

No. 09-50296

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

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PIERCE O'DONNELL,

Defendant-Appellee.

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

**MOTION FOR A STAY OF ISSUANCE OF THE MANDATE OF
DEFENDANT-APPELLEE PIERCE O'DONNELL**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. Introduction.....	1
II. Argument.....	2
A. Standard for Granting Motion	2
B. Defendant’s Petition for Writ of Certiorari Will Present Substantial Questions.....	3
1. The Panel Opinion’s Interpretation of Section 441f Conflicts with Supreme Court Precedent Regarding Statutory Interpretation.	3
<i>a. Statutory Interpretation Should Not Render Other Provisions of the Statute Superfluous.....</i>	<i>3</i>
<i>b. The Panel Opinion Conflicts with Supreme Court Precedent Regarding Due Process and the Rule of Lenity.</i>	<i>5</i>
2. The Panel Opinion Conflicts with Supreme Court Precedent Regarding Interpretation of Statutes Criminalizing Political Speech.....	6
C. Absent a Stay, Defendant Would Suffer Irreparable Harm and the Balance of Equities Favors Granting a Stay.	8
III. Conclusion	10

TABLE OF AUTHORITIES

Supreme Court of the United States

<i>Araneta v. United States</i> , 478 U.S. 1301 (1986).....	9, 10
<i>Boos v. Barry</i> , 485 U.S. 312 (1988).....	8
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	7
<i>Holder v. Humanitarian Law Project</i> , 130 S. Ct. 2705 (2010).....	5
<i>Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach</i> , 523 U.S. 26 (1998).....	4
<i>McNally v. United States</i> , 483 U.S. 350 (1987).....	6
<i>Planned Parenthood of Southeastern Pa. v. Casey</i> , 510 U.S. 1309 (1994).....	2
<i>Randall v. Sorrell</i> , 548 U.S. 230 (2006)	7, 8
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	5
<i>Skilling v. United States</i> , 130 S. Ct. 2896 (2010)	6
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001).....	4
<i>United States v. CIO</i> , 335 U.S. 106 (1948).....	8
<i>United States v. Kokinda</i> , 497 U.S. 720 (1990).....	7
<i>United States v. Santos</i> , 553 U.S. 507 (2008).....	6
<i>Village of Schaumburg v. Citizens for a Better Env't</i> , 444 U.S. 620 (1980).....	7

United States Courts of Appeals

<i>Al-Marbu v. Mukasey</i> , 525 F.3d 497 (7th Cir. 2008)	2
---	---

<i>Richey v. Smith</i> , 515 F.2d 1239 (5th Cir. 1975).....	9
<i>United States v. Pete</i> , 525 F.3d 844 (9th Cir. 2008).....	2

United States District Courts

<i>Greene v. Bowen</i> , 639 F. Supp. 554 (E.D. Cal. 1986).....	10
---	----

Statutes

2 U.S.C. § 441a(a)(8) (2000)	4, 5
2 U.S.C. § 441b(b)(2) (Supp. II 2000).....	5
2 U.S.C. § 441c(a)(1) (2000)	5
2 U.S.C. § 441e(a)(1) (Supp. II 2000)	5
2 U.S.C. § 441f (Supp II 2000).....	<i>passim</i>

Federal Court Rules

S. Ct. R. 10(c).....	3
Fed. R. App. P. 41(d)(2)(A).....	1
Fed. R. App. P. 41(d)(2)(B)	8
9th Cir. R. 41-1	1

State Statutes

Cal. Bus. & Prof. Code § 6102(a).....	9
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I. Introduction

Pursuant to Federal Rule of Appellate Procedure 41(d) and 9th Circuit Rule 41-1, Defendant-Appellee Pierce O'Donnell brings this motion for a stay of issuance of the mandate for a period of 90 days so that he may prepare and file a petition for a writ of certiorari to the United States Supreme Court. A certiorari petition by Defendant would present substantial and meritorious questions arising from the panel's decision, including: (1) whether the Ninth Circuit interpreted provisions of the Federal Election Campaign Act ("FECA") in accordance with Supreme Court precedent concerning statutory interpretation; (2) whether the panel opinion applied Fifth Amendment due process principles and the rule of lenity as required when interpreting a criminal statute; and (3) whether the panel opinion followed Supreme Court precedent concerning interpretation of statutes criminalizing otherwise constitutionally-protected political speech. Fed. R. App. P. 41(d)(2)(A).

Good cause exists for a stay, Defendant would be irreparably harmed absent a stay, and the balance of equities favors the granting of a stay. This motion is meritorious and not for the purposes of delay. 9th Cir. R. 41-1.

II. Argument

A. Standard for Granting Motion

This Court has held:

A [motion to stay a circuit court mandate] must show that the certiorari petition would present a substantial question and that there is good cause for a stay. [Fed. R. App. P.] 41(d)(2)(A). *See also* 9th Cir. R. 41-1 (stating that a stay of the mandate pending petition to the Supreme Court “will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.”).

