IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	Criminal No. 1:11CR85
vs.	)	
	)	Hon. James C. Cacheris
WILLIAM P. DANIELCZYK JR. and EUGENE R. BIAGI,	)	Motions Hearing: May 20, 2011
	)	
Defendants.	)	

GOVERNMENT'S OMNIBUS RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

The United States of America, by and through undersigned counsel, submits this response to the Motions to Dismiss filed by defendant William P. Danielczyk, Jr. and defendant Eugene R. Biagi. (Doc. No. 23, 28, 29.) The United States respectfully requests that this Honorable Court deny the defendants' motions to dismiss for the reasons more fully set forth below.

I. Factual Background

The indictment charges both defendants with violations of 2 U.S.C. § 441f, (making contributions in the name of another), 2 U.S.C. § 441b (corporate contributions), 18 U.S.C. § 1519 (obstruction of justice), and 18 U.S.C. § 371 (conspiracy). The indictment further charges Danielczyk with violations of 18 U.S.C. § 1001 (false statements).

In sum, as alleged in the indictment, in September 2006 and March 2007, the defendants engaged in a scheme to cause Galen Capital Group, LLC and Galen Capital Corporation (collectively, "Galen"), companies which Danielczyk effectively controlled, to make illegal contributions to two federal campaigns by using 'straw donors.' To carry out this scheme, the defendants conspired to solicit and induce these straw donors by assuring them that any

contribution they made would be reimbursed with Galen's funds and then did in fact reimburse the contributions.[1] As a result, over $180,000 in federal campaign contributions from Galen were submitted in the names of more than 35 straw donors.

Subsequently, as part of a scheme to conceal this illegal activity, the defendants created and distributed back-dated letters and checks to certain of the straw donors in a effort to make the reimbursements appear to be bonuses for work performed. Danielczyk also caused counsel for Galen to file a letter with the Federal Election Commission (FEC) which falsely stated that some of the reimbursements were in fact bonuses for work performed. He also caused one of the campaigns to file a report with the FEC in April 2007 which falsely stated that the straw donors were the true contributors to the campaign when, in fact, the contributions had come from Galen.

The defendants now move this Court to dismiss counts two, three, four, six and seven of the indictment. As the defendants' motions are substantially similar in most respects, the government will respond to both the motions below.[2]

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[1] Except as otherwise noted, the term "reimburse" is used here, as in the indictment, to refer to funds provided before the straw donor made the contribution as well as funds provided after the straw donor made the contribution pursuant to a previous promise to provide those funds. *See United States v. O'Donnell*, 608 F.3d 546, 550-51 (9th Cir. 2010) ("*O'Donnell II*") (noting that §441f applies both where the defendant advanced money and where he promised repayment and then followed through). The indictment does not allege a scenario where an individual gave a contribution while unaware of the possibility of reimbursement and was later given funds to cover the cost of that contribution.

[2] The defendants' have also moved to dismiss certain objects of the conspiracy charged in count one on the grounds that the substantive allegations discussed herein must be dismissed. Accordingly, the government does not address that argument independently.

II. Counts Two and Three - 2 U.S.C. § 441f

In moving to dismiss Counts Two and Three, the defendants argue that 2 U.S.C. § 441f does not criminalize their conduct. In sum, the defendants claim that the only behavior criminalized by the statute is the extremely narrow situation where the final, direct source of the funds provided to the campaign (the 'last mile' as it were) is falsely attributed, and that the statute does not apply where that direct source of funds is merely a pass-thru for the true contributor. Put another way, the defendants appear to believe that even when the "actual donor gives money to a nominal donor, who in turn actually hands the money over to a campaign," the actual donor escapes liability under § 441f.

However, that interpretation of the statute, while convenient for the defendants, is an unreasonably narrow reading of the text. In fact, the statutory text and the legislative history all make it plain that a pass-thru scheme using straw donors to conceal the identity of the actual donor, as alleged in the indictment, is "unambiguously" criminalized by § 441f. *United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010) ("*O'Donnell II*").

Moreover, as will be discussed below, the only case law with persuasive relevance unequivocally supports the government's interpretation of § 441f. Indeed, in *O'Donnell II* and *Boender*, the courts addressed almost identical arguments as presented by the defendants in this case and had little difficulty finding that a scheme as alleged in this indictment is well within the criminal conduct controlled by § 441f, and there is not a single valid case which the defendants can point to which supports their theory.[3] Further, as discussed below, every other court which

[3] To one degree or another, the defendants rely on the district court's decision in *O'Donnell*, while glossing over the inconvenient fact that the district court's decision was overruled unanimously by the Ninth Circuit and, as a basic matter of legal analysis, carries no

has touched on this issue provides additional support for the government's position and creates a record in the case law which cannot be denied.

A. The Text of the Statute Prohibits Reimbursing Contributions

As noted by the defendants, statutory interpretation begins with the wording of the provision at issue. *New York State Conference v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("[W]e begin as we do in any exercise of statutory construction with the text of the provision in question."). However, it is the defendants' attempt to artificially limit the text to only a narrow set of convenient facts which cannot stand up to scrutiny.

Modern campaign finance began with the 1971 Federal Election Campaign Act (FECA), Pub. Law 92-225, 86 Stat. 3-20 (1972). FECA was subsequently amended and updated through four additional Acts in 1974, 1976, 1979, and 2002.

The 1971 Act replaced previous disclosure laws with Title III, entitled "Disclosure of Federal Campaign Funds," and included the provision which is currently found at § 441f, which states:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.[4]

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persuasive significance whatsoever. *United States v. O'Donnell*, 2009 U.S. Dist. LEXIS 125596 (No. 2:08-CR-872, C.D. Cal., June 8, 2009) (*O'Donnell I*).

[4] For the purposes of the Federal Election Campaign Act, which includes § 441f, "[t]he term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11).

The defendants, notwithstanding their arguments to the contrary, violated the plain wording of the text and its common sense application, by causing Galen to contribute over $180,000 to a federal campaign in the names of more than 35 people.

First, the defendants caused Galen to "make" a "contribution." While the defendants attempt to confuse the issue as to whose contribution this was, the indictment is clear that this was Galen's money, and therefore Galen's contribution. As the court in *Boender* notes, to "make" a contribution, in both common usage and in its dictionary definition, encompasses "both the source of funds and the nominal donor" and "supports the conclusion that one makes a contribution either by giving money to a nominal donor [who then passes the money along to the campaign] or by directly giving money to a donee [i.e., the campaign]." 691 F.Supp.2d at 839 (comparing the situation to 'making' a payment by writing a check, where the money is actually moved by the banks and the check is delivered by the postal service, or 'making' war through soldiers); *see also O'Donnell II*, 608 F.3d at 550 (reviewing the definition of "contribute" and finding that "§441f must be understood on [the] common sense level" of referring to "the original source rather than the intermediary as the one who gave"). There is no alternative definition that comports with common sense and plain meaning. Surely the defendants, both experienced businessmen, would not argue that they had not caused Galen to make a payment to its employees just because the payment came from an outside payroll service.

As for the term "contribution," it is defined by statute as "any gift . . . of money . . . made by any person for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i). What Galen did in this case was to provide money, filtered through straw donors, to a campaign, which explicitly exists to help elect a candidate for federal office. Simply put, as

specified in the indictment, the defendants were pulling the strings, making sure that Galen's money was transmitted through straw donors to the campaigns, and the existence of these straw donors, who served as a mere pass-thru for Galen's money, does not alter the nature or fact of Galen's contribution. *See O'Donnell II*, 608 F.3d at 550 (the straw donor is "merely . . . a mechanism" who fills an "essentially ministerial role to the substance of the transaction"). To find that Galen did not "make" the contribution simply because someone else wrote the actual check to the campaign to pass along Galen's money would be to grossly and unreasonably pervert the plain meaning of the statute.

