, 441e), but not Section 441f, and highlighted Section 441a(a)(8), which governs, in part, individual contribution limits:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

Defendant argued interpreting Section 441f to apply here would

---

[3] Defendant also moved to dismiss count three, arguing, in part, that the statements were true. (GER 30). The court disagreed (GER 8-11) but declined to stay trial pending this appeal, so the government obtained dismissal of that count without prejudice (CR 84).

render the term "conduit" in Section 441a(a)(8) superfluous. (GER 44-45). Defendant also relied on legislative history (not about Section 441f) and the rule of lenity. (GER 45-50).[4]

In response, the government argued that Section 441f was not limited to contributions in a false name: "While such conduct would obviously constitute a violation of § 441f, defendant's interpretation is too narrow" (GER 91) and "contradicts the broad language of the statute" (GER 99).[5] The government argued that such a limit was inconsistent with Congress increasing Section 441f's penalties in 2002 and calling the new provision, "[i]ncrease in penalties imposed for violations of conduit contribution ban." (GER 92 n.3). The government also noted that this Court had recognized that Section 441f applied to conduit contributions, United States v. Goland, 903 F.2d 1247 (9th Cir.

---

[4] Defendant also suggested that Section 441f was vague and violated the First Amendment. (GER 49-53). The court did not address these issues in its order, although it stated at argument that precedent barred the First Amendment claim. (GER 144). The court also did not certify these issues for initial hearing en banc. 2 U.S.C. § 437h.

[5] The government's wording in its opposition could have been more precise as, at times, the government described defendant as "essentially" and "basically" contributing in others people's names. (GER 93, 98-99). Defendant pounced on this wording, arguing a statute prohibits only "conduct which it expressly prohibits, and not other conduct that is 'essentially' or 'basically' like that which is prohibited." (GER 120). At argument, the government clarified "[i]t isn't essentially doing it or basically doing it . . . but it's doing it." (GER 175). Because of the government's clarification and because, regardless, this Court reviews the issue here de novo, the government's imprecise wording is irrelevant.

1990), as had other circuits, Mariani v. United States, 212 F.3d 761 (3d Cir. 2000) (en banc); United States v. Sun-Diamond Growers, 138 F.3d 961 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999), and the FEC had a regulation, 11 C.F.R. § 110.4(b)(2)(i), and advisory opinions reaching the same conclusion. (GER 91-92, 96).

In response to defendant's contextual arguments, the government noted that Sections 441a(a)(8) and 441f had different purposes, meaning "the absence of the term 'conduit' or the phrase 'indirectly or directly'" did not prevent "§ 441f from applying." (GER 95). The government finally argued the lack of grievous ambiguity meant lenity did not apply. (GER 97-99).

In his reply, defendant noted that Section 441f "specifically does not include 'indirect' contributions" and reiterated his previous contextual arguments. (GER 120, 123-24). Defendant also asserted that the statements in the cases cited were dicta, the FEC was entitled to no deference in a criminal case and, regardless, the FEC's interpretation did not trump the wording of the statute. (GER 121-22 & n.6).

3. Hearing

At argument, the district court began by citing Goland and the rationale for FECA discussed there, namely, "to provide the electorate with information as to where campaign money comes from to aid voters in evaluating those who seek office and to deter

corruption." (GER 146). The court asked defendant: "[D]oesn't it logically follow that 441[f] would include both direct and indirect contributions?" (Id.). The court further stated, if a purpose of FECA "is to provide the electorate with information as to where campaign money comes from, a conduit contribution does not." (GER 149). Defendant did not disagree with Goland's statement about FECA's rationale and agreed that Section 441f's purpose was "so that the public will know where money is coming from when someone makes a contribution." (GER 147-48). Defendant argued, however, that Congress in Section 441a(a)(8) chose not to ban conduit contributions and Congress' rationale in enacting Sections 441a(a)(8) and 441f "separately [was] to allow conduit contributions" as long as they did not exceed the contribution limit of $2,000 and the conduit provided the name of the source of the money. (GER 148-50). Defendant also reiterated that Goland's statement that Section 441f applied to conduit contributions was dictum. (GER 151-52).

The government began by noting that, in 1971, Congress chose not to impose individual contribution limits but, instead, sought disclosure of the source of campaign funds. (GER 155-57). "By using the conduits, . . . [defendant] violated what the act was trying to prohibit back then, which was letting the electorate know who is behind somebody's candidacy." (GER 155). In addition to Section 441f "logically encompass[ing]" defendant's

conduct, the government emphasized that "clearly the wording in the statute expressly encompasse[d]" it. (GER 158). The government also noted that this Court in Goland "didn't seem to have a problem recognizing" that Section 441f prohibited this conduct and other courts had done the "same thing." (GER 158-59). The government finally highlighted Congress' 2002 increase in penalties for Section 441f, entitled: "Increase in penalties for violation of conduit contribution ban." (GER 159).

The court then questioned whether applying Section 441f here conflicted with Section 441a(a)(8), which "seemingly allows for indirect contributions." (GER 161). The government noted that Congress passed Section 441a(a)(8) after Section 441f,[6] said "I do see the ambiguity that the Court's pointing to," but noted that Sections 441a(a)(8) and 441f had different purposes and were not irreconcilable. (GER 161-64; see also GER 164-66 (similar as to "indirectly" in § 441e)). The court asked why other provisions mentioned "indirect" and "conduit" if Section 441f prohibited such conduct; the government responded, "I don't have an answer," but emphasized that Section 441f "has very clear, simple language" prohibiting defendant's conduct. (GER 166-67). The government also noted that the provisions were passed at different times, and Section 441f focused on identity whereas the

[6] Congress adopted the predecessor to Section 441f in 1971, and the predecessor to Section 441a(a)(8) in 1974.

later provisions had "more precise" contribution wording. (GER 166-69). The government also argued that lenity did not apply.[7] (GER 169-70).

4. Order

Shortly after argument, the court dismissed counts one and two of the indictment, relying on statutory context, legislative history, and lenity. (GER 1-7). First, the court recognized that other provisions in FECA used terms such as "indirect" and "conduit," and held: (1) "if Congress intended § 441f to apply to indirect contributions, or contributions made through a conduit or intermediary, it would have included explicit language, as it did in other sections;" (2) if "§ 441f covered 'conduit' and 'indirect' contributions, there would be no need for Congress to have explicitly included those terms in other sections" and, thus, the government's interpretation would render those terms superfluous; and (3) "if § 441f covered indirect contributions made through a conduit, that would mean such contributions were never allowed[;] [h]owever, § 441a allows for indirect and

---

[7] During argument, the government stated there was no criminal liability under Section 441f until a person contributed $2,000. (GER 164). After argument, the government noted that, irrespective of criminal thresholds, "making a conduit contribution is always prohibited," regardless of amount. (GER 182-83). The government also analogized Sections 441a and 441f to the drug and tax codes, noting the tax code requires including drug sales in income, but such sales are still prohibited by Title 21. (Id.). The court declined to rely on the analogy because those provisions were in different Acts. (GER 4).

conduit contributions," and, thus, "reading § 441f to prohibit such contributions is irreconcilable with § 441a's express authorization of them." (GER 4). Accordingly, read in context, "§ 441f is unambiguous and does not prohibit soliciting and reimbursing contributions." (GER 5).

Second, were there ambiguity, the legislative history suggested "Congress did not intend § 441f to cover indirect contributions." (Id.). The court cited: (1) floor debate in the House about whether a corporation reimbursing an employee would violate a prohibition against corporations contributing; Representative Orval Hansen stated it would "as an indirect payment," and Representative Wayne Hays agreed, 117 Cong. Rec. 43,381 (1971), which the court held showed "Congress used the term 'indirect' to cover reimbursement;" and (2) floor debate in the Senate (over an amendment to limit money candidates could spend from their own wealth), during which Senator Hugh Scott mentioned a "loophole" because a rich candidate could give friends money to contribute back, 117 Cong. Rec. 29,295 (1971); according to the court, "[i]f § 441f prohibited using one's friends as conduits," "there would be no 'loophole'." (Id.).

Third, were there ambiguity after applying statutory-construction tools, the court held the rule of lenity required interpreting Section 441f in defendant's favor. (GER 5-6).

Finally, the court rejected the government's arguments.

(GER 6-7). The court dismissed statements in Goland and Mariani as dicta and noted the FEC's regulation and advisory opinions "may reflect the spirit of FECA," but declined to defer to them because "they do not accord with the plain language of § 441f read in conjunction" with context and legislative history. (Id.).

III

HISTORY OF FECA

FECA is primarily the product of five Acts (1971, 1974, 1976, 1979, and 2002). Before FECA, Congress had passed disclosure laws, 2 U.S.C. §§ 241-256 (1970), and contribution limits, see 18 U.S.C. §§ 608-613 (1970). McConnell v. FEC, 540 U.S. 93, 115-17 (2003) (history). But the requirements in these laws were more illusory than real. S. Rep. No. 92-229, at 114-15 (1971) (Sen. Prouty, Cooper, and Scott) (previous Acts were probably "worse than having no law;" they were "full of loopholes" and a "sham"); Buckley v. Valeo, 424 U.S. 1, 62 (1976) (per curiam) (disclosure provisions "widely circumvented").

