

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

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF APPELLEE
AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1, Amicus Curiae American Civil Rights Union submits this corporate disclosure statement. The American Civil Rights Union is a non-profit, non-stock corporation with no parent corporation, and no publicly held corporation owns 10% or more of its stock. It is organized under Section 501(c)(3) of the Internal Revenue Code as a non-partisan, educational, legal policy organization.

AUTHORITY OF AMERICAN CIVIL RIGHTS UNION TO FILE *AMICUS CURIAE* BRIEF

All parties have consented to the filing of this brief.

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**INTEREST OF AMICUS CURIAE
AMERICAN CIVIL RIGHTS UNION**

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn Laforce.

The ACRU's interest in this case is to ensure full Constitutional and legal protections for criminal defendants, which is fundamental to ensuring individual liberty. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The government and its supporting *amici* have fundamentally misconceived the decision of the Court below, and the argument of the Defendant Pierce O'Donnell in this case. The undisputed facts based on the Indictment clearly establish beyond argument that the Defendant O'Donnell did not commit any act in violation of the plain language of Section 441f of the Federal Election Campaign Act ("FECA"). The Court below recognized this, and, therefore, properly dismissed Counts I and II of the Indictment, which were based on supposed violations of Section 441f.

This does not leave any loophole in FECA, as the overreaching government and *amici* so repetitiously contend. Section 441a expressly prohibits the conduct they are alarmed about, banning contributions made "indirectly...including contributions which are in any way...directed through an intermediate or a conduit." It also requires disclosure of such contributions to prevent evasion of the prohibition. The government simply erred in charging the Defendant under Section 441f, a felony provision that does not apply to the Defendant's actions, instead of under Section 441a, which is only a misdemeanor provision involving lesser penalties.

Consequently, the policy arguments of the government and its *amici* are without merit, and in any event cannot be used to railroad the Defendant

into prison for a crime he did not commit. The plain text of the statute settles this case. Allowing criminal prosecution and imprisonment for conduct outside the text of a criminal statute would violate the fundamental rule of law, and transgress the fundamental rights and liberties of American citizens, as in a rogue, authoritarian state.

Actual legislative history involving Section 441f is scant and not determinative, and in any event cannot serve to rewrite plain textual language. Prior case law also does not support the government and its *amici*, and must bow to the plain text in any event as well. Agency interpretation contrary to the plain text is also irrelevant.

STATEMENT OF FACTS

The government alleged in Counts I and II of the Indictment of Defendant Pierce O'Donnell that several individuals other than O'Donnell made contributions to a Presidential campaign political committee, denominated EFP, which were solicited by O'Donnell. The Indictment further alleged that subsequently Defendant O'Donnell reimbursed those contributors for the amounts they contributed.

The contributors made the contributions in their own names. The Indictment does not allege facts showing that Defendant O'Donnell himself made any contributions to the Presidential campaign political committee. It

alleges that O'Donnell later made payments to the actual contributors reimbursing them for their contributions.

Defendant O'Donnell moved to dismiss the Indictment on March 16, 2009, on the grounds that it failed to state a violation of law. In an opinion issued on June 8, 2009, District Court Judge S. James Otero granted the Defendant O'Donnell's motion as to Counts I and II of the Indictment, which were based on supposed violations of Section 441f of FECA. Judge Otero ruled, "Section 441f is unambiguous and does not prohibit soliciting and reimbursing contributions." (GER 5)¹.

But Judge Otero denied the motion as to Count III, which he found sufficiently alleged a violation of 18 U.S.C. Section 1001. The government then filed this appeal.

ARGUMENT

I. THE DEFENDANT O'DONNELL DID NOT COMMIT THE VIOLATION CHARGED BASED ON THE FACTS ALLEGED IN THE INDICTMENT.

Counts 1 and 2 of the Indictment charge the Defendant Pierce O'Donnell with violating Section 441f of the Federal Election Campaign Act ("FECA"). Section 441f states,

¹ "GER" refers to the government's excerpts of record and is followed by the page number.

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.

2 U.S.C. Section 441f. The undisputed facts show that the Defendant O'Donnell did not commit any act that violates the plain language of this text.