Second, the defendants caused Galen to make these contributions "in the name of another person," specifically in the names of over 35 other people. It is undisputed that Galen, the actual source of the money, was nowhere identified as the contributor to either of the campaigns; indeed, Galen Capital Corporation, as a corporate entity, could not identify itself without alerting the campaign to the violation of 2 U.S.C. § 441b. Reimbursements were promised and given by Galen to the straw donors for one reason and one reason only, that is, so that those straw donors could pass Galen's money along to the campaigns in a way that would hide the true source of the money. In sum, Galen made the contribution and these straw donors are the "names" attached to the contributions, the names which were given to the campaigns and ultimately to the FEC.

Put another way, through the defendants' efforts, Galen made a contribution, indeed made many contributions, in the names of others by providing them with money for the explicit purpose of having that money transferred to the campaign on Galen's behalf. By reimbursing the contributions, by *inducing* the contributions by advancing funds and promising repayments, it

was made plain that the money given to the campaigns was always and only Galen's money. The added step of having the straw contributor write out a check from his or her own account does not somehow transform the contribution into something other than a contribution from Galen in someone else's name. However, that step *is* what makes it illegal.

Moreover, there is no functional or logical distinction between what took place here and the defendants' own example of writing a check using a name picked out of a phone book - in both cases, the true contributor is using someone else's name to accomplish the goal of disguising the source of the contribution, hiding who it is who is "mak[ing] a contribution" by using a misleading name, which is the type of activity which § 441f was created to combat, as discussed below. If you understand that one activity is illegal, it is unreasonable to believe that the other is any more permissible.

Further, had Congress intended to limit the application of § 441f, it could well have done so. But there is nothing in the text suggesting any limitation as to how the true contributor managed to obtain the names of others or transmit the contribution, nor is there any reason that Congress would have created such a limitation. *See Brogan v. United States*, 522 U.S. 398, 408 (1998) ("[c]ourts may not create their own limitations on legislation;" declining to read "exculpatory no" exception into 18 U.S.C. § 1001); *Smith v. United States*, 508 U.S. 223, 229 (1993) ("Had Congress intended the narrow construction petitioner urges, it could have so indicated."); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (statute providing liability for denying rights "secured by the Constitution and laws" not limited "to some subset of laws," "[g]iven that Congress attached no modifiers to the phrase"); *Lewis v. United States*, 445 U.S. 55, 60 (1980) (statute applied to any person who "has been convicted by a court;" "no modifier is present, and

nothing suggests any restriction on the scope of the term 'convicted'"). Under the plain text of the statute, all that is required is that the individual whose name is provided to the campaign is not the true contributor. Thus, the defendants, by causing Galen to make contributions through the straw donors, violated Section 441f's straightforward prohibition against "making a contribution in the name of another person."

B. The Language of § 441f is Expansive

While the text is clear in its meaning and application to the facts of this case, the defendants attempt to shoehorn in a limitation that is found nowhere in the text to exclude the pass-thru process that is so evidently illegal under § 441f. Specifically, the defendants point to language elsewhere in FECA where the terms "directly and indirectly" are used to argue that since that language is not present in § 441f, § 441f could not apply to "indirect" contributions. *See* 2 U.S.C. §§ 441a, 441b, 441c, and 441e. Relatedly, the defendants argue that the use of the terms "intermediary or conduit" in § 441a(a)(8) but not in § 441f means that such terms are excluded from the meaning of § 441f.[5] However, this argument does nothing to undermine the plain meaning of the statute.

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[5] Section 441a states, in relevant part,

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

2 U.S.C. § 441a(a)(8).

Congress always has a variety of wording choices available when drafting statutes. The question is not whether Congress could have used different words, but whether the wording Congress actually chose embraces the conduct at issue, and in this case, it does. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (court's "task is to apply the text, not to improve" it); *United States v. Demerritt*, 196 F.3d 138, 143 (2d Cir. 1999) (court's role "to apply the provision as written, not as we would write it"); *Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 635 (9th Cir. 1999) ("we are bound by the words that Congress actually used").

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

Perhaps most importantly, Congress' choice to simply provide that "[n]o person shall make a contribution in the name of another person" demonstrates *breadth*, not ambiguity or limitation. *O'Donnell II*, 608 F.3d at 552 (Any presumption that Congress acted purposefully in using different terms "applies with limited force here because the language used in § 441f is

broad rather than specific. Section 441f does not, for example, include 'directly' but omit the word 'indirectly' . . . it makes less sense to draw that inference [that the absence of the terms in § 441f was meant to exclude their application] when, as here, the provision at issue uses broader language that encompasses the meaning of the absent words and thus did not need to expressly include them."); *see also United States v. Monsanto*, 491 U.S. 600, 609 (1989) ("The fact that the forfeiture provision reaches assets that could be used to pay attorney's fees, even though it contains no express provisions to this effect, does not demonstrate ambiguity in the statute: It demonstrates breadth.") (citations and internal quotations omitted); *Brogan*, 522 U.S. at 406 (rejecting idea that "criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions"); *Royal Foods*, 252 F.3d at 1106 (When Congress "intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort.") (citation and internal quotations omitted). Had Congress intended to limit this broad wording, it would have done so expressly. Indeed, as the *O'Donnell II* court points out,

> The comparison to § 441a(a)(8) actually *undermines O'Donnell's interpretation*, because the language of that provision shows that indirect gifts are merely particular types of contributions, subsumed within the general concept. If Congress had understood § 441a(a)(8) to reach more broadly than § 441f, there are several ways it could have so indicated. For example, § 441a(a)(8) could have referred to "contributions, which for purposes of this section include indirect gifts," a construction that would imply that the same word, used elsewhere, should not have that expanded meaning. Similarly, the provision could have referred to 'contributions or conduit gifts,' which would have suggested that conduit gifts are a distinct concept for which Congress would use a distinct term. Instead, § 441a(a)(8)'s identification of indirect or conduit gifts as particular types of contributions reinforces our conclusion that the unqualified term, standing alone, should be accorded its full range of meaning.

O'Donnell II, 608 F.3d at 553 (emphasis added).[6]

The *O'Donnell II* court also correctly notes that any attempt to read congressional intent by comparing § 441f and § 441a(a)(8) is flawed since they were passed three years apart, "so the choice of wording in the latter offers little insight into the meaning of the former." *Id*. at 552; *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (presumption that Congress acted purposefully in using in using different terms is "strongest in those instances in which the relevant statutory provisions were considered simultaneously when the language raising the implication was inserted") (citations and internal quotations omitted).

In addition, as explained by the court in *Boender*, the FEC has already promulgated regulations interpreting § 441f. 691 F.Supp.2d at 839.[7] That regulation, set out at 11 C.F.R. § 110.4(b)(2)(I), provides as an example of a violation of § 441f a situation where someone "[gives] money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money." In other words,

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[6] It is also noteworthy that the penalty provision for § 441f passed in 2002, 2 U.S.C. § 437g(d)(1)(D), was entitled "[i]ncrease in penalties imposed for violations of conduit contribution ban." 116 Stat. 108. Although a heading cannot "substitute for the operative text," *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008), here it highlights what the wording of § 441f itself demonstrates, namely, that it applies to so-called conduit contributions. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (citations and internal quotations omitted). Because it is generally more difficult to violate § 441f by contributing in a false names, the title confirms that the common method of violating § 441f is through so-called conduit contributions. Indeed, § 441f is often referred to as the conduit-contribution ban/provision. *See* Craig C. Donsanto & Nancy L. Simmons, *Federal Prosecution of Election Offenses* at 166 (7th ed. 2007).