Modern campaign finance began with the 1971 FECA, Pub. Law 92-225, 86 Stat. 3-20 (1972). Rather than limiting individual contributions, that Act focused on disclosure so the electorate could make an informed decision when voting. S. Rep. No. 92-229, at 122 (committee "rejected placing a limitation on individual contributions," in part, because "[f]ull disclosure makes such a

limitation unnecessary;"); S. Rep. No. 93-689, at 2 (1974) ("The Act of 1971 was predicated upon the principle of public disclosure"). The 1971 Act, thus, eliminated the previous individual contribution limits in 18 U.S.C. § 608, 86 Stat. 9-10, and repealed the previous disclosure law in its entirety, 1971 FECA § 405, replacing it with Title III, entitled "Disclosure of Federal Campaign Funds," 86 Stat. 11.[8] That Title required treasurers to: (1) "keep a detailed and exact account of . . . all contributions made" and "the full name and mailing address (occupation and the principal place of business, if any) of every person making a contribution in excess of $10, and the date and amount thereof," 1971 FECA § 302(c)(1),(2), codified at 2 U.S.C. §§ 432(c)(1),(2) (1972); and (2) file reports "disclos[ing]" the "full name and mailing address (occupation and the principal place of business, if any) of each person who has made . . . contributions . . . within the calendar year" aggregating "in excess of $100, together with the amount and date," id. § 304(b)(2), codified at 2 U.S.C. § 434(b)(2) (1972). That Title further included the provision at issue here: "No person shall make a contribution in the name of another person, and no person

[8] Title I addressed communications. 86 Stat. 3-8. Title II amended pre-FECA campaign-contribution statutes, including bars/limits on promises of employment (18 U.S.C. § 600), expenditures (18 U.S.C. § 608), contributions by corporations/unions/banks (18 U.S.C. § 610) and government contractors (18 U.S.C. § 611). 86 Stat. 8-11. Title IV had general provisions. 86 Stat. 19-20.

shall knowingly accept a contribution made by one person in the name of another person." Id. § 310, codified at 2 U.S.C. § 440 (1972). A violation of the Title III disclosure provisions was a misdemeanor. Id. § 311, codified at 2 U.S.C. § 441 (1972).

The 1971 Act took effect in April 1972, id. § 406, shortly before the 1972 election.[9] In 1974, "[i]n the aftermath of Watergate, Congress overhauled" the 1971 Act, Pub. Law 93-443, 88 Stat. 1263-1304 (1974). Goland, 903 F.2d at 1249. "The 1974 amendments set various limits on the size of individuals' contributions to federal candidates, of expenditures by the candidates themselves, and of independent expenditures," and created the FEC "to oversee and enforce the Act." Id.

As part of the 1974 Act, Section 310 of the 1971 Act was moved from 2 U.S.C. § 440 to 18 U.S.C. § 614. 1974 FECA §§ 101(f)(1),(4). Congress also amended the provision, adding a prohibition on a person "knowingly permit[ing] his name to be used to effect" a contribution in the name of another, and giving Section 614 its own penalty provision. Id. § 101(f)(1).

Additionally, Congress amended 18 U.S.C. § 608 -- which pre-FECA had provided contribution limits -- once again limiting contributions for individuals and adding a new subsection:

---

[9] Before the election, the General Accounting Office adopted regulations, including § 19.1, which stated, in part: "[n]o person shall make a contribution (as defined in Part 11 . . .) in the name of another person or in any other name than his own."

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

Id. § 101(a), codified at 18 U.S.C. § 608(b)(6) (1974).

The constitutionality of this legislation "was immediately challenged," Goland, 903 F.2d at 1249, and, in Buckley, the Court upheld the contribution limits and disclosure requirements, but invalidated expenditure limits (and appointment of FEC members), 424 U.S. at 23-84, 118-44; Goland, 903 F.2d at 1249-51. After Buckley, Congress amended FECA, Pub. Law 94-283, 90 Stat. 475-502 (1976), re-enacting 18 U.S.C. § 608(b)(6), which was moved to 2 U.S.C. § 441a(a)(8), and 18 U.S.C. § 614, which was moved to 2 U.S.C. § 441f. 1976 FECA §§ 320, 325. Congress also created a new, unified penalty provision, id. § 329, codified at 2 U.S.C. § 441(j) (1976), and modified appointment to the FEC to comply with Buckley, id. § 101(a)(1).

The FEC then proposed its first regulations, including examples of "contributions in the name of another" under Section 441f: (1) giving money "all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money;" and (2) "making a contribution" and "attributing as the source" "another person when in fact the

contributor is the source," 11 C.F.R. §§ 110.4(b)(2)(i),(ii). As required, 2 U.S.C. § 438(c) (1976), the FEC submitted the proposed regulations to the House, which did not disapprove, allowing them to take effect in 1977.

Two years later, in 1979, Congress amended FECA, redesignating the enacted FECA code sections for 2 U.S.C. §§ 441a and 441f, changing the former to § 315 and latter to § 320. Pub. Law 96-187, 93 Stat. 1354 (1980). Congress also moved the penalty provision. Id. § 309, codified at 2 U.S.C. § 437g(d).

After the 1996 election, Congress itself investigated so-called conduit contributions (straw-donor contributions). Investigation of Political Fundraising Improprieties and Possible Violations of Law, H.R. Rep. No. 105-829 (1998); Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (1998). Thereafter, in 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"). In response to abuses in the 1996 election, Congress increased the penalties for Section 441f. See 147 Cong. Rec. 3,187-3,188 (2001) (Sen. Bond) (noting it was a misdemeanor to make "an illegal contribution through a conduit (2 U.S.C. 441f)," detailing problems in the 1996 election, and noting "[m]y amendment would make it a felony to knowingly make conduit contributions'"). Congress entitled that new provision, 2 U.S.C. § 437g(d)(1)(D), "[i]ncrease in penalties imposed for violations

of conduit contribution ban," Pub. Law 107-155, 116 Stat. 108, § 315 (2002); see also H.R. Rep. No. 107-131, at 10 (2001).

Defendant was charged with violating the wording of Section 441f as originally passed in 1971 under the felony-penalty provision enacted in 2002.

IV

SUMMARY OF ARGUMENT

Section 441f provides: "No person shall make a contribution in the name of another person." Defendant violated the plain wording of that provision by contributing $26,000 to a presidential candidate in the names of 13 other people. The district court nevertheless read a nontextual limitation into Section 441f, holding it applied only to contributions in a false name. Had Congress intended such a limit, however, it would have expressly stated so. Nor did the court's observation that Section 441f failed to use the words "conduit" or "indirect" support reading a limit into that provision. Section 441f focuses on the name of the contributor, not manner of contribution, and Congress' choice simply to provide "[n]o person shall make a contribution in the name of another person" demonstrates breadth, not ambiguity or limitation.

When Congress passed FECA in 1971, the primary purpose was disclosure. Applying the plain wording of Section 441f to prohibit contributions in straw donors' names is consistent with

that purpose whereas the court's limit is not. Moreover, when Congress added contribution limits in 1974, Section 441f served the added purpose of helping to detect violations of those limits. Accepting defendant's argument that he had no duty to use his own name when contributing frustrates that purpose.

The FEC has recognized what Section 441f's wording and FECA's purpose demonstrate, namely, that Section 441f applies here. 11 C.F.R. § 110.4(b)(2)(i) (1977). Indeed, the FEC submitted its proposed regulation so indicating to the House, 2 U.S.C. § 438(c) (1976), which did not disapprove. And, in 1979 and 2002, Congress amended FECA but did not modify Section 441f to reject this regulation. To the contrary, in 2002, Congress confirmed its agreement when adopting a new penalty provision for Section 441f, entitled "[i]ncrease in penalties imposed for violations of conduit contribution ban." 116 Stat. 108.

Like the FEC, the Supreme Court, this Court, and other courts have recognized that Section 441f applies here, see, e.g., McConnell, 540 U.S. at 231-32; Goland, 903 F.2d at 1251, and the district court cited no decision to the contrary in the nearly 40 years since Congress passed FECA.

The district court nevertheless relied on statutory context, particularly Section 441a(a)(8), to hold that Section 441f did not apply. First, the court noted that Section 441a(a)(8) includes the terms "conduit" and "indirectly," but Section 441f

does not. The two provisions, however, were passed in different years, are worded differently, and have different focuses. Unlike Section 441a(a)(8), Section 441f does not focus on how the contribution was made but, instead, solely on the name of the contributor. That other provisions use different terms in different contexts does not support reading nontextual limits into Section 441f.

Second, the court held that reading Section 441f to "prohibit" indirect/conduit contributions "is irreconcilable with § 441a's express authorization" and would render the words "conduit" and "indirectly" in that Section superfluous. (GER 4). But defendant did not violate Section 441f by contributing indirectly or through a conduit. He, instead, violated Section 441f solely by contributing in the names of conduits (straw donors). There is, thus, no conflict nor are the words "conduit" or "indirectly" in Section 441a(a)(8) rendered superfluous by applying Section 441f here.

The district court also emphasized two congressional floor discussions involving amendments to non-disclosure provisions of the 1971 Act. These statements do not support the weight placed on them. Instead, the legislative history demonstrates that Congress intended Section 441f to apply here.

Finally, the court held that the rule of lenity applied if there were ambiguity. But (1) that rule controls only where

there is grievous ambiguity, which is absent here; and (2) deference to an agency's regulation applies before lenity, Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001), meaning that the court erred by not deferring to the FEC if there were ambiguity.