O'Donnell did not "make a contribution in the name of another person." The specific facts alleged in the Indictment are that O'Donnell reimbursed others for contributions that they made. O'Donnell himself did not make any actual contribution to the Presidential campaign committee EFP, and there is not even an allegation to the contrary.

The Defendant O'Donnell did not "knowingly permit his name to be used to effect such a contribution," and again there is not even an allegation to that effect. The Defendant O'Donnell also did not "knowingly accept a contribution made by one person in the name of another."

Consequently, there can be no dispute that the Defendant O'Donnell did not violate Section 411f. The District Court below recognized these arguments grounded in the plain text of the statute, and, therefore, properly dismissed Counts I and II of the Indictment, which were based on supposed violations of Section 411f.

The government and its *amici* erroneously argue that the Court's ruling leaves an enormous loophole in the statutory framework for campaign finance regulation, as the contribution limits and reporting requirements allegedly could be evaded by wealthy individuals soliciting and reimbursing contributions made by others. But Section 441a of FECA expressly bans contributions made "indirectly...including contributions which are in any way...directed through an intermediate or a conduit." Section 441a also requires disclosure and reporting of any such indirect contributions.

The government, however, brought its Indictment against the Defendant O'Donnell under Section 441f, a felony provision which includes penalties of imprisonment. But that provision does not prohibit the Defendant's conduct. That is why the Court below correctly dismissed the two counts relating to Section 441f. The provision that prohibits the conduct that the government and its *amici* raise is Section 441a, which provides only for misdemeanor penalties. Because of Section 441a, the hypothetical loophole that the government and *amici* raise does not exist.

It is fundamental to the basic liberties of our society that the government not be allowed to stretch and twist the plain language of criminal statutes to conduct not covered by the actual text of the statute. Indeed, that is fundamental to the very rule of law. Such government action

would transgress the fundamental rights and liberties of American citizens, as in a rogue, authoritarian state, rather than an enlightened liberal society. As the Court reminds us in *McNally v. United States*, 483 U.S. 350, 359-360 (1987), when considering criminal allegations, “There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.” *Accord: Fasulo v. United States*, 272 U.S. 620 (1926); *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987)(describing as a “bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them.”).

This is all the more so when the criminal statute regulates what is otherwise constitutionally protected activity. Campaign financing and contributions are core political activities essential to our democracy, and protected by the First Amendment. Criminal violations related to such activities must be narrowly and literally construed to protect essential basic liberties, and avoid any chilling effect on the exercise of such liberties. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. Kokinda*, 497 U.S. 720 (1990); *Emily’s List v. FCC*, 581 F. 3d 1 (D.C. Cir. 2009); *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003).

If the government and its *amici* believe the penalties for violating Section 441a are not sufficient, they are free to seek a remedy from Congress. But they cannot be allowed to railroad a Defendant into prison for a crime he didn't commit based on their policy arguments for such heightened penalties.

II. THE PLAIN TEXT OF THE STATUTE SETTLES THIS CASE.

This Court set the standard for statutory interpretation in *Caminetti v. United States*, 242 U.S. 470 (1917), saying,

[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain,...the sole function of the courts is to enforce it according to its terms.

242 U.S. at 485. In other words, the plain meaning of the text controls.

Perrin v. United States, 444 U.S. 37, 42 (1979) (“[W]ords [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning.”).

The Court added in *Rubin v. United States*, 449 U.S. 424, 430 (1981),

“When we find the terms of the statute unambiguous, judicial inquiry is

complete....” *Accord: Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438,

450 (2002), (“The inquiry into the meaning of the statute ceases” if the text is plain and unambiguous.).

As discussed above, the Defendant O'Donnell did not commit any act that violates the plain language of Section 441f, and so Counts I and II of the Indictment were properly dismissed. The plain text of the statute settles the matter in this case. Consequently, there is no basis for any further inquiry.

Nevertheless, the government and its *amici* resort to legislative history to try to rewrite the statute. But even the government concedes that it “has found no relevant discussion of now-Section 441f in the 1971 Act’s legislative history....” Gov Br 47. The Court below concluded that the contemporaneous legislative history only further supported its ruling regarding the plain meaning of the statute. GER 5.

