

No. 09-50296

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,

*Plaintiff-Appellant,*

v.

PIERCE O'DONNELL,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Central District of California  
D.C. No. 2:08-cr-00872-SJO-1  
Hon. S. James Otero, United States District Judge

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**BRIEF OF DEFENDANT-APPELLEE PIERCE O'DONNELL**

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## **THE ISSUE PRESENTED FOR REVIEW**

Does the conduct charged in the Indictment—reimbursing individuals after they have made contributions to a candidate for federal office using their true names—violate Section 441f,<sup>1</sup> which provides that “[n]o person shall make a contribution in the name of another person”?

## **PRELIMINARY STATEMENT**

The issue is not whether it is unlawful for one individual to reimburse \$26,000 in contributions to a presidential candidate made by thirteen other individuals. The arguments by the government, Federal Election Commission (“FEC”), and *amici* that the decision below creates a “loophole” that would render contribution limits “meaningless” are simply wrong. Section 441a of the Federal Election Campaign Act (“FECA”) expressly prohibits “indirectly” making “contributions, . . . including contributions which are in any way . . . directed through an intermediary or conduit,” and it requires disclosure to ensure that this prohibition cannot be evaded.

Thus, affirming the decision below would occasion no “loophole” in FECA. The government simply elected to charge under a felony provision that does not apply, rather than under Section 441a, which could have a lesser penalty.<sup>2</sup>

The adequacy of the underlying Indictment turns on whether Section 441f, which provides that “[n]o person shall make a contribution in the name of another person,” prohibits reimbursement using one’s own name to individuals for contributions they made using their true names. As the District Court found, reimbursing a contribution made by someone using his or her true name is not the same as “mak[ing] a contribution in the name of another.” Rather, Section 441f prohibits providing a name other than the contributor’s own name when making a contribution.

Having no answer to the effect of the express language of the statute,

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<sup>1</sup> “Section 441a” refers to 2 U.S.C. § 441a, “Section 441f” refers to 2 U.S.C. § 441f, and references to Title 2 are to the 2000 United States Code, as amended through Supplement II, unless otherwise noted; “Gov Br” refers to the government’s brief on appeal; “FEC Br,” “CREW Br,” and “CLC Br” refer, respectively, to the *amici* briefs for the Federal Election Commission, Citizens for Responsibility and Ethics in Washington, and Campaign Legal Center and Democracy 21.

<sup>2</sup> On the facts charged—reimbursing “more than \$10,000” in contributions, GER 18—Section 441a would carry a misdemeanor penalty; the penalty under Section 441f is a felony, conviction for which would result in Defendant-Appellee’s (“Defendant”) immediate disbarment. *See* Cal. Bus. & Prof. Code § 6102(a).

the government and *amici* resort to:

- Falsely alarmist policy arguments;
- Legislative history irrelevant because there is no statutory ambiguity and unpersuasive nonetheless, including because it mostly post-dates enactment of Section 441f;
- Inapposite court decisions, none of which addressed the issue in this case, let alone decided it adversely to Defendant's position; and
- Deference to FEC regulations not controlling because they are at odds with the plain language of the statute, and contrary to principles of lenity.

The Court need not consider more than the unambiguous statutory language. However, if the Court were to consider the policy and agency deference arguments, an overriding consideration is recognition that when Congress acts to regulate core First Amendment-protected conduct—which includes financing campaigns—it must do so narrowly and with precision. Under well-established principles, the need for doing so could not be greater than when Congress provides criminal penalties for otherwise-protected conduct.

For the same reasons, we respectfully submit that the government's argument that deference to the FEC's interpretation of Section 441f

displaces application of the rule of lenity is incorrect. As Congress must legislate with precision when regulating First Amendment conduct, the Court should adhere to the rule of lenity, rather than to the views of an agency, because lenity effectuates fundamental constitutional protections that are not subsumed in agency deference.

The Government's characterization of the District Court's ruling as reading a "non-textual limitation" into Section 441f is also without merit because limiting a criminal statute to its text is not reading into it a "non-textual limitation." Criminal statutes are not elastic bands of enforcement authority that prosecutors may twist and apply at will. They are instead confined to their textual requirements or proscriptions and, if ambiguous, are to be interpreted in favor of the accused, whose liberty is at stake. Allowing the government to contort Section 441f to prohibit the conduct charged in the Indictment would improperly license prosecutors to effectively rewrite criminal statutes' proscriptions at will.

Finally, the Indictment is fatally flawed because factually it does not charge Defendant with making the contributions, but rather with making reimbursements in his own name to those who had previously made the contributions in their own names. That defect, alone, requires the Court to affirm the decision below, because when the factual allegations in an

indictment do not make out the offense charged, the indictment must be dismissed.

### **STATEMENT OF FACTS<sup>3</sup>**

Counts One and Two of the Indictment are based on Defendant's allegedly having "reimbursed" in his own name other persons for "contributions" they made in their own names to the EFP political committee.<sup>4</sup> The factual predicate of the Indictment is clear: other individuals made "contributions" and Defendant "reimbursed" them.

The government elected to charge a two-step sequence of events, alleging first that a number of individuals made "contributions" to the EFP political committee. Those contributions were complete when made. Subsequently, the Indictment alleged, a second transaction occurred wherein Defendant, using his own name, reimbursed those contributors for the amounts of their contributions.

In pertinent part, Count Two alleges that:

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<sup>3</sup> The government references certain additional "facts" from a motion in limine to "provide[] context." Gov Br 3 n.2, 21 n.11. While those "facts" are irrelevant to this Court's review of the decision below, they are not properly before this Court on review of a motion to dismiss, *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996), as the government acknowledges (Gov Br 3 n.2), and should be ignored.

<sup>4</sup> Although not specified in the Indictment, there is no dispute that "EFP" refers to the Edwards for President political committee.

[S]pecifically, defendant O'DONNELL knowingly and willfully caused *other persons to contribute to EFP . . . and reimbursed those persons* a total of more than \$10,000 for their contributions . . . .

GER 18 (emphasis added).<sup>5</sup>

The Indictment further alleges that the reimbursements would be effected by means of “bank checks drawn on the account of defendant,” and that “defendant . . . would sign bank checks drawn on the account of defendant . . . reimbursing the conduit contributors for *their contributions* . . . .” GER 16 (emphasis added).

Overt Acts 1-7 in Count One similarly allege that Defendant solicited “contributions” or caused others to make “contributions,” and Overt Acts 8-12 allege that such contributions were “reimbursed.” GER 16-17.

The Indictment does not allege that the contributions themselves were made using anything other than the contributors’ true names. Nor does it allege facts showing that Defendant made “contributions”<sup>6</sup> or that

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<sup>5</sup> Although the Indictment refers to advances as well as reimbursements, GER 18, the factual allegations in the Indictment involve only reimbursements. GER 15-17.

<sup>6</sup> Although Count Two states that “defendant . . . through his agents and employees, knowingly and willfully made, and caused to be made, contributions in the names of other persons,” it clarifies that “[m]ore specifically, defendant . . . knowingly and willfully caused other persons to contribute to EFP . . . and reimbursed those persons . . . .” GER 18.



Defendant's "reimbursements," using his own name, are "contributions."<sup>7</sup>

### SUMMARY OF ARGUMENT

Counts One and Two of the Indictment were properly dismissed because Section 441f does not prohibit reimbursing campaign contributions made by others using their true names.<sup>8</sup> The text of Section 441f begins and ends the proper analysis. Nonetheless, while unnecessary, consideration of FECA as a whole and, specifically, a comparison of the language of Sections 441a and 441f confirm this conclusion.

The government's statutory interpretation argument not only ignores the plain meaning of the statute, but also runs afoul of long-standing principles of statutory construction, most importantly those (i) dictating against interpretations that render portions of a statute superfluous and (ii) explaining that when Congress includes words in one section of a statute but

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<sup>7</sup> One absurd result of the government's position would be that, on the facts alleged in the Indictment, the actual contributors violated Section 441f by reporting their own names rather than Defendant's name, even though at the time the contributors made the contributions, the only financial transaction that had occurred was one in which the contributors transferred their own funds to the EFP committee and Defendant had transferred nothing.

<sup>8</sup> If the conduct alleged in the substantive count (Count Two) does not constitute a crime under Section 441f, then Count One, which charges a conspiracy to violate Section 441f, also fails to allege a crime. *See, e.g., Parr v. United States*, 363 U.S. 370, 393 (1960); *Ingram v. United States*, 360 U.S. 672, 680-81 (1959). The government did not dispute this point below. Consequently, the argument here is framed in terms of Count Two.

omits them from another, it intends a different meaning for the two sections. (Points I.A.1. and I.A.2.)

The government’s “plain wording” argument is anything but that because it ignores the statutory text, would insert terms without any textual basis, and would render most of Section 441a(a)(8) and portions of various other FECA provisions superfluous. Equally unpersuasive—indeed, backwards—is the government’s argument that the decision below would strip Section 441f of meaning. Properly construed, Section 441f retains an important role in combating campaign finance abuse; construing Section 441f as the government argues, however, would effectively strip most of Section 441a(a)(8) of any meaning. (Points I.A.3. and I.A.4.)