[7] Although the text is clear and "[w]here the language of the statute is clear, resort to the agency's interpretation is improper," this interpretation is relevant to the defendants' claim that the statute is unclear. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996).

where the true contributor conceals his identity by passing that money through another, § 441f is implicated.[8] As *Boender* notes, even in a criminal matter "at least some amount of deference to an FEC interpretation of FECA is appropriate." *Id.* at 840-841 (citing cases); *cf. Yi v. Federal Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("[D]eference trumps lenity when courts are called upon to resolve disputes about ambiguous statutory language, at least where the agency interpreting the criminal statute is: (1) responsible for administering the statute; and (2) that agency has promulgated its interpretation pursuant to the notice and comment provisions of the Administrative Procedure Act.") (quoting *Sash v. Zenk*, 344 F.Supp.2d 376, 383 (E.D.N.Y. 2004)).[9]

C. Section 441f Does Not Render § 441a(a)(8) Superfluous

The defendants, in a related argument, claim that § 441f cannot be referring to reimbursed straw donor contributions since that would make the attribution rules of § 441a(a)(8) superfluous. However, these statutes, enacted at different times, serve different purposes. As the court in *O'Donnell II* noted, the purpose of § 441f "is plain" - namely, its purpose "is [to] ensure the

[8] The defendants attempt to argue that the phrasing of this regulation would prohibit anyone from contributing money that came from any outside source, even something as benign as a regular paycheck. However, the defendants ignore the words in the regulation that make it plain that the regulation is concerned with money provided to the straw donor by the "true contributor," i.e. the person who is in fact engaging in the act of contribution using the straw donor, and not with a contribution using funds which were obtained unrelated to the act of contribution.

[9] *Crandon v. United States,* 494 U.S. 152, 177 (1990) (Scalia, J., concurring), which held that the "interpretation of those charged with prosecuting criminal statutes is not entitled to deference" and is also cited in *United States v. Toliver*, 972 F.Supp. 1030 (W.D. Va. 1997) and *United States v. Armstrong*, 974 F.Supp. 528 (E.D.Va. 1997), is not inconsistent with this rule, as it was dealing with statutes "not administered by any agency but by the courts" whereas the FEC is charged with administering this statute, at least as to administrative penalties.

complete and accurate disclosure of the contributors who finance federal elections." 608 F.3d at 553. On the other hand, § 441a

> served primarily to reinstate contribution limits [which had previously been eliminated with the 1971 Act] . . . . There is nothing in the language of § 441a(a)(8) to indicate that the provision was directed at the disclosure concerns of § 441f . . . . Moreover, although § 441a(a)(8) requires the original source of funds to be reported, it addresses only the intermediary's obligations and not the principal offender in the straw donor scheme. *In contrast, § 441f under the government's interpretation properly criminalizes the conduct of both parties involved*.

Id. at 554 (citations omitted). In other words, § 441a(a)(8) is a statute focused on contribution limits and providing guidance on how to attribute and account for contributions for, as it says on its face, the "*purposes of the limitations imposed by this section*," created when Congress reinstated contribution limits, while § 441f is directed at criminalizing disclosure violations and ensures that the actual and nominal donors are responsible for the illegal contribution.[10] There is simply no basis in the text or the history of these statutes to believe that Congress was addressing a loophole left by § 441f or otherwise comment on the straw donor prohibition, and any overlap between these statutes is easily explained by their differing purposes, making that overlap "unsurprising - and legally insignificant." *Id.* In fact, if Congress, three years after enacting § 441f had wanted to broaden or limit its scope, it would have done that *within* an amended § 441f, rather than in an entirely separate section of the code which dealt with different matters.

Additionally, the defendants' argument incorrectly identifies the "intermediar[ies]" and "conduit[s]" referred to by § 441a(a)(8) as identical to the straw donors of § 441f. Section

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[10] The relevant C.F.R. also supports this view. 11 C.F.R. § 110.6(a) ("All contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate.").

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 straw donor contributions. Instead, the provision facially is designed to account for legal conduit contributions, i.e., those given to committees and people forwarding funds. In fact, the attribution rules of § 441a(a)(8) apply to a broader range of situations. *See* 54 Fed. Reg. 34,106 (1989) (administrative definition of "'conduit or intermediary'. . . encompasses all those who receive and forward contributions earmarked" and FEC considers terms "synonymous"); 11 C.F.R. § 110.6(b)(2) ("conduit or intermediary means any person who receives and forwards an earmarked contribution to a candidate") (emphasis omitted); *United States v. Hsia*, 24 F. Supp. 2d 33, 60 n.29 (D.D.C. 1998) *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999) ("This provision, however, was intended to address legal 'conduit' contributions -- for instance when an individual contributes money to a national party that is earmarked for the campaign of a certain candidate") (emphasis omitted); 119 Cong. Rec. 26,595 (1973) (Sen. Clark) ("This amendment is designed to clarify and reinforce the intentions of the Senate with regard to the earmarking of funds to a particular candidate through the conduit of a political committee"); H.R. Rep. No. 93-1239, at 149 (1974) (Rep. Frenzel) ("[T]he earmarking language in the bill prevents an individual from channeling funds to a particular candidate through these political parties and political committees.").[11]

[11] That appears to be why Section 441a(a)(8) puts the obligation on the intermediary/conduit -- i.e., the person/entity with the superior role in fundraising -- to report the source, rather than requiring the source to self-report. *See* 120 Cong. Rec. 4,710 (1974) (Sen. Cook) ("[I]f one wishes to give $3,000 and say, 'will you please give it to the Senator from Maine, and that is whom I want it to go for,' under the law, the organization that receives the $3,000, and is a conduit to get it to the Senator from Maine, has to report where it came from, and that it was instructed to pass it on."); 11 C.F.R. § 110.6(c) (conduit reporting requirements).

The defendants also raise the specter that the government's interpretation would lead to criminalize otherwise legal conduct. Specifically, the defendants argue that there is nothing wrong with a parent who pays for a child's ticket to a political fundraiser, an activity which the government's interpretation of § 441f would prohibit. But the defendants begin from a false premise and reach a false result. In fact, there could be a problem with a parent reimbursing a child's ticket to a fundraiser, if the parent were trying to conceal his or her own contribution; that activity would fall squarely within the text and policy of § 441f, and the mere fact that it stems from a parent-child relationship does not and should not create an exception. See *McConnell v. FEC*, 540 U.S. 93, 231-232 (2003) (implicitly acknowledging that such activity could be criminal in suggesting that "perhaps" the statute now codified § 441f has deterred illegal "donations by parents through their minor children to circumvent contribution limits applicable to the parents") (overruled on other grounds). However, if the contribution is properly attributed to the parent under § 441a(a)(8), then it does not implicate the concerns underpinning § 441f as it is no longer "in the name of another" and it may be reimbursed without creating any concern about criminal liability (so long as the parent has not exceeded the total contribution limit); put another way, § 441f does not prohibit all 'conduit' contributions, just those made in the name of another, and it is entirely consistent with § 441a(a)(8).[12]

[12] To the extent defendants are suggesting that § 441a(a)(8) makes it permissible to use the names of conduits, it actually states the opposite: "The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient. *Cf.* H.R. Rep. No. 93-1239, at 5 ("The bill prohibits contributions in the name of another and provides that, for the purposes of limitations and reporting 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.").

D. The Legislative History and Structure Support the Government's Argument

While the text of the statute is sufficient on its face, it is also worth briefly noting Congress's intent when enacting what is now § 441f as part of the 1971 Act.

Rather than mentioning limitations, the legislative history demonstrates: (1) Congress wanted full disclosure of campaign contributions;[13] and (2) that disclosure included the source of contributions.[14] *See United States v. Passaro*, 577 F.3d 207, 214 (4th Cir. 2009) (while not dispositive, legislative history can support a court's construction of statutory text) (citing *Babbitt*

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[13] S. Rep. 92-229, at 57 ("Disclosure, if it is to be effective, must mean total disclosure"); 117 Cong. Rec. 29,311 (1971) (Sen. Pastore) ("The name of the game is full disclosure."); *Id*. at 30,066 (Sen. Hart) ("The Senator from Rhode Island has emphasized that the key value in the bill we are considering is disclosure, the availability of information. We have our disagreements about many other aspects, but all of us see the value in this."); 118 Cong. Rec. 326 (1972) (Rep. Keith) ("I am particularly pleased that this report contains the things for which I have been pressing," including "[f]ull and timely disclosure of contributions.").