United States v. Pete, 525 F.3d 844, 851 n.9 (9th Cir. 2008).

To satisfy the “substantial question” and “good cause” requirements, a party seeking a stay must show that: (1) there is a reasonable probability that the Supreme Court will grant certiorari; (2) there is at least a fair prospect that it will reverse this Court’s decision; and (3) assuming the correctness of the moving party’s position, there is a likelihood of irreparable harm if a stay is not granted. *See Al-Marbu v. Mukasey*, 525 F.3d 497, 498-99 (7th Cir. 2008); *see also Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) (“The conditions that must be shown to be satisfied before a Circuit Justice may grant such an application are familiar: a likelihood of irreparable injury that, assuming the correctness of the applicants’ position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits[.]”).

B. Defendant's Petition for Writ of Certiorari Will Present Substantial Questions.

Supreme Court Rule 10 provides that certiorari may be granted when “a United States court of appeals has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c). The panel's holding in this case conflicts with Supreme Court precedent in three ways. First, the panel opinion conflicts with precedent requiring that statutes be interpreted as a whole and, in particular, in a manner that avoids rendering statutory provisions superfluous and that recognizes that when Congress uses different language in different sections it intends them to have different meanings. Second, the panel opinion ignores precedent prohibiting criminal punishment under statutes that do not provide adequate notice of the conduct proscribed and requiring application of the rule of lenity in interpreting ambiguous statutes. Third, the panel opinion ignores First Amendment precedent requiring narrow construction of statutes criminalizing otherwise protected speech.

1. The Panel Opinion's Interpretation of Section 441f Conflicts with Supreme Court Precedent Regarding Statutory Interpretation.

a. Statutory Interpretation Should Not Render Other Provisions of the Statute Superfluous.

The Supreme Court has clearly stated that a statute's language must be interpreted in light of other sections of the statute. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). Various sections of a statute

should be construed in concert so that “no clause, sentence or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The panel opinion’s interpretation of Section 441f¹ of the FECA renders substantial portions of Section 441a(a)(8), as well as portions of numerous other FECA provisions, superfluous. Section 441f proscribes the “mak[ing] of a contribution in the name of another person,” while Section 441a(a)(8) regulates “contributions” made “either directly or indirectly” or “which are . . . directed through an intermediary or conduit.” 2 U.S.C. §§ 441a(a)(8), 441f. Under the panel’s interpretation, “contributions” as used in Section 441f includes direct and indirect contributions, and conduit contributions. However, if that interpretation is correct, then Section 441a(a)(8) would not have to use the terms “directly or indirectly” or “conduit” when describing the types of contributions it regulates. As a result, Section 441a(a)(8)’s use of those terms—a substantial portion of that provision—is superfluous under the panel’s opinion.²

Additionally, the use of certain language in one section of a statute but not in another demonstrates congressional intent that those statutes be read differently.

¹ “Section 441f” refers to 2 U.S.C. § 441f (Supp. II 2000); “Section 441a(a)(8)” refers to 2 U.S.C. § 441a(a)(8) (2000).

² A number of other FECA provisions also use the terms “directly or indirectly” to describe contributions or payments and, under the panel’s opinion, portions of those sections would also be superfluous. *See* 2 U.S.C. § 441b(b)(2) (Supp. II 2000); 2 U.S.C. § 441c(a)(1) (2000); 2 U.S.C. § 441e(a)(1) (Supp. II 2000).

Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2717-18 (2010); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[I]t is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion.”). The panel’s opinion ignores this fundamental principle of statutory construction by using the same interpretation for “contribution” in both Sections 441f and 441a(a)(8) even though Congress purposefully used different language in each section.

b. The Panel Opinion Conflicts with Supreme Court Precedent Regarding Due Process and the Rule of Lenity.

The panel opinion conflicts with Supreme Court holdings by failing properly to apply an analysis of Fifth Amendment due process principles when interpreting a criminal statute.

Due process principles require that a criminal statute clearly proscribe certain conduct before the government may punish a person for engaging in that conduct. *McNally v. United States*, 483 U.S. 350, 360 (1987). Specifically, the rule of lenity, grounded in these due process principles, requires 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.” *Id.* at 359-60. Ambiguities in a criminal statute must 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. . . . We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.” *United States v. Santos*, 553 U.S. 507, 514, 519 (2008) (plurality op.) (citations omitted); *see also Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (“ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”) (citation omitted).

The panel opinion’s lengthy discussion of the statute, which resorts to extrinsic sources that are only appropriate to aid in interpreting ambiguous statutes, demonstrates that Section 441f is ambiguous. When faced with such ambiguity, Supreme Court precedent requires courts to apply the rule of lenity and interpret the statute in favor of the defendant. By failing to consider adequately other rational interpretations of Section 441f, such as Defendant’s, the panel opinion exposes Defendant to potential criminal punishment under an ambiguous statute. In such a case, the proper analysis required application of the rule of lenity.