The government and *amici* cannot point this Court to any case holding that Section 441f prohibits reimbursements, and Defendant is aware of none. Indeed, what is posited to the Court as the “seminal case” on point is merely a footnote, in a dissent, that noted, in dicta, an “inference” that a reimbursement was a contribution in the name of another.<sup>9</sup> (Point I.B.)<sup>10</sup>

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<sup>9</sup> CREW Br 12-13 (citing *United States v. Hankin*, 607 F.2d 611, 616 n.4 (3d Cir. 1979) (Garth, C.J., dissenting)); see FEC Br 14 (citing *Hankin*, 607 F.2d at 612); *Hankin*, 607 F.2d at 612 (holding that the statute of limitations mooted substantive issues).

The FEC's regulations and policy statements also do not aid the government's position. (Point I.D.) As the District Court correctly ruled, "[w]hile these statements may reflect the spirit of FECA, they do not accord with the plain language of § 441f read in conjunction with the sections of FECA expressly prohibiting 'conduit' and 'indirect' contributions . . . ." GER 7. As such, no deference is due because the agency's interpretation conflicts directly with the statute's plain language.

Even if it were appropriate to consider legislative history in this case (which it is not, given the plain meaning of the statute), the key piece of legislative history relied on by the government and *amici*—the amendment increasing the penalties under Section 441f—is entitled to little weight because it is both (1) subsequent legislative history and (2) merely a statutory heading. Overall, the scant legislative history provides no adequate basis to expand the express statutory language of Section 441f as the government urges. (Point I.E.)

Likewise, were it appropriate to consider policy issues (which it is not because the statutory language is decisive and fatal to the government's

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<sup>10</sup> Nor do the similar state statutes help the government. Many distinguish between contributions in the name of another and reimbursed contributions, supporting Defendant's, not the government's, interpretation of Section 441f. And the cited state court decisions do not hold that a provision similar  
(*cont'd*)

claim), they are precisely the opposite of those cited by the government and *amici*. Rather than concern about a non-existent “loophole” in FECA, the controlling policy issue is the requirement that criminal statutes be narrowly construed and that Congress act with clarity when, as here, it regulates legitimate—indeed, core—First Amendment activities. The appropriate forum to seek enhanced penalties for reimbursements of campaign contributions, as the government and *amici* seek here by judicial ruling,<sup>11</sup> is Congress, which would need to act with the specificity required when regulating political speech. (Point I.F.)

Based on case law holding that deference to the Bureau of Prisons’ interpretation of a statute governing the calculation of a prisoner’s credit for good behavior trumps the application of the rule of lenity, the government asserts that the rule of lenity does not control in the event of ambiguity in the statutory language. We respectfully submit that the deference due the Bureau of Prisons regarding the calculation of good behavior credits under the Sentencing Reform Act is far different from the deference posited by the government here. Deferring to the interpretation of an agency charged with

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to Section 441f prohibits reimbursements. (Point I.C.)

<sup>11</sup> A violation of Section 441a is a felony for contributions totaling more than \$25,000, while a violation of Section 441f is a felony for contributions totaling more than \$10,000. 2 U.S.C. §§ 437g(d)(1)(A), (D).

enforcement of the statute at issue and displacing the venerable and well-established principles that underlie the rule of lenity would be analogous to deferring to prosecutors' interpretation of general criminal statutes, which would not be a sufficient basis for abandoning the rule of lenity.<sup>12</sup>

Finally, even if Section 441f could be stretched to prohibit reimbursements, the Indictment would still be defective. The Indictment charges that others made "contributions" using their own names and Defendant subsequently reimbursed them. That the Indictment alleged that Defendant solicited these contributions is irrelevant. Soliciting contributions is not only lawful, it is protected core First Amendment activity. That Defendant promised to reimburse the contributions he solicited is also irrelevant to the Section 441f analysis. The promise was not what was charged as violating Section 441f, as indeed it could not be because a promise or pledge is not a contribution. Thus, the Indictment did not factually charge Defendant with making campaign contributions in the name

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<sup>12</sup> We note also that the government cites as authoritative its own manual on election law enforcement. Gov Br 27, 38, 44 (citing Craig C. Donsanto & Nancy Simmons, *Federal Prosecution of Election Offenses* (7th ed. 2007)). Intending no disrespect to its authors, this Court should give the manual no weight for the same reasons as outlined in the text herein regarding the government's argument. See *Crandon v. United States*, 494 U.S. 152, 168 (1990); see *id.* at 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal

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of others, but rather charged that others made contributions in their own names which Defendant then reimbursed using his own name. This variance between the charged conduct and the charged statute is fatal and would compel affirming dismissal of Counts One and Two of the Indictment, even if Section 441f did prohibit reimbursements. (Point II.)

## ARGUMENT

### I.

#### **SECTION 441F DOES NOT PROHIBIT REIMBURSING CAMPAIGN CONTRIBUTIONS MADE BY OTHERS USING THEIR TRUE NAMES.**

##### **A. THE PLAIN MEANING OF SECTION 441F, ESPECIALLY INTERPRETED IN THE CONTEXT OF FECA, DOES NOT PROHIBIT REIMBURSING CAMPAIGN CONTRIBUTIONS.**

###### *1. The plain meaning of Section 441f does not prohibit reimbursing campaign contributions.*

As the District Court determined, examination of Sections 441f and 441a (in particular Section 441a(a)(8)) compels the conclusion that Section 441f does not prohibit an individual from reimbursing another's contribution. Section 441f is a complete prohibition ("no person shall make . . ."). Section 441a(a)(8), in contrast, allows, regulates, and limits conduct (conduit contributions) by requiring disclosure of third-party sources of

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statutes is entitled to deference.").

funds contributed and regulating the total amounts that can be contributed by any individual.<sup>13</sup>

The language of Section 441a(a)(8), part of the provision limiting contributions to presidential campaigns, is clear and unambiguous:

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.

Section 441a(a)(8) (emphasis added).

Section 441a therefore addresses the conduct alleged in the Indictment: exceeding the individual contribution limits by reimbursing “conduits” who made contributions. The conduits’ failure to report any original source of the contributions also runs afoul of Section 441a. The Indictment specifically and repeatedly refers to the people making the

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<sup>13</sup> The government’s argument that Section 441f bans some conduit contributions but not others (Gov Br 43-44) is inconsistent with the text of the statute and is illogical. Even if Section 441f could be so construed, its application could not be squared with the conduct charged in the Indictment because it would create a felony offense when someone subsequently reimburses a contribution that was not a violation of Section 441f when  
(*cont’d*)

contributions and being reimbursed by Defendant as “conduit contributor[s],” GER 14 (§ 10(b)); GER 15 (§ 3); GER 16 (§§ 4, 5, 6); GER 18, and to the contributions themselves as “conduit contributions.” GER 17 (§§ 8-12).<sup>14</sup>

The plain language of Section 441f is equally clear and unambiguous:

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 . . . .

Section 441f.

Unlike Section 441a(a)(8), Section 441f does not prohibit making contributions “directly or indirectly,” and does not refer to “contributions which are in any way . . . directed through an intermediary or conduit.” Rather, Section 441f prohibits a person from making a contribution using other than his or her name; its terms do not proscribe reimbursing a contribution made by another.<sup>15</sup> Nor does the definition of “contribution”

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made.

<sup>14</sup> The government’s claim—made for the first time on appeal—that these were really contributions through “straw donors” rather than “conduits,” Gov Br 21 n.11, 44, is contradicted by the plain, and repeated, language of the Indictment.

<sup>15</sup> Congress has in numerous other contexts explicitly prohibited “reimbursements,” but chose not to do so in Section 441f. *See* 2 U.S.C. § 31-2(a)(3)(A) (2006) (restricting the value of gifts a Senator may accept and defining a gift to include “reimbursement for other than necessary (cont’d)



applicable to Section 441f include amounts paid for the purpose of reimbursing others for “contributions.” 2 U.S.C. § 431(8)(A).<sup>16</sup>

When construing statutes, the plain meaning of the words controls:

[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.

*Caminetti v. United States*, 242 U.S. 470, 485 (1917). Unless otherwise indicated, “words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning,” *Perrin v. United States*, 444 U.S. 37, 42 (1979), and the “[t]he inquiry [into the meaning of the statute] ceases” if the text is plain and unambiguous. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002).

Moreover, “[w]here the words of the statute are clear and free from ambiguity, the letter of the statute may not be disregarded under the pretext of pursuing its spirit.” 2A Norman J. Singer & J.D. Shambie Singer,

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expenses”); 2 U.S.C. § 610(d) (2006) (prohibiting the Congressional Budget Office from reimbursing an employee for certain student loan payments); 5 U.S.C. § 8902a(a)(2)(A) (2006) (prohibiting health care providers from providing payment, either directly or through reimbursements, to debarred insurance carriers).