[14] FN23. S. Rep 92-229, at 60 (eliminating contribution limits because "the Committee is of the general opinion that the voters, having knowledge of all sources of contributions and the nature of all expenditures, and, having the privilege of demonstrating at the polls their approval or disapproval with respect to particular candidates or political parties for excessive contributions received or expenditures made, will serve as a deterrent to abuse or excesses."); 117 Cong. Rec. 29,004 (1971) (Sen. Brooke) ("I believe that the most significant section of this bill is Title III. . . . Comprehensive disclosure is vital because it permits the voters to review the source of funds for each candidate, as well as the total amount of such contributions. Indeed, disclosure requirements, if enforced, . . . provide the public full opportunity to determine the appropriateness of a candidate's income and spending practices, and to translate that judgment into action at the ballot box."); *Id*. at 30,073 (Sen. Dole) ("[A]mplified disclosure provisions will enable the public to be better aware of candidates' real sources of support."); id. at 30,083 (Sen. Church) ("[T]he legislation requires detailed disclosure, both during and after elections, as to the sources of contributions."); 118 Cong. Rec. 327 (1972) (Rep. Anderson) ("Most importantly, the act provides for timely and thorough pre-election reports on cam-paign contributions and expenditures. As Senate Majority Leader Scott said during the debate in the other body, the single most important item on the agenda of campaign finance reform is to provide the electorate with the opportunity to determine 'who gave it and who got it' before they enter the voting booth."); Signing Statement, President Nixon ("It provides for full reporting of both the sources and the uses of campaign funds.").

v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704-08 (1995)). Section 441f was the only provision of the 1971 Act compelling contributors to use their own names when contributing. If the defendants' interpretation is correct, then no provision of the 1971 Act prohibited people from contributing in straw donors' names (thereby hiding their identities), which conflicts with the legislative history and frustrates the very purpose of the 1971 Act. S. Rep. No. 93-689, at 2 (1971 Act "predicated upon the principle of public disclosure"); 117 Cong. Rec. 26,111 (1971) (Sen. Mathias) ("Title III is the most important part of the 1971 campaign reform. It deals with the public's right to know."); *Id*. at 29,306 (Sen. Humphrey) ("It is the exposure that would be gotten, the fact that you could not disguise, avoid, or evade. That is what is important in this bill."); *Id*. at 30,071 (Sen. Mansfield) ("The requirement for the names of contributors of $100 or more will again allow the public to be informed as to who is or who is not contributing to particular campaigns."); 122 Cong. Rec. 3,704 (1976) (Sen. Schweiker) ("The theory of election reform is disclosure, and that means disclosure of what interests are giving contributions.").

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

contributions" "in excess of $100, together with the amount and date of such contributions;" *Id.* § 304(b)(2); and (4) providing that "[n]o person shall make a contribution in the *name* of another person," *Id*. § 310. (emphasis added). Requiring treasurers to keep records of, and file reports with, the names (and occupations/employers) of contributors would be meaningless if those documents could contain the names (and occupations/employers) of straw donors, rather than the actual contributors. *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (courts generally avoid rendering provisions "meaningless"); *United States v. Hsia*, 176 F.3d 517, 524 (D.C. Cir. 1999) ("§ 434(b)(3)'s demand for identification of the 'person . . . who makes a contribution' is *not* a demand for a report on the person in whose name money is given; it refers to the true source.") (emphasis and alteration in original). To the contrary, the interlocking provisions in Title III demonstrate: (1) the "name" of the "person" making the "contribution" in the recordkeeping/reporting provisions is the name of the person actually providing the money; and (2) by preventing a "person" from making a "contribution" in the "name" of another "person," what is now § 441f enforced that requirement. *Mariani v. United States*, 80 F. Supp. 2d 352, 368 (M.D. Pa. 1999) ("Section 441f also ensures that proper disclosure of the actual sources of campaign contributions occurs."); Advisory Opinion 1986-41 (Section 441f, in part, "serves to insure disclosure of the source of contributions"). The defendants' reading of a nontextual limitation into this section of the Act is, thus, inconsistent with the structure and purpose of the 1971 Act.

In contrast to the defendants limited reading, applying the plain wording of § 441f here as the government has in this indictment is consistent with the structure and purpose of the 1971 Act where the wording at issue originated. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291

(1988) (“In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *McCarthy v. Bronson,* 500 U.S. 136, 139 (1991) ("statutory language must always be read in its proper context"); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”); *Wilderness Society v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) ("structure and purpose of a statute may also provide guidance in determining the plain meaning"); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1985) (duty to "consider time and circumstances surrounding the enactment as well as the object to be accomplished by it").

In addition, although later legislative history is generally a weak indicator of the intent of an earlier Congress, *Russello v. United States,* 464 U.S. 16, 26 (1983), here it confirms what the 1971 legislative history demonstrates, namely, that § 441f applies here. Cf. 122 Cong. Rec. 2,606 (1976) ("[I]f he buys a ticket for $100 and turns to his wife and hands her $100 and she buys the ticket -- Mr. MATHIS. I think the gentleman knows that there is a provision in the law that provides for criminal penalties for using another as a conduit.").

First, the FEC submitted the above referenced regulation to the House in 1977 and Congress in 1989 and Congress neither disapproved nor altered § 441f in response when amending FECA. 54 Fed. Reg. 34,098 (1989); *Grove City College v. Bell*, 465 U.S. 555, 568 (1974). (“Congress' failure to disapprove the regulations is not dispositive, but, as we recognized in *North Haven Board of Education v. Bell*, [456 U.S. 512, 533-534 (1982)] , it strongly implies that the regulations accurately reflect congressional intent.”) (overturned on other grounds); *see*

also FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 34 & n.8 (1981) (citing Congress' failure to disapprove FEC regulation and suggesting it was "indication that Congress does not look unfavorably" on it)..

Second, Congress itself investigated so-called conduit contributions (straw-donor contributions) made during the 1996 election, and stated that § 441f applied to them. Investigation of Political Fundraising Improprieties and Possible Violations of Law, H.R. Rep. No. 105-829, at 182 ("Contributions in the name of another -- conduit contributions -- are illegal. The Act provides that: 'No person shall make a contribution in the name of another person.' ") (quoting 2 U.S.C. § 441f); Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at 1782 & n.203 (citing Section 441f as barring contributions "made through 'straw donors' "); *id*. at 7241 (Section 441f, in part, prohibits contributors "from disguising a contribution by using another person as a conduit"); *see also* H.R. Rep. No. 105-797, at 94 n.658 (1998) (contribution under Section 441f "commonly referred to as a 'conduit contribution' ").

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

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

> contribution or knowingly accept a contribution made in the name of another. The amendment does not change the conditions of the underlying offense, but by making it a felony, it adds some "teeth" to the law.

147 Cong. Rec. 3,187-3,188.[15]

E. Courts Have Consistently Applied § 441f to Straw Donors

In addition to the *O'Donnell* and *Boender* cases discussed above, other courts have recognized that § 441f applies to the facts before this court. In *McConnell*, 540 U.S. at 231-32, the Supreme Court addressed a statutory provision prohibiting minors from contributing. The government argued that the provision "protects against corruption by conduits; that is donations by parents through their minor children to circumvent contribution limits applicable to the parents." *Id.* at 232. The Court invalidated the provision, noting that the government offered "scant evidence of this form of evasion" and stating: "Perhaps the Government's slim evidence results from sufficient deterrence of such activities by § 320 of FECA, which prohibits any person from "mak[ing] a contribution in the name of another person." *Id*. (quoting 2 U.S.C. § 441f; alteration in original); *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 424 (D.D.C. 2003) (Henderson, J., concurring) (making the same point) (overruled on other grounds).

In *United States v. Goland*, 903 F.2d 1247, 1251 (9th Cir. 1990), the defendant attempted to get the Democratic candidate elected by "giving a boost to the ultra-conservative Vallen," a third-party candidate, thereby taking votes away from the Republican. "Presumably in order to avoid both FEC detection of the excessive contribution and Vallen's awareness of the true source of the funds, [the defendant] arranged for 56 persons to make payments" "with the understanding

[15] The legislative history cited by the *O'Donnell I* court is inopposite as the cited sources deal with amendments unrelated to what is now § 441f, and rather involve criminal code amendments in Title II, not amendments to the disclosure Title (Title III).

that [the defendant] would reimburse them, which apparently he did." *Id*. The defendant was charged, in part, with violating § 441f. *Id*. at 1252. The defendant filed a civil suit, asserting that the disclosure requirements (including § 441f) violated his "First Amendment right to contribute anonymously" to fringe candidates, as did the contribution limits. *Id.* When discussing FECA's reporting requirements and contribution limits, the court in *Goland* stated: "The Act prohibits the use of 'conduits' to circumvent these restrictions: 'No person shall make a contribution in the name of another person.' " *Id*. at 1251 (quoting 2 U.S.C. § 441f). The court rejected the suggestion that the defendant lacked standing to challenge the disclosure requirements because he made secret, rather than anonymous, contributions: "Taking [the defendant] at his word, he would not have used individuals as conduits if the law did not prohibit making anonymous contributions. Under FECA's reporting and disclosure requirements, to bypass the law in effect required violating it." *Id*. at 1255.

Other courts have likewise recognized and supported the interpretation that § 441f applies to straw donors. *United States v. Serafini*, 233 F.3d 758, 763 n.5 (3d Cir. 2000) ("FECA also makes it unlawful for any person to make a contribution in the name of another person (referred to in this opinion as a 'conduit')."); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (recognizing "Section 441(f) of the FECA, the conduit contribution ban or 'anti-conduit' provision, prohibits one from making a contribution 'in the name of another person;' " rejecting First Amendment challenge because "[p]roscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to be at the very core" of the analysis in *Buckley* [*v. Valeo,* 424 U.S. 1 (1976)]) (quoting 2 U.S.C. § 441f); *United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999) ("[T]here is no soft money

counterpart to § 441f in FECA itself, which prohibits conduit transfers of 'contributions.'"); *Hsia*, 176 F.3d at 523-24 ("We are convinced by these latter provisions [including § 441f] that § 434(b)(3)'s demand for identification of the 'person . . . who makes a contribution" is not a demand for a report on the person in whose name money is given; it refers to the true source of the money."); *United States v. Sun-Diamond Growers*, 138 F.3d 961, 969 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999) (addressing reimbursement scheme from corporate funds and noting illegality, in part, because "no one may make a campaign contribution in the name of another, 2 U.S.C. § 441f."); *United States v. Curran*, 20 F.3d 560, 564 n.1 (3d Cir. 1994) ("18 U.S.C. § 614 prohibited making a contribution through a conduit. In 1976, that offense became 2 U.S.C. § 441f") *vacated on other grounds*, 20 F.3d 560 (3rd Cir.1994); *Mariani*, 80 F. Supp. 2d at 364 ("Section 441f of FECA, the conduit contribution ban or 'anti-conduit' provision, prohibits one from making a contribution 'in the name of another person.' ") (quoting 2 U.S.C. § 441f); *Hsia*, 24 F. Supp. at 39 (D.D.C. 1998) (The 1971 "Act also set forth a variety of disclosure requirements and, as part of those requirements, it prohibited contributions in the name of another, so-called conduit contributions."); *United States v. Curran*, 1993 WL 137459, at *1 (E.D. Pa. April 28, 1993) ("FECA forbids the use of 'conduits' to circumvent these restrictions by prohibiting campaign contributions in the name of another person."); *FEC v. Weinsten*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978) (rejecting vagueness challenge to so-called conduit contributions; noting the "simple words" of Section 441f and finding "no ambiguity in the statutory language"); *see, e.g., United States v. Hsu*, 2009 WL 2495794, at *1 (S.D.N.Y. Aug. 10, 2009) (upholding sufficiency of evidence under Section 441f for "straw donor scheme"); *Fieger v. Gonzales*, 2007 WL 2351006, at *2 (E.D. Mich. Aug. 15, 2007), *aff'd on other grounds*, 542

F.3d 1111 (6th Cir. 2008).

Looking at this legal landscape, the court in *O'Donnell II* noted that "the sheer consistency of [the] assumptions at the least undermines [the defendant's] argument that § 441f should plainly be read otherwise" 608 F.3d at 549 n.1. Indeed, the court in *Boender* noted that the interpreting of § 441 in Supreme Court's *McConnell* decision, as well as the D.C. Circuit's *Kanchanalak* and *Hsia* decisions, was "was part of the Court's analysis, not stray dicta." 691 F.Supp.2d at 841-842. Nor has the defendant been able to point to a single valid case to the contrary. The entire body of federal law on this subject points to only one conclusion.

F. The Rule of Lenity, First Amendment and Due Process

The defendants go on to argue that even if the government's interpretation of the statute is correct, the counts must be dismissed because the rule of lenity should apply. However, the circumstances do not warrant the application of any such rule.

The rule of lenity requires that "ambiguous criminal laws . . . be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507 (2008) (plurality opinion). However, "[i]t is not the case . . . that a provision is ''ambiguous' for purposes of lenity merely because it [is] possible to articulate a construction more narrow than that urged by the Government.'" *United States v. Ehsan*, 163 F.3d 855, 857 -58 (4th Cir. 1998) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Rather, "since most statutes are ambiguous to some degree . . . . to invoke the rule, [a court] must conclude that there is a *grievous ambiguity or uncertainty* in the statute." *Muscarello v. United States*, 524 U.S. 125, 139 (1998) (emphasis added); *United States v. Nelson*, 484 F.3d 257, 263 (4th Cir. 2007); *United States. v. Burgess*,

478 F.3d 658, 662 (4th Cir. 2007).[16]

In this case, there no "grievous ambiguity." The plain text of the statute, as well as the structure and purpose of the Federal Election Campaign Act, do not leave § 441f's meaning "genuinely in doubt." *United States v. Otherson*, 637 F.2d 1276, 1285 (9th Cir. 1980); *see also O'Donnell II*, 608 F.3d at 555; *Boender,* 691 F.Supp.3d at 842. Indeed, as discussed above, the statute is entirely clear and no reasonable person could understand it as prohibiting direct false name contributions while permitting a straw donor scheme.

Moreover, to apply the rule of lenity here would be to ignore the legal history described above in which, at least as far back as 1990, court after court has found § 441f to apply to straw donors, with the single exception being a case that was almost immediately overturned. *See O'Donnell II*, 608 F.3d at 549 n.1 ("the sheer consistency of [the] assumptions [in the case law] at the least undermines [the defendant's] argument that § 441f should plainly be read otherwise"). It would also ignore more than two decades of agency interpretation of this provision of law which provides further notice as to the meaning of this particular statute, as well as the legal history described above in which court after court has found § 441f to apply to straw donors, both explicitly and implicitly, with the single exception being a case that was almost immediately overturned. *Boender,* 691 F.Supp.3d at 842 (noting that "[]in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court rejected a lenity-based argument and strongly suggested that on-point agency regulations militate against application of the rule of lenity.") (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,

[16] Although the Fourth Circuit cases cited by defendants, as well as other cases, imply that any ambiguity might suffice, the Supreme Court has spoken clearly on this point and the Fourth Circuit had repeatedly made clear that the standard is one of "grievous ambiguity."

515 U.S. 687, 704 n. 18 (1995)); *see also In re Sealed Case*, 223 F.3d 775, 77 (D.C. Cir) (deference to FEC interpretations of FECA is due as much in a criminal context as in any other); *cf. Yi*, 412 F.3d at 535("[D]eference trumps lenity when courts are called upon to resolve disputes about ambiguous statutory language, at least where the agency interpreting the criminal statute is: (1) responsible for administering the statute; and (2) that agency has promulgated its interpretation pursuant to the notice and comment provisions of the Administrative Procedure Act.") (quoting *Sash v. Zenk*, 344 F.Supp.2d 376, 383 (E.D.N.Y. 2004)).

Relatedly, the defendants argue the applying the government's interpretation of § 441f would violate their First Amendment and Due Process rights. Specifically, the defendants allege that the statute is void-for-vagueness and lacks sufficient specificity.

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Buckley*, 424 U.S. at 77 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"). Again, despite the defendants' attempts to inject confusion, the statute provides clear notice of what behavior was prohibited and there is nothing vague about the statutory text. *See FEC v. Weinsten*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978) (rejecting vagueness challenge to similar contributions; noting the "simple words" and finding "no ambiguity in the statutory language").

G. Willfulness

Finally, the defendants argue that their conduct cannot be willful, as the law requires, since the conduct was consistent with an objectively reasonable interpretation of the law, even if the conduct was in fact illegal under § 441f.

As the defendants note, in the analogous tax context – which similarly requires willfulness – courts have held that the legal "duty involved must be knowable." *United States* v. *Mallas*, 762 F.2d 361, 363 (4th Cir. 1985). Where "'law is vague or highly debatable, a defendant - actually or imputedly - lacks the requisite intent to violate it.'" *Id*. (quoting *United States* v. *Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974)); *see also United States* v. *George,* 420 F.3d 991, 995 (9th Cir. 2005) ("The element of wilfulness cannot obtain in a criminal tax evasion case unless the law clearly prohibited the conduct alleged in the indictment.") (citations and internal quotations omitted).

However, unlike the arcane tax law discussed in *Mallas* and *Critzer*, the statute at issue here is clear, not vague or highly debatable, and the defendants had ample warning from the text and the legal history as to what the law requires. The mere fact that a defendant can put forth some argument as to an alternative meaning of the law does not control - if a defendant merely had to come up with some theoretical alternative, then the whole body of criminal law requiring willfulness would become a nullity. Put another way, complaining about ambiguity does not make it so. Rather, willfulness is only undermined where the defendant has a "plausible" theory. *Mallas*, 762 F.2d at 364. Additionally, even if courts had not repeatedly made clear the meaning of § 441f, "a lack of prior appellate rulings on the topic does not render the law vague, nor does a lack of previously litigated fact patterns deprive [defendants] of fair notice." *George,* 420 F.3d at

995-96; s*ee also United States* v. *Ingredient Technology Corp.*, 698 F.2d 88, 96 (2d Cir. 1983) (in assessing whether law is sufficiently clear to satisfy due process, "it is immaterial that there is no litigated fact pattern precisely in point.") (citations and internal quotations omitted). Indeed, it is instructive to note that in *George*, which also involved tax law, the defendant put forth arguments as to why the law was ambiguous which were ultimately rejected by the court, which found that the law on the relevant point was "sufficiently clear to allow prosecution." 420 F.3d at 998.

Moreover, even if the statute were not as clear as it is, the court in *Mallas* noted that "[i]n the absence of explicit language in the regulation, potential liability might alternatively be announced by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition." 762 F.2d at 364 (citations and internal quotations omitted). Here, the FEC has spoken and interpreted § 441f to include straw donors. While *Mallas* was dealing with a regulation, as discussed above, the FEC is entitled to at least some deference in providing guidance on the meaning of the criminal law.

The defendants then rely heavily on *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), for the proposition that liability cannot attach so long as the defendants' reading of the statute was not "objectively unreasonable." *Id.* at 69. However there is nothing in the Supreme Court's ruling on civil liability that even begins to imply that it would import the same standard in the wholly separate realm of criminal law, nor have the defendants cited a single case where it has been applied in criminal law. Indeed, in the nearly four years since *Safeco* was decided, the government cannot find a single case applying its rulings in a criminal context.

However, even if *Safeco* would apply to criminal law, the Court did not begin and end with the term "objectively unreasonable." Rather, the Court went on to explain that the reason Safeco's interpretation of the law was not objectively unreasonable is because "its reading has a foundation in the statutory text . . . and a sufficiently convincing justification." *Id*. at 69-70; *see also Simonoff v. Kaplan, Inc*. 2010 WL 4823597, at *4-9 (S.D.N.Y. 2010) (finding that the defendant's reading of the statute was not objectively unreasonable because it is 1) consistent with the plain meaning of the text, including the dictionary definition of terms, 2) it is reasonable in context, 3) it is supported by legislative history, and 4) the majority of courts found the defendant's reading to be correct). In other words, the defendants need to be able to do more than show that they are relying on a conceivable interpretation but rather on one supported by the text and with a convincing justification. As the above discussion makes plain, the statutory text and the legislative history point to only one interpretation and there is no justification for any other reading; indeed, the defendants' reading of § 441f runs contrary to all legislative intent. Further, the Court specifically notes that the statute in question in *Safeco* was "less-than-pellucid" and that Safeco had a "dearth of guidance" from the appellate courts or regulatory bodies, and that such guidance may have provided sufficient warning. Again, in the present case, the statute is entirely lucid, clear in its meaning and intent. Further, as has been noted, and contrary to the defendants' assertion, there is a long legal history dealing with § 441f, as well as guidance by the FEC that has been on the books for over 20 years. Even if this Court were to apply *Safeco's* standard, the defendants do not have an objectively reasonable basis for their now-claimed understanding of the law, and they had ample notice to commit a willful violation

of § 441f.[17] *See also Cortez v. Trans Union, LLC*, 617 F.3d 688, 721 (3rd Cir. 2010) (lack of authoritative guidance does not "immunize" the defendant from liability).

It should finally be noted that, with regards to the FEC regulations, the defendants want to have their cake and eat it to, claiming on one hand that the FEC regulation cannot provide guidance as a matter of law and on the other that it demonstrates that the statute does not apply to straw donors. In fact, the regulation does provide guidance and that guidance is entirely consistent with the government's position. The defendants tortured reading of 11 C.F.R. § 110.4(b)(2)(i) to somehow refer to the contributions made by the nominal contributor defies common sense and the plain text. The 'giving', like the statutory term "make" discussed above, plainly refers to"both the source of funds and the nominal donor" and "supports the conclusion that one makes a contribution either by giving money to a nominal donor [who then passes the money along to the campaign] or by directly giving money to a donee [i.e. the campaign];" the term 'give', like the term 'make', is not limited to direct contact. *Boender,* 691 F.Supp.2d at 839 (discussing the statutory language); *see* BLACK'S LAW DICTIONARY (9th ed. 2009) (providing first definition of "give" as "To voluntarily transfer (property) to another without compensation <Jack gave his daughter a car on her birthday>"). Moreover, it defies common sense and any coherent reading of the text that the example given in the regulation could be referring to the straw donor as the one who has made a "contribution in the name of another" since it is the true contributor (in our case, Galen) which is using the names of another, not the other way around.

[17] The defendants at one point argue that since the trial judge in *O'Donnell I* held that the statute applied only to false names, that is proof of sufficient ambiguity for the purposes of lenity or willfulness. Would the overruled decision of a single judge be sufficient, then § 441f and, indeed all statutes requiring willfulness, could be undone for years merely because of a legal error, an absurd conclusion.

Instead, this example in the regulations means what it appears to mean, that one cannot use a straw donor to provide money to a campaign.[18]

The defendants also argue that, under this regulation, the only activity covered is where the straw donor first receives the money and then transfers it to the campaign. However, even if one were to read this example as referring to that particular case, there is no logical distinction between money provided to a straw donor before he writes his check to the campaign or a promise to repay the money which induces the straw donor to write the check. *See O'Donnell II*, 608 F.3d at 549 ("When a defendant arranges to have an intermediary deliver a gift and promises reimbursement, the offense will at least have begun at the moment the contribution arrives at the campaign."). Moreover, even if the law only prohibits contributions where the actual donor first gave the money to the straw donor, the application of that law is a factual issue to be determined at trial and not proper for a motion to dismiss.

Accordingly, since the text of the statute clearly prohibits the use of straw donors, and since that interpretation is supported by the statutory context, the legislative history, and the legal and regulatory history, there is no basis to dismiss counts Two and Three of the indictment.

II. Count Four - 2 U.S.C. § 441b

Count Four charges the defendants with causing Galen, Inc. to make corporate contributions to a federal candidate, that is, to a candidate for Congress or the Presidency, in violation of the Federal Election Campaign Act, and specifically, 2 U.S.C. § 441b. The term "contribution" is defined to include "anything of value" made "for the purpose of influencing" a

[18] Even if the defendants' reading were correct, by its own wording the regulation is providing only an example and is not covering the entire sphere of conduct.

federal election. 2 U.S.C. § 431(8). The defendants contend that the reasoning of a recent Supreme Court decision invalidating the prohibition in section 441b against making campaign *expenditures*, *Citizens United v. Federal Election Commission,* 130 U.S. 876 (2010), also applies to the statute's ban on corporate *contributions,* and hence Count Four must be dismissed. The defendants misread the holding of *Citizens United*, anticipate a ruling the Supreme Court has not made, and ignore the Court's landmark First Amendment case in this area, *Buckley v. Valeo*, 424 U.S. 1 (1976) *per curiam.* Section 441b's ban on corporate contributions is constitutional and applies to defendants' conduct.

