

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
AT LOS ANGELES**

**BRIEF OF AMICUS CURIAE
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
IN SUPPORT OF REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae Citizens for Responsibility and Ethics in Washington submits this corporate disclosure statement.

(a) Citizens for Responsibility and Ethics in Washington does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest.

(b) Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. CREW has an interest in ensuring that the American public can discover the true source of elected officials' campaign funds.

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**BRIEF OF AMICUS CURIAE
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
IN SUPPORT OF REVERSAL**

STATEMENT OF INTEREST

Citizens for Responsibility and Ethics in Washington (“CREW”) files this memorandum as an amicus curiae in support of the position of the United States.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the campaign finances of elected officials and, where appropriate, files complaints with the Federal Election Commission (“FEC”).

Among CREW’s core beliefs are that no one is above the law and that campaign finance law must be applied equally to all. CREW files its brief as an entity that monitors compliance with campaign finance laws to ensure that the people know the true sources of their elected officials’ campaign funds. Toward that end, CREW files its brief to support an interpretation of 2 U.S.C. § 441f that safeguards the ability of government agencies to enforce campaign finance laws and preserves the historical and common understanding of the provision.

Both Appellant and Appellee have consented to the filing of this brief.

STATEMENT OF ARGUMENT

Since 1972, federal law has prohibited the making of a campaign contribution “in the name of another person.” 2 U.S.C. § 441f. For thirty-seven years this provision has consistently been interpreted by all three branches of the federal government as prohibiting an individual from reimbursing a third party for a campaign contribution made to a candidate for federal office. The District Court below, however, ruled that Section 441 “prohibits only the act of making a contribution and providing a false name, not asking others to make contributions in their names and reimbursing them for it.” United States v. O’Donnell, No. CR-08-00872-SJO, slip. op. at 3 (C.D. Cal. June 8, 2009).

The District Court’s ruling represents a radical departure from the well-settled meaning of Section 441f. If upheld, the ruling would have a disastrous impact on the ability of the Department of Justice and the FEC to enforce the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 through 455 (“FECA” or “the Act”). Individual contribution limits are meaningless if wealthy individuals need only find people willing to act as conduits for contributions to federal candidates. Furthermore, Congress never intended to leave a loophole for indirect contributions through intermediary donors. The legislative history of FECA demonstrates that Congress intended Section 441f to ban reimbursements to conduit contributors when the Act was originally passed. More importantly,

Congress twice reiterated its understanding that the language of 2 U.S.C. § 441f prohibited reimbursements to conduit contributors when it revisited FECA in 1976 and again in 2002.

This Court should reject the District Court's radical departure from the well-settled meaning of Section 441f and instead accept the interpretation of the Department of Justice and the FEC, which has been accepted by the courts in all prior cases. Contrary to the District Court, this Court should follow precedent and defer to the FEC's long-standing interpretation of Section 441f. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981).

I. THE DISTRICT COURT RULING IS A RADICAL DEPARTURE FROM THE WELL-SETTLED MEANING OF 2 U.S.C. § 441f THAT SERIOUSLY ENDANGERS ENFORCEMENT OF FECA.

The District Court's ruling is a radical departure from the well-settled meaning of 2 U.S.C. § 441f that would seriously interfere with the ability of the Department of Justice and the Federal Election Commission to enforce the Act. If affirmed, the opinion will call into question several recent convictions under Section 441f. See, e.g., United States v. Geneske, No. 2:09-cr-00435-SDW (D. N.J. June 11, 2009) (defendant convicted of reimbursing multiple straw donors a total of \$25,000 for contributions to a candidate for the U.S. House of Representatives); United States v. Pierce-Santos, No. 1:09-cr-00014-EGS (D. D.C. June 3, 2009) (defendant convicted of reimbursing multiple straw donors a total of

\$20,000 for contributions to a candidate for federal office); United States v. Fannon, No. 3:08-cr-00043-nkm (W.D. Va. May 19, 2009) (defendant convicted of serving as a conduit for \$8,950 in corporate contributions from the Virginia Gamefowl Breeders Association, Inc. to candidates for the U.S. Senate and the U.S. House of Representatives). Other significant convictions also would be jeopardized. See also United States v. DeLoach, No. 06-20583-CR-KING-001 (S.D. Fla. July 17, 2007) (defendant convicted of reimbursing six individuals a total of \$11,000 for contributions to a candidate for U.S. Senate); and United States v. Noe, No. 3:05cr796-01 (N.D. Ohio Sept. 13, 2006) (defendant convicted of reimbursing 24 individuals a total of \$45,400 for contributions to a U.S. presidential candidate).