V

ARGUMENT

A. STANDARD OF REVIEW

This Court reviews statutory interpretation de novo. United States v. Fuller, 531 F.3d 1020, 1024 (9th Cir. 2008), cert. denied, 129 S. Ct. 1603 (2009).

B. SECTION 441f PROHIBITS DEFENDANT'S CONDUCT

1. Defendant Violated the Plain Wording of Section 441f

a. Section 441f prohibits defendant from contributing $26,000 in the names of 13 other people

Statutory interpretation begins with the wording of the provision at issue and, thus, the district court erred by not focusing initially on the wording of Section 441f itself. New York State Conference v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) ("[W]e begin as we do in any exercise of statutory construction with the text of the provision in question."). Section 441f provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Defendant violated the plain wording of this provision -- and its prohibition that "[n]o person shall make a contribution in the name of another person" -- by contributing $26,000 to a presidential candidate in the names of 13 other people. FEC v. Weinsten, 462 F. Supp. 243, 250 (S.D.N.Y. 1978) (rejecting vagueness challenge to similar contributions; noting the "simple words" of Section 441f and finding "no ambiguity in the statutory language").

First, defendant made a "contribution," which is defined as "any gift . . . of money . . . made by any person for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i). As alleged in the indictment, defendant gave $26,000 for the purpose of electing a presidential candidate. (GER 15-18). That defendant gave this money by soliciting others and advancing or reimbursing them the money has no effect on whether he made a "contribution" by giving "any gift . . . of money" ($26,000) "for the purpose of influencing" an election. The definition of "contribution" focuses on what is a "contribution," not how it is made.[10]

Second, defendant made the contributions "in the name of another person," specifically in the names of 13 other people.

---

[10] For example, if defendant had given a friend a $1 bill to forward to a candidate, it would not matter whether that friend gave the candidate that specific $1 bill or a different $1 bill from her wallet. Either way, defendant would have contributed $1.

It is undisputed that neither defendant nor anyone else submitted defendant's name to the candidate with these contributions. Contrary to the district court's suggestion, it is insignificant that defendant advanced or reimbursed money to the 13 straw donors using his own name. (GER 6-7). The names at issue in Section 441f are those attached to the "contributions," i.e., the names given to the candidate.

Defendant, thus, contributed $26,000 in 13 other people's names and, in doing so, violated Section 441f's straightforward bar that "[n]o person shall make a contribution in the name of another person."[11] (This mirrors the equally straightforward Section 441f violation committed by the 13 straw donors who "knowingly permit[ting] [their] name[s] to be used to effect such a contribution.")

b. Had Congress intended to limit Section 441f only to contributions in a false name, it would have done so expressly

The district court apparently limited Section 441f to prohibiting only contributions made in a false name. (GER 3-4). Section 441f, however, broadly states that "[n]o person shall

[11] What defendant did is often called a conduit contribution, but is more specifically a straw-donor contribution. That is so because a "conduit" is simply a manner of transferring money and does not necessarily involve using the conduit's name or exceeding the contribution limit. (Indeed, a within-limit conduit contribution made in the name of the source of the money does not generally violate FECA.) Here, however, defendant recruited straw donors so he could use their names and contribution limits (as he had already hit his own limit).

make a contribution in the name of another person," and does not qualify or limit this prohibition based on the manner in which a person contributes in the name of another. Had Congress intended to limit Section 441f -- as the district court believed -- Congress would have expressly stated that limit in Section 441f. Brogan v. United States, 522 U.S. 398, 408 (1998) ("[c]ourts may not create their own limitations on legislation;" declining to read "exculpatory no" exception into 18 U.S.C. § 1001); Smith v. United States, 508 U.S. 223, 229 (1993) ("Had Congress intended the narrow construction petitioner urges, it could have so indicated."); Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (statute providing liability for denying rights "secured by the Constitution and laws" not limited "to some subset of laws," "[g]iven that Congress attached no modifiers to the phrase"); Lewis v. United States, 445 U.S. 55, 60 (1980) (statute applied to any person who "has been convicted by a court;" "no modifier is present, and nothing suggests any restriction on the scope of the term 'convicted'"); United States v. 103 Elec. Gambling Devices, 223 F.3d 1091, 1097-98 (9th Cir. 2000).

Nor is the limitation that the court read into Section 441f a logical one. There is no functional difference between contributing using a false name and contributing using the name of a straw donor. In each circumstance, the name provided to the campaign is not that of the actual source of the contribution

and, in each circumstance, the public is prevented from knowing the true source of campaign funds in violation of an undisputed purpose of the 1971 Act. (GER 148 (defense counsel: purpose of Section 441f is "so that the public will know where the money is coming from when someone makes a contribution"); Wilderness Society v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) ("purpose of a statute may also provide guidance in determining the plain meaning of its provisions"), as amended, 360 F.3d 1374 (2004)).[12] There is, thus, no reason to expect that Congress would have included contributions in false names but excluded those in the names of straw donors when it simply wrote: "No person shall make a contribution in the name of another person." Had Congress intended such an artificial limitation in Section 441f, it would have stated so.

---

[12] Congress did not limit Section 441f to made-up names. In 1974, Congress amended the provision to prohibit a person from "knowingly permitt[ing] his name to be used to effect" a contribution in the name of another. 1974 FECA § 101(f)(1). Section 441f, thus, contemplates that the contributor would use a real person's name with that person's knowledge and, indeed, that the two would conspire together to violate Section 441f. Moreover, in 1974, Congress also added a bar against cash contributions exceeding $100 (now § 441g). Id. That provision makes it difficult to violate Section 441f without one person serving as a conduit for another because, to pay for a contribution in a false name, a contributor generally would: (1) be limited to small cash contributions ($100 or less); or (2) need to create bank or credit accounts in the false name thereby committing serious additional crimes. That the court's interpretation limited Section 441f to the type of harm less likely to occur highlights that the limitation is misplaced.

Finally, the court's limitation renders Section 441f avoidable and essentially superfluous. Beck v. Prupis, 529 U.S. 494, 506 (2000) ("statute should not be construed so as to render any provision of that statute meaningless or superfluous"). No rational person would contribute in a false name (risking prosecution for violating Section 441f) when he could hide his identity as the source of campaign funds by contributing in the name of a straw donor (and, thus, not risk prosecution for violating Section 441f). Comment, Undisclosed Earmarking: Violation of the Federal Election Campaign Act of 1971, 10 Harv. J. on Legis. 175, 185 (1973) (if straw-donor contributions permitted, then-2 U.S.C. § 440 is "completely ineffective, since an individual could evade its ban merely by getting a friend to make his contribution").

c. Given the broad and unambiguous wording of Section 441f, the absence of the words "conduit" or "indirect" is not meaningful

The district court limited Section 441f because that Section does not use the words "conduit" or "indirect." (GER 4). Congress, however, always has a variety of wording choices available when drafting statutes. The question is not whether Congress could have used different words, but whether the wording Congress actually chose embraces the conduct at issue; here, it does. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989) (court's "task is to apply the text, not to

improve" it); United States v. Demerritt, 196 F.3d 138, 143 (2d Cir. 1999) (court's role "to apply the provision as written, not as we would write it"); Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States, 179 F.3d 630, 635 (9th Cir. 1999) ("we are bound by the words that Congress actually used").

Moreover, although Congress could have listed the manners of contributing that violated Section 441f, there is no requirement that Congress do so. Ali v. Federal Bureau of Prisons, 128 S. Ct. 831, 837 (2008) ("We have no reason to demand that Congress write less economically and more repetitiously."); Royal Foods Co., Inc. v. RJR Holdings, Inc., 252 F.3d 1102, 1107 n.6 (9th Cir. 2001) (addressing whether restaurants were "dealers" of perishable produce and rejecting argument that term "dealer" was "ambiguous because it does not explicitly include restaurants;" the section "does not enumerate any entities that fall under its definition of dealer. Merely because a statute's plain language does not specify particular entities that fall under its definition, does not mean that the statute is ambiguous as to all those who do fall under it.") (emphasis and citation omitted). That is particularly true here given Congress' focus in Section 441f on the name of the contributor, not manner of contribution.

Regardless, Congress' choice to simply provide that "[n]o person shall make a contribution in the name of another person" demonstrates breadth, not ambiguity or limitation. United States

v. Monsanto, 491 U.S. 600, 609 (1989) ("The fact that the forfeiture provision reaches assets that could be used to pay attorney's fees, even though it contains no express provisions to this effect, does not demonstrate ambiguity in the statute: It demonstrates breadth.") (citation and internal quotations omitted); Brogan, 522 U.S. at 406 (rejecting that "criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions"); Royal Foods, 252 F.3d at 1106 (When Congress "intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort.") (citation and internal quotations omitted). Had Congress intended to limit this broad wording, it would have done so expressly.

The district court's focus on the absence of the word "conduit" was also misplaced because it failed to look to the penalty provision for Section 441f, 2 U.S.C. § 437g(d)(1)(D). Congress passed that provision in 2002 and entitled it "[i]ncrease in penalties imposed for violations of conduit contribution ban." 116 Stat. 108. Although a heading cannot "substitute for the operative text," Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2336 (2008), here it highlights what the wording of Section 441f itself demonstrates, namely, that Section 441f applies to so-called

conduit contributions,[13] Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (citation and internal quotations omitted).