The government and its *amici* point to supposed legislative history that occurred years after Section 441f was adopted. But such *post-enactment* “legislative history” is not a guide to the intended meaning of the language when it was adopted. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 (“The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”). These post-enactment citations do not lead to a different conclusion as to the meaning of Section 441f in any event.

The government and its *amici* discuss considerable case law, but they do not produce a single case ruling that Section 441f prohibits

reimbursements of contributions. These cases involve at best dicta in regard to the issue of whether contribution reimbursements are prohibited by Section 441f, with that issue was not even contested. *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005)(Such “dictum settles nothing, even in the court that utters it.”); *Central Valley Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006)(“For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.”); *Cross v. Burke*, 146 U.S. 82 (1892); *Exp. Group v. Reef Indus., Inc.* 54 F.3d 1466, 1472 (9th Cir. 2004)(dictum has “no binding or precedential impact.”). There is no actual holding that Section 441f prohibits reimbursements.

Amicus Curiae Citizens for Responsibility and Ethics in Washington (“CREW”) tells us, “Conspicuously missing from the District Court’s discussion of the case law is any mention of the seminal case interpreting the language of Section 441f, *United States v. Hamkin*, 607 F. 2d 611 (3d Cir. 1979).” CREW Br. 12-13. It turns out that “seminal” discussion is a footnote in a dissent involving *dicta* proclaiming an “inference” that Section

441f banned reimbursements, in a case where the majority ruling was on on an issue relating to the statute of limitations.²

Finally, the government and its *amici* raise FEC advisory opinions and regulations, arguing that the agency's interpretation of the statute deserves decisive deference. But the FEC here serves in the role of a prosecutor, whose interpretation of criminal statutes is entitled to no deference. In our system of ordered liberty, no body may serve as both prosecutor and judge. *Crandon v. United States*, 494 U.S. 152, 177 (1990)(Scalia, J.)("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

Even more importantly, when the language of the statute is plain and unambiguous, as in this case, any agency interpretation to the contrary is irrelevant. As the Court below said regarding the cited agency interpretations,

[T]hey do not accord with the plain language of [Section]441f read in conjunction with the sections of FECA expressly prohibiting "conduit" and "indirect" contributions, as well as FECA's legislative history. Moreover, because the plain language, structure, and legislative history of FECA

² Government *amici* Campaign Legal Center and Democracy 21 cite *McConnell v. FEC*, 540 U.S. 93 (2003) as supporting their interpretation that Section 411f bans contribution reimbursements. But the Court simply recognized there that Section 441f banned parents from making contributions in the name of their children, consistently with the plain wording of the text and the ruling of the court below.

demonstrate that “indirect” and “conduit” contributions are covered by other FECA sections but not by [Section] 441f, deference to the FEC’s interpretation is not warranted.

GER 7. *Accord: Barnhart v. Walton*, 535 U.S. 212 (2002); *Demarest v. Manspeaker*, 498 U.S. 184 (1991); *Pub. Employees Ret. Sys. Of Ohio v. Betts*, 492 U.S. 158 (1989); *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001), *aff’d on other grounds*, 333 F.3d 168 (D.C. Cir. 2005).

Indeed, as stated at the outset, when the text of the statute is plain, as in this case, that settles the matter, and legislative history and even case law is irrelevant. *McNally v. United States*, 483 U.S. 350 (1987).

CONCLUSION

For all of the foregoing reasons, the decision of the Court below should be affirmed.

Dated: November 16, 2009

Respectfully submitted,

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**Certificate of Compliance Pursuant to Fed. R. Civ. P. 32(a)(7)(C) and
Circuit Rule 32-1**

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 2,566 words, which is less than the applicable limit of 7,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2009, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLEE AND AFFIRMANCE 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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APPEARANCE OF PROSPECTIVE *AMICUS CURIAE*

The American Civil Rights Union enters its appearance as *Amicus Curiae* in support of appellee, seeking affirmance, and will file its brief *amicus curiae* on the filing deadline for such a brief, Monday, October 16, 2009. All parties have consented to the filing of this brief.

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