2. The Panel Opinion Conflicts with Supreme Court Precedent Regarding Interpretation of Statutes Criminalizing Political Speech.

The panel opinion ignores important First Amendment principles related to the FECA. The Supreme Court has held that campaign finance activities are constitutionally protected political activity. *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (“Solicitation is a recognized form of speech protected by the First

Amendment.”) (citations omitted). Associating with others for purposes of financially supporting an election campaign involves core First Amendment interests, and providing financial support to a candidate and a campaign are forms of protected political speech. *Buckley v. Valeo*, 424 U.S. 1, 15, 24-25 (1976).

Thus, control and limitation of political contributions “‘implicate fundamental First Amendment interests,’ namely, the freedoms of ‘political expression’ and ‘political association.’” *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (plurality op.) (quoting *Buckley*, 424 U.S. at 15, 23); see *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 633 (1980) (“Our cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money.”) (alterations to original and internal quotation marks omitted). As a result, the panel opinion should have analyzed whether Section 441f is a closely drawn statute based on a carefully considered record establishing a sufficiently important government interest necessary to justify such a restriction. *Randall*, 548 U.S. at 247. Here, despite Section 441f’s restriction on constitutionally protected speech, the panel opinion omits any such analysis and creates a chilling effect on such protected speech.

Supreme Court precedent required that the panel apply a narrow interpretation of Section 441f to avoid constitutional infirmities, especially in the federal campaign contribution context. *Boos v. Barry*, 485 U.S. 312, 330-31

(1988) (“It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.”) (citation omitted); *see e.g., United States v. CIO*, 335 U.S. 106, 123-24 (1948) (narrowly interpreting a limitation on certain political expenditures by labor unions in a predecessor statute to the FECA to affirm the dismissal of an indictment on the grounds that it failed to state a crime, thereby avoiding discussion of constitutional infirmities found by the district court).

C. Absent a Stay, Defendant Would Suffer Irreparable Harm and the Balance of Equities Favors Granting a Stay.

The requested stay is for a maximum of 90 days (unless good cause to extend it is shown or a petition for certiorari is filed). Fed. R. App. P. 41(d)(2)(B). Absent a stay, Defendant would face irreparable injury and the balance of equities favors Defendant.

If the mandate issues, Defendant would face imminent prosecution. Being obligated to defend oneself in a criminal proceeding predicated on a statute that fails to provide adequate notice of the conduct proscribed, and/or is otherwise unconstitutional, constitutes irreparable injury. *Cf. Araneta v. United States*, 478 U.S. 1301, 1304-05 (1986) (Burger, C.J., in chambers) (granting a stay of a district court’s contempt order because forcing defendants to testify could result in defendants facing substantial possibility of prosecution in foreign court). The

resulting reputational damage would also cause Defendant irreparable injury, even if he were eventually acquitted. *See Richey v. Smith*, 515 F.2d 1239, 1243 n.10 (5th Cir. 1975) (discussing the reputational effects of an indictment founded upon illegal evidence: “[A] wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. . . . In the public mind, the blot on a man’s escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently the public remembers the accusation, and still suspects guilt, even after an acquittal.”).

Furthermore, a conviction would result in the immediate suspension of Defendant’s legal license. Cal. Bus. & Prof. Code § 6102(a). Such a ban constitutes irreparable harm because Defendant would be unable to pursue his profession and would suffer economic and reputational damage. *Cf. Greene v. Bowen*, 639 F. Supp. 554, 563 (E.D. Cal. 1986) (loss of income and loss of reputation constituted irreparable injury when doctor sought to enjoin government from providing public notice of his suspension from Medicare).

The record does not indicate that the Government would be prejudiced by further delay. *See Araneta*, 478 U.S. at 1304-05 (noting that denial of stay resulting in potential prosecution constituted harm to defendant, but delay was not harmful to government). The potential irreparable harm to Defendant thus

outweighs any potential harm to the Government or the public, and the balance of equities favors the granting of the stay.

III. Conclusion

For the foregoing reasons, the motion to stay the mandate pending a petition for certiorari by Defendant should be granted.

Dated: December 7, 2010

Respectfully submitted,

s/ George J. Terwilliger III

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULES 35-4 AND 40-1**

Pursuant to Circuit Rules 35-4 and 40-1, I certify that the attached motion for a stay of issuance of the mandate is proportionately spaced, has a typeface of 14 points or more, and contains 2,050 words, exclusive of the cover, table of contents, table of authorities, certificate of counsel, this certificate of compliance, and proof of service, according to the word count feature of Microsoft Word used to generate this brief.

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

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2010, I electronically filed the foregoing **MOTION FOR A STAY OF ISSUANCE OF THE MANDATE OF DEFENDANT-APPELLEE PIERCE O'DONNELL** 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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