Section 441b provides in pertinent part as follows:

> It is unlawful for . . . any corporation whatever . . . to make a contribution [or expenditure] in connection with any election at which presidential and vice presidential electors or a Senator or Representative . . . in Congress. . . are to be voted for.

In *Citizens United v. Federal Election Commission*, *supra,* the Supreme Court held that the prohibition in section 441b against independent corporate expenditures for political communications (the bracketed phrase in the above quote), violated the First Amendment. The Court did not address the statute's ban on corporate contributions. Hence this provision remains in effect. Defendants now attempt to escape liability by stretching *Citizens United* to reach facts that were not before the Court. While creative, defendants' motion ignores clear judicial precedent stretching over 100 years. The motion must be denied.

In upholding the broad campaign financing reforms contained in the Bipartisan Campaign Reform Act of 2002, the Supreme Court reviewed the genesis of the corporate ban on political contributions to federal candidates. *McConnell v. Federal Election Commission*, 540 U.S. 93,

115-16 (2003):

> More than a century ago the "sober-minded Elihu Root" advocated legislation that would prohibit political contributions by corporations in order to prevent " 'the great aggregations of wealth, from using their corporate funds to elect legislators who would vote for their protection and the advancemet of their interests as against those of the public.' " *United States v. Automobile Workers*, 352 U.S. 567 (1957) (quoting E. Root, Addresses on Government and Citizenship 143 (R. Bacon & J. Scott eds. 1916). The first such enactment responded to President Theodore Roosevelt's call for legislation forbidding all contributions by corporations " 'to any political committee or for any political purpose.' " *Ibid.* (quoting 40 Cong. Rec. 96 (1905). The resulting 1907 statute completely banned corporate contributions of "money . . . in connection with" any federal election. Tillman Act, ch. 420, 34 Stat. 864.

Defendants would have the court throw out a century of jurisprudence upholding the ban on corporate political contributions, by equating expenditures – which the Court struck down in *Citizens United* – with contributions. This is, however, equating apples and oranges.

In its landmark First Amendment decision in *Buckley v. Valeo, supra,* the Supreme Court explained the fundamental difference between contributions and expenditures for political communications:

> In contrast to a limitation upon expenditures for political expression, a limitation upon the amount that a person may contribute to a candidate or political organization *entails only a marginal restriction upon the contributor's ability to engage in free communication* . . . While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley,* 424 U.S. at 21-22 (emphasis added).

Thus, the defendants are free to engage in unlimited campaign expenditures. What they are **not** free to do is make direct contributions to candidates. Count Four charges that they did so.

Unlike expenditures, contributions are a symbolic statement of support for a candidate, and provide a form of influence-peddling in a campaign finance system that is dependent on financial contributions from others to conduct a successful campaign. Although the *Buckley* Court upheld restrictions on large contributions, it recognized the danger inherent in the giving of funds to public officials or candidates for public office:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . [Therefore] Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'

Buckley, 424 U.S. at 27 (citations omitted).

The *Buckley* appellants then contended that the contribution limits must be invalidated because bribery laws and disclosure requirements were a less restrictive means of dealing with suspected corrupt arrangements. The Court flatly rejected this contention, noting that the bribery statutes deal with only "the most blatant and specific attempts" of those with money to influence governmental action, and that . . .

> Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

Id. at 28.

While it may be true that most large contributors do not seek improper influence over a candidate's position or an officeholder's action, this does not undercut the validity of the contribution ban. First, as the *Buckley* Court noted, it is difficult to isolate and prove suspect transactions. *Id.* at 30. Second, the first Congress to consider a ban on corporate contributions at the turn of the century, like the Congress considering the widespread reforms of the Bipartisan Campaign Reform Act 100 years later, as well as the courts in between that considered this issue, were justified in concluding that the interest in safeguarding against the appearance of impropriety required that the opportunity for abuse inherent in opening the gates to corporate contributions be eliminated.

Precedent, as well as good government, require that defendants' motion to dismiss Count Four be denied.[19]

III. Counts Six and Seven - - 18 U.S.C. § 1001

Next defendant argues that Counts Six and Seven fail to state offenses under 18 U.S.C. § 1001. With respect to Count Six, he complains that the indictment is somehow insufficient to identify the document in which the false statement was contained or why that statement was false, or what a truthful statement would have contained. Defendant Danielczyk then raises the same arguments that he employed in attacking Counts Two and Three which were dispensed with above. *See* Defendant Danielczyk's Memorandum of Law, 27.

Regarding this attack on the indictment's specificity, defendant's arguments fail for the following reasons. In order to be constitutionally valid, an indictment must fairly inform the

[19] Since defendants' arguments as to Counts Two, Three, and Four fail, the defense motions to strike certain objects from the conspiracy as alleged in Count One, Paragraphs 10, a and b must also fail.

defendant of the charges against him and be sufficiently clear to bar subsequent prosecutions for the same conduct. *United States v. Resendiz-Ponce,* 549 U.S. 102, 108 (2007); *see also United States v. Hamling*, 418 U.S. 87, 117 (1974). Rule 7(c)(1) of the Federal Rules of Criminal Procedure demands only that an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." While the Supreme Court in *Russell v. United States* found that there are exceptional occasions where an indictment must be pled with greater specificity, such as when the definition of an offense includes generic terms, the type of minutely detailed pleading suggested by the defendant is not contemplated or required by the Federal Rules of Criminal Procedure. 369 U.S. 749, 765 (1962); *see also Resendiz-Ponce*, 549 U.S. at 109.

Indictments should be reviewed "on a practical basis and in [their] entirety, rather than in a hypertechnical manner." *United States v. McLeczynsky*, 296 F.3d 634, 636 (7th Cir. 2002) (internal quotations and citations omitted). The question is not "whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *United States v. Allender*, 62 F.3d 909, 914 (7th Cir. 1995). It is normally sufficient for an indictment to track the words of the statute under which the defendant is being charged. *Allender*, 62 F.3d at 914. While the Indictment at issue here is a detailed speaking Indictment, indictments need not exhaustively recount the facts surrounding the crime's commission. *Agostino*, 132 F.3d at 1189 ("Generally, an indictment is sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished.").

The elements of 18 U.S.C. § 1001(a)(2) and 18 USC §§ 2(b), consist of the following:

(1) that the statement to be made was false and the defendant knew it to be so;

(2) the defendant intentionally caused the statement to be made by another;

(3) the statement was within the jurisdiction of a federal agency; and

(4) the statement was material.

United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999) (discussing the elements of a prosecution for causing false statements to the FEC under §§ 1001 and 2(b)); *United States v. Daughtry*, 48 F.3d 829, 831 (4th Cir. 1995) (holding that § 1001 itself is not a specific intent crime but indicating that § 2(b) requires "evil intent") (abrogated on other grounds); *but see United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) (holding that, in a prosecution under § 2(b) for causing false statements to the FEC, the defendant has to know his conduct was unlawful).

Here, the indictment plainly charges defendant Danielczyk with causing false statements to be made to the FEC, specifically in Count Six that Danielczyk caused the Clinton campaigns to file a report with the FEC that contained false information as to the true source of the contributions made by the conduits, and in Count Seven that the December 2007 letter to the FEC contained false information about the nature of the reimbursement scheme.

For good reason, the type of minutiae demanded by the defendants runs directly counter to the clear purpose of Rule 7(c)(1). The Federal Rules of Criminal Procedure "were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure. *Resendiz-Ponce*, 549 U.S. at 110 (quoting *United States v. Debrow*, 346 U.S. 374, 376 (1953)). Accordingly, defendant's arguments must fail because they lack merit and support in the law.

