No. 09-50296

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PIERCE O'DONNELL,

Defendant-Appellee.

GOVERNMENT'S REPLY BRIEF

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

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I

INTRODUCTION

Section 441f provides, in part: "No person shall make a contribution in the name of another person." Defendant secretly contributed $26,000 in 13 other people's names by getting them to purportedly contribute to a candidate in their names, with defendant reimbursing or advancing the money. Defendant thereby violated the plain and simple wording of Section 441f. FECA's purpose, legislative history, and precedent, as well as an FEC regulation, demonstrate the same.

Defendant does not argue that Congress authorized his contributions in the names of conduits/straw donors. But he reads a sentence in Section 441a(a)(8), rather than Section 441f, as prohibiting them: "The intermediary or conduit shall report

the original source and the intended recipient." Unlike Section 441f, Section 441a(a)(8) does not read like a prohibition. And adopting defendant's reading of FECA would illogically mean:

> (1) Section 441f's prohibition -- "No person shall make a contribution in the name of another person" -- applies only to some contributions in the name of another (false-name contributions) despite the absence of any textual limit and despite Congress having passed now-Section 441f in 1971 as part of a title designed to require disclosure of the sources of contributions;
>
> (2) Congress prohibited contributions in the names of conduits three years later -- fixing this nontextual "loophole" -- not by amending now-Section 441f, but by creating now-Section 441a(a)(8), which placed obligations on the conduit (the least culpable party), not on the actual contributor (the most culpable party), flipping traditional liability principles; and
>
> (3) Congress put these prohibitions in separate sections because it wanted less severe penalties for contributions in the names of conduits, although when Congress created these differing penalties for Section 441f and other FECA provisions in 2002, Congress indicated the opposite and stated that Section 441f applied to conduit contributions.

Common sense dictates Congress did not intend defendant's reading of FECA. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 63 (2004) ("There is no canon against using common sense in construing laws as saying what they obviously mean.") (citation, alteration, and internal quotations omitted). Instead, when Congress broadly stated in Section 441f, "[n]o person shall make a contribution in the name of another person," it prohibited defendant's contributions in the names of 13 other people.

II

ARGUMENT

A. SECTION 441f's PLAIN WORDING APPLIES HERE

Defendant begins by focusing on Section 441a(a)(8) (AAB 12-13),[1] but analysis properly starts with Section 441f because: (1) statutory-construction principles require beginning with the provision at issue (GOB 19); and (2) Congress passed Section 441a(a)(8) three years after Section 441f, so it provides little insight into what Congress meant when drafting Section 441f, Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998) ("These later enacted laws, however, are beside the point. They do not declare the meaning of earlier law.").

1. Defendant Violated Section 441f's Straightforward Textual Prohibition

a. Defendant made "contributions" in the "name of another person"

Section 441f provides, in part: "No person shall make a contribution in the name of another person." Defendant violated that provision by contributing $26,000 in 13 other people's names. Contrary to defendant's argument, the government is not attempting to insert words into Section 441f to reach that

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[1] In addition to the abbreviations in the opening brief, "GOB" refers to the government's opening brief, "FEC" to the FEC's amicus brief, "CLC" to the Campaign Legal Center's/Democracy 21's amicus brief, "CREW" to the Citizens for Responsibility and Ethics in Washington's amicus brief, "AAB" to defendant's answering brief, and "ACRU" to the American Civil Rights Union's amicus brief. Each reference is followed by the page number.

conclusion. (AAB 8, 22). Rather, the government is asking this Court to apply Section 441f's simple words as written. Section 441f prohibits a person from: (1) making a "contribution," (2) "in the name of another person."

First, "contribution" is defined as "any gift . . . of money . . . made by any person for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i), which defendant satisfied by giving $26,000 to elect a presidential candidate (GOB 20). Contrary to defendant's suggestion, Section 431(8)(A)(i) does not turn on how a contribution is made (directly or through an intermediary), it turns on the substance of what was done (whether there was "any gift . . . of money" made "for the purpose of influencing any election"). Thus, whether defendant gave a candidate a $100 bill or gave a friend a $100 bill to forward to the same candidate, he would have made a "contribution," i.e., given $100 to elect that candidate.

Indeed, defendant repeatedly acknowledges his $26,000 was a "contribution" subject to Section 441a(a)'s contribution limit and Section 441a(a)(8).[2] (AAB 1-2, 13, 16, 50). But Section 441a(a)(8) does not redefine the generally applicable definition

[2] When defendant argues Section 441a(a)(8) controls, he suggests he made conduit "contributions" to the candidate, i.e., he directed his $26,000 through the conduits to the candidate. At other times, defendant suggests he independently gave the conduits money for their own use after they contributed. The indictment, which is presumed true, charges the former.

of "contribution" from Section 431(8)(A)(i) for purposes of Section 441a(a) (it merely explains that all contributions, including those directed through an intermediary, count as those of the source). Compare 2 U.S.C. § 441b(b)(2) ("For purposes of this Section . . ., the term 'contribution or expenditure' includes a contribution or expenditure, as those terms are defined in Section 431 of this title, and also includes . . . .") with 2 U.S.C. § 441a(a)(8) ("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."); see also California Med. Ass'n v. FEC, 453 U.S. 182, 198 n.19 (1981) (applying Section 431(8)(A) under Section 441a(a)). Because Section 441a(a)(8), like Section 441f, uses the generally applicable definition of "contribution" from Section 431(8)(A)(i), defendant's concession that he met the definition for Section 441a(a) and 441a(a)(8) means he met that same definition for Section 441f.