Nor is the absence of the word "indirect" significant. Although defendant indirectly contributed money (through straw donors), he directly used their names (which he and his co-conspirator submitted to the candidate (GER 16)). Moreover, the absence of the word "indirect" does not support limiting Section 441f to contributions in a false name, as the district court did, because a person can contribute either directly or indirectly in a false name. For example, if defendant had given a candidate a $100 bill in a made-up name, defendant would have directly contributed in a false name. If, instead, he had given a friend a $100 bill to forward to the candidate in the same made-up name, defendant would still have contributed in a false name, but he would have contributed indirectly. That Section 441f does not use the term "indirect," thus, does not support limiting it only to contributions in a false name. To the contrary, Section 441f

---

[13] Because it is generally more difficult to violate Section 441f by contributing in a false names, the title confirms that the common method of violating Section 441f is through so-called conduit contributions. Indeed, Section 441f is often referred to as the conduit-contribution ban/provision. See Craig C. Donsanto & Nancy L. Simmons, Federal Prosecution of Election Offenses at 166 (7th ed. 2007).

broadly prohibits "mak[ing] a contribution in the name of another person," and defendant violated that provision by contributing $26,000 in 13 other people's names.

2. Applying the Plain Wording of Section 441f to Defendant's Conduct is Consistent with the Structure and Purpose of FECA

Applying the plain wording of Section 441f here is consistent with the structure and purpose of the 1971 Act, where the wording at issue originated. Wilderness Society, 353 F.3d at 1060 ("structure and purpose of a statute may also provide guidance in determining the plain meaning"); Callejas v. McMahon, 750 F.2d 729, 731 (9th Cir. 1985) (duty to "consider time and circumstances surrounding the enactment as well as the object to be accomplished by it").

One of the 1971 Act's primary purposes was disclosure of the sources of campaign funds so voters could make an informed decision. S. Rep. No. 93-689, at 2 (1971 Act "predicated upon the principle of public disclosure").[14] The government's interpretation of then-Section 440 (now-Section 441f) is consistent with that purpose, whereas the district court's

[14] Defendant recognized the disclosure purpose of the 1971 Act (GER 148), but argued Section 441a(a)(8) serves it by requiring conduits to report the source of money, instead of Section 441f requiring actual contributors to use their own names (GER 149-50). As discussed below, however, Congress did not pass the predecessor to Section 441a(a)(8) until 1974 so it could not serve the disclosure function of the 1971 Act. Either now-Section 441f required contributors to use their own names when contributing in 1971 or no FECA provision did.

limitation is not.[15]

Indeed, to accomplish the Act's disclosure purpose in 1971, Congress included -- in the "Disclosure" Title of the Act -- provisions: (1) defining "contribution" to include a "gift . . . of money . . . made for the purpose of influencing the nomination for election . . . to Federal office," 1971 FECA § 301(e); (2) requiring treasurers to "keep a detailed and exact account of" "the full name and mailing address (occupation and the principal place of business, if any) of every person making a contribution in excess of $10, and the date and amount thereof;" Id. § 302(c)(2); (3) requiring treasurers to file reports "disclos[ing]" the "full name and mailing address (occupation and the principal place of business, if any) of each person who has made . . . contributions" "in excess of $100, together with the amount and date of such contributions;" Id. § 304(b)(2); and (4) providing "[n]o person shall make a contribution in the name

---

[15] This case highlights why disclosure was important in 1971. Defendant is a trial lawyer and then-Senator Edwards was attacked for relying heavily on contributions from trial lawyers. http://www.nytimes.com/2007/08/09/us/politics/09edwards.html (last visited Sept. 4, 2009). If members of such an interest group could contribute in straw donors' names, they could hide their role as the source of funds. Buckley, 424 U.S. 67 (source tells voters "interests to which a candidate is most likely to be responsive"); Goland, 903 F.2d at 1261; 118 Cong. Rec. 332-33 (1972) (Rep. Anderson) (so "the public will know who is attempting to influence elections, the disclosure of campaign contributions is required"); 122 Cong. Rec. 3,704 (1976) (Sen. Schweiker) ("The theory of election reform is disclosure, and that means disclosure of what interests are giving contributions.").

of another person," Id. § 310. (Emphasis Added.)

Requiring treasurers to keep records of, and file reports with, the names (and occupations/employers) of contributors would be meaningless if those documents could contain the names (and occupations/employers) of straw donors, rather than the actual contributors. Beck, 529 U.S. at 506 (courts generally avoid rendering provisions "meaningless"); United States v. Hsia, 176 F.3d 517, 524 (D.C. Cir. 1999) ("§ 434(b)(3)'s demand for identification of the 'person . . . who makes a contribution' is not a demand for a report on the person in whose name money is given; it refers to the true source.") (emphasis and alteration in original). To the contrary, the interlocking provisions in Title III demonstrate: (1) the "name" of the "person" making the "contribution" in the recordkeeping/reporting provisions is the name of the person actually providing the money; and (2) by preventing a "person" from making a "contribution" in the "name" of another "person," then-Section 440 enforced that requirement. Mariani v. United States, 80 F. Supp. 2d 352, 368 (M.D. Pa. 1999) ("Section 441f also ensures that proper disclosure of the actual sources of campaign contributions occurs"); Advisory Opinion 1986-41 (Section 441f, in part, "serves to insure disclosure of the source of contributions"). The district court's reading of a nontextual limit into then-Section 440 (now-Section 441f) is, thus, inconsistent with the structure and purpose of the 1971

Act.

After Congress added individual contribution limits in 1974, now-Section 441f also served to provide information "necessary to detect violations of the contribution limits." Goland, 903 F.2d at 1261; see also Buckley, 424 U.S. at 67-68. Here, by contributing in the names of 13 straw donors, defendant not only hid his identity, he also exceeded the contribution limit in Section 441a(a)(1)(A) by $26,000. According to defendant, FECA imposed no duty on him to use his name when contributing, thereby disclosing he was the source of this $26,000. (GER 41) (defense: "FECA imposes no obligation on the 'original source' of a contribution to report" himself.). Adopting such an interpretation would undermine the ability to detect violations of the contribution limits.[16]

3. The FEC Has Recognized that Section 441f Applies Here and Congress Has Demonstrated its Agreement

The FEC has recognized what is apparent from the foregoing: Section 441f applies here. In 1977, among its first regulations, the FEC adopted 11 C.F.R. § 110.4(b)(2)(i), and included as an example of "contributions in the name of another:"

---

[16] Section 441f served a similar purpose in 1971. Because unions/corporations were prohibited from contributing under (and before) the 1971 Act (18 U.S.C. § 610) and such organizations were "persons" (2 U.S.C. § 431(h)), Section 441f prevented such "persons" from evading this bar by contributing in other people's names. Mariani, 80 F. Supp. 2d at 368 (Section 441f's purposes include preventing circumvention by prohibited sources).

> Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money[.]

Advisory Opinion 1995-19 ("A contribution by a person who is reimbursed in advance or afterward by another person or entity is unlawful under the Act because it is a 'contribution in the name of another.' 2 U.S.C. § 441f."); id. 1996-33; id. 1986-41.

Moreover, the FEC transmitted this proposed regulation to the House, as required, U.S.C. § 438(c) (1976), which chose not to disapprove (and, in 1989, the FEC resubmitted the regulation with other changes to Congress, 54 Fed. Reg. 34,098 (1989), which did not disapprove). FEC v. Ted Haley Congressional Comm., 852 F.2d 1111, 1114 (9th Cir. 1988) ("THCC") (failure to disapprove "strongly implies that the regulations accurately reflect congressional intent") (citation and internal quotations omitted); see also FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 34 & n.8 (1981) ("DSCC") (citing Congress' failure to disapprove FEC regulation and suggesting it was "indication that Congress does not look unfavorably" on it).

Moreover, in 1979 and 2002, Congress amended FECA (and redesignated Section 441f in 1979), but did not modify Section 441f to reject the regulation. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional

failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (citation and internal quotations omitted); see, e.g., Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). But cf. Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (no adoption by reeanctment when statute plainly to contrary).

Rather than disagreeing, in 2002, Congress confirmed its agreement by adopting a new penalty provision for Section 441f, entitled "[i]ncrease in penalties imposed for violations of conduit contribution ban." 116 Stat. 108; see also 147 Cong. Rec. 3,188 (2001) (Sen. Bond) ("My amendment would make it a felony to knowingly make conduit contributions. . . . The amendment does not change the conditions of the underlying offense, but by making it a felony, it adds some 'teeth' to the law."); Schor, 478 U.S. at 846 ("Where, as here, Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation, we cannot but deem that construction virtually conclusive.") (citation and internal quotations omitted).

4. Courts Have Consistently Recognized that Section 441f Applies Here

Like the FEC, courts have recognized that Section 441f applies here. In McConnell, the Supreme Court addressed a BCRA provision prohibiting minors from contributing. 540 U.S. at 231-32. The government argued that the provision "protects against corruption by conduits; that is donations by parents through their minor children to circumvent contribution limits applicable to the parents." Id. at 232. The Court invalidated the provision, noting that the government offered "scant evidence of this form of evasion" and stating:

> Perhaps the Government's slim evidence results from sufficient deterrence of such activities by § 320 of FECA, which prohibits any person from "mak[ing] a contribution in the name of another person."

