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

PETITION FOR PANEL OR *EN BANC* REHEARING OF DEFENDANT-APPELLEE PIERCE O'DONNELL

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I. Introduction

The District Court dismissed an Indictment charging that Defendant, a lawyer in California practice, violated Section 441f of the Federal Election Campaign Act ("FECA"), which provides that "[n]o person shall make a [campaign] contribution in the name of another person," because it determined that the plain language of Section 441f did not prohibit reimbursement of others who made contributions with their own funds in their own names.[1] The offense conduct alleged in the Indictment was that third parties made contributions, in their own names, and that Defendant subsequently reimbursed them.

The District Court also determined that reading Section 441f to prohibit reimbursements, as the government contended, would conflict with FECA Section 441a(a)(8), which allows and regulates conduit contributions by setting limits on individual contributions and requires conduit contributors to report the identity of the original source of the funds. 2 U.S.C. § 441a(a)(8). Independent of Section 441f, there are criminal penalties for violating Section 441a(a)(8).

A panel of this Court reversed the District Court's determinations, holding broadly "**that [Section 441f] prohibits a person from providing money to others to donate to a candidate for federal office in their own names, when in reality they are merely 'straw donors.'**" Op. at 8695 (emphasis added).

[1] "Section 441f" refers to 2 U.S.C. § 441f (Supp II 2000).

This panel's opinion warrants rehearing or *en banc* review because it constitutes an impermissible judicial amendment of a criminal statute, relying on elements of the crime found nowhere in the statutory text, and its ruling rests on mistakes of law and fact. The panel's opinion ignores the statutory text, established principles of statutory construction, and renders other FECA provisions superfluous. Its ruling that the statute "unambiguously" prohibits reimbursement of campaign contributions made by others using their own true names is belied by the panel's labored discussion of statutory construction, and its conclusion that the rule of lenity therefore does not apply is error.

Contrary to the panel's express holding, Section 441f makes no reference to providing funds to other persons at any time. Indeed, its express prohibition is directed only at the conduct of persons providing funds to a campaign committee—that is, making a contribution. It simply forbids doing so in or using the name of another person.

Second, the panel's conclusion that Section 441f's proscription is "unambiguous," and thus the rule of lenity does not apply, is contradicted by the panel's own analysis, which relies on interpretive tools only to be used when a statute is ambiguous. This holding runs afoul of two fundamental constitutional guarantees: (1) the First Amendment protection of political speech requiring narrow restrictions on campaign finance activities; and (2) the Fifth Amendment

due process prohibition of criminal punishment under statutes that do not clearly give notice that the challenged conduct is criminal.

Third, the panel's conclusion that the Indictment is not defective is based, in part, on a mistake of fact: the panel addresses advancements, but only reimbursements are at issue. The panel's decision is also based on a mistake of law since, as a matter of law, the contributions were complete when the donors relinquished control of them, before Defendant's alleged reimbursements occurred. Further, the panel's opinion does not take cognizance of the express allegations in the Indictment that allege only "contributions" by persons other than Defendant, and there is no dispute that those persons made contributions only in their own names. Finally, even if the panel decision were correct in its interpretation of Section 441f, its conclusion on the sufficiency of the Indictment would still be erroneous. The Indictment fails to allege that Defendant had the requisite knowledge to violate Section 441f because it does not allege that Defendant knew, or made an agreement with the contributors, that the contributors would not report him as the original source of the funds.

II. Argument

A. The Panel Overlooks Material Points of Fact and Law in Concluding That Section 441f Prohibits Reimbursements.

In addition to ignoring the plain language of the text, the panel erred by interpreting Section 441f contrary to principles of statutory construction. This

error in interpreting a criminal statute regulating core First Amendment conduct warrants rehearing, either by the panel or *en banc*.

Section 441f contains a clear and simple proscription: "No person shall make a contribution in the name of another person . . ." 2 U.S.C. § 441f. The statutory text does not address reimbursing another person's federal campaign contribution. The panel, however, concluded that Section 441f "unambiguously" prohibits what the panel terms "straw donor contributions."[2] Op. at 8701.

The interpretation of a statutory provision requires not only acceptance of the text's plain language, it must account for a statute "in all its parts," including the impact of an interpretation on related provisions. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998); *Padash v. Immigration and Naturalization Serv.*, 358 F.3d 1161, 1170 (9th Cir. 2004) ("We must analyze the statutory provision in question in the context of the governing statute as a whole, presuming congressional intent to create a coherent regulatory scheme."). Various sections of the FECA must be construed in light of each other, so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citations and quotations omitted).

[2] Although the panel opinion describes such contributions as "straw donor contributions," that term appears nowhere in the text of the statute or the Indictment.