Second, defendant made his contributions "in the name of another person," specifically, 13 other people. According to defendant, he gave money to the conduits/straw donors "in his true name." (AAB 22). Although defendant gave his money to the

conduits, his "contributions" were to the candidate and the candidate received the conduits' names (not defendant's name). Defendant's argument to the contrary is premised on the notion that he can avoid Section 441f's prohibition by doing in two steps what he cannot do in one. Defendant concedes if he gave $100 to a candidate in his sister's name (a false name), he would violate Section 441f. But, according to defendant, if he instead gave his sister $100 and directed her to give $100 to that same candidate in her name, he would not contribute "in the name of another." Nothing in Section 441f's text supports such a distinction. In both cases, defendant made a contribution to the same candidate, in the same amount ($100), in the same name (his sister's). In both cases, defendant would violate Section 441f by making a "contribution in the name of another."

b. Defendant asks this Court to read a nontextual limit into Section 441f

This Court, thus, need only apply the text as written to conclude that defendant violated Section 441f. Defendant, by contrast, seeks to read a nontextual limit into that provision, arguing that, when Congress wrote "[n]o person shall make a contribution in the name of another person," it prohibited only some contributions in the name of another -- those "using a false name" -- not those in the names of conduits/straw donors.[3] (AAB

[3] Defendant suggests that reading Section 441f as prohibiting "some conduit contributions but not others is inconsistent with

25 n.25; see also AAB 2, 16). Had Congress intended such a limit, it would have stated so in Section 441f. (GOB 21-23).

Defendant seeks this nontextual limit because Congress did not use words like "conduit," "reimbursement," and "indirect" in Section 441f. (AAB 14). But the focus is on the words Congress actually used, not those it could have included. (GOB 24-28). And Section 441f does not list any manners of contributing, such that the absence of these terms is significant, nor is there reason to expect such a listing given Congress' focus on the name of the contributor, not the manner of contribution. (Id.). Royal Foods Co., Inc. v. RJR Holdings, Inc., 252 F.3d 1102 (9th Cir. 2001), is instructive. There, this Court addressed whether a restaurant was a "dealer," which was defined as any person/corporation "engaged in the business of buying or selling in wholesale or jobbing quantities . . . any perishable agriculture commodity." 7 U.S.C. §§ 499a(b)(1),(6). The defendant suggested the provision was "ambiguous because it does not explicitly include restaurants," but this Court held:

> Section 499a(b)(6) . . . 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.

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the text and is illogical." (AAB 13 n.13). But Section 441f prohibits contributions in the names of conduits, not those where the source's name is disclosed. This distinction is compelled by Section 441f's text.

252 F.3d at 1107 n.6 (citing United States v. Monsanto, 491 U.S. 600 (1989); other citation and emphasis omitted). As in Royal Foods, the absence of words like "conduit," "reimbursement," and "indirect" does not limit the meaning of the words Congress actually chose. Congress' choice to simply provide, "[n]o person shall make a contribution in the name of another" demonstrates breadth, not ambiguity, Monsanto, 491 U.S. at 609, and that broad wording prohibits defendant's contributions.

2. Statutory Context Does Not Support Reading a Nontextual Limit into Section 441f

Defendant next emphasizes statutory context, highlighting canons of construction. (AAB 17-21). Such canons, however, are "not a license . . . to rewrite language enacted by the legislature." Id. at 611 (citation and internal quotations omitted).

Defendant cites the Russello presumption, notes Section 441a(a)(8) uses the term "conduit" but Section 441f does not, and argues Congress could not have intended for Section 441f to apply to conduit contributions. (AAB 18-19). The government's opening brief explained why Congress' use of the term "conduit" in Section 441a(a)(8), three years after it passed Section 441f, does not support reading a nontextual limit into Section 441f. (GOB 40-42). Defendant responds that the presumption applies "even where the provisions were not adopted in the same act." (AAB 19-20 n.19). Although it can apply in such circumstances

(GOB 40-42), defendant offers no reason why it actually controls here. Had Congress listed manners of contributing in Section 441f, but omitted "conduit" contributions, then the presumption might apply. (Id.). But Congress did not. That Congress used the term "conduit" three years later in a different statute with a different focus and wording does not support reading a nontextual limit into Section 441f's unambiguous wording. (Id. see Gutierrez v. Ada, 528 U.S. 250, 257-58 (2000)).