Id. (quoting 2 U.S.C. § 441f; alteration in original); see also McConnell v. FEC, 251 F. Supp. 2d 176, 424 (D.D.C. 2003) (Henderson, J., concurring) (making the same point).

This Court has also recognized that Section 441f applies here. In Goland, the defendant attempted to get the Democrat elected by "giving a boost to the ultra-conservative Vallen," a third-party candidate, thereby taking votes away from the Republican. 903 F.2d at 1251. "Presumably in order to avoid both FEC detection of the excessive contribution and Vallen's awareness of the true source of the funds, [the defendant] arranged for 56 persons to make payments" "with the understanding

that [the defendant] would reimburse them, which apparently he did." Id. The defendant was charged, in part, with violating Section 441f. Id. at 1252. The defendant filed a civil suit, asserting that the disclosure requirements (including Section 441f) violated his "First Amendment right to contribute anonymously" to fringe candidates, as did the contribution limits. Id.

When discussing FECA's reporting requirements and contribution limits, this Court stated: "The Act prohibits the use of 'conduits' to circumvent these restrictions: 'No person shall make a contribution in the name of another person.'" Id. at 1251 (quoting 2 U.S.C. § 441f). This Court rejected the suggestion that the defendant lacked standing to challenge the disclosure requirements because he made secret, rather than anonymous, contributions: "Taking [the defendant] at his word, he would not have used individuals as conduits if the law did not prohibit making anonymous contributions. Under FECA's reporting and disclosure requirements, to bypass the law in effect required violating it." Id. at 1255. And this Court held, as the Supreme Court had done in Buckley, that the disclosure provisions did not violate the First Amendment.[17] Id. at 1259-61.

---

[17] The district court noted that the government apparently later eliminated the Section 441f charge after mistrial. (GER 6; United States v. Goland, 897 F.2d 405 (9th Cir. 1990) (mistrial and charges); United States v. Goland, 959 F.2d 1449 (9th Cir. 1992) (later proceedings)). But the opinion cited in the text

Other circuits and district courts have likewise recognized that Section 441f applies here. United States v. Serafini, 233 F.3d 758, 763 n.5 (3d Cir. 2000) ("FECA also makes it unlawful for any person to make a contribution in the name of another person (referred to in this opinion as a 'conduit')."); Mariani, 212 F.3d at 766, 775 (recognizing "Section 441(f) of the FECA, the conduit contribution ban or 'anti-conduit' provision, prohibits one from making a contribution 'in the name of another person;'" rejecting First Amendment challenge because "[p]roscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to be at the very core" of the analysis in Buckley) (quoting 2 U.S.C. § 441f); United States v. Kanchanalak, 192 F.3d 1037, 1042 (D.C. Cir. 1999) ("[T]here is no soft money counterpart to § 441f in FECA itself, which prohibits conduit transfers of 'contributions.'"); Sun-Diamond Growers, 138 F.3d at 969 (addressing reimbursement scheme from corporate funds and noting illegality, in part, because "no one may make a campaign contribution in the name of another, 2 U.S.C. § 441f."); United States v. Curran, 20 F.3d 560, 564 n.1 (3d Cir. 1994) ("18 U.S.C. § 614 prohibited making a contribution through a conduit. In 1976, that offense became 2 U.S.C. § 441f"); Mariani, 80 F. Supp.

---

addressed the civil action, not the criminal trial, and defendant raised a First Amendment challenge there involving Section 441f, which this Court addressed.

2d at 364 ("Section 441f of FECA, the conduit contribution ban or 'anti-conduit' provision, prohibits one from making a contribution 'in the name of another person.'") (quoting 2 U.S.C. § 441f); United States v. Hsia, 24 F. Supp. 2d 33, 39 (D.D.C. 1998) (The 1971 "Act also set forth a variety of disclosure requirements and, as part of those requirements, it prohibited contributions in the name of another, so-called conduit contributions."), rev'd on other grounds, 176 F.3d 517 (D.C. Cir. 1999); United States v. Curran, 1993 WL 137459, at *1 (E.D. Pa. April 28, 1993) ("FECA forbids the use of 'conduits' to circumvent these restrictions by prohibiting campaign contributions in the name of another person."); Weinsten, 462 F. Supp. at 250 (rejecting vagueness challenge to so-called conduit contributions; noting the "simple words" of Section 441f and finding "no ambiguity in the statutory language"); see, e.g., United States v. Hsu, 2009 WL 2495794, at *1 (S.D.N.Y. Aug. 10, 2009) (upholding sufficiency of evidence under Section 441f for "straw donor scheme"); Fieger v. Gonzales, 2007 WL 2351006, at *2 (E.D. Mich. Aug. 15, 2007), aff'd on other grounds, 542 F.3d 1111 (6th Cir. 2008).

The district court's response, at least as to Goland and Mariani, was to label these statements dicta. (GER 6). The problem with that label is that these courts considered the wording of Section 441f and found it apparent that Section 441f

applies to so-called conduit contributions (straw-donor contributions). See, e.g., United States v. Bond, 552 F.3d 1092, 1096 (9th Cir. 2009). Moreover, although "the conduit statute is one of FECA's most frequently violated," Donsanto & Simmons, Federal Prosecution of Election Offenses at 166, and the Act is nearly 40 years old, neither the district court nor defendant cited a case adopting a contrary interpretation. This body of decisions supports what the wording of Section 441f itself demonstrates: Defendant violated Section 441f when he contributed $26,000 in the names of 13 other people.

C. THE DISTRICT COURT'S RATIONALES FOR READING A NONTEXTUAL LIMIT INTO THE PLAIN WORDING OF SECTION 441f LACK MERIT

1. Context Does Not Limit the Wording of Section 441f

Rather than the foregoing, the district court's primary focus was context. The court was correct to look to context (albeit only after initially focusing on Section 441f itself), United States v. Bowen, 172 F.3d 682, 686 (9th Cir. 1999), but context does not support reading a limitation into Section 441f.

a. Congress' use of the terms "indirectly" and "conduit" in other provisions does not support reading a limitation into Section 441f

As the district court recognized, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16,

23 (1983) (citation and internal quotations omitted). Some FECA contribution prohibitions use the phrase "directly and indirectly." 2 U.S.C. §§ 441b(a),(b)(2) (prohibiting corporation/union/bank contributions and, "for purposes of this section," "contribution" includes "direct or indirect payment"); 2 U.S.C. § 441c (government contractors prohibited from "directly or indirectly" contributing); 2 U.S.C. § 441e (unlawful for "foreign national, directly or indirectly," to contribute). Section 441a(a)(8) uses the "directly-or-indirectly" phrase and the word "conduit."[18] Looking to these provision, the court held that, if Congress intended Section 441f to apply to indirect or conduit contributions, "it would have included explicit language, as it did in [these] other sections." (GER 4).

The district court's use of the Russello presumption is misplaced. First, Section 441f does not include the word "directly" and omit the word "indirectly," which might have suggested that Congress considered and rejected applying Section 441f to indirect contributions in the name of another. Duncan v. Walker, 533 U.S. 167, 172-73 (2001) (inclusion of "State and Federal" in multiple provisions of same Act invoked presumption that Congress' use of only term "State" in another provision

[18] Sections 441a and 441e were not part of the 1971 Act -- when Congress passed the relevant wording in Section 441f -- but the predecessors to Sections 441b and 441c were. 86 Stat. 10; see also 86 Stat. 9 (unlawful to "directly or indirectly" promise employment/benefit for political support).

meant that provision did not include "Federal"); see, e.g., Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."). Section 441f, instead, omits the "directly-or-indirectly" phrase altogether, meaning the presumption does not control. City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424, 435-36 (2002) ("The Russello presumption -- that the presence of a phrase in one provision and its absence in another reveals Congress' design -- grows weaker with each difference in the formulation of the provisions."); see also Clay v. United States, 537 U.S. 522, 532 (2003) (same).

Moreover, the distinction between direct/indirect contributions is irrelevant here. Although defendant indirectly contributed money (through straw donors), he directly used their names (which he and his co-conspirator submitted to the candidate (GER 16)). And the court limited Section 441f to contributions in a false name, but a person can both directly and indirectly contribute in a false name. That other provisions of FECA use the direct-and-indirect phrase, thus, does not support the limitation the court read into Section 441f.

As to the term "conduit" in Section 441a(a)(8), Congress did not pass the predecessors to Sections 441f and 441a(a)(8) as part

of the same enactment, which undermines the Russello presumption. Gomez-Perez v. Potter, 128 S. Ct. 1931, 1940 (2008) (implication "strongest in those instances in which the relevant statutory provisions were considered simultaneously when the language raising the implication was inserted;" not applying presumption because provisions there "were enacted separately and are couched in very different terms") (citation and internal quotations omitted); Russello, 464 U.S. at 23 (applying presumption to sections of "same Act"). But see United States v. Youssef, 547 F.3d 1090, 1094-95 (9th Cir. 2008) (per curiam) (applying although statutes were not part of "same Act").