The panel's interpretation fails to adequately consider Section 441a(a)(8), which states:

> For purposes of the [contribution] 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) (emphasis added). Section 441a(a)(8) addresses the conduct alleged in the Indictment: exceeding the individual contribution limits through "indirect" contributions by reimbursing "conduit" contributors. Unlike Section 441a(a)(8), Section 441f does not prohibit making contributions "directly or indirectly," and does not refer to "contributions which are in any way . . . directed through an intermediary or conduit." Rather, the text of Section 441f only prohibits a person from making a contribution using a false name, not reimbursing a contribution made by another in his or her own name.[3]

[3] That the panel's sweeping holding can not be squared with Section 441a(a)(8) is illustrated by a simple example. If A desires to provide $1,000 each to eleven persons to contribute to eleven different campaigns in their own names, and does so by reimbursing their contributions, A's conduct is perfectly lawful; indeed, it is constitutionally-protected activity. If the contributors failed to report A as the "original source" of the funds, and/or if A exceeded the annual limit for individual contributions, that conduct would violate the requirements of Section 441a(a)(8) and be punishable as crimes. But the mere act of reimbursing, or for that matter

Sections 441f and 441a(a)(8) must be interpreted so that Section 441a(a)(8)'s use of "directly or indirectly" or "in any way . . . directed through an intermediary or conduit" is not superfluous. *TRW Inc.*, 534 U.S. at 31; *see also 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.") (quotation marks and citation omitted). Congress's use of different language in different statutory provisions demonstrates congressional intent that the provisions have different meanings. *Holder v. Humanitarian Law Project*, No. 08-1498, Slip Op. at 11-12 (U.S. June 21, 2010). The panel opinion, in contrast, holds that the absence of "directly or indirectly" in Section 441f and its presence in Section 441a(a)(8) does not "indicate an intention to exclude . . . application" of those words in the former. Op. at 8703. Under that reasoning, however, every usage in the FECA of "directly or indirectly" or similar phrases would be unnecessary, and thus superfluous, because both direct and indirect contributions would already be included in the term "contributions." Indeed, the panel's decision renders not only much of Section 441a(a)(8) superfluous, but also the

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advancing, funds contributed by others using their own names is not a crime if the reporting and giving limits are observed. Under the panel holding, however, this conduct (**"providing money to others to donate to a candidate for federal office in their own names, when in reality they are merely 'straw donors'"**) would be a felony under Section 441f. Op. at 8695 (emphasis added). Clearly, the statute can not be properly construed to prohibit in one part what it allows in another.

"directly or indirectly" language in additional sections of the FECA.[4] This flies in the face of the requirement that courts give meaning to every word in a statute, and avoid interpretations that result in creating superfluous language.

Additionally, the panel concedes that "the timing objection would be troubling (perhaps even decisive) when, for example, a defendant reimburses the contributions made by others without any prior arrangements or understandings." Op. at 8700. Yet, it identifies no statutory basis for the distinction, contrary to the rule that interpretation of a statute must be based on its words. Courts may not revise the language or "pervert[] the purpose of a statute." *Humanitarian Law Project*, No. 08-1498, Slip Op. at 12 (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)).[5]

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[4] The FECA uses "directly or indirectly" in other provisions describing contributions and payments. *See* 2 U.S.C. § 441b(b)(2) (Supp. II 2000) (prohibiting "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" from corporations, banks, and labor organizations to a campaign); 2 U.S.C. § 441e(a)(1) (Supp. II 2000) (prohibiting foreign nationals from making contributions "directly or indirectly"); 2 U.S.C. § 441c(a)(1) (2000) (prohibiting government contractors from "directly or indirectly . . . mak[ing] any contribution of money or other things of value" to political parties, committees, or candidates). The opinion's analysis would likewise render portions of those provisions superfluous.

[5] The panel's construct also results in the anomalous circumstance that whether an original source committed a crime would depend only on whether the conduit fulfilled his or her obligation to identify and report the original source. Even if the conduit's action could be determinative, this Indictment is still defective because it alleges no facts upon which the grand jury could have based its allegation that Defendant violated Section 441f and because it provides him no notice of that element of the crime. *See* GER 15-18; *Hamling v. United States*, 418 U.S. 87, 117-

Finally, the entirety of the panel's reasoning turns on its resort to a dictionary definition to redefine "contribution" by expanding it to include an antecedent promise to reimburse a contribution. Op. at 8699. Revision of the statute is error because the term "contribution" is defined in it. 2 U.S.C. § 431(8)(a) (2000); *see United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998) ("When . . . the meaning of a word is clearly explained in a statute, courts are not at liberty to look beyond the statutory definition."); *see also Cleveland v. City of Los Angeles*, 420 F.3d 981, 989 (9th Cir. 2005) (resort to a dictionary definition is only appropriate if the statute does not define the term). Moreover, the panel's construct depends on the allegation that Defendant, by informing the contributors that he would reimburse them, "agreed to make conduit contributions . . . that is, contributions in the names of others." Op. at 8709. This is wrong as a matter of law because promises or pledges are not "contributions." *See* 2 U.S.C. § 431(8)(a).[6]

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18 (1974) (holding that an indictment must include a set of facts that set forth all the elements necessary to constitute the alleged crime).

[6] Congress could have included a promise or agreement to pay as part of the definition of "contribution." To the contrary, Congress amended the FECA in 1980 to remove a promise or agreement from the definition of contribution. *Compare* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(b), 90 Stat. 475, 478 (1976) (amending definition of contribution to include "a written contract, promise, or agreement"), *with* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1340 (1980) (amending the definition of contribution and removing that language).

Unlike the panel's approach, interpreting Section 441f's plain language to reach only "false name" contributions gives effect to all related provisions in the statute, results in no logical inconsistencies, and thus the panel's interpretation is error in light of relevant principles of statutory interpretation.[7]

B. The Panel's Analysis Demonstrates That the Statute Is, at Best, Ambiguous and Thus Due Process Principles and the Rule of Lenity Required Affirmance.

After 15 pages of statutory construction, the panel concludes that the statute is unambiguous and then eschews analysis of the rule of lenity. Op. at 8707-08. The panel's failure to apply the constitutionally-mandated rule of lenity to a statute that is, at best, ambiguous is an error of law on an issue of exceptional importance, meriting panel rehearing or rehearing *en banc*. *See, e.g.*, *Skilling v. United States*, No. 08-1394, Slip. Op. at 46 (U.S. June 24, 2010) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity") (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)); *Evans v. United States*, 504 U.S. 255, 289 (1992) (Thomas, J. dissenting) (noting that rule of lenity serves "vitally important functions" of providing notice of what law proscribes and

[7] The panel opinion references (and several amici opined) that upholding the district court would result in a troubling loophole in the statute and frustrate congressional objectives for campaign contribution transparency. Op. at 8705-06; *see, e.g.*, FEC Br 21-23. It would do no such thing because the conduct alleged in the Indictment would still run afoul of criminal provisions enforcing individual contribution limits and punishing failure to disclose the original source of any conduit contribution. *See* 2 U.S.C. § 441a(a)(8); 2 U.S.C. § 437g(d) (Supp. II 2000).

ensuring that "legislatures and not courts . . . define criminal activity"); *see also United States v. Weitzenhoff*, 35 F.3d 1275, 1296 (9th Cir. 1993) (Kleinfeld, J., dissenting from order rejecting suggestion for rehearing en banc) ("The category of *malum prohibitum*, or public welfare offenses, makes the rule of lenity especially important, most particularly for felonies, because persons of good conscience may not recognize the wrongfulness of the conduct when they engage in it.").

The conclusion that the statute unambiguously proscribes the charged conduct is untenable in light of the panel's own discussion. Its reliance on statutory interpretation tools belies its conclusion that the statute is unambiguous. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) ("The authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). The panel also addresses the statute's legislative history, *see* Op. at 8705, a step this court has held is appropriate only where a court deems a statute to be ambiguous. *Cooper v. Fed. Aviation Admin.*, 596 F.3d 538, 547 (9th Cir. 2010). Further, the opinion's necessary reliance on a dictionary definition of a key statutory term, Op. at 8699, belies the conclusion that the statute is unambiguous.

The Supreme Court has stated that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). Due process principles require that a criminal statute clearly proscribe certain conduct before the government may punish a person for engaging in that conduct. *Id.* at 360. More specifically, the rule of lenity, grounded in these due process principles, requires that ambiguities be resolved in favor of Defendant: "Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. . . . We interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *United States v. Santos*, 128 S. Ct. 2020, 2025, 2028 (2008) (plurality op.) (citations omitted); *United States v. Bass*, 404 U.S. 336, 347 (1971); *see also Skilling*, No. 08-1394, Slip. Op. at 46.

The due process imperative of precision in criminalizing campaign finance activities is heightened because Section 441f's proscription addresses otherwise 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 associational 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 Village 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). "When First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Bursey v. United States*, 466 F.2d 1059, 1088 (9th Cir. 1972). Any ambiguity in a statute criminalizing such conduct must be resolved in favor of Defendant to avoid a chilling effect on protected speech. *Buckley*, 424 U.S. at 40-41, 77-78. The panel erred by failing to analyze Section 441f pursuant to relevant First Amendment and due process principles.

C. The Panel's Conclusion That the Indictment Was Sufficient Was Based on a Mistake Regarding the Indictment's Language and Ignores the Government's Concession That There Were No Advancements.

Finally, the panel's conclusion that the Indictment is sufficient conflicts with governing Supreme Court precedent and overlooks other pertinent points of law and fact, and thus warrants rehearing.

For an indictment to be sufficient, it must include "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Although an indictment may track the language of a statute, it must also include a statement of facts and circumstances that inform the defendant of the specific offense charged. *Hamling v. United States*, 418 U.S. 87, 117-18 (1974); *Russell v. United States*, 369 U.S. 749, 764 (1962). When determining the sufficiency of an indictment, "[i]t is the statement of facts in the [indictment], rather than the statutory citation, that is controlling." *United States v. Wuco*, 535 F.2d 1200, 1202 n.1 (9th Cir. 1976).

Here, the Indictment quotes the language of the statute in alleging that Defendant made contributions in the names of other persons, but factually states that Defendant promised to and did reimburse others who had made completed contributions in their true names. GER 15-18. The Indictment never factually alleges that Defendant made any contributions. The panel opinion concedes that allegations that Defendant "reimbursed the contributions of others . . . alone might not clearly state a legal violation," but nevertheless concludes that the Indictment is sufficient because it also states that Defendant "agreed to make conduit contributions . . ., that is, contributions in the names of others." Op. at 8709. For two reasons, the panel's conclusion warrants rehearing.

First, the panel misapprehended the law in determining that a criminal act by Defendant could occur after the conduit contributors made their contributions. Op. at 8700-01 ("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."). The text of Section 441f expressly circumscribes the offense to the occurrence of "mak[ing] a contribution." Implementing regulations make clear that a contribution is "made" when the donor "relinquishes control over the contribution." 11 C.F.R. § 110.1(b)(6). As a result, the alleged "making" of a "contribution" was complete before any alleged reimbursement occurred.

Further, although the panel refers throughout its opinion to "advancements," *see* Op. at 8697, 8701, 8707, the Indictment does not factually allege that Defendant ever made any such advancements. GER 15-18. At oral argument, the government clarified that although the Indictment used the statutory language of both advancements and reimbursements, in the actual scheme "[t]he individuals provide[d] the money and Defendant reimburse[d] them." Hr'g Tr. 8. Thus, allegations of reimbursements alone do not state a violation of the statute because they are not "making a contribution."[8] Because the Indictment's factual allegations

[8] Allegations of reimbursements could potentially state a violation of Section 441a(a)(8) if other conditions were met, in light of that statute's application to both "direct" and "indirect" contributions.

involved only reimbursements of completed contributions, as the government conceded at oral argument, the Indictment was deficient and properly dismissed.

Second, even if the panel's interpretation of Section 441f were generally correct, the Indictment is nonetheless deficient because it does not factually allege that Defendant "made contributions" in the names of others. Rather, the factual allegations describing the charges repeatedly allege that Defendant and another individual solicited others to make contributions, that others "made contributions," and that Defendant thereafter reimbursed those individuals in the amount of their contributions. *See* GER 15-18.

The panel's reading of the above-quoted language in isolation improperly ignores the relevant explanatory portions of the Indictment. *See Wuco*, 535 F.2d at 1202 n.1. Read as a whole, the Indictment failed to recite an element of the crime proscribed under Section 441f, and thus was properly dismissed. *See United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) ("[A]n indictment's complete failure to recite an essential element of the charged offense is . . . a fatal flaw requiring dismissal of the indictment.").

Finally, even if the panel decision were correct in its interpretation of Section 441f, its conclusion on the sufficiency of the Indictment would still be erroneous. Under the panel's decision, and as argued by the government, a potential defendant who agreed to reimburse, and did reimburse, others for their

campaign contributions, does not violate Section 441f if the straw donor reports the original source of the funds. Op. at 8697 (describing a "straw donor contribution" as one in which the straw donor transmits funds in the straw donor's name); Gov Br 46 n.20 ("If a straw donor notifies the candidate/FEC of the original source, there is no violation of Section 441f—as there is no contribution in the name of another."). Only knowing violations of Section 441f are crimes. 2 U.S.C. § 437g(d). Thus, even under the government's construct and the panel opinion, a required factual allegation for a valid Section 441f indictment is knowledge by Defendant that the straw donors would not report Defendant as the original source of the funds to the campaign committee (and an agreement to do so is an essential element of any conspiracy to violate Section 441f). However, the Indictment includes no such allegations. *See* GER 15-18. For this reason alone, even assuming the panel's construction of the statute is correct, dismissal was required and rehearing or *en banc* review is warranted.

III. Conclusion

For the reasons stated above, panel or *en banc* rehearing is appropriate.

Dated: June 28, 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 petition for panel or *en banc* rehearing is proportionately spaced, has a typeface of 14 points or more, and contains 3,965 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 June 28, 2010, I electronically filed the foregoing **PETITION FOR PANEL OR *EN BANC* REHEARING 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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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. PIERCE O'DONNELL, *Defendant-Appellee.*	No. 09-50296 D.C. No. 2:08-cr-00872-SJO-1 OPINION

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted
January 13, 2010—Pasadena, California

Filed June 14, 2010

Before: Alfred T. Goodwin, William C. Canby, Jr., and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

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OPINION

FISHER, Circuit Judge:

Federal campaign finance law says that "[n]o person shall make a contribution in the name of another person." 2 U.S.C. § 441f. We hold that this law prohibits a person from providing money to others to donate to a candidate for federal office in their own names, when in reality they are merely "straw donors."

BACKGROUND

Defendant Pierce O'Donnell is alleged to have contributed $26,000 of his money in 2003 to the Edwards for President campaign through 13 individuals — primarily employees of his law firm as well as some of his relatives. According to the indictment, O'Donnell arranged for these individuals to donate $2,000 ostensibly in their own names but with the understanding that he would either advance them funds or reimburse them after the donation was made. In accord with these allegations, the grand jury charged O'Donnell with, *inter alia*, contributing in the names of others in violation of 2 U.S.C. § 441f. The district court dismissed the § 441f counts, and the government appeals. *See* 18 U.S.C. § 3731. We reverse.

Congress first enacted § 441f as part of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), which was designed to regulate campaign finance by requiring the disclosure of contributions and their sources. In its present form, § 441f 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." 2 U.S.C. § 441f (emphasis added); *see also* 11 C.F.R. § 110.4(b)(2) (applicable regulations).

In 1974, Congress also enacted a new provision, § 441a(a)(8), relating to the reinstatement of contribution limits. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974). Section 441a(a)(8) states:

> 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). Although O'Donnell is not charged with violating § 441a(a)(8), it is relevant because the parties dispute whether and how its passage should influence our interpretation of § 441f.

STANDARD OF REVIEW

"We review de novo a district court's decision to dismiss an indictment based on an interpretation of a federal statute." *United States v. Marks*, 379 F.3d 1114, 1116 (9th Cir. 2004).

DISCUSSION

I.

The issue in this appeal is whether § 441f proscribes only "false name" contributions or, as the government contends, it also prohibits "straw donor" contributions. A false name contribution is a *direct* contribution from *A* to a campaign, where *A* represents that the contribution is from another person who may be real or fictional, with or without obtaining that per-

son's consent. A straw donor contribution is an *indirect* contribution from *A*, through *B*, to the campaign. It occurs when *A* solicits *B* to transmit funds to a campaign in *B*'s name, subject to *A*'s promise to advance or reimburse the funds to *B*. Although employing different methods, false name and straw donor schemes both facilitate attempts by an individual (or campaign) to thwart disclosure requirements and contribution limits. O'Donnell argues as a matter of statutory interpretation that § 441f cannot apply to straw donor contributions because, irrespective of *A*'s role in directing and reimbursing the money, the straw donor *B* has actually made the contribution, which is accurately reported in *B*'s name. We disagree.

Statutory interpretation begins with the text. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). To put the language of § 441f in context, we also consider how related language is used in § 441a(a)(8). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Finally, we analyze § 441f in light of its purpose of promoting disclosure and the broader structure of the Federal Election Campaign Act (FECA). *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) ("[T]he structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions."). Relying on these tools of interpretation, we hold that § 441f unambiguously applies to straw donor contributions.[1]

[1]The only court to have squarely addressed this issue concluded that § 441f applies to straw donor contributions. *See United States v. Boender*, ___ F. Supp. 2d ___, 2010 WL 725318 (N.D. Ill. Feb. 24, 2010). Numerous cases have assumed the same. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 232 (2003), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010); *United States v. Serafini*, 233 F.3d 758, 763 & n.5 (3d Cir. 2000); *United States v. Kanchanalak*, 192 F.3d 1037, 1042

A. The Text of § 441f

[1] Section 441f provides:

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

2 U.S.C. § 441f. Under O'Donnell's interpretation, only the person who personally transmits the contribution has actually made it. Therefore, § 441f is violated only if that person provides a false name. He argues that his alleged scheme, in contrast, did not violate § 441f because the straw donors actually transmitted the contributions, and they properly used their own names.

[2] The government agrees that false name contributions violate § 441f, but it argues that the language is sufficiently broad to reach straw donor contributions as well. Under the government's interpretation, the original source of funds has *made* the contribution even though it was actually transmitted by an intermediary, and if the intermediary is named as the source, the contribution has been made "in the name of another." The intermediary, in turn, having acted at the direction and used the funds of the original source, has not made a contribution, but instead has "knowingly permit[ted] his name to be used to effect such a contribution." There is no dispute that the contributions here were made in the names of O'Donnell's intermediaries. The only question is whether such attribution

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(D.C. Cir. 1999); *Goland v. United States*, 903 F.2d 1247, 1251-54 (9th Cir. 1990); *FEC v. Weinstein*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978). O'Donnell has not pointed us to a single counterexample. These decisions do not control our analysis, but the sheer consistency of their assumptions at the least undermines his argument that § 441f should *plainly* be read otherwise.

violated § 441f because it was O'Donnell who actually "made" the contributions.

[3] To determine which party in a straw donor scheme "make[s] a contribution," we first look to the statute to understand the meaning of that phrase. A contribution is statutorily defined as "any gift . . . of money . . . made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The statutory definition clarifies what purpose is required for the gifts to be covered, and there is no dispute that the gifts here were made for the purpose of influencing the presidential primary election. The statutory definition, however, does not specifically address the salient question of *who* made the contributions. Therefore, we look next to the first dictionary definition of "contribute," which is "[t]o give or supply in common with others; give to a common fund or for a common purpose." *Am. Heritage Coll. Dictionary* 303 (3d ed. 2000). Applying that definition, it is clear that O'Donnell gave the money at issue for the common purpose of advancing the Edwards campaign.

[4] In ordinary usage, when Friend *B* delivers a gift that was provided by Friend *A*, we say that it was Friend *A* who gave that gift. In the context of gifts, the word "giving" connotes the idea of providing from one's own resources rather than simply conveying, and thus we refer to the original source rather than the intermediary as the one who gave. Section 441f must be understood on this same common sense level. In a straw donor situation, the person who actually transmits the money acts merely as a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation. To identify the individual who has made the contribution, we must look past the intermediary's essentially ministerial role to the substance of the transaction. Accordingly, the statutory language applies when a defendant's funds go to a campaign either directly from him or through an intermediary. In either case, for purposes of § 441f, the defendant has made that contribution — and he

has violated the statute if his own name was not provided as the source.[2]

O'Donnell argues that this interpretation illogically would result in criminalizing conduct when the intermediary is later reimbursed rather than at the time the money is delivered to the candidate's campaign. The concern, in other words, is that the defendant does not actually become the source — and thus no offense takes place — until the defendant reimburses the intermediary, after the donation (with its attendant reporting obligation) has already been made. Consequently, a contribution that was lawful at the time it was made would become unlawful based on subsequent events — a temporal sequence that seems anomalous should the language of § 441f be read as not concerned with anything that happens after the contribution is made.

We note preliminarily that this argument does not apply to the extent that O'Donnell was alleged to have *advanced* funds. When the funds are advanced rather than reimbursed, there is no timing anomaly: O'Donnell made the contributions at the moment they were transmitted to the campaign because he would already have supplied the necessary funds. With regard to reimbursed gifts, we acknowledge that the timing objection would be troubling (perhaps even decisive) when, for example, a defendant reimburses the contributions made by others without any prior arrangements or understandings. We therefore express no view on whether § 441f would apply to that hypothetical defendant. In the present circumstances, however, we reject O'Donnell's view that the contribution would not have been unlawful at the time it was made. When

[2]We need not decide whether and under what circumstances the intermediary should also be understood to have made a contribution, such that the intermediary's name must jointly be reported. We note, however, the Federal Election Commission regulation stating that when an intermediary exercises direction or control over a gift, the entire amount must be attributed to both the original source and the intermediary. *See* 11 C.F.R. § 110.6(d).

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. Because the indictment alleges that O'Donnell then actually followed through with the reimbursements, we need not decide whether a subsequent failure to actually reimburse the intermediary would negate the offense. Our holding is limited to defendants who, as O'Donnell is alleged to have done, both prearrange for and follow through with the reimbursement of their intermediaries.[3]

[5] Considering the plain language of § 441f itself, therefore, we conclude that it encompasses straw donor contributions, whether accomplished through the advancement or reimbursement of funds. Because the context in which language is used is also relevant to plain meaning, we turn to O'Donnell's arguments based on § 441a(a)(8).

B. Reading § 441f in Light of § 441a(a)(8)

[6] O'Donnell argues that additional language in § 441a(a)(8) but not present in § 441f requires interpreting the latter provision as having a more limited scope, an argument the district court found persuasive. O'Donnell's argument focuses on two phrases in § 441a(a)(8):

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

[3]O'Donnell's timing argument fails for an additional reason based on § 441a(a)(8), which we discuss in section I.B *infra*.

2 U.S.C. § 441a(a)(8) (emphasis added). He argues that both of these italicized phrases would be unnecessary if the term "contribution" already encompassed indirect gifts delivered through an intermediary. From this language, he infers that "contribution," standing alone, must refer to *direct* contributions delivered without the use of an intermediary. Therefore, § 441f's use of "make a contribution" without any reference to intermediaries or conduits indicates that the provision is limited to false name contributions. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (internal quotation marks omitted) (alteration in original))).

O'Donnell's argument is unpersuasive for two reasons. First, Congress enacted § 441f and § 441a(a)(8) at different times, a fact that weakens the *Russello* presumption. *See Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1940 (2008) (explaining that the *Russello* presumption is " 'strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted' " (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997))). We have applied the *Russello* presumption in at least one case in which the two provisions were not enacted at the same time. *See United States v. Youssef*, 547 F.3d 1090, 1094-95 (9th Cir. 2008) (per curiam). But in *Youssef*, the two provisions were more similar in purpose and structure, and these parallels made the absence of a particular word more telling than it otherwise would have been. *See id.*; *see also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002) ("The *Russello* presumption . . . grows weaker with each difference in the formulation of the provisions under inspection.").[4] And

[4]In *Youssef*, both statutes at issue prohibited false statements to government officials, and one included the word "materially" to modify "false"

even if the parallels were stronger, § 441f was passed three years earlier than § 441a(a)(8), so the choice of wording in the latter offers little insight into the meaning of the former. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (declining to interpret provisions with reference to later enacted laws that did not, among other possibilities, "declare the meaning of earlier law" or "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions").

Second, the *Russello* presumption 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." Nor does § 441f specify a number of covered ways to "make a contribution" while omitting "conduit" from the list. In either of those situations, the absence of the words used in § 441a(a)(8) could indicate an intention to exclude their application in § 441f. But it makes less sense to draw that inference 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 Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1107 n.6 (9th Cir. 2001) ("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.").

[7] 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

whereas the other did not. Relying in part on *Russello*, we declined to read a materiality requirement into the statute that omitted the modifier. *See Youssef*, 547 F.3d at 1094-95. In this case, as we explain further in section I.D *infra*, the two provisions share some overlap but otherwise are less aligned in purpose and structure than the statutes in *Youssef*.

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.

Finally, our examination of § 441a(a)(8) demonstrates that O'Donnell's timing argument regarding § 441f proves too much, because it would preclude liability for reimbursement schemes under the former provision as well. Central to O'Donnell's argument that § 441f does not reach his conduct is his contention that § 441a(a)(8) separately requires that intermediaries report the original source of the funds that they donate. He thus relies on § 441a(a)(8) to argue that his narrow reading of § 441f would not create a loophole for straw donor contributions. Yet both provisions are subject to the same concern about the timing anomaly created by reimbursed gifts. Although § 441a(a)(8) includes additional language regarding indirect contributions, it does not specifically acknowledge that a person who receives the original source's funds *after* transmitting a donation could still be considered an intermediary. Thus, the language of both provisions could be read to focus only on the moment a contribution is made, so they would share the same supposedly anomalous feature of being dependent on the effect of subsequent events. If we agreed that O'Donnell's objection warranted excluding reimbursement schemes from the reach of § 441f, we would have to conclude that § 441a(a)(8)'s reference to indirect contributions similarly encompasses only funds that the original

source has advanced to intermediaries. O'Donnell himself does not read § 441a(a)(8) in this manner, which reinforces our earlier conclusion that § 441f covers such reimbursement schemes so long as they have been prearranged and effectuated.

C. Purpose

An examination of statutory purpose reinforces our interpretation of the text. As noted earlier, Congress originally enacted § 441f as part of the Federal Election Campaign Act of 1971, which overall sought to regulate campaign finance through a regime of disclosure requirements. For example, in addition to § 441f's prohibition, the Act required campaigns to keep detailed information about all contributors who donated a minimum amount and to file regular public reports. *See* 2 U.S.C. §§ 432(c), 434(b) (1972). Simultaneously, the Act eliminated the individual contribution limits that had been in place under existing law. *See* 1971 FECA § 203, 86 Stat. at 9-10 (amending 18 U.S.C. § 608). Congress believed that full disclosure would make contribution limits unnecessary. *See* S. Rep. No. 92-229, at 122 (1971).

In this light, the congressional purpose behind § 441f — to ensure the complete and accurate disclosure of the contributors who finance federal elections — is plain. Our reading of the statute as applying to straw donor contributions is entirely consistent with this purpose, because such contributions undermine transparency no less than false name contributions do by shielding the identities of true contributors. The same is true of our specific textual conclusion that O'Donnell *made* the contributions under § 441f, because it is implausible that Congress, in seeking to promote transparency, would have understood the relevant contributor to be the intermediary who merely transmitted the campaign gift.

Moreover, if § 441f were limited to false name contributions, then straw donor schemes would have been unregulated

at least until 1974, when Congress adopted § 441a(a)(8). We think it highly unlikely that a Congress seeking to promote disclosure, and willing to eliminate contribution limits as an alternative means of regulating campaign finance, would have intended to leave out straw donor contributions, which were a recognized concern at the time. *See, e.g.*, Alexander Heard, *The Costs of Democracy* 359-60 (1960) (describing how "[d]ummy contributors" were used both to avoid disclosure as well as to evade contribution limits).

[8] To this reasoning, O'Donnell responds that Congress did leave a loophole in 1971, that the loophole was contrary to FECA's purpose and that Congress therefore closed the loophole by enacting § 441a(a)(8) in 1974. Thus, he contends, the enactment of § 441a(a)(8) confirms his interpretation of § 441f. We disagree. Section 441a and the 1974 amendments to FECA served primarily to reinstate contribution limits. *See* 1974 FECA § 101(a), 88 Stat. at 1263-64. There is nothing in the language of § 441a(a)(8) to indicate that the provision was directed at the disclosure concerns of § 441f. Indeed, had Congress been concerned about a loophole in § 441f, it likely would have amended that provision rather than enacting § 441a(a)(8). 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.[5] In contrast, § 441f under the government's interpretation properly criminalizes the conduct of both parties involved.