Defendant also cites the Russello presumption to argue that Congress' use of "indirectly" in FECA provisions, but not Section 441f, demonstrates that Section 441f does not apply here. (AAB 17-19). The government's opening brief explained why defendant is wrong.[4] (GOB 39-40). Defendant's argument is also a red-herring. Although defendant funneled money through intermediaries, he and his co-conspirator directly gave the payments in the conduits/straw-donors' names to the candidate (GER 16), meaning defendant directly used the names of others (GOB 27, 40). And a person can contribute either indirectly or directly in a false name (GOB 27 (example)), meaning defendant's

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[4] Defendant suggests FECA does not use the term "directly" without "indirectly." (AAB 19 n.19). But (1) it does, 2 U.S.C. § 441b(c)(2) ("funds provided directly by individuals"); (2) regardless, the Russello presumption does not support reading a limit into Section 441f given the different wording; and (3) accepting defendant's argument would likely lead to reading the same limit into Section 441g (cash limitation) and there is no textual basis to do so there either.

reading of Section 441f does not turn on the presence or absence of the term "indirectly" (GOB 27, 40).

Defendant next argues that applying Section 441f here renders words in Section 441a(a)(8) superfluous. (AAB 19-21). Congress' wording in a 1971 provision (Section 441f) should not make words Congress used three years later in a different provision (Section 441a(a)(8)) superfluous. See, e.g., Agredano v. Mutual of Omaha Co., 75 F.3d 541, 544 (9th Cir. 1996) (no "presumption where the terms appear in different statutes enacted at different times"). Defendant suggests, however, if Section 441f applies here, Congress could have simply provided in Section 441a(a)(1)(A) -- as it did -- that "no person shall make contributions . . . which, in the aggregate, exceed $2,000" and it would embrace defendant's contributions, thereby rendering unnecessary the following words in Section 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.

The government agrees that Section 441a(a)(1)(A) embraces defendant's contributions without Section 441a(a)(8). But Congress' decision, when imposing individual contribution limits in 1974, to clarify who is the contributor when money is provided indirectly (the contributor or intermediary) does not alter the

plain meaning of Section 441a(a)(1)(A), much less Section 441f. Ali v. Federal Bureau of Prisons, 552 U.S. 214, 226 (2008) (interpretation did not render wording superfluous; "Congress may have simply intended to remove any doubt that officers of customs or excise were included 'in law enforcement officers'"); United States v. Bendtzen, 542 F.3d 722, 727 (9th Cir. 2008) (interpretation did not render provision superfluous; definition was likely "inserted out of excess caution"); see, e.g., Lamie v. United States Trustee, 540 U.S. 526, 536 (2004) (plain meaning controls over avoiding surplusage); Gutierrez, 528 U.S. at 258 (similar).

3. Section 441a(a)(8) Does Not Control and Prohibit Contributions in the Names of Conduits

The core of defendant's and his amicus' argument involves Section 441a(a)(8)'s last sentence: "The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient." Relying on this sentence, they read Section 441a(a)(8), not Section 441f, as prohibiting contributions in the names of conduits. (AAB 1, ACRU 2). The district court held that Section 441a(a)(8) allowed (not prohibited) conduit contributions (GER 4), and it did not cite this sentence in its order (GER 3; GOB 46 n.20). Defendant and his amicus emphasize this argument, however, to overcome the objection that the district court created a loophole in FECA, allowing contributors

to hide their identities using straw donors' names. (FEC 22; CLC 12; CREW 2; AAB 1, 16, 49-50; ACRU 2, 6).

Contrary to defendant and his amicus' argument, Section 441a(a)(8) does not read like a prohibition. Compare 2 U.S.C. § 441a(a)(1)(A) ("no person shall make contributions" exceeding $2,000), 2 U.S.C. § 441b ("[i]t is unlawful for" banks/unions/corporations to "make a contribution"), and 2 U.S.C. § 441f ("[n]o person shall make a contribution in the name of another"). Instead, it reads like an accounting/reporting provision, directing the conduit to provide the name of the source to the candidate/FEC. This directive works in tandem with, not in place of, Section 441f.[5] (FEC 19-20; CLC 3-13).

Moreover, Congress created now-Section 441a(a)(8) three years after passing FECA and now-Section 441f in 1971. Defendant acknowledges that "full disclosure of campaign contributions, including their source, was an objective of the 1971" Act. (AAB 44). To accomplish that objective, Congress required records/reports with the names of contributors. Now-Section 441f was the only provision in the 1971 Act compelling contributors to use their own names. Thus, if defendant's interpretation were correct, no provision in the 1971 Act prohibited people from

[5] The government did not suggest that Section 441a(a)(8) does not apply to defendant's contributions (AAB 23-24), arguing only that Congress did not design it to address straw-donor contributions or as the means to prohibit contributions in the names of straw donors (GOB 44-46).

hiding their identities by contributing in conduits' names, rendering the recordkeeping/reporting conditions meaningless and the disclosure title/purpose a nullity. (GOB 28-30 & n.14, 47-49; see also Castaneda v. United States, 546 F.3d 682, 696 (9th Cir. 2008) (general notion "Congress would not do anything as preposterous as to pass a statute that was, in part or in whole, a nullity ab initio"), cert. granted, 130 S. Ct. 49 (2009)).

Defendant does not dispute the foregoing, but suggests Congress passed now-Section 441a(a)(8) in 1974 to fix this loophole. (AAB 21 n.21). But, on its face, Section 441f has no loophole, as it provides "[n]o person shall make a contribution in the name of another" and includes neither textual limit nor any suggestion it reaches only some contributions in the name of another (false-name contributions). And defendant does not: (1) cite legislative history identifying such a loophole or saying that Section 441a(a)(8) was meant to fix it, cf. 120 Cong. Rec. 5,861 (1974) (wording at issue not in Senate bill); or (2) explain why Congress would fix a loophole in Section 441f by creating Section 441a(a)(8), rather than amending Section 441f (particularly given that Section 441f is a provision of general applicability, Mariani v. United States, 80 F. Supp. 2d 352, 368 (M.D. Pa. 1999), whereas Section 441a(a)(8) applies only "[f]or purposes of the limitations imposed by this section"). Moreover, Section 441f potentially places liability on all three actors in

the prohibited conduct: (1) the contributor; (2) the person allowing his/her name to be used; and (3) the candidate. Section 441a(a)(8), by contrast, imposes a duty only on the conduit, not on the actual contributor: "The intermediary or conduit shall report the original source." (See also GER 41 ("FECA imposes no obligation on the 'original source'" to report himself); AAB 25 n.25 ("failure of the conduits to provide Defendant's name was a violation of their duty under Section 441a(a)(8)"); AAB 13, 16 n.17). But placing liability "solely on straw donors -- the least culpable party -- is contrary to traditional liability principles." (GOB 46 n.20 (citing Bartnicki v. Vopper, 532 U.S. 514, 529 (2001)). And leaving the actual contributor free from liability under FECA for using the names of conduits creates, rather than fixes, a loophole.[6]

Defendant and his amicus assert, however, that Congress chose a lower threshold to trigger felony penalties under 441f than under Section 441a(a)(8). (AAB 2, 50 n.44; ACRU 2, 6). According to defendant, "[i]t is perfectly rational for Congress to have concluded" that false-name contributions under Section

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[6] The conduits may not face criminal liability either. Such liability arises only if a person "knowingly and willfully" violates FECA and in amounts "aggregating $2,000 or more." 2 U.S.C. § 437g(d)(1)(A)(ii). Thus, if a contributor funneled money through conduits who did not know about FECA's requirements and/or each contribution was less than $2,000, the conduits would not face criminal liability. Moreover, the conduit may not be a willing participant (such as where an employer forces employees to make conduit contributions).

441f are "a greater evil" than contributions in the names of conduits under Section 441a(a)(8). (AAB 26). But whether a person contributes in false names or in the names of conduits, the evil is the same: The public is prevented from knowing the source of the contribution (and the contributor is provided an avenue for evading contribution limits).[7] (GOB 22-23). Reading FECA as prohibiting this same evil in separate provisions renders the one with more severe penalties (Section 441f) avoidable. That problem is particularly pronounced here because, under defendant's view, a contributor seeking to hide his identity can: (1) contribute in false names and face liability/penalties under Section 441f; or (2) contribute in the names of conduits and face no liability/penalties under FECA for hiding his identity (as Section 441a(a)(8) places obligations solely on the conduits). Defendant's interpretation renders Section 441f avoidable and essentially superfluous, as no rational person would chose the first option. (GOB 24).

Moreover, until 2002, FECA violations were misdemeanors. 2 U.S.C. § 437g(d) (1980). Congress created these differing felony penalties as part of BCRA in 2002, enacting a general

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[7] The grand jury here could have charged defendant with exceeding the contribution limits (Section 441a(a)(1)(A)), and contributing in the names of others (Section 441f). A contribution-limit/prohibition violation is always a separate and independent charge from any based on a defendant hiding his identity (whether Section 441f or 441a(a)(8) applies).

felony provision triggered by contributions of $25,000 or more, Pub. Law 107-155, 116 Stat. 106, § 312 (2002), and carving out a lower threshold (exceeding $10,000) to trigger felony violations of Section 441f, 116 Stat. 108, § 315. As the government and its amici noted (and defendant does not dispute): (1) Congress passed this carve-out for Section 441f after holding hearings on conduit/straw-donor violations from the 1996 election (during which Congress noted that Section 441f applied to them), (GOB 53-54); (2) the legislative history highlights that the carve-out for Section 441f was created because of unhappiness over penalties for conduit/straw-donor contributions, 147 Cong. Rec. 3,187-3,188 (2001) (Sen. Christopher Bond) (introducing provision; explaining purpose); Hearing on Campaign Finance Reform, 107 Cong., 37 (2001) (Rep. Dan Burton) (proposing similar legislation for Section 441f violations; noting "[c]onduit contributions are a serious and growing problem. . . . Current penalties for making conduit contributions are too lenient"); and (3) Congress entitled Section 441f's carve-out provision, "[i]ncrease in penalties imposed for violations of conduit contribution ban," 116 Stat. 108, § 315. The differing penalties thus undermine (rather than support) defendant's argument.

Taken as a whole, accepting defendant's argument would mean: (1) Section 441f's prohibition -- "No person shall make a contribution in the name of another person" -- applies only to

some such contributions (false-name contributions) despite the lack of textual limit; (2) Congress prohibited contributions in the names of conduits three years later in a different provision, placing liability only on conduits, not the actual contributors; and (3) Congress did so because it wanted less severe penalties for contributions in the names of conduits, although when it created the differing penalties, Congress indicated the opposite and stated that Section 441f applied to conduit contributions. Common sense dictates Congress did not intend defendant's proposed scheme. Koons Buick, 543 U.S. at 63. To the contrary, when Congress stated, "[n]o person shall make a contribution in the name of another person," it meant any contribution in the name of another person, not just some such contributions.

B. PRECEDENT SUPPORTS SECTION 441f's PLAIN WORDING

The government's opening brief cited 14 cases recognizing that Section 441f applies to straw-donor/conduit contributions. (GOB 34-37). The government amici cited additional cases, most notably FEC v. Williams, CV 93-6321-ER (C.D. Cal. Jan. 31, 1995) (FEC APPENDIX 18) (granting summary judgment; "[d]efendant's conduct in either advancing or reimbursing the $1,000 to the 22 individuals violates the prohibition of making contributions . . . in another person's name. This constitutes a violation of 2 U.S.C. § 441f."), rev'd on other grounds, 104 F.3d 237 (9th Cir. 1996). Although each of these 15 decisions recognized that

Section 441f applies here, defendant devotes substantial space to minimizing these cases. (AAB 28-36). The government generally disagrees with defendant's case descriptions. Compare, e.g., AAB 32 (Mariani referenced disclosure, which is provided for by Section 441a(a)(8), and "it is clear that the court made no determination as to whether conduit contributions were prohibited by Section 441f") with Mariani v. United States, 212 F.3d 761, 766, 775 (3d Cir. 2000) (en banc) (stating "Section 441f of the FECA, the conduit contribution ban or 'anti-conduit' provision, prohibits one from making a contribution 'in the name of another;'" holding Section 441f did not violate First Amendment because "[p]roscription of conduit contributions" was seemingly at core of Buckley). The government, however, readdresses only two cases in detail.

First, in McConnell v. FEC, 540 U.S. 93 (2003), the Supreme Court decided a First Amendment challenge to a new BCRA provision (2 U.S.C. § 441k) providing that minors "shall not make a contribution." The government argued the provision protected "against corruption by conduit; 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, in part, the government's "scant evidence of this form of evasion" which "[p]erhaps" "result[ed] from sufficient deterrence of such activities" by Section 441f, which

prohibited contributions "in the name of another." Id.

Defendant and his amicus question whether the Court was referencing the same conduct as here. (AAB 30; ACRU 11 n.2). The Court, however, mentioned corruption by "conduit" and noted that the conduct involved parents contributing "through" their children. 540 U.S. at 232. Defendant next suggests "Section 441a would equally explain the lack of a need for the disputed provision." (AAB 30). But, after considering FECA/BCRA in detail, the Court identified Section 441f as the provision it believed already prohibited contributions in the names of conduits, not Section 441a(a)(8). Defendant finally notes the discussion is dictum. (AAB 30). It is, however, Supreme Court dictum. Laub v. United States Dep't of Interior, 342 F.3d 1080, 1090 n.8 (9th Cir. 2003) (Supreme Court dicta not "lightly disregarded"). And, regardless, the Court recognized what is apparent from Section 441f's wording: It applies to conduit contributions.

Defendant also dismisses United States v. Goland, 903 F.2d 1247 (9th Cir. 1990), because it resolved a constitutional, not a statutory-interpretation, challenge. (AAB 31 & n.29). Although there has been dispute about when case discussion controls, compare United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (Kozinski, J.) (controlling, even if unnecessary, when resolves germane issue after reasoned consideration) with

id. at 920-21 (Tashima, J., concurring) (not binding when unnecessary), defendant's out-of-hand dismissal is misplaced.

First, the defendant in Goland contributed in the names of conduits, he was thus charged with violating Section 441f and, as part of a discussion of FECA's provisions and history, this Court stated that Section 441f applied to conduit contributions. 903 F.2d at 1249-52. This Court discussed the statutory scheme and Section 441f not as a whim, but because it was considering a constitutional challenge to them. Id. at 1295-61. In such circumstances, a statement about the meaning of a statute is controlling. United States v. Bond, 552 F.3d 1092, 1096 (9th Cir. 2009) ("[D]iscussion in a published opinion . . . is binding circuit law regardless of whether it was in some technical sense 'necessary.'") (citation and internal quotations omitted).

Second, although this Court resolved a constitutional claim, it first determined the defendant had standing to raise a First Amendment claim to anonymous speech, even though he made conduit, not anonymous, contributions. 903 F.2d at 1255. This Court allowed the defendant to press his claim because FECA prevented anonymous contributions, meaning the defendant had to "violat[e]" the Act by making conduit contributions. Id. The interpretation of Section 441f (and that the defendant violated it) appears necessary to standing.

Third, even if not controlling, this Court (like the Supreme

Court in McConnell) recognized that Section 441f applies to conduit contributions, highlighting that Section's plain meaning.

Apart from criticizing these numerous cases, defendant and his amicus fail to cite any case, law-review article, or other source even suggesting their interpretation of FECA. FECA is nearly 40 years old and, as the government noted, conduit violations under Section 441f are one of FECA's most frequent violations. (GOB 38). The FEC supported that statement, noting that, since 1990, it brought 45 proceedings against more than 220 people under Section 441f for the same conduct and, since 2004, the Department of Justice ("DOJ") prosecuted at least 15 defendants under Section 441f for the same conduct. (FEC 10 & n.4). Given the age of FECA and the number of actions under Section 441f for the same conduct, defendant's and his amicus' failure to identify any authority supporting their interpretation suggests Section 441f does not have that meaning (much less does it unambiguously have that meaning).[8]

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[8] In response to a government amici (CREW 14-16), defendant discusses state laws, observing that some are worded differently than Section 441f (AAB 36-41). That Congress had other wording choices, however, is not helpful in deciding the meaning of the words Congress actually chose. (GOB 24-25). That is particularly true here where these state laws were generally adopted after Section 441f. But see Conn. Gen. Stat. 9-343(g) (1959). Indeed, one of the laws cited defines "contribution in the name of another" to include wording modeled on the FEC's regulation applying Section 441f. Compare Nev. Rev. Stat. § 294A.112(2)(a) with 11 C.F.R. § 110.4(b)(2)(i). Defendant also notes that at least one law worded similarly to Section 441f was interpreted to apply to straw-donor contributions, but argues

C. WERE THERE AMBIGUITY, DEFERENCE TO THE FEC IS REQUIRED

If there were ambiguity, deference to the FEC is required. (GOB 55-57). Defendant and his amicus suggest two reasons to the contrary. But Section 441f is not fairly susceptible to their interpretation, defeating both arguments. (GOB 55 & n.26). And, regardless, as explained below, both arguments lack merit.

1. Constitutional-Avoidance Principles Do Not Apply

Defendant and his amicus argue that "Section 441f must be narrowly interpreted" because of First Amendment concerns. (AAB 52; see also AAB 55 n.46; ACRU 7). Although constitutional avoidance can support a narrowing interpretation, DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988), the constitutional issue must, at a minimum, raise "serious" concerns where Chevron deference is involved (GOB 55 n.26 (citing Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997)); see, e.g., Morales-Izquierdo v. Gonzales, 486 F.3d 484, 492-93 (9th Cir. 2007) (en banc) (avoidance "plays no role" in second Chevron step)). The district court recognized that precedent barred defendant's First Amendment claim (GOB 55 n.26)

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that interpretation is not persuasive because there was no "analogue" there to Section 441a(a)(8). (AAB 41 n.33). But FECA also did not have such an analogue when Congress passed now-Section 441f in 1971 and, regardless, these interpretations highlight Section 441f's plain meaning. Kansas Ethics Op. 1997-45 (applying to straw donors); 1998 Illinois Atty. Gen. Op. 4 (similar statute prohibits "'laundering' of contributions to disguise the source" of funds).

and defendant has not argued to the contrary, much less asserted his claim raises "serious" issues.[9] Rather than impinge "first amendment values," this Court noted that FECA's disclosure provisions "may actually further them" by informing the electorate which interests support a candidate. Goland, 903 F.2d at 1261 (emphasis omitted). Thus, invocation of constitutional-avoidance principles is misplaced.

2. Deference, Not Lenity, Controls

Although the district court recognized that the FEC was entitled to Chevron deference, it held that lenity applied were there ambiguity. As noted, however, this Court has held that deference controls over lenity. (GOB 55-57 (citing Mujahid v. Daniels, 413 F.3d 991 (9th Cir. 2005); Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001))). Defendant first argues that this Court was wrong in Pacheco-Camacho to believe lenity applied to good-time credit calculations. (AAB 53). Even if true, the relevant holding remains, namely, that deference controls over lenity. Mujahid, 413 F.3d at 999 (Pacheco-Camacho addressed "when the rule of lenity takes priority over Chevron deference;" reaffirming Pacheco-Camacho); Pacheco-Camacho, 272 F.3d at 1271 ("The rule of lenity . . . does not prevent an agency from

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[9] Defendant does not identify what right Section 441f implicates. Defendant concedes he had to disclose his identity (the only question being under which FECA provision). Defendant suggests Section 441f interferes with his right to solicit others, but it does not (limiting only his use of others' names).

resolving statutory ambiguity through a valid regulation.").

Defendant suggests this Court was also wrong to hold that deference controls over lenity. (AAB 53 n.45). But a three-judge panel is bound by that precedent. Irons v. Carey, 505 F.3d 846, 854 n.5 (9th Cir. 2007). And defendant has not identified why this precedent is wrong. This Court noted that applying deference over lenity "comported with the rule [of lenity's] purpose." Mujahid, 413 F.3d at 998. Lenity is "premised on two ideas:" (1) defendants should have fair warning of what the law intends; and (2) courts should not define criminal activity. Babbitt v. Sweet Home Chapter, 515 U.S. 687, 704 n.18 (1995). A regulation (particularly a longstanding one as here) provides fair warning. Babbitt, 515 U.S. at 704 n.18 (two-decade-old regulation gave "fair warning" and did not "offend the rule of lenity"); Mujahid, 413 F.3d at 998 ("Regulations such as the one at issue here gives the public sufficient warning to ensure that nobody mistakes the ambit of the law.") (citation and internal quotations omitted); Pacheco-Camacho, 272 F.3d at 1272 (same). And where, as here, Congress delegated enforcement of an Act to an agency (GOB 56) and the agency exercises its authority, the court is asked to defer to the agency, not to define criminal liability. Moralez-Izquierdo, 486 F.3d at 493. Thus, this Court correctly held that applying deference over lenity comports with lenity's purpose. Indeed, Babbitt compelled that holding.

Defendant argues that this Court's precedent is inconsistent with other circuits'. (AAB 53-55). But, as this Court noted, that is generally not the case. Mujahid, 413 F.3d at 998 n.7; see also Mizrahi v. Gonzales, 492 F.3d 156, 174-75 (2d Cir. 2007) ("lenity is a doctrine of last resort, and it cannot overcome a reasonable BIA interpretation entitled to Chevron deference"); Yi v. Federal Bureau of Prisons, 412 F.3d 526, 535 (4th Cir. 2005) ("Rather than apply a presumption of lenity to resolve the ambiguity, Chevron requires that we defer.") (emphasis omitted); O'Donald v. Johns, 402 F.3d 172, 174 (3d Cir. 2005) (per curiam) (similar); Perez-Olivo v. Chavez, 394 F.3d 45, 53 (1st Cir. 2005) (questioning whether lenity applied but, assuming it did, "lenity does not foreclose deference to an administrative agency's reasonable interpretation"); Amador-Palomares v. Ashcroft, 382 F.3d 864, 868 (8th Cir. 2004).

Defendant nevertheless cites Dolfi v. Pontesso, 156 F.3d 696 (6th Cir. 1998), and United States v. McGoff, 831 F.2d 1071 (D.C. Cir. 1987). But this Court noted Dolfi in Mujahid, 413 F.3d 998 at n.7, and did not follow it. And the D.C. Circuit decided McGoff before Babbitt. After Babbitt, it too has recognized that deference controls over lenity: "To argue . . . lenity compels us to reject the FEC's otherwise reasonable interpretation of an ambiguous statutory provision is to ignore established principles." United States v. Kanchanalak, 192 F.3d 1037, 1050

n.23 (D.C. Cir. 1999) (citing Babbitt, 515 U.S. at 704 n.18).

Defendant and his amicus also ask this Court to treat the FEC -- a non-party to this criminal case -- as the prosecutor, thereby declining deference. (AAB 55; ACRU 11). They rely on a Justice Scalia concurrence suggesting the DOJ is not entitled to deference and noting criminal statutes are "not administered by any agency but by the courts." Crandon v. United States, 494 U.S. 152, 177 (1990). The FEC, however, is an independent regulatory agency with civil enforcement power and it can neither file criminal charges nor insist on prosecution. (The FEC may refer an apparent criminal violation to the Attorney General, who need only report back "any action taken." 2 U.S.C. §§ 437g(a)(5)(C),(c).) And, unlike criminal statutes, which are administered by courts, Congress has delegated administration of FECA to the FEC, and this Court and the Supreme Court have held the FEC is entitled to deference. (GOB 56-57; FEC v. DSCC, 454 U.S. 27, 37 (1981) (FEC "is precisely the type of agency to which deference should presumptively be afforded")).