Moreover, the order is significant here. Congress adopted the predecessor to Section 441f in 1971 and the predecessor to Section 441a(a)(8) in 1974. The mention of the term "conduit" in 1974 sheds little light on the meaning of words Congress used years earlier in a different provision. Almendarez-Torres, 523 U.S. at 237. Indeed, if Congress had intended to limit Section 441f in 1974, it would have done so expressly by amending Section 441f, rather than simply adding the predecessor to Section 441a(a)(8). That Congress did not demonstrates that Congress did not intend for Section 441a(a)(8) to affect Section 441f.

Regardless, this is not a case: (1) where Section 441f omits "conduit" contributions from a list of manners of contributing, but the government nevertheless seeks to apply it to conduit

contributions, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452-54 (2002); United States v. Miqbel, 444 F.3d 1173, 1181-82 (9th Cir. 2006); or (2) where a party is attempting to limit Section 441f only to conduit contributions (despite its broad language), such that Congress' mention of "conduit" in Section 441a(a)(8) suggests Congress did not intend such a limited reach, Russello, 464 U.S. at 23.

Rather, the government is asking this Court simply to apply the broad and plain wording of Section 441f as written: "No person shall make a contribution in the name of another person." The Russello presumption does not support reading nontextual limits into this provision. See, e.g., 464 U.S. at 25 ("The use of the specific in the one statute cannot fairly be read as imposing a limitation upon the general provision in the other statute."). That is particularly true given the different purposes, wording, and focus of the provisions, with Section 441a(a)(8) focusing primarily on the manner of contributions and what counts towards a person's dollar limit and Section 441f focusing only on the name of the contributor. Ours Garage, 536 U.S. at 435-36; see also Field v. Mans, 516 U.S. 59, 67 (1995) (presumption not "interpretative trump card"); Fuller, 531 F.3d at 1027 (declining to apply because inconsistent with legislative purpose).

b. Applying the plain wording of Section 441f neither conflicts with Section 441a(a)(8) nor renders the words "indirectly" or "conduit" in that Section superfluous

The district court next held: "§ 441a allows for indirect and conduit contributions. . . . Thus, reading § 441f to prohibit such contributions is irreconcilable with § 441a's express authorization" and would render the inclusion of the terms "conduit" and "indirectly" in Section 441a(a)(8) superfluous. (GER 4). But Section 441a(a)(8) provides, in part:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.

Although Section 441a(a)(8) undoubtedly contemplates that there are legal conduit contributions, on its face, it neither authorizes nor prohibits conduit/indirect contributions; it, instead, counts them towards a person's limit. Nor does Section 441f prohibit all conduit contributions. It focuses solely on the name of the contributor, not how the money got to the candidate. Defendant did not violate Section 441f because he contributed indirectly or through a conduit, but rather because he contributed in the names of conduits/straw donors. There is, thus, no conflict between Sections 441a(a)(8) and 441f, nor are the terms "conduit" and "indirectly" rendered superfluous.

Indeed, the error here appears rooted partly in terminology

rather than statutory scope. The court was concerned that interpreting Section 441f to "ban" "conduit" contributions was inconsistent with Section 441a(a)(8). Section 441f is often called the conduit-contribution ban, see Donsanto & Simmons, Federal Prosecution of Election Offenses at 166, but the term "conduit" in this context refers to contributing through straw donors, thereby using their names to conceal the true source of funds. Id. Although conduit contributions often involve such conduct, they need not do so, as a "conduit" is simply a means of transferring money through another. Thus, despite Section 441f often being called the conduit-contribution ban, the term "conduit" in that context is shorthand for referring to a person taking on the name of the conduit (straw-donor contributions), not all conduit transfers. Interpreting Section 441f as prohibiting contributions in the names of straw donors, thus, does not conflict with Section 441a(a)(8), nor render the term "conduit" in that provision superfluous.

Similarly, defendant indirectly contributed money and, thus, his contributions were subject to (and vastly exceeded) the $2,000 limit in Section 441a(a)(1)(A). But Section 441a(a)(8)'s inclusion of "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate" is not designed to refer to his straw-donor contributions. Instead, the provision facially is designed to

account for legal conduit contributions, i.e., those given to committees and people forwarding funds. See 54 Fed. Reg. 34,106 (1989) (administrative definition of "'conduit or intermediary' . . . encompasses all those who receive and forward contributions earmarked" and FEC considers terms "synonymous"); 11 C.F.R. § 110.6(b)(2) ("conduit or intermediary means any person who receives and forwards an earmarked contribution to a candidate") (emphasis omitted); Hsia, 24 F. Supp. 2d at 60 n.29 ("This provision, however, was intended to address legal 'conduit' contributions -- for instance when an individual contributes money to a national party that is earmarked for the campaign of a certain candidate") (emphasis omitted); 119 Cong. Rec. 26,595 (1973) (Sen. Clark) ("This amendment is designed to clarify and reinforce the intentions of the Senate with regard to the earmarking of funds to a particular candidate through the conduit of a political committee"); H.R. Rep. No. 93-1239, at 149 (1974) (Rep. Frenzel) ("[T]he earmarking language in the bill prevents an individual from channeling funds to a particular candidate through these political parties and political committees.").[19]

---

[19] That appears to be why Section 441a(a)(8) puts the obligation on the intermediary/conduit -- i.e., the person/entity with the superior role in fundraising -- to report the source, rather than requiring the source to self-report. See 120 Cong. Rec. 4,710 (1974) (Sen. Cook) ("[I]f one wishes to give $3,000 and say, 'will you please give it to the Senator from Maine, and that is whom I want it to go for,' under the law, the organization that receives the $3,000, and is a conduit to get it to the Senator from Maine, has to report where it came from, and

Regardless, Section 441a(a)(8) does not suggest that it is permissible to use the names of conduits. (Section 441a(a)(8) actually states the opposite: "The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient."[20]) Thus, applying Section 441f to prevent contributions in the names of straw donors/conduits neither conflicts with Section 441a(a)(8) nor renders the words "conduit" or "indirectly" in that provision superfluous. Cf. H.R. Rep. No. 93-1239, at 5 ("The bill prohibits contributions in the name of another and provides that, for the purposes of limitations and reporting

---

that it was instructed to pass it on."); 11 C.F.R. § 110.6(c) (conduit reporting requirements).

[20] Although the district court did not rely on this wording, defendant suggested it alone, not Section 441f, applied here and placed obligations on the straw donors, not him. (GER 148-50). If a straw donor notifies the candidate/FEC of the original source, there is no violation of Section 441f -- as there is no contribution in the name of another, 11 C.F.R. § 110.4(b)(2)(i) -- but the reason straw donors are used is to avoid making such disclosures (Indeed, had defendant used his own name, the contributions would have been rejected, as they violated the contribution limits in Section 441a(a)(1)(A).) When defendant contributed in the straw donors' names, he violated the plain wording of Section 441f. Defendant's suggestion that Congress intended Section 441a(a)(8) alone to apply here lacks merit because: (1) as noted, Congress passed Section 441a(a)(8) after Section 441f and, if Congress intended to limit Section 441f, it would have done so expressly; (2) placing responsibility solely on straw donors -- the least culpable party -- is contrary to traditional liability principles. Cf. Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."); and (3) as noted, in 2002, Congress said Section 441f applied to conduit contributions, 116 Stat. 108.

requirements, any contribution by a person which is earmarked or directed through an intermediary or conduit to a candidate shall be treated as a contribution from such person.").

2. The Legislative History Does Not Support the Nontextual Limitation that the Court Read into Section 441f

a. The 1971 legislative history demonstrates that Congress did not intend to allow contributors to hide their identities

The district court next relied on legislative history to read a nontextual limit into Section 441f. (GER 5). The government has found no relevant discussion of now-Section 441f in the 1971 Act's legislative history,[21] but has also discovered no suggestion that Congress intended the prohibition that "[n]o person shall make a contribution in the name of another" to apply to only some uses of the "name of another," as the court held. Rather than mentioning limitations, the legislative history demonstrates: (1) Congress wanted full disclosure of campaign contributions;[22] and (2) that disclosure included the source of

[21] Section 441f appears to have originated during the Senate's attempt to reform campaign finance in 1967 (SB 596 and 1880). The Senate appears to have used a bill it passed then, but which died in the House (SB 1880), as a model for Titles II and III of the 1971 Act (SB 382). Cf. S. Rep. 92-229, at 55.

[22] S. Rep. 92-229, at 57 ("Disclosure, if it is to be effective, must mean total disclosure"); 117 Cong. Rec. 29,311 (1971) (Sen. Pastore) ("The name of the game is full disclosure."); id. at 30,066 (Sen. Hart) ("The Senator from Rhode Island has emphasized that the key value in the bill we are considering is disclosure, the availability of information. We have our disagreements about many other aspects, but all of us see the value in this."); 118 Cong. Rec. 326 (1972) (Rep. Keith)

contributions.[23] As noted, now-Section 441f was the only provision of the 1971 Act compelling contributors to use their own names when contributing. If the court's interpretation were correct, then no provision of the 1971 Act prohibited people from contributing in straw donors' names (thereby hiding their identities), which conflicts with the legislative history and

---

("I am particularly pleased that this report contains the things for which I have been pressing," including "[f]ull and timely disclosure of contributions.").