<sup>16</sup> The government’s “plain wording” argument based on the statutory definition of “contribution,” Gov Br 19-21, is addressed below. It does not demonstrate that Section 441f prohibits reimbursements.

*Sutherland Statutory Construction* § 46:1 (7th ed. 2008) (footnotes, quotation marks, and citations omitted).

Applying these principles, the decision below is plainly correct: Section 441f prohibits a contributor from making a contribution and using another's name;<sup>17</sup> it does not prohibit reimbursements of contributions made by others using their true names. Section 441a governs that conduct.<sup>18</sup>

Thus, Sections 441f and 441a both are aimed at securing campaign contribution limits and disclosing the identities of persons supplying funds to campaigns. An individual exceeding the limits through the use of a conduit violates Section 441a(a)(8)'s contribution limits and attribution requirements; an individual doing so by contributing in a false name violates Section 441f. Contrary to the government's and *amici*'s arguments, these

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<sup>17</sup> Defendant has never argued, as the government suggests, that Section 441f only prohibits the use of "made-up names." Gov Br 23 n.12. Rather, Section 441f prohibits any contribution made using other than the contributor's true name. It is undisputed here, however, that the contributors' provided their true names. They allegedly failed to disclose, as required by Section 441a(a)(8) (but not under Section 441f), that Defendant was the "original source" of the contribution. That failure, however, would be a violation of Section 441a by the contributors, and does not convert Defendant's conduct into a violation of Section 441f.

<sup>18</sup> This conclusion does not amount to "read[ing] a nontextual limitation into Section 441f," as the government repeatedly claims. Gov Br 16, 21-24. Rather, the District Court confirmed its interpretation of Section 441f by reference to Section 441f's interaction with other provisions of FECA.

sections—properly construed—are perfectly compatible and serve different purposes under a common objective.

2. *Construing FECA as a whole reinforces the conclusion that Section 441f does not prohibit reimbursement of campaign contributions.*

Primary statutory interpretation principles require that a statute “be considered in all its parts when construing any one of them.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). FECA is a comprehensive statutory regime governing the election of federal officials. *See Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975) (en banc) (per curiam), *aff’d in part*, 424 U.S. 1, 143 (1976) (per curiam). FECA regulates the organization and registration of political committees, *see* 2 U.S.C. §§ 431(4), 432, 433, subjects them to reporting requirements and limitations, *see* 2 U.S.C. § 439a, and limits some contributions and prohibits others altogether, *see* 2 U.S.C. §§ 441a, 441b, 441c, 441e, 441f. Contributions prohibited altogether include those by national banks, corporations, labor organizations, government contractors, foreign nationals, and persons in the name of other persons. *Id.* Significantly, this broad statutory scheme does not—as the government admits—prohibit altogether “conduit contributions.” Section 441a(a)(8); Gov Br 44-45.

Congress has also carefully regulated campaign contributions,

expressly limiting indirect contributions in statutes and provisions of FECA other than Section 441f. *See, e.g.*, 2 U.S.C. § 441b(b)(2) (prohibiting “any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value” from corporations, banks, and labor organizations to a campaign); 2 U.S.C. § 441c(a)(1) (prohibiting government contractors from “directly or indirectly . . . mak[ing] any contribution of money or other things of value” to political parties, committees, or candidates); 2 U.S.C. § 441e(a)(1) (prohibiting foreign nationals from making contributions “directly or indirectly”). Congress chose not to prohibit “indirectly” making a contribution in the name of another in Section 441f.

In sharp contrast, Congress specifically provided that Section 441a’s contribution limits would include indirect contributions, explicitly including contributions made through conduits (Section 441a(a)(8)), compelling the conclusion that Congress intentionally omitted this language from Section 441f. Contrary to well-established canons of construction, the government argues that this Court should interpret Section 441f as prohibiting “indirect” contributions. This interpretation, however, would have Section 441f reach “direct or indirect” contributions, even though that term is used expressly only in other provisions and not in Section 441f. When “Congress includes

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 purposefully in the disparate inclusion and exclusion.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (citations omitted); *see, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute”).<sup>19</sup>

Applying the term “contribution” under Section 441f to include reimbursements also would violate the fundamental rule of statutory interpretation “that a statute ought, upon the whole, to be so construed that,

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<sup>19</sup> The government minimizes the omission of “directly or indirectly” from Section 441f by arguing that the omission would be relevant if Section 441f included “directly” but not “indirectly,” Gov Br 39-40, and that comparison between Sections 441a and 441f is not meaningful because Section 441f’s predecessor was not enacted contemporaneously with the provisions proscribing certain “direct or indirect” contributions. Gov Br 40-41. However, the absence of “directly” in Section 441f is not significant because none of the prohibitions on contributions in FECA use “directly” without “indirectly.” Clearly, there is no basis in the canons of construction to conclude that the omission of “indirectly” is only material to the construct of a provision of FECA if “directly” is included. As to the argument that Sections 441f and 441a(a)(8) were not enacted at the same time, Section 441f was re-enacted and amended in 1974 when Section 441a was enacted, and twice they were both re-enacted at the same time (in 1976 and 1979) with the differing language. *See* Gov Br 11-16 (reciting history); FEC Br 27 (same). In any event, this Court presumes that different language in different sections of a statute have different meanings, even where the provisions were not adopted in the same act. *United States v. Youssef*, 547 (cont’d)

if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citations and quotations omitted). If the government’s view were correct, Section 441a(a)(8) would not need to refer to “either directly or indirectly . . . including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit” because those terms would already be included in the simple term “contribution.” Moreover, if, as the government suggests, reimbursements are always “contributions,” then they would count against aggregate limits and all of the italicized language below in Section 441a(a)(8) would be superfluous:

*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 . . . 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 intended recipient of such contribution to the Commission and to the intended recipient.*

Thus, the government’s interpretation would render 52 of the 79 words in Section 441a(a)(8) superfluous and would mean that the Congress, acting a

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F.3d 1090, 1094-95 (9th Cir. 2008) (*per curiam*).

few years after adopting Section 441f,<sup>20</sup> had no understanding of what it meant.<sup>21</sup> Such a reading of Section 441f is impermissible.<sup>22</sup>

The government's interpretation would also impermissibly render the phrase "directly or indirectly" superfluous everywhere it appears in FECA, since under the government's construction the word "contribution" alone would be broad enough to encompass "indirect" contributions. This would render superfluous portions of Sections 441b, 441c, and 441e.

The court below carefully analyzed the statutory language in light of

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<sup>20</sup> Section 441a(a)(8) was added in 1974, after Section 441f had already been in the statute for several years.

<sup>21</sup> The government and *amici* make much of the fact that while Section 441f's predecessor was part of FECA beginning in 1971, Section 441a(a)(8)'s predecessor was not added until 1974, asserting that this shows that Section 441f must have prohibited conduit contributions. *See, e.g.*, Gov Br 28 n.14, 47-49. But that history is equally consistent with Congress having recognized that reimbursements were left unaddressed by the 1971 Act and adding Section 441a(a)(8)'s predecessor in 1974 to deal with this fact. Since the legislative history for Sections 441f and 441a does not address which scenario was the case, the enactment sequence is hardly a dispositive factor in the government's favor.

Moreover, since Congress added Section 441a(a)(8) to FECA at the same time it re-enacted and amended Section 441f, an interpretation of Section 441f that renders most of Section 441a(a)(8) superfluous is especially unwarranted.

<sup>22</sup> Defendant does not argue, as the government suggests, Gov Br 41, that the adoption of Section 441a limited the reach of Section 441f. The express language of Section 441f never reached conduit contributions through reimbursements. Rather, Section 441a(a)(8) addresses, explicitly, conduit contributions, leaving Section 441f unchanged.

these well-established principles of statutory construction, GER 2-5, and concluded that Section 441f does not prohibit reimbursing campaign contributions made by individuals using their true names. That conclusion is correct and should be affirmed.

3. *The government's "plain wording" argument is inconsistent with the actual language of Sections 441a and 441f.*

The government argues that Defendant's reimbursement of individuals who made contributions constituted a "contribution in the name of another person," specifically the persons whom he reimbursed. Gov Br 19-21.

There are multiple defects in the government's "plain wording" argument. The most obvious defect is that, rather than being based on the "plain wording" of Section 441f, the government urges the Court to insert terms that simply are not there. Thus, the government's textual argument is anything but that.

Moreover, even assuming, *arguendo*, that Defendant's reimbursements constituted a "contribution" under the statutory definition, they were made in his true name, not "in the name of another." There is no allegation in the Indictment that Defendant used any name other than his own in reimbursing the actual contributors. Indeed, it is undisputed that he did so by "bank checks drawn on defendant O'DONNELL'S account."