The Federal Election Campaign Act, in 2 U.S.C. § 434(b), requires filing of reports with the FEC identifying individuals who contribute over $200 to a campaign in an election cycle. This requirement refers to the contribution's actual or "true" source. *See United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999); *United States v. Hsia*, 176 F.3d 517, 524 (D.C. Cir. 1998); *O'Donnell*, 608 F.3d at 550. Since a conduit is not the true source of the contribution, reports identifying a conduit as a 'contributor' constitutes a false statement under 18 U.S.C. § 1001(a). *Hsia*, 176 F.3d at 524 (where "the committees . . . did not report the true sources, their statements would appear to be false"); *cf. O'Donnell*, 608 F.3d at 550. In this case, the campaign filed the required quarterly finance report with the FEC in April 2007 which falsely included the names of the conduit contributors as the actual source of the funds to the Clinton presidential campaign.

Having failed to identify a genuine defect in Count Six of the indictment, defendant Danielczyk next casually suggests that he is entitle to a bill of particulars. *See* Defendant Danielczyk's Memorandum of Law, 27. This request for a bill of particulars is a thinly veiled request for additional discovery above and beyond that to which he is entitled under Rule 16. Under modern-day discovery rules, especially where there is a "speaking indictment," bills of particulars are largely unnecessary. As the Third Circuit stated in *United States v. Urban*, 404 F.3d 754 (3d Cir. 2005), in affirming the denial of a motion for bill of particulars:

> The purpose of a bill of particulars is "to inform the defendant of the nature of the charges brought against him, to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *Addonizio*, 451 F.2d at 63-64. Only where an indictment fails to perform these functions, and thereby "significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial[,]" *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir.1989) (citing *Addonizio*, 451 F.2d at 62-63), will we find that a bill of particulars

> should have been issued. As discussed above, the indictment provided more than enough information to allow Appellants to prepare an effective trial strategy.

Id. at 771-72.

While granting a bill of particulars lies within the sound discretion of the court, *United States v. Armodica*, 515 F.2d 49, 54 (3d Cir. 1975), *cert. denied*, 423 U.S. 858 (1975), the court may consider the scope of information available through discovery as well as the information set forth in the indictment in determining the appropriateness of ordering a bill of particulars in a given case. *See, e.g. United States v. Boffa*, 513 F. Supp. 444, 485 (D. Del. 1980), *aff'd in part, rev'd in part on other grounds*, 688 F.2d 919 (3d Cir. 1982). Courts have repeatedly recognized that compliance with the discovery requirements of Rule 16 often obviates the need for entry of an order compelling the government to file a bill of particulars. *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979), *cert. denied*, 444 U.S. 979 (1979); *United States v. Deerfield Spec. Papers, Inc.*, 501 F. Supp. 796, 809 (E.D.Pa. 1980).

Pursuant to the government's discovery obligations, the prosecution has made available to the defendants expansive discovery materials since March 9, 2011. Hundreds of pages of discovery contained on four CDs have been turned over, including a detailed six-page index describing the contents. The government has reviewed its files and has and will continue to produce the material to which the defendant is entitled under Fed.R.Crim.P. 16, *Brady*/*Giglio* and their progeny, and the *Jencks Act*.

Here, defendant has specifically asked for the bill of particulars "to set forth" the government's theory of the case. *See* Defendant Danielczyk's Memorandum of Law, 27. It is axiomatic that a bill of particulars may not be used merely as a discovery device to acquire

evidentiary details of the government's case or its theories, *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985), particularly in a case such as this where voluminous discovery materials have already been disclosed. A bill of particulars "is not intended to provide the defendant with the fruits of the government's investigation . . . Rather, it is intended to give the defendant only that minimum amount of information necessary to permit the defendant to conduct his *own* investigation" *United States v. Smith*, supra, 776 F.2d at 1111 (citations omitted; emphasis in original); *see also United States v. Kilrain*, 566 F.2d 979, 985 (5th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978). In particular, there is no requirement that the government "weave the information at its command into the warp of a fully integrated trial theory for the benefit of the defendants . . ." *United States v. Boffa*, 513 F. Supp. at 485; see also *United States v. Addonizio*, 451 F.2d at 64.

In seeking a bill of particulars, the defendant totally misconceives the purpose of such a bill. To assert that this indictment does not provide notice of the charges against the defendant is specious. The indictment clearly describes defendant's criminal conduct, and satisfies the requirement of concise notice to the defendant, permitting him to prepare a defense and avoid double jeopardy for the same offense.

With respect to Count Seven, the defendant takes issue with the factual background giving rise to the charges and also questions the materiality of the false statement at issue. However, an indictment is"not the vehicle" by which the Government is required to demonstrate the defendant's guilt beyond a reasonable doubt. *See United States v. Yoon*, 128 F.3d 515, 523 (7th Cir.1997); *see also United States v. Schmidt*, 947 F.2d 362, 369 (9th Cir. 1991) (holding that the indictment is only required to allege the essential facts of the crime and need not explain the

government's theory of the case.").

As charged in the indictment, in December 2007, defendant Danielczyk caused legal counsel to file a letter with the FEC. This letter, while admitting certain information, also contained a materially false statement in representing that "the checks provided to Galen and IJM employees at or around the time of the 2007 event were the first installment on a series of bonus payments he intended to make as a result of the transaction" while acknowledging that "the payments were timed to allow employees and others to attend" the Clinton event. In other words, Danielczyk told the FEC that at least some of the reimbursements checks were in fact legitimate bonuses, which is demonstrably untrue.

The materiality requirement of a § 1001 violation is satisfied if the statement is *capable* of influencing or affecting a federal agency. *See, e.g., United States v. Boone,* 951 F.2d 1526, 1545 (9th Cir. 1991); *United States v. Rodriguez-Rodriguez*, 840 F.2d 697, 700 (9th Cir.1988). The false statement need not have actually influenced the agency, *see, e.g., Boone*, 951 F.2d at 1545; *United States v. Vaughn*, 797 F.2d 1485, 1490 (9th Cir.1986), and the agency need not rely on the information in fact for it to be material. *See, e.g., Rodriguez-Rodriguez*, 840 F.2d at 700. In other words, "the test is the *intrinsic* capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." *United States v. Salinas-Ceron*, 731 F.2d 1375, 1377 (9th Cir.1984) (internal citations omitted), *vacated on other grounds*, 755 F.2d 726 (9th Cir.1985).

The FEC is "the agency of United States government empowered with the exclusive and primary jurisdiction with respect to administration, interpretation and civil enforcement of the [Federal Election Campaign] Act." *Federal Election Comm'n v. American Intern. Demographic*

Services, Inc., 629 F.Supp. 317, 319 (E.D. Va. 1986). As the FEC is charged with enforcing the FECA, statements which deceive the FEC as to the facts of the reimbursements are material to any investigation conducted by the FEC. *See United States v. Littleton*, 76 F.3d 614, 618 (4th Cir.1996) ("A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed.").

Whether the government has proved facts beyond a reasonable doubt illustrating that a false statement is material to an agency decision is a mixed question of fact and law typically resolved by a properly instructed jury. *See United States v. Gaudin*, 515 U.S. 506, 512, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *United States v. Garcia-Ochoa*, 607 F.3d 371 (4th Cir. 2010) ("Materiality, [as an element of 18 U.S.C. 1001], is a question of fact (or at the very least a mixed question of law and fact) to be resolved by the *fact finder*"); *United States v. David*, 83 F.3d 638, 646 (4th Cir. 1996) ("[I]t is obvious error today not to submit the question of materiality to the jury in a false statements prosecution."). An indictment has a much more limited purpose, and therefore defendant's motion to dismiss fails. *See United States v. Vitillo*, 490 F.3d 314, 320 (3d Cir. 2007) ("An indictment is generally deemed sufficient if it: [sic] (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.") (internal quotations and citations omitted).

IV. Conclusion

For the reasons set forth above, the government respectfully requests that the defendants' motions to dismiss counts of the Indictment should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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