[23] S. Rep 92-229, at 60 (eliminating contribution limits because "the Committee is of the general opinion that the voters, having knowledge of all sources of contributions and the nature of all expenditures, and, having the privilege of demonstrating at the polls their approval or disapproval with respect to particular candidates or political parties for excessive contributions received or expenditures made, will serve as a deterrent to abuse or excesses."); 117 Cong. Rec. 29,004 (1971) (Sen. Brooke) ("I believe that the most significant section of this bill is Title III. . . . Comprehensive disclosure is vital because it permits the voters to review the source of funds for each candidate, as well as the total amount of such contributions. Indeed, disclosure requirements, if enforced, . . . provide the public full opportunity to determine the appropriateness of a candidate's income and spending practices, and to translate that judgment into action at the ballot box."); id. at 30,073 (Sen. Dole) ("[A]mplified disclosure provisions will enable the public to be better aware of candidates' real sources of support."); id. at 30,083 (Sen. Church) ("[T]he legislation requires detailed disclosure, both during and after elections, as to the sources of contributions."); 118 Cong. Rec. 327 (1972) (Rep. Anderson) ("Most importantly, the act provides for timely and thorough pre-election reports on campaign contributions and expenditures. As Senate Majority Leader SCOTT said during the debate in the other body, the single most important item on the agenda of campaign finance reform is to provide the electorate with the opportunity to determine 'who gave it and who got it' before they enter the voting booth."); Signing Statement, President Nixon ("It provides for full reporting of both the sources and the uses of campaign funds.").

frustrates the purpose of the 1971 Act. 117 Cong. Rec. 26,111 (1971) (Sen. Mathias) ("Title III is the most important part of the 1971 campaign reform. It deals with the public's right to know."); id. at 29,306 (Sen. Humphrey) ("It is the exposure that would be gotten, the fact that you could not disguise, avoid, or evade. That is what is important in this bill."); id. at 30,071 (Sen. Mansfield) ("The requirement for the names of contributors of $100 or more will again allow the public to be informed as to who is or who is not contributing to particular campaigns.").

Rather than the foregoing, the district court cited floor statements involving two amendments to the 1971 Act. (GER 5). Not only were these amendments unrelated to now-Section 441f, they involved criminal code amendments in Title II, not amendments to the disclosure Title (Title III).

Specifically, the court cited floor debate on an amendment to 18 U.S.C. § 610 (prohibiting corporations/unions/banks from contributing). (GER 5). Representative Hansen proposed amending that Section to continue prohibiting such organizations from contributing, while allowing them a role in elections. 117 Cong. Rec. 43,379 (1971). The amendment defined the term contribution "in this section" to include "any direct or indirect payment." (Id.). During the debate, Representative Hays asked:

> say that John Doe is vice president of X Corporation, and that he gave $500 to a fund, and the corporation then reimbursed him, say, with some kind of cover saying it was expenses or something. That would be

prohibited[?]

Id. 43,381. Representative Hansen responded: "That in my judgment would constitute a violation of law; in fact, a violation of law as it exists now, as an indirect payment." Id.; see also id. (Representative Hays agreeing).

The district court viewed this discussion as demonstrating "that Congress used the term 'indirect' in FECA to cover reimbursement." (GER 5). Even assuming such a comment represents the views of "Congress," Garcia v. United States, 469 U.S. 70, 78 (1984), the Section 441f violation did not occur here because defendant contributed indirectly or reimbursed people, but because he contributed in 13 other people's names. Representative Hansen's statement did not relate to now-Section 441f or the name in which the contribution was made. Indeed, it is apparent he was discussing neither, because he said the conduct was unlawful under the "law as it exists now" and now-Section 441f was not part of existing pre-FECA law. The reason the contribution was unlawful was because corporations could not contribute.

Moreover, this discussion actually undercuts the district court's decision. Representative Hansen stated that the "indirect payment" violated the "law as it exists now." Although the 1971 amendment defined "contribution" to include "direct and indirect payments," existing law had no such definition and

simply made it unlawful "to make a contribution." 18 U.S.C. § 610 (1970). The statement that indirect contributions were already embraced in a provision that did not use the term "indirect" highlights that the absence of that word from Section 441f does not limit its plain wording.[24]

The court also cited a statement of Senator Scott. (GER 5). In 1971, FECA did not impose individual contribution limits, causing some Senators to propose such limits as well as limits on money candidates could expend from their own funds. 117 Cong. Rec. 29,290-29,291 (1971) (Sen. Mathias). Senator Scott noted he had "no objection" to the latter, "the so-called rich man's amendment. But I question seriously the efficacy of the limitation on contributions to candidates by others." Id. at 29,292. Rather than limiting contributions, the committee had decided that disclosure was the best approach, in part, because "[f]ull disclosure makes such a limitation unnecessary." Id. at 29,295. Senator Scott noted the proposed amendment, with its individual limits, "reverses the processes on which this bill is predicated, the process of disclosure." Id. Senator Scott's emphasis on disclosure highlights that defendant violated the

---

[24] The definition appears to have included the "direct-and-indirect" wording because it later exempted certain indirect activity. 117 Cong. Rec. 43,380 (Rep. Hansen). The fight in the House was over what to exempt, between the perceived anti-union Crane Amendment and pro-union Hansen Amendment. See id. 43,389-43,390 (Rep. Steiger). Both amendments included the "direct-and-indirect" wording. Compare HR 11060 with 117 Cong. Rec. 43,379.

Act's purpose by contributing $26,000 in 13 other people's names.

Rather than rely on this discussion, the court cited Senator Scott's final comment:

> I would suggest we have the rich man's amendment separately, and some limitation on how much a man can give to his own campaign, because I can see a great evasion in this amendment. If he is limited to $5,000, what does he do? He has no limitation on his own money. He is a man of influence. He wants to find $200,000. He finds 40 friends and gives it to them and each of them gives back $5,000.
>
> Let us close that loophole and go after the man who would bribe the election because he is so well financed.

Id. The court noted, "[i]f § 441f prohibited using one's friends as a conduit" "there would be no loophole to fill." (GER 5). Senator Scott's comment is unclear, in part, because the "rich-man's" amendment had a limit of more than $5,000. Nevertheless, his reference to a "loophole" is to the amendment, and he did not discuss now-Section 441f.[25] Such an ambiguous and isolated floor statement in response to amendments on other provisions does not support the weight placed on it nor overcome the plain wording of Section 441f. Garcia, 469 U.S. at 78.

---

[25] Senator Scott was focused on defeating individual contribution limits, not whether now-Section 441f applied to the conduct he was discussing. Indeed, he stated that individual limits would be an "open invitation to evasion" and result in people "lend[ing] their name" to contributions, id. at 29,292, although now-Section 441f prohibits such contributions.

b. Post-1971 legislative history confirms that Congress intended for Section 441f to apply here

Although later legislative history is generally a weak indicator of the intent of an earlier Congress, Russello, 464 U.S. at 26, here it confirms what the 1971 legislative history demonstrates, namely, that Section 441f applies here. Cf. 122 Cong. Rec. 2,606 (1976) ("[I]f he buys a ticket for $100 and turns to his wife and hands her $100 and she buys the ticket -- Mr. MATHIS. I think the gentleman knows that there is a provision in the law that provides for criminal penalties for using another as a conduit.").

First, as noted, the FEC submitted its regulation to the House in 1977 and Congress in 1989 and Congress did not disapprove nor alter Section 441f in response when amending FECA.

Second, Congress itself investigated so-called conduit contributions (straw-donor contributions) made during the 1996 election, and stated that Section 441f applied to them. Investigation of Political Fundraising Improprieties and Possible Violations of Law, H.R. Rep. No. 105-829, at 182 ("Contributions in the name of another -- conduit contributions -- are illegal. The Act provides that: 'No person shall make a contribution in the name of another person.'") (quoting 2 U.S.C. § 441f); Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at 1782 & n.203 (citing Section 441f as barring contributions "made

through 'straw donors'"); id. at 7241 (Section 441f, in part, prohibits contributors "from disguising a contribution by using another person as a conduit"); cf. H.R. Rep. No. 105-797, at 94 n.658 (1998) (contribution under Section 441f "commonly referred to as a 'conduit contribution'").

Third, thereafter in 2002, Congress increased the penalties for Section 441f and entitled the new provision "[i]ncrease in penalties imposed for violations of conduit contribution ban." 116 Stat. 108. When proposing that provision, Senator Bond stated:

> It is a misdemeanor offense to make a campaign contribution in the name of another person . . . in other words make an illegal contribution through a conduit (2 U.S.C. 441f).
>
> Despite this clear prohibition, it came to light during the 1996 presidential campaign millions of dollars in illegal donations from foreign nationals were funneled into party and campaign coffers through conduit contributions, some as outrageous as nuns and other people of worship. . . .
>
> As simply a misdemeanor offense, those intent on corrupting the process do not fear the consequence . . . .
>
> . . . .
>
> My amendment would make it a felony to knowingly make conduit contributions, knowingly permit your name to be used for such a contribution or knowingly accept a contribution made in the name of another. The amendment does not change the conditions of the underlying offense, but by making it a felony, it adds some "teeth" to the law.

147 Cong. Rec. 3,187-3,188.

3. Were there Ambiguity, Deference to the FEC, Rather than Lenity, Would Control

The district court finally held that, were there ambiguity after applying statutory-construction tools, the rule of lenity controlled. (GER 5-6). But "that rule applies only when there is grievous ambiguity or uncertainty in the statute and when, after seizing everything from which aid can be derived, [the court] can make no more than a guess as to what Congress intended." United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998) (citation and internal quotations omitted). As demonstrated above, "interpretative aids indicate Congressional intent and prevent application of that rule." Id.; see also United States v. Hayes, 129 S. Ct. 1079, 1088-89 (2009).[26]

Moreover, were there ambiguity, the court erred by turning to lenity, rather than deferring to the FEC. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984).