GER 16-17.<sup>23</sup>

In sum, the government advances the following entirely implausible readings of Sections 441a and 441f:

- Section 441f, which does not refer to “conduit” contributions, is in fact the “conduit contribution ban.” But although it is the “conduit contribution ban,” it does not actually ban all conduit contributions; rather it only bans “undisclosed” conduit contributions: “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.” Gov Br 44.
- Section 441a, which does refer to conduit contributions in the broadest possible language (“contributions which are in any way . . . directed through an intermediary or conduit”), in fact does not address all conduit contributions, but only those where the original source is disclosed, and then only to count them against aggregate limits:

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<sup>23</sup> The government’s interpretation could turn almost any expenditure into an illegal “contribution in the name of another.” Indeed the government’s interpretation is so broad that it would appear to swallow the separate statutory definition of expenditure. *See* 2 U.S.C. § 431(9) (defining an expenditure as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”).

“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.” Gov Br 44.

This is obviously not statutory construction, but statutory invention. Licensing the government to prosecute a defendant for a felony based on such a creative and fanciful rewriting of a criminal statute would be dangerous precedent.

4. *The government’s and amici’s argument that the decision below effectively stripped Section 441f of any meaning is incorrect.*

The government incorrectly argues that the interpretation of Section 441f adopted below is illogical, Gov Br 22, and would leave virtually no conduct prohibited by Section 441f. Gov Br 23 n.12, 24; *see also* FEC Br 2, 21-23 (the decision below would render Section 441f “virtually meaningless”). Thus, the government asserts:

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.

Gov Br 22-23.

This point is plainly wrong. First, whether there is a “functional” difference is not the question in this case; rather, it is whether there is a statutory difference, which there undeniably is.<sup>24</sup> Section 441a(a)(8) requires the actual contributor to report the name of the original source of the money, thus informing the public of the original source.<sup>25</sup> Where a person makes a contribution using a false name, however, there is no such disclosure and little record by which to trace the original source.

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<sup>24</sup> The government attempted to argue below that Defendant “basically” or “essentially” violated Section 441f. GER 93, 99. The District Court rejected this government argument, just as this Court should reject its “no functional difference” point, to ensure that the government cannot render limitations in criminal statutes meaningless by elasticizing them.

<sup>25</sup> The government and *amici* consistently ignore the requirements of Section 441a(a)(8) in making their policy arguments against the decision below. Thus, it is simply incorrect to suggest that Defendant is arguing that “he had no duty to use his own name when contributing” and that Defendant’s argument “frustrates th[e] purpose” of FECA. Gov Br 17. Section 441f prohibits Defendant from using a false name. Section 441a establishes a duty to report the true name of the original source of funds contributed. Similarly, the government’s suggestion that because “neither defendant nor anyone else submitted defendant’s name to the candidate with these contributions,” it must be a violation of Section 441f, Gov Br 21, ignores the fact that the failure of the conduits to provide Defendant’s name was a violation of their duty under Section 441a(a)(8). The government’s assertion that “[r]equiring treasurers to keep records of, and file reports with, the names . . . of contributors would be meaningless if those documents could contain the names . . . of straw donors, rather than actual contributors,” Gov Br 30, is also incorrect. Again, Section 441a(a)(8) ensures that the records would contain the true names of the original source of any contributions.

Moreover, the government's argument that there would be few violations of Section 441f if it does not prohibit reimbursements is not only irrelevant, but also wrong. There are innumerable means by which false identities could be used to make contributions in the name of another person and, again, such actions would leave no easy way to identify the source of the money. It is perfectly rational for Congress to have concluded that such misconduct is a greater evil than reimbursing someone for a contribution where the contributor has an obligation to report the original source.

Equally incorrect is the government's assertion that "the court's limitation renders Section 441f avoidable and *essentially 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 the campaign funds by contributing in the name of a straw donor . . . ." Gov Br 24 (emphasis added). This argument is untenable for several reasons.

First, a reimbursed contribution could violate Section 441a(a)(8) where the original source is undisclosed. That is hardly an irrational scheme for Congress to devise. Moreover, the ruling below does not render Section 441f "essentially superfluous," as it recognizes that Section 441f prohibits contributions made in any name other than the contributor's. It is, rather, the government's construction which renders most of a section of FECA

(Section 441a(a)(8)) not just “essentially superfluous,” but entirely so.<sup>26</sup>

Equally unavailing are the government’s and *amici*’s attempts to read Sections 441a and 441f together to support their contention that “[a] failure by a contributor and his conduit to abide by th[e] disclosure requirement of Section 441a results in a violation of Section 441f.” CLC Br 9; *see* Gov Br 46. This would result in the anomalous circumstance that by failing to comply with Section 441a’s requirements, the contributor and conduit would not violate Section 441a, which explicitly governs such conduct, but would violate Section 441f, which does not.

Moreover, the operative temporal limitation expressed in the text of Section 441f—“make a contribution”—renders the government’s construct illogical and outside the text of the statute because it would have a crime being committed not when the contribution is made, but rather when an event subsequent to the “making” of a contribution occurs. Plainly, Section 441f cannot be construed to be rendered operative only by events that occur subsequent to the making of a contribution, because it is acts done at the

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<sup>26</sup> Even if the government’s policy arguments had some merit, which they do not, as this Court has made clear, “we are bound by the words that Congress actually used.” *Gov’t of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 635 (9th Cir. 1999); *see also Pavelic & LeFlore v. Marvel Entm’t Group*, 493 U.S. 120, 126 (1989) (court’s “task is to apply the text, not to improve” it).

making of the contribution which defines the crime in that section.

**B. NO COURT HAS HELD THAT SECTION 441F PROHIBITS REIMBURSING CAMPAIGN CONTRIBUTIONS MADE BY OTHERS USING THEIR TRUE NAMES.**

Because no court has held that Section 441f prohibits reimbursing campaign contributions made by others using their true names, the claim in this Court by government and *amici*, citing dicta in various decisions, that prior decisions are controlling authority is without merit. *See* Gov Br 34-38; FEC Br 14-18; CREW Br 12-14; CLC Br 15-18.

In each case cited by the government or *amici*, any discussion of Section 441f, and any description of it as prohibiting “conduit contributions,” is no more than dicta in cases where the issue of whether Section 441f prohibits the conduct charged here was not contested and none involves a holding that Section 441f prohibits reimbursements. Indeed, the statement in a “seminal case” cited by the *amici* in their efforts to find contrary precedent—*United States v. Hankin*, 607 F.2d 611 (3d Cir. 1979)—is a footnote in a dissent that simply notes, in dicta, the “inference” that a reimbursement was a contribution in the name of another. CREW Br 12-13 (citing *Hankin*, 607 F.2d at 616 n.4 (Garth, C.J., dissenting)); *see* FEC Br 14 (citing *Hankin*, 607 F.2d at 612); *Hankin*, 607 F.2d at 612 (the statute of limitations mooted substantive issues).

Such “[d]ictum settles nothing, even in the court that utters it.” *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005).<sup>27</sup> This is especially true where, as in the cases discussed below, the issue of whether Section 441f prohibits reimbursements of contributions was not contested. *See, e.g., Cross v. Burke*, 146 U.S. 82, 87 (1892) (“But the question of jurisdiction does not appear to have been contested in [*Wales v. Whitney*, 144 U.S. 564 (1885)] and, where this is so, the court does not consider itself bound by the view expressed.”).<sup>28</sup>

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<sup>27</sup> The Supreme Court has repeatedly held that a court is not bound by its prior dicta: “For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, [19 U.S. (6 Wheat.) 264 (1821)], we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated. *See [id. at 399-400]* (‘It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision[.]’).” *Cent. Valley Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006); *see Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626-27 (1935).

<sup>28</sup> As noted, there are various statements referring to Section 441f as prohibiting conduit contributions and a number of individuals have pled guilty to violations of Section 441f (or paid civil penalties) based on reimbursements of contributions. FEC Br 9-10, 10 n.4; CREW Br 4, 4 n.1; CLC Br 18-20. Because FECA prohibits undisclosed conduit contributions or conduit contributions in excess of aggregate limits under Section 441a, there may be many reasons why those individuals took the actions they did in those cases. In any event, as noted, where an issue is not contested in a case, any views expressed by the court are not binding. *Cross*, 146 U.S. at 87. Similarly, the fact that many courts or defendants may have assumed a statute applied is of no moment if the statutory language does not support

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- *McConnell v. FEC*, 540 U.S. 93 (2003) (Gov Br 34; FEC Br 14; CLC Br 15-16). Striking a ban on contributions by minors, the Supreme Court suggested in dicta that there was little evidence of a need for this provision because such activities were deterred by the prohibition against making contributions in the name of another. 540 U.S. at 232. The Supreme Court’s suggestion that Section 441f applied to a contribution made by a parent in a child’s name is, in fact, consistent with Defendant’s interpretation of Section 441f and inconsistent with the government’s interpretation of Section 441f, because Section 441f does prohibit a contribution in the name of another. Even if the Supreme Court were addressing reimbursement by the parent of a contribution made in the child’s name (and there is no indication it was), the statement is dicta and the prohibitions in Section 441a would equally explain the lack of a need for the disputed provision.