[5]Although § 441a(a)(8) does not place reporting obligations on the original source, that source could violate 2 U.S.C. § 441a(a)(1)(A) by exceeding the individual contribution limit. Generally, violations of § 441a become felonies when the contributions total $25,000 during a calendar year, in contrast to the $10,000 threshold for violations of § 441f. *See* 2 U.S.C. § 437g(d)(1).

D. Structure

Although we reject O'Donnell's argument that § 441a(a)(8) was added to close a loophole for straw donor contributions, we acknowledge that the government's interpretation of § 441f does result in an overlap in FECA's present structure. Both provisions appear to require that a campaign contribution from *A* through *B* be reported as a contribution from *A*. The two provisions serve different purposes, however, making the overlap unsurprising — and legally insignificant. Congress enacted § 441a(a)(8) as part of its reinstatement of contribution limits. As noted above, the provision does not appear to be directed at § 441f's domain of criminalizing disclosure violations, but rather with providing guidance on accounting for purposes of calculating an individual's contribution totals. Given this fundamental difference in purpose, evident from the text of the provisions as well as the context in which they were passed, the overlap is less troublesome than it would be if the two provisions purported to address the same matter. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 29-31 (2001) (rejecting an interpretation of a statute's general rule that would have rendered a listed exception superfluous, where both provisions addressed the same issue).

* * *

[9] In sum, the text, purpose and structure of § 441f all support the conclusion that the statute applies not only to false name but also to straw donor contributions. We therefore hold that § 441f unambiguously applies to a defendant who solicits others to donate to a candidate for federal office in their own names and either advances the money or promises to — and does — reimburse them for the gifts.

That conclusion forecloses O'Donnell's rule of lenity argument. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plural-

ity opinion). Lenity does not, however, apply in the absence of a "grievous ambiguity," *Huddleston v. United States*, 415 U.S. 814, 831 (1974), that requires us to "guess as to what Congress intended," *Ladner v. United States*, 358 U.S. 169, 178 (1958). We are sensitive to the need to require fair notice to defendants, but here the statutory language, structure and purpose do not leave the provision's meaning "genuinely in doubt." *United States v. Otherson*, 637 F.2d 1276, 1285 (9th Cir. 1980); *see also Barber v. Thomas*, 560 U.S. ___, No. 09-5201, slip op. at 13-14 (2010). The fair notice concern seems especially inapposite in this case, because O'Donnell seeks to create a textually dubious loophole for himself by reading the two provisions to criminalize only the behavior of the accomplices who acted at his direction.

In any event, O'Donnell has at most shown that a narrower interpretation of § 441f is conceivable, but that is insufficient to establish ambiguity. *See Smith v. United States*, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable."); *Otherson*, 637 F.2d at 1285 ("[D]isputed words or phrases in criminal laws have in many instances been interpreted broadly, defeating defendants' claims." (citing *Huddleston*, 415 U.S. 814; *United States v. Cook*, 384 U.S. 257 (1966))). Thus, the rule of lenity does not apply.

II.

[10] Separately, O'Donnell argues that even if § 441f applies to straw donor contributions, the indictment against him is defective. "An indictment must be specific in its charges and necessary allegations cannot be left to inference . . . ." *Williams v. United States*, 265 F.2d 214, 218 (9th Cir. 1959). Moreover, "an indictment must do more than simply repeat the language of the criminal statute." *Russell v. United States*, 369 U.S. 749, 764 (1962). At the same time, an "indictment should be read in its entirety, construed according to common sense, and interpreted to include facts which are nec-

essarily implied." *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985). We review the sufficiency of an indictment de novo. *United States v. Rodriguez*, 360 F.3d 949, 958 (9th Cir. 2004).

[11] O'Donnell argues that the indictment is inadequate because it charges him with reimbursing contributions made by others rather than with making contributions himself. By characterizing the indictment in this manner, he seeks to illustrate a "variance between the charged conduct and the charged statute." It is true that the indictment includes allegations that O'Donnell reimbursed the contributions of others, which alone might not clearly state a legal violation. But the indictment also alleges that he "agreed to make conduit contributions . . . , that is, contributions in the names of others." Taken together, these allegations reasonably describe reimbursements as the particular method used to violate the ban on contributing in the names of others. The indictment is not defective.

CONCLUSION

We hold that § 441f prohibits straw donor contributions, in which a defendant solicits others to donate to a candidate for federal office in their own names and furnishes the money for the gift either through an advance or a prearranged reimbursement. We further hold that the indictment against O'Donnell is sufficient. Accordingly, the district court's order dismissing counts one and two of the indictment is reversed, and the case is remanded.

REVERSED and REMANDED.