---

[26] The court did not accept defendant's suggestion to interpret Section 441f to avoid a grave/doubtful constitutional issue. As the court recognized, defendant's First Amendment claim lacks merit. (GER 144). Indeed, the Supreme Court upheld the disclosure provisions and contribution limits, Buckley, 424 U.S. at 23-68, and defendant lacks a right to use straw donors' names to circumvent the limits or hide his identity, Mariani, 212 F.3d at 775; Hsia, 176 F.3d at 525; Goland, 903 F.2d at 1258. Because defendant's claim lacks merit, there is no issue to avoid, much less a grave/doubtful one. Almendarez-Torres, 523 U.S. at 239 (rejecting doctrine despite question lacking obvious answer); Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) (must raise "serious" concerns when Chevron deference involved). And, regardless, the statute is not susceptible to defendant's interpretation. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998).

This Court has already held that deference controls in such circumstances. In Pacheco-Camacho, the defendant argued that, in the face of ambiguity, the rule of lenity applied rather than an administrative regulation. 272 F.3d at 1271. This Court held: "The rule of lenity, however, does not prevent an agency from resolving statutory ambiguity through a valid regulation." Id. (citing Babbitt v. Sweet Home Chapter, 515 U.S. 687, 704 n.18 (1995)). "In such a case, the regulation gives the public sufficient warning to ensure that nobody mistakes the ambit of the law or its penalties." Id. at 1272. Thus, "[t]o the extent that there is any ambiguity . . ., the BOP has resolved it through a reasonable interpretation, and the rule of lenity does not apply." Id.; see also Mujahid v. Daniels, 413 F.3d 991, 998-99 (9th Cir. 2005) (reaffirming Pacheco-Camacho).

The district court recognized that the FEC was entitled to deference were there ambiguity. (GER 7). Congress delegated the FEC responsibility to "prescribe rules, regulations and forms to carry out the provisions of this Act," 2 U.S.C. § 438(a)(8), and to "administer, seek to obtain compliance with, and formulate policy with respect to, this Act," 2 U.S.C. § 437c(b)(1), and the Supreme Court and this Court have held that the FEC is entitled to deference, DSCC, 454 U.S. at 37 (FEC "is precisely the type of agency to which deference should presumptively be afforded"); THCC, 852 F.2d at 1113-15 (Chevron deference to FEC); FEC v.

Furgatch, 869 F.2d 1256, 1260 (9th Cir. 1989).[27] Accordingly, were there ambiguity, the court erred by not deferring to the FEC's regulation which, at a minimum, reasonably interprets Section 441f to apply here.

[27] Although the court accepted deference applied, defendant argued that deferring to interpretations of criminal statutes is inappropriate because courts (not agencies) are charged with enforcing them. (GER 121-22 n.6; United States v. Douglas, 974 F.2d 1046, 1048 n.1 (9th Cir. 1992) ("unclear whether an agency's interpretation of a criminal statute is entitled to deference") (emphasis omitted)); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("the law in question, a criminal statute, is not administered by any agency but by the courts;" rejecting notion of deference to Department of Justice). Whether defendant's argument would have force if Section 441f were itself a criminal statute and the government sought deference to the Department of Justice's interpretation, neither is the case. Section 441f is an election statute with civil and criminal penalties and the FEC is entrusted with enforcing it. A regulation by an agency in such circumstances is entitled to deference. Babbitt, 515 U.S. at 703-04 & n.18, 708 (so holding); Kanchanalak, 192 F.3d at 1047 n.17 ("Defendants argue that this court should not give Chevron deference to the FEC's interpretation of an ambiguous statute in a criminal proceeding. . . . That criminal liability is at issue does not alter the fact that reasonable interpretations of the act are entitled to deference.") (citing Babbitt, 515 U.S. at 703-05). And, as noted in the text, the Supreme Court and this Court have held that the FEC is entitled to deference.

VI

CONCLUSION

For these reasons, this Court should reverse the dismissal.

DATED: September 14, 2009

Respectfully submitted,

GEORGE S. CARDONA
Acting United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

_____/s/_____
ERIK M. SILBER
Assistant United States Attorney
Criminal Appeals Section

Attorneys for Plaintiff-Appellant
UNITED STATES OF AMERICA

STATEMENT OF RELATED CASES

The government is not aware of any related cases pending in this Circuit.

Appendix

Note 2

then used money from foreign sources to reimburse those conduits, made contributions through one or more companies, and entered into an agreement with co-conspirators to conceal true foreign source of contributions were sufficient to specify illegal object of alleged conspiracy, even though allegations did not differentiate between illegal "hard money" donations and legal "soft money" donations. U.S. v. Trie, D.D.C.1998, 23 F.Supp.2d 55. Elections ⇦ 328(1)

§ 441f. Contributions in name of another prohibited

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

(Pub.L. 92–225, Title III, § 320, formerly § 325, as added Pub.L. 94–283, Title I, § 112(2), May 11, 1976, 90 Stat. 494, renumbered Pub.L. 96–187, Title I, § 105(5), Jan. 8, 1980, 93 Stat. 1354.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Acts. Senate Report Nos. 92–96 and 92–229 and Senate Conference Report No. 92–580, see 1972 U.S. Code Cong. and Adm. News, p. 1773.

1976 Acts. Senate Report No. 94–677 and House Conference Report No. 94–1057, see 1976 U.S. Code Cong. and Adm. News, p. 929.

1980 Acts. House Report No. 96–422, see 1979 U.S. Code Cong. and Adm. News, p. 2860.

CROSS REFERENCES

Penalties for violation of this section, see 2 USCA § 437g.

LIBRARY REFERENCES

American Digest System

Elections ⇦317.2.
Key Number System Topic No. 144.

Research References

ALR Library

26 ALR 4th 170, Election Campaign Activities as Ground for Disciplining Attorney.

111 ALR, Fed. 295, Giving False Information to Federal Department or Agency as Violation of 18 U.S.C.A. § 1001, Making it Criminal Offense to Make False Statements in Any Matter Under Jurisdiction of Department or Agency of United States.

Encyclopedias

26 Am. Jur. 2d Elections § 478, Solicitation or Making of Contributions for Political Purposes; Generally.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

1977 Amendments. Pub.L. 95–127 added provisions authorizing appropriations of $7,811,500 for the fiscal year ending Sept. 30, 1978.

1976 Amendments. Pub.L. 94–283, § 113, added provisions authorizing appropriations through the fiscal year ending Sept. 30, 1977.

Effective and Applicability Provisions

1974 Acts. Section effective Jan. 1, 1975, see section 410(a) of Pub.L. 93–443, set out as a note under section 431 of this title.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 440. Repealed. Pub.L. 93–443, Title I, § 101(f)(4), Oct. 15, 1974, 88 Stat. 1268

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 92–225, Title III, § 310, Feb. 7, 1972, 86 Stat. 19, related to prohibition of contributions in the name of another. See section 441f of this title.

Effective Date of Repeal

Section repealed effective Jan. 1, 1975, see section 410(a) of Pub.L. 93–443, set out as an Effective Date of 1974 Amendment note under section 431 of this title.

§ 441. Repealed. Pub.L. 94–283, Title I, § 112(1), May 11, 1976, 90 Stat. 486

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 92–225, Title III, § 320, formerly § 311, Feb. 7, 1972, 86 Stat. 19, renumbered § 321, Pub.L. 93–443, Title II, § 208(a), Oct. 15, 1974, 88 Stat. 1279, renumbered § 320, Pub.L. 94–283, Title I, § 105, May 11, 1976, 90 Stat. 481, provided penalties of not more than $1,000 fine or not more than 1 year imprisonment, or both for violations of this subchapter. See section 441j of this title.

Savings Provisions

Section 114 of Pub.L. 94–283 provided that: "Except as otherwise provided by this Act [see Short Title of 1976 Amendments note set out under section 431 of this title], the repeal by this Act of any section or penalty shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under such section or penalty, and such section or penalty shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability."

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) of this section and section 441a–1 of this title, no person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

Case: 09-50296 09/14/2009 Page: 80 of 85 ID: 7060842 DktEntry: 8

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation,

labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation; labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of Title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures 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;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and [1]

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 434(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) Dollar limits on expenditures by candidates for office of President of United States

(1) No candidate for the office of President of the United States who is eligible under section 9003 of Title 26 (relating to condition for eligibility for payments) or under section 9033 of Title 26 (relating

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 09-50296

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: **(check appropriate option(s))**

☑ 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

☑ Monospaced, has 10.5 or fewer characters per inch and contains 13,909 words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____pages or_____ words or _____ lines of text.

☐3. *Briefs in Capital Cases*

❑ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

❑ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

or is

❑ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐4. *Amicus Briefs*

❑ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

or is

❑ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

or is

❑ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

09/14/2009	/s/ Erik M. Silber
Date	Signature of Attorney or Unrepresented Litigant

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that on (date) Sep 14, 2009 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature /ERIK M. SILBER/

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that on (date) , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature