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,

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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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