At bottom, defendant suggests criminal cases are different and lenity, not deference, controls in them. But (1) as explained above, this Court and the Supreme Court have recognized that applying deference over lenity comports with lenity's purpose; (2) this Court is interpreting an election statute as it applies in all cases (criminal, civil, and administrative); its

meaning does not turn on the happenstance of whether first interpreted in a civil or criminal case, United States v. Thompson/Center Arms, Co., 504 U.S. 505, 518 n.10 (1992) (plurality) (lenity is "not a rule . . . calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation"); and (3) the existence of statutory criminal penalties (not a prosecution) triggers lenity, Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (dictum), meaning applying lenity here would incorrectly prevent deference to the FEC and numerous other agencies enforcing statutes with criminal penalties, Babbitt, 515 U.S. at 703-04 & n.18 (applying deference in such circumstances); GOB 56-57 (precedent deferring to FEC).[10]

D. DEFENDANT IMPERMISSIBLY CHALLENGES THE INDICTMENT'S ALLEGATIONS

Defendant attempts to recast the facts and, for the first time, procedurally challenges the indictment. Relying on out-of-context snippets, defendant suggests there was a "two-step sequence of events:" (1) the conduits chose to contribute; and (2) "[s]ubsquently" in a "second transaction," defendant chose to

[10] Defendant suggests he prevails under 11 C.F.R. § 110.6(d) (AAB 43 n.36), which treats a contribution as made by both the conduit and contributor when the conduit controls the choice of candidate. Because the indictment makes clear that the conduits were recruited to "contribute" to a particular candidate (GER 15), Section 110.6(d) does not apply. Even if it did, defendant still violated Section 441f by not using his own name.

reimburse them. (AAB 5; see also AAB 7 n.7, 13-14 n.13, 27-28). When considering a motion to dismiss, however, the indictment is presumed true (GOB 3 n.2) and "read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied," United States v. Hinton, 222 F.3d 664, 672 (9th Cir. 2000) (citations and internal quotations omitted). Read in context, the indictment alleges that defendant and his co-conspirator solicited others to contribute to a candidate with the promise that defendant would provide the money.[11] (GER 15, 18). The indictment makes clear that these people agreed to "contribute" only because of defendant's promise to provide the money. (Id.). Defendant and his co-conspirator collected payments from them, reimbursed/advanced them the money from defendant's account, and forwarded the payments in their names to the candidate. (GER 15-16, 18). Thus, the indictment alleges a single course of action and a standard concealed-conduit/straw-donor scheme: Defendant provided $26,000 to a candidate, but

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[11] Defendant insists the indictment alleges only that he reimbursed (not advanced) money, but it does not. (GER 18) ("advanced . . . and reimbursed"). Whether there was advancement, reimbursement, or both does not affect the government's analysis. Defendant also objects to the term "straw-donor" contribution because it is not used in the indictment. (AAB 14 n.14). The term, however, is descriptive of the conduct alleged and avoids confusion between disclosed and concealed conduit contributions. Whatever term is used, the question here is one of statutory scope. Indeed, the district court's error was partly rooted in its focus on terminology over Section 441f's wording. (GOB 43-44).

through, and using the names of, 13 straw donors/conduits.

Defendant also focuses on the indictment's reference to "contributions" from the conduits and suggests only they (not he) made "contributions," necessitating dismissal. (AAB 4-7, 11-12, 58). But the indictment identifies these individuals as "conduit contributors" (GER 16-17; see also GER 18 (table heading for "conduit contributor")), which it defines as people who permitted their names to be used to effect contributions in the name of another (GER 14). The indictment, thus, makes clear that the conduits were not the actual contributors. (See GER 19 (false-statement charge based on candidate reporting "certain individuals . . . had each made a $2,000 contribution. . ., when, in fact, . . . defendant . . . made those contributions by providing his money to those individuals")). Regardless, all counts alleged that defendant made "contributions," which is all that is required. (GER 15 ("defendant . . . conspired . . . to make conduit contributions . . ., that is, contributions in the names of others," 2 U.S.C. §§ 437g(d), 441f); GER 18 ("defendant . . . made . . . contributions in the names of other persons," 2 U.S.C. §§ 437g(d), 441f); GER 19; United States v. Woodruff, 50 F.3d 673, 676 (9th Cir. 1995) (indictment generally sufficient "if it sets forth the elements")). Although not required, the indictment alleged the underlying facts, citing 13 people in whose name defendant contributed and the dates and amounts

($2,000 each). (GER 18). And neither defendant nor the district court expressed confusion about the nature of the charges. United States v. Lopez-Gonzalez, 183 F.3d 933, 935 (9th Cir. 1999) (indictment designed to provide notice of charges).

III

CONCLUSION

Accordingly, this Court should reverse the dismissal.

DATED: December 9, 2009

Respectfully submitted,

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