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that view. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (“since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits”). Indeed, even where many courts have squarely upheld a particular statutory interpretation—which is not the case here—that is of no moment if that interpretation is contrary to the language of the statute. *See, e.g., McNally v. United States*, 483 U.S. 350, 358-61 (1987) (restricting reach of mail fraud statute despite widespread judicial acceptance of contrary interpretation).



- *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990) (Gov Br 34-35; FEC Br 14, 15-16; CREW Br 13; CLC Br 17-18). Goland allegedly made conduit contributions, and argued unsuccessfully that Section 441f violated his constitutional right to contribute to political campaigns anonymously. *See* 903 F.2d at 1252. This Court was not faced with the question of whether Section 441f in fact prohibited reimbursements and did not address that issue.<sup>29</sup>
- *United States v. Serafini*, 233 F.3d 758 (3d Cir. 2000) (Gov Br 36; FEC Br 14). This case involved an appeal from a conviction for

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<sup>29</sup> The government asserts that even though the statement in *Goland* describing Section 441f as a ban on conduit contributions is dicta, it is binding. Gov Br 37-38 (citing *United States v. Bond*, 552 F.3d 1092, 1096 (9th Cir. 2009)). But this Court has made clear that even Supreme Court dicta is not binding. *Newdow v. U.S. Congress*, 328 F.3d 466, 489 (9th Cir. 2003) (noting that Supreme Court dicta is owed “due deference”), *rev’d on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *see Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 2004) (dictum has “no binding or precedential impact”). And, as noted above, *supra* note 27, the Supreme Court has repeatedly held that dictum is not binding “even in the court that utters it.” *Jama* 543 U.S. at 352 n.12. *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005) (en banc) (per curiam), is not to the contrary. There, the court stated that: “In *Quinn*, the proper scope of ‘incidental to’ was an issue presented for review. We addressed the issue and decided it in an opinion joined in relevant part by a majority of the panel. Consequently, our articulation of ‘incidental to’ became law of the circuit, regardless of whether it was in some technical sense ‘necessary’ to our disposition of the case.” *Id.* at 750-51 (footnotes omitted). In *Goland*, whether Section 441f, as opposed to Section 441a, banned reimbursements was not raised or addressed by this Court.

perjury where interpreting Sections 441a or 441f was not an issue.

*See* 233 F.3d at 762.

- *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) (Gov Br 36; FEC Br 14-15; CREW Br 13; CLC Br 16-17). As part of a discussion of the constitutionality of Section 441f, the court referenced the requirement of disclosure, a requirement only in Section 441a(a)(8). It is clear that the court made no determination as to whether conduit contributions were prohibited by Section 441f, where the Third Circuit's entire pertinent statement was: "Proscription of conduit contributions (with the concomitant requirement that the true source of the contribution be disclosed) would seem to be at the very core of the Court's analysis [in *Buckley*]." 212 F.3d at 775.
- *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999) (Gov Br 36; CREW Br 13). *Kanchanalak* is not relevant to interpretation of Sections 441f or 441a, which were not before that court reviewing convictions for false statements by foreign national contributors. *See*

192 F.3d at 1040.<sup>30</sup>

- *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) (Gov Br 36);  
*United States v. Curran*, 1993 WL 137459 (E.D. Pa. April 28, 1993)  
(Gov Br 37). This case also involved convictions for making false statements, not for violating Section 441f. The description of Section 441f on which the government relies is simply a footnote discussing the transfer of the campaign finance provisions from Title 18 to Title 2. *See* 20 F.3d at 564 n.1.
- *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998) (Gov Br 36; FEC Br 14, 16-17). The defendant argued that it could not be vicariously liable under Section 441f for an employee's actions that harmed Sun-Diamond. 138 F.3d at 970. The court did not address whether Section 441f prohibited reimbursements.
- *United States v. Hsia*, 176 F.3d 517 (D.C. Cir. 1999) (CREW Br 13);  
*United States v. Hsia*, 24 F. Supp. 2d 33 (D.D.C. 1998) (Gov Br 37);

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<sup>30</sup> While Count Three of Defendant's Indictment, which charged false statements, is not before this Court, the FEC nonetheless argues that the decision below was inconsistent in dismissing Counts One and Two but not Three. FEC Br 23-24. The FEC erroneously equates an unsuccessful motion to dismiss with an affirmative ruling that the conduct charged is sufficient for conviction. The ruling below indicates only that the conduct charged in Count Three (since dismissed) is sufficient to call for a trial on the merits.

- United States v. Trie*, 23 F. Supp. 2d 55 (D.D.C. 1998) (CREW Br 14). These cases involved charges for false statements and/or conspiracy to defraud the United States, not violations of Section 441f, and the courts had no occasion to consider the reach of Section 441f or its interplay with Section 441a.
- *United States v. Hsu*, 2009 WL 2495794 (S.D.N.Y. Aug. 10, 2009) (Gov Br 37). The decision in this case involved a challenge to the sufficiency of the evidence, not any question of whether Section 441f prohibited reimbursements. *See id.* at \*1-\*2. Moreover, in contrast to the Indictment here, Mr. Hsu was charged in the operative counts with “making contributions . . . in the names of others,” *United States v. Hsu*, 2007 WL 4245863 (S.D.N.Y. Nov. 27, 2007) (Counts Thirteen, Fourteen and Fifteen), not with reimbursing others for contributions they had made.
  - *FEC v. Weinstein*, 462 F. Supp. 243 (S.D.N.Y. 1978) (Gov Br 37; FEC Br 14). This case involved a constitutional vagueness challenge to Section 441f. The court rejected the challenge. 462 F. Supp. at

250. It did not address the interplay of Sections 441a and 441f.<sup>31</sup>
- *Fieger v. Gonzales*, 2007 WL 2351006 (E.D. Mich. Aug. 15, 2007) (Gov Br 37; FEC Br 14 n.6; CREW Br 13). This case involved the question of whether the Justice Department could investigate violations of the federal campaign finance laws before a referral from the FEC. The court did not interpret Section 441f.
  - *United States v. Johnston*, 2008 WL 2544779 (E.D. Mich. June 20, 2008) (CREW Br 13). This decision involved sentencing issues and includes no discussion of whether Section 441f prohibits reimbursements.
  - *FEC v. Kopko*, Civ. No. 91-CV-7764 (E.D. Pa. May 22, 1992) (FEC Br 14 n.6). This was a stipulated order and did not involve discussion

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<sup>31</sup> The court's entire discussion was:

For purposes of this motion it is assumed that defendant Weinstein directed his plant manager to make funds available to employees of Winfield so that those employees could send individual checks to the Sapp election committee. Defendants made those funds available to the manager. These acts demonstrate that defendants did comprehend the simple words: "No person shall make a contribution in the name of another." 2 U.S.C. § 441f. In any case, the court finds no ambiguity in the statutory language.

462 F. Supp. at 250.

of any issue by the district court.

- *FEC v. Wolfson*, Civ. No. 85-1617-CIV-T-12 (M.D. Fla. Feb. 6, 1986)

(FEC Br 17). The defendant did not respond, so this was essentially a default judgment,<sup>32</sup> in which the court found violations of both Sections 441a and 441f without any discussion of the statutes or their differences.

**C. THE STATE EXPERIENCE, CITED BY ONE AMICUS, SUPPORTS DEFENDANT’S INTERPRETATION, NOT THE GOVERNMENT’S.**

Although one *amicus* argues that analogous state statutes and decisions show that Section 441f’s language prohibits reimbursement of contributions, CREW Br 14-16 (claiming that “twenty-two states have incorporated the same or similar language [of Section 441f] into their own campaign finance laws”), the reality is far different. No state court has held that a reimbursement is a contribution in the name of another, and many of the cited state statutes, while prohibiting contributions “in the name of another,” include additional language not found in Section 441f to specify

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<sup>32</sup> The FEC also cites a series of default judgments. FEC Br 17 (citing *FEC v. Williams*, Civ. No. 93-6321-ER (C.D. Cal. Jan. 31, 1995); *FEC v. Lawson*, Civ. No. 6:90-2116-9 (D.S.C. Apr. 8, 1991); *FEC v. Rodriguez*, Civ. No. 86-687-CIV-T-10 (M.D. Fla. Oct. 28, 1998)). As default judgments, these are not persuasive as to the proper interpretation of Section 441f, let alone dispositive.

the activity that is prohibited; some even explicitly prohibit

“reimbursements.”

- Haw. Rev. Stat. § 11-202: “No person shall make a contribution of the person’s own money or property, or money or property of another person . . . in any name other than the true name of the person who owns the money or who supplied the money or property.” This language plainly covers contributions pursuant to a reimbursement arrangement in a way that Section 441f does not.
- Iowa Code § 68A.502: “A person shall not make a contribution . . . in the name of another person. . . . For the purpose of this section, a contribution . . . made by one person which is ultimately reimbursed by another person who has not been identified as the ultimate source . . . of the funds is considered to be an illegal contribution . . . in the name of another.” The second sentence would be superfluous if “in the name of another” already prohibited reimbursements.
- Nev. Rev. Stat. § 294A.112: “1. A person shall not: (a) Make a contribution in the name of another person. . . . 2. As used in this section, ‘make a contribution in the name of another person’ includes, without limitation: (a) Giving money . . . all or part of which was provided by another person, without disclosing the source of the

money. . . .” Again, this definition would be superfluous if the language of Section 441f prohibited reimbursements.

- N.J. Rev. Stat. § 19:44A-20: “No contribution of money . . . shall be made . . . whether anonymously, in a fictitious name, or by one person . . . in the name of another . . . . No individual . . . shall loan or advance to any individual . . . any money or other thing of value expressly for the purpose of inducing the recipient thereof . . . to make a contribution, either directly or indirectly . . . . No person shall contribute . . . funds or property . . . which has been given or furnished to him by any other person . . . for the purpose of making a contribution thereof . . . .” Again, this language plainly covers contributions pursuant to a reimbursement arrangement in a way that Section 441f does not.
- S.D. Codified Laws § 12-27-12: “No person . . . may make a contribution in the name of another person,” or “make a contribution on behalf of another person. . . .” The addition of the “on behalf of another person” language indicates that the language of Section 441f standing alone would not prohibit such conduct.

Several state statutes add “directly or indirectly” to the prohibition on making a contribution in the name of another, in marked contrast to Section



441f. *See, e.g.*, Fla. Stat. § 106.08(5)(a) (“A person may not make any contribution through or in the name of another, *directly or indirectly*, in any election.”) (emphasis added); La. Rev. Stat. Ann. § 18:1505.2(A)(1) (“No person shall give, furnish, or contribute monies . . . to . . . a candidate . . . through or in the name of another, *directly or indirectly*.”) (emphasis added); Mo. Rev. Stat. § 130.031(3) (“No contribution shall be made . . . *directly or indirectly*, in a fictitious name, in the name of another person, or by or through another person in such a manner as to conceal the identity of the actual source of the contribution . . . .”) (emphasis added); Conn. Gen. Stat. § 9-622 (prohibiting an individual from “*directly or indirectly*, individually or through another person, mak[ing] a payment or promise of payment to a campaign treasurer in a name other than the person’s own . . .”) (emphasis added); Idaho Code Ann. § 67-6614 (“No contribution shall be made . . . *directly or indirectly*, in a fictitious name, anonymously, or by one (1) person through an agent, relative or other person in such a manner as to conceal the identity of the source of the contribution.”) (emphasis added); Wash. Rev. Code § 42.17.780 (“A person or entity may not, *directly or indirectly*, reimburse another person or entity for a contribution . . . .”) (emphasis added).

Thus, the analogous state statutes make clear that Section 441f’s

prohibitions are narrow, and that the language does *not* “demonstrate[] breadth” as the government claims. Gov Br 25. Rather, the state statutes show a widespread recognition among state legislatures that Section 441f does not cover the conduct alleged in this case.

Cases interpreting these state statutes also fail to support *amicus*’ claim that the proper interpretation of “in the name of another” includes the conduct alleged in the Indictment. In the cited cases, much like the federal cases cited by the government, the defendants never directly challenged the interpretation of the statute and the courts did not address the issue.

- *Latchem v. State*, 1999 WL 587238 (Alaska Ct. App. Aug. 4, 1999):  
The issue addressed was the applicable statute of limitations. The court did not address the proper interpretation of the prohibition against making contributions in the name of another.
- *State v. Azneer*, 526 N.W.2d 298 (Iowa 1995). The issue addressed was the meaning of the word “willfully” in the enforcement provision of the campaign finance statute. The court did not address the proper interpretation of the prohibition against making contributions in the name of another.
- *State v. Palmer*, 810 P.2d 734 (Kan. 1991). The issue addressed related to the statute of limitations and whether it was tolled by the

concealment doctrine. The court did not address the proper interpretation of the prohibition against making contributions in the name of another.<sup>33</sup>

Thus, just as no federal court has held that Section 441f prohibits the alleged conduct, no state court interpreting similar statutory language has held that such language prohibits reimbursements.

**D. THE FEC’S INTERPRETATION, WHICH IS CONTRARY TO THE PLAIN MEANING OF THE STATUTE, IS ENTITLED TO NO WEIGHT.**

The government’s and *amici*’s heavy reliance on FEC advisory opinions and regulations, Gov Br 31-33; FEC Br 8-10; CREW Br 16-18; CLC Br 18-20, is also unavailing. Even if deference to an agency’s views were appropriate in criminal cases,<sup>34</sup> agency interpretations that are inconsistent with clear and unambiguous statutory language are entitled to no weight. *See Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002); *Demarest*

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<sup>33</sup> The *amicus* brief also cites two non-judicial opinions. An Illinois opinion concludes that an arrangement between a corporation and a subsidiary is *legal* on a set of facts very different than the ones at issue. 1998 Ill. Att’y Gen. Op. 004, 1998 WL 205432, at \*1 (Apr. 23, 1998). A Kansas opinion is of no persuasive value because the Kansas statutory scheme does not contain an analogue to Section 441a(a)(8). 1997 Kan. Comm’n on Gov’t Stds. and Conduct Op. No. 1997-45 (Sept. 11, 1997); *see* Kan. Stat. Ann. § 25-143 (stating contribution limits, but not containing a provision regarding conduit contributions).

<sup>34</sup> *See infra* Part I.F.

*v. Manspeaker*, 498 U.S. 184, 190 (1991); *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (superceded on other grounds by statute, *see, e.g., EEOC v. Westinghouse Elec. Corp.*, 925 F.2d 619, 622 n.2 (3d Cir. 1991)). Thus, an interpretation by the FEC that, as in this case, is contrary to the “plain meaning” of the statute must be rejected. *See AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 55 (D.D.C. 2001) (rejecting the FEC’s interpretation of FECA’s disclosure statute, 2 U.S.C. § 437g(a)(12)(A), because “upon examination of the traditional tools of statutory construction, including a review of the text, legislative purpose, and statutory context” the “plain meaning” of the statute prohibited disclosure), *aff’d on other grounds*, 333 F.3d 168 (D.C. Cir. 2005) (holding that the statute was ambiguous, but the FEC failed to assuage First Amendment concerns).<sup>35</sup>

As the court below found:

While these statements [from the FEC regulations and advisory opinions] may reflect the spirit of FECA, they do not accord with the plain language of § 441f read in conjunction with the sections of FECA expressly prohibiting “conduit” and

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<sup>35</sup> The fact that Congress did not disapprove the regulation when it was initially submitted and re-enacted FECA without explicitly disapproving the interpretation does not save an agency interpretation that is contrary to the statutory language. *See infra* note 39. Moreover, here Congress added Section 441a(a)(8) when it re-enacted and amended Section 441f in 1974, showing that it did not share the FEC’s interpretation of Section 441f. *See supra* notes 19, 21.

“indirect” contributions, as well as FECA’s legislative history. Moreover, because the plain language, structure, and legislative history of FECA demonstrate that “indirect” and “conduit” contributions are covered by other FECA sections but not by § 441f, deference to the FEC’s interpretation is not warranted.

GER 7 (citations omitted).<sup>36</sup>

**E. THE LEGISLATIVE HISTORY IS MIXED AND DOES NOT—AND CANNOT—CONTRADICT THE PLAIN MEANING OF THE STATUTE.**

The FEC admits that the legislative history of the 1971 enactment of what is now Section 441f is scant. FEC Br 28. The government and *amici* thus spend much of their effort on *post-enactment* legislative “history,” upon which they rely heavily but which is neither controlling nor particularly illuminating as to what the enacting Congress intended. In any event, no legislative history can overwrite the plain meaning of the text of Section 441f. As the Supreme Court has explained, “[w]hen we find the terms of a

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<sup>36</sup> The FEC’s regulations, even if correct, would necessitate dismissal of the Indictment. Those regulations provide that where the conduit exercises direction or control over the choice of the ultimate recipient of the contribution, the contribution will be treated as a contribution from both the original source and the conduit. 11 C.F.R. § 110.6(d). That is, where, as alleged in the Indictment, the conduit does not exercise direction or control over the ultimate recipient but simply provides the money to the candidate requested, it is only a contribution from the original source, not the conduit. But the Indictment unmistakably and repeatedly alleges that the conduits made contributions. *See supra* 5-7.

statute unambiguous, judicial inquiry is complete . . . .” *Rubin v. United States*, 449 U.S. 424, 430 (1981). Where, as here, the statutory language is clear, “only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language.” *Garcia v. United States*, 469 U.S. 70, 75 (1984). No such extraordinary showing has been made here.

1. *The legislative history of Section 441f contains no statements suggesting that it prohibits reimbursements.*

As cited by the government and *amici*, full disclosure of campaign contributions, including their source, was an objective of the 1971 FECA legislation. *See* Gov Br 47-49; FEC Br 25-27; CREW Br 6-8.<sup>37</sup> Nonetheless, the legislative history of the 1971 enactment of Section 441f contains no statements suggesting that it prohibits reimbursement. Indeed, the government concedes, as it must, that “[t]he government has found no relevant discussion of now-Section 441f in the 1971 Act’s legislative history . . . .” Gov Br 47.<sup>38</sup>

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<sup>37</sup> Much of this discussion is irrelevant, because Section 441f has neither reporting nor disclosure requirements designed to render campaign finance transparent. It is, rather, a ban on the decidedly opaque act of making a contribution using a false name.

<sup>38</sup> The FEC concedes that “very little legislative history from the 1971 enactment specifically discusses the prohibition against contributions in the name of another . . . .” FEC Br 28.

Moreover, as the court below noted, there is relevant legislative history supporting the conclusion that Section 441f does not prohibit reimbursements:

Even if the language of § 441f were ambiguous, the legislative history of FECA suggests that Congress did not intend § 441f to cover indirect contributions. After § 441f was introduced, Senator Scott stated that a “loophole” existed in the campaign contribution laws because a “man of influence” could evade contribution limits by giving his friends money and having them contribute an equal amount to his campaign. 117 Cong. Rec. 29,295 (1971). If § 441f prohibited using one’s friends as conduits for contributions, there would be no “loophole” to fill. In addition, § 441b’s predecessor, 18 U.S.C. § 610, prohibited contributions by national banks, corporations, and labor organizations. During debate on a proposed bill and amendment to add language defining “contribution” to “include any direct or indirect payment,” Senator Hansen was asked whether an employee could make a contribution and be reimbursed by his corporate employer. Hansen replied that doing so “would constitute a violation of law . . . *as an indirect payment.*” 117 Cong. Rec. 43,381 (1971) (emphasis added). Senator Hayes agreed. *Id.* This discussion demonstrates that Congress used the term “indirect” to cover reimbursements.

GER 5.

The government and *amici* argue at length that this pertinent legislative history should not be accorded weight. Gov Br 49-52; FEC Br 26 n.8. But even if not dispositive, it is more compelling than the legislative

history cited by the government and *amici* in support of their position because it is contemporaneous with the statute at issue. At best, from the government's perspective, the legislative history is mixed and cannot contradict the plain meaning of Sections 441a and 441f.

2. *The subsequent legislative history relied on by the government is of limited interpretive value and cannot overcome the plain meaning of the statute.*

The government and *amici* also rely on legislative “history” post-dating the enactment of Section 441f, principally the amendment to FECA increasing the penalties for violations of Section 441f in a section entitled “Increase in Penalties Imposed for Violations of Conduit Contribution Ban.” Gov Br 54; FEC Br 29; *see* CREW Br 9-12.<sup>39</sup> There are three insurmountable problems with this reliance.

First, even if the section's title meant what the government suggests,

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<sup>39</sup> The government and *amici* also argue that, because Congress amended FECA without modifying Section 441f after the FEC interpreted Section 441f to ban conduit contributions, Congress has adopted or ratified that interpretation. *See, e.g.,* Gov Br 32-33, 53. Re-enactment, however, does not effect the adoption of an interpretation that is contrary to the statutory language. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (“Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.”); *Leary v. United States*, 395 U.S. 6, 25 (1969) (“re-enactment cannot save a regulation which ‘contradict[s] the requirements’ of the statute itself. When a regulation conflicts with the statute, the fact of subsequent re-enactment ‘is immaterial, for Congress could not add to or expand [the] statute by impliedly approving the

(*cont'd*)



“we begin with the oft-repeated warning that ‘the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.’”

*Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (citations omitted).<sup>40</sup>

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regulation.”) (citations omitted) (brackets in original).

<sup>40</sup> The government concedes that “later legislative history is generally a weak indicator of the intent of an earlier Congress . . . .” Gov Br 53. Moreover, other subsequent legislative history cited by the government or *amici* does not support their interpretation, even were such subsequent history entitled to weight.

For example, the FEC and the government quote the statement of Representative Mathis during the 1976 debates that “there is a provision in the law that provides for criminal penalties for using another as a conduit for funds. One cannot give money for another.” FEC Br 28 (citing 122 Cong. Rec. H2606 (daily ed. Mar. 31, 1976)); Gov Br 53 (same, but omitting “. . . for funds. One cannot give money for another.”). The FEC (but not the government) notes that Representative Mathis did not identify the provision to which he was referring, but then asserts that it was Section 441f, FEC Br 28 n.11, even though Section 441f does not use the word “conduit” that Representative Mathis used, but Section 441a does.

The same is true of Senator Clark’s comments on March 17, 1976. *See* CREW Br 9. Although he referred to a prohibition on earmarking, there is no indication that he was referring to Section 441f rather than Section 441a. The bill he referenced, *see* 122 Cong. Rec. 4,870-71 (1976) (S. 3065, 94th Cong. § 111 (1976), as reported out of committee on March 2, 1976), contains the word “earmark” under Section 441a (the section titled “Limitations on contributions and expenditures”), not Section 441f (the section titled “Contributions in name of another prohibited”), making it more likely that he was referring to Section 441a.

(*cont’d*)

Second, it is well settled that “[t]he heading of . . . a statute is not controlling when it contradicts the plain meaning of the words of the law, particularly where, as here, the error is easily explained by reference to legislative history.” *Habib v. Raytheon Co.*, 616 F.2d 1204, 1210 n.8 (D.C. Cir. 1980); *see generally Bhd. of R.R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947) (“the title of a statute and the heading of a section cannot limit the plain meaning of the text”). The government concedes as much: “a heading cannot ‘substitute for the operative text.’” Gov Br 26 (quoting *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008)).<sup>41</sup>

Finally, even if neither of these considerations applied, the legislative history cannot contradict the statute’s plain meaning. Even if Congress in 2002 thought the provision for which it was increasing penalties (Section

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The government also quotes H.R. Rep. No. 93-1239, concerning the 1974 amendments, to the effect that “The bill prohibits contributions in the name of another and provides that, for the purposes of limitations and reporting 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.” Gov Br 46-47. It is unclear how this straightforward description of Sections 441f and 441a(a)(8) supports the government’s interpretation of the statutory language.

<sup>41</sup> In this regard, it is puzzling that the government would put such great weight on the presence of the word “conduit” in the heading for a provision increasing the penalty for violations of Section 441f, Gov Br 26-27, while ignoring its presence in Section 441a(a)(8) and its absence in Section 441f.

441f) dealt generally with conduit contributions, it was incorrect in that understanding given the plain meaning of Sections 441a and 441f.<sup>42</sup>

**F. THE DECISION BELOW DOES NOT CREATE ANY OBSTACLE TO ENFORCEMENT OF FECA AND RELEVANT JURISPRUDENTIAL PRINCIPLES FAVOR APPLICATION OF THE RULE OF LENITY.**

The government and *amici* rely heavily on FECA enforcement considerations, contending that construing Section 441f as not prohibiting reimbursements would create a “loophole” in the campaign finance laws that would render contribution limits “meaningless.” CREW Br 2.<sup>43</sup> Even if this argument were correct, it could not justify interpreting a statute contrary to its plain terms. But the government’s and *amici*’s argument is simply wrong.

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<sup>42</sup> For the same reasons that the enactment of enhanced penalties sheds no light on the meaning of Section 441f, the isolated legislative statements cited by *amicus* regarding the penalties, CREW Br 10-11, likewise are of no interpretive value. Indeed, other than simply using the term “conduit,” some do not discuss what conduct would fall within that term.

<sup>43</sup> *See also* CLC Br 20 (“If the District Court’s misinterpretation of Section 441f stands, FECA’s contribution limits and disclosure requirements will be seriously undermined . . . .”); FEC Br 1, 5 (“[T]he district court’s unprecedented interpretation of section 441f . . . could undermine the government’s ability to fulfill the policies of deterring actual and apparent corruption . . . .”; “the decision below . . . emasculates FECA’s disclosure requirements”); CREW Br 2 (“If upheld, the ruling would have a disastrous impact on the ability of the Department of Justice and the FEC to enforce [FECA]”). Given that Section 441a prohibits the conduct alleged, there is no explanation for how these alarmist statements can be correct.

Section 441a explicitly prohibits hidden reimbursements and exceeding contribution limits and, thus, addresses the government's concerns. There is no "loophole" in FECA. The government simply needs to charge a campaign contribution reimbursement scenario using the applicable provisions of the statute.<sup>44</sup>

What the government and *amici* fail to address are the paramount jurisprudential principles supporting the District Court's ruling. In criminal cases, constitutional concerns have long dictated that statutes be construed narrowly, especially in the First Amendment context. As the Supreme Court explained in *McNally*:

The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. . . . As the Court said in a mail fraud case years ago: "*There are no constructive offenses; and before one can be punished, it must*

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<sup>44</sup> The alarmist statements by *amici* ignore this point. It is incorrect to suggest that the "practical effect of the [decision below]" is that "Section 441a(a)(8) may serve as a shield to conceal a contributor's identity." CLC Br 12. Because Section 441a(a)(8) affirmatively requires disclosure of the "original source" of any contribution, the decision below could not possibly allow Section 441a(a)(8) to conceal that contributor's identity. Similarly, any claim that the decision below jeopardizes or renders impossible convictions for the use of undisclosed conduits, CREW Br 3, ignores the fact that violations of Section 441a(a)(8) are crimes—the only difference being that the penalty for the felony offense under Section 441f starts at \$10,000, compared to \$25,000 under Section 441a.

*be shown that his case is plainly within the statute.” Fasulo v. United States*, 272 U.S. 620, 629 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [18 U.S.C.] § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

483 U.S. at 359-60 (citations omitted) (emphasis added).

More generally, the rule of lenity is fundamental to due process and requires that ambiguities be resolved in favor of Defendant:

Under a long line of our decisions, the tie must go to the defendant. *The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.* . . . This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead . . . . *We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.*

*United States v. Santos*, 128 S. Ct. 2020, 2025, 2026, 2028 (2008) (plurality op.) (emphasis added and citations omitted); *see United States v. Bass*, 404 U.S. 336, 347 (1971).

While the rule of lenity applies to the construction of criminal statutes

generally, the First Amendment also dictates, in this case, that ambiguities be resolved in Defendant's favor to avoid an inappropriate chilling effect on constitutionally protected political activities. *Buckley*, 424 U.S. 1, 40-41, 77-78 (1976); *United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment.") (citations omitted); *Emily's List v. FEC*, 581 F.3d 1, 4 (D.C. Cir. 2009) ("The First Amendment, as interpreted by the Supreme Court, protects the right of individual citizens to spend unlimited amounts to express their views about policy issues and candidates for public office."); *see AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (FEC regulation interpreting FECA section invalid due to the agency's failure to undertake First Amendment "tailoring"). Accordingly, Section 441f must be narrowly interpreted so as to limit the restrictions on constitutionally-protected speech to the text of the statute.

The government argues that, if there is ambiguity, deference to the FEC trumps application of the rule of lenity. Gov Br 19, 56 (citing *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001)). Defendant respectfully submits that relevant jurisprudential considerations dictate otherwise and that the authority in this Circuit on which the government relies can be distinguished and should be confined to its factual context.

In *Pacheco-Camacho*, the Ninth Circuit did not apply the rule of lenity to the Bureau of Prisons’ (“BOP”) interpretation of a statute in a manner that reduced prisoners’ good behavior credit because the BOP “resolved” the ambiguity “through a reasonable interpretation.” 272 F.3d at 1271-72 (regarding 18 U.S.C. § 3624). The statute at issue in *Pacheco-Camacho*, however, is not a criminal statute. See *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005) (reaching the same interpretation as *Pacheco-Camacho* but holding that Section 3624 “is not . . . a ‘criminal’ statute, and thus we do not believe the rule of lenity would apply.”).<sup>45</sup> Nor do the purposes underlying the rule of lenity concern conduct such as awarding good behavior credits. For example, *Pacheco-Camacho* had already “run afoul” of a “penal law[]” and the BOP—not the court—had discretion to determine *Pacheco-Camacho*’s remaining sentence. Cf. *Pacheco-Camacho* 272 F.3d at 1271; see *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (the rule of lenity “promote[s] fair notice to those

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<sup>45</sup> *Pacheco-Camacho* cites a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* for the proposition that deference trumps lenity. 272 F.3d at 1271-72 (citing 515 U.S. 687, 704 n.18 (1995)). In *Babbitt*, the Supreme Court noted the absence of prior authority requiring that the rule of lenity “provide the standard for reviewing facial challenges to administrative regulations,” 515 U.S. at 704 n.18, but this footnote does not hold that no circumstances could exist under which agency deference would violate the rule of lenity, and it should not be interpreted in a manner  
(cont’d)

subject to the criminal laws, . . . minimize[s] the risk of selective or arbitrary enforcement, and . . . maintain[s] the proper balance between Congress, prosecutors, and courts” ).

In contrast with the good behavior statute, Defendant has been charged with violating Section 441f, a felony. Accordingly, Section 441f’s interpretation should be constrained by the rule of lenity, rather than expanded by agency deference.

Other circuits have held that, in certain circumstances, agency deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), is inappropriate when interpreting an ambiguous criminal statute, and that, instead, the rule of lenity should apply. *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998); *United States v. McGoff*, 831 F.2d 1071, 1077, 1080 n.17, 1084 n.22 (D.C. Cir. 1987). Prior to examining the legislative history as an aid in interpreting an ambiguous criminal statute, the D.C. Circuit explained that:

[W]hile courts recognize the inevitability and, in certain contexts, the desirability of legislation that leaves some details to be resolved as the statute is applied, there are limits. Those limits are most graphic in cases involving criminal sanctions. . . . In the criminal context, courts have traditionally required greater clarity in draftsmanship than in

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inconsistent with other Supreme Court precedents, *see infra* note 46.



civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them. . . . [T]he law of crimes must be clear. There is less room in a statute's regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration. We are, in short, far outside *Chevron* territory here.

*McGoff*, 831 F.2d at 1077 (citations omitted) (interpreting the Attorney General's application of the Foreign Agents Registration Act to a newspaper publisher). Similarly, the Sixth Circuit held in *Dolfi* that, "[u]nlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts." 156 F.3d at 700.<sup>46</sup> Moreover, the circumstances in this case render the FEC analogous to the Justice Department in its prosecutorial role, as to which no deference is due in interpreting criminal statutes generally.

*See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J.,

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<sup>46</sup> Other fundamental canons of construction also preclude *Chevron* deference. *See Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("We thus read the [Clean Water Act] as written to avoid the significant constitutional and federalism questions raised . . . and therefore reject the request for administrative deference."); *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988) (*Chevron* deference not appropriate when in conflict with the canon of constitutional avoidance).

concurring) (“The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”).

Even if agency deference was given precedence generally, the government’s argument fails here because, as detailed above, its interpretation of the statute is at odds with its express terms. *See supra* Part I.D.; *cf. AFL-CIO*, 177 F. Supp. 2d at 55.

## II

### **EVEN IF SECTION 441F COULD BE READ TO PROHIBIT REIMBURSEMENTS, THE INDICTMENT BELOW WOULD STILL BE DEFECTIVE AND HAVE BEEN PROPERLY DISMISSED.**

#### **A. LEGAL STANDARD**

An indictment must sufficiently allege the facts constituting a violation of the cited statute, and the sufficiency of an indictment should be tested solely on the basis of the allegations on its face. *See United States v. Sampson*, 371 U.S. 75, 78-79 (1962). When determining the sufficiency of an indictment, “[i]t is the statement of facts in the [indictment], rather than the statutory citation, that is controlling . . . .” *United States v. Wuco*, 535

F.2d 1200, 1202 n.1 (9th Cir. 1976). Although an indictment may track the language of a statute to describe a criminal offense, “it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.” *Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (internal quotation marks omitted); *Russell v. United States*, 369 U.S. 749, 764 (1962) (“Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.”).

Moreover, as this Court has explained, “[a]n indictment must be specific in its charges and necessary allegations cannot be left to inference.” *Williams v. United States*, 265 F.2d 214, 218 (9th Cir. 1959). Courts require such specificity because:

To allow a prosecutor or court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him.

*United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979).

**B. THE FACTUAL ALLEGATIONS IN THE INDICTMENT ARE OF ILLEGAL REIMBURSEMENTS, NOT ILLEGAL CONTRIBUTIONS.**

The Indictment does not charge Defendant with making contributions; rather, it charges him with reimbursing contributions made by others.

Repeatedly, the Indictment charges that Defendant and others solicited individuals to make contributions and that Defendant then reimbursed those individuals. *See supra* at 5-7.<sup>47</sup>

Thus, even if Section 441f prohibited making contributions by reimbursing others, it would not save this Indictment because the facts of it would not charge Defendant with such an offense. The factually charging language—reimbursing in one’s own name contributions previously made by others in their own names—is not proscribed by Section 441f. This variance between the charged conduct and the charged statute is fatal and is an independent basis for affirming the decision below.

**CONCLUSION**

For the foregoing reasons, the decision below should be affirmed.

Dated: November 9, 2009

Respectfully submitted,

/s/ George J. Terwilliger III  
GEORGE J. TERWILLIGER III

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<sup>47</sup> As noted above, the FEC’s regulations contradict this pleading theory. *See supra* note 36.

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**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***

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November 9, 2009

Date

/s/ George J. Terwilliger III

Signature of Attorney or  
Unrepresented Litigant

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 9, 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.

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