The FEC has consistently sought civil penalties for violations of Section 441f throughout its existence. Since December 1998, the earliest date that information on enforcement cases is available from the FEC website, the FEC has obtained almost \$5 million in civil penalties from 141 respondents in 36 enforcement cases involving violations of 2 U.S.C. § 441f.¹

¹ MUR 5504 - John Karoly, Jr., Karoly Law Office, P.C. (June 29, 2009)(\$155,000); MUR 6186 - Mark Leggio (May 21, 2009)(\$6,000); MUR 5927 - Joseph A. Solomon (April 13, 2009)(\$6,400); MUR 5871 - Joseph Restivo (September 15, 2008)(\$25,000); MUR 5871 - Margret Thurber (September 15, 2008)(\$9,000); MUR 5871 - Howard T. Talbott (September 15, 2008)(\$5,000); MUR 5871 - Sam Thurber (September 15, 2008)(\$9,000); MUR 5871 - Donna Owens (September 15, 2008)(\$9,000); MUR 5871 - Sally Perz (September 15,

2008)(\$7,000); MUR 5871 - Betty Shultz (September 15, 2008)(\$1,500); MUR 5948 - Critical Health Systems of North Carolina P.C. (January 3, 2008)(\$3,400); MUR 5666 - MZM Inc. and Mitchell Wade (October 31, 2007)(\$1,000,000); MUR 5666 - Richard A. Berglund (October 31, 2007)(\$42,000); MUR 5784 - Morton Grove Pharmaceuticals, Inc. (August 29, 2007)(\$9,000); MUR 5765 - Crop Production Services, Inc. (February 8, 2007)(\$17,000); MUR 5366 - Tab Turner (June 21, 2006)(\$50,000); MUR 5305 - James M. Rhodes, et al. (November 4, 2005)(\$148,000); MUR 5386 - International Association of Machinists and Aerospace Workers District Lodge 141-M, et al. (October 24, 2005)(\$151,000); MUR 5628 - AMEC Construction Management Inc., et al. (October 14, 2005)(\$85,000); MUR 5453 - Thomas Willsey (October 11, 2005)(\$13,000); MUR 5305 - Nadine Giudicessi (September 30, 2005)(\$5,500); MUR 5305 - James A. Bevan (September 30, 2005)(\$5,500); MUR 5398 - LifeCare Holdings, Inc. (June 7, 2005)(\$50,000); MUR 5405 - Apex Healthcare, Inc. and James Chao (April 20, 2005)(\$275,000); MUR 5643 - Carter's Inc. (March 14, 2005)(\$8,000); MUR 5453 - Arthur A. Watson & Co., Inc. (January 15, 2005)(\$16,000); MUR 4818 - Edith Susie Beavers (June 24, 2004)(\$13,500); MUR 4818 - The Stipe Law Firm (February 2, 2004)(\$101,000); MUR 4818 - Gene Stipe (January 28, 2004)(\$267,000); MUR 4818 - Larry Morgan (January 14, 2004)(\$18,500); MUR 5357 - Centex Construction Group, Inc., et al. (December 17, 2003)(\$112,000; \$56,000); MUR 4818 - Michael Mass (December 9, 2003)(\$30,000); MUR 4931 - Audiovox Corporation, et al. (July 17, 2003)(\$620,000); MUR 4931 - Phillip Christopher (July 17, 2003)(\$130,000); MUR 5101 - Yaakov Bender (May 20, 2003)(\$14,000); MUR 5092 - Lawrence Friedman (May 17, 2003)(\$1,000); MUR 4931 - Auto Sounds Company, Inc.; Howard Honigbaum (May 16, 2003)(\$30,000); MUR 5092 - Steven Graham (May 14, 2003)(\$1,000); MUR 5092 - Michael Lazaroff (March 26, 2003)(\$8,000); MUR 5187 - Fermin Cuza (December 3, 2002)(\$188,000); MUR 5187 - Mattel, Inc. (December 3, 2002)(\$94,000); MUR 5187 - Alan Schwartz; AMS Consulting Services (December 3, 2002)(\$195,000); MUR 4931 - Joseph DiFazio (October 21, 2002)(\$10,000); MUR 4530-1, 4909 - Pauline Kanchanalak (September 4, 2002)(\$25,000); MUR 4530-1, 4909 - Duanget Kronenberg (September 11, 2002)(\$20,000); MUR 4530-1, 4909 - Keshi Zhan (November 15, 2001)(\$12,500); MUR 4871 - Rick Riccobono (September 17, 2001)(\$5,600); MUR 4530-1, 4909 - Yah Lin "Charlie" Trie (June 21, 2001)(\$7,000); MUR 5041 - Wuesthoff Memorial Hospital, Inc. (February 21, 2001)(\$32,000); MUR 5041 - Robert Carman (February 21, 2001)(\$20,000); MUR 5041 - Rebecca Colker (February 21, 2001)(\$2,000); MUR 4871 - Broadcast Music, Inc. (February 21, 2001)(\$19,000); MUR 5027 - Mark Nichols (December 11, 2000)(\$56,000); MUR 5027 - Gregorio

II. THE LEGISLATIVE HISTORY OF FECA DEMONSTRATES CLEARLY THAT CONGRESS INTENDED SECTION 441f TO PROHIBIT REIMBURSEMENTS TO CONDUIT CONTRIBUTORS.

The District Court devoted just one paragraph to the legislative history of Section 441f, instead focusing entirely on two statements in the Congressional Record made by two separate members of Congress, one in the House and one in the Senate, discussing distinct provisions in different bills on different days. The complete legislative history of Section 441f spans thirty-six years and demonstrates not only that Congress intended to prohibit reimbursements to conduit contributors when Section 441f was originally passed, but also that Congress has twice ratified its understanding that the language of Section 441f effects such a prohibition.

Cervantes (September 5, 2000)(\$26,000); MUR 4530-1, 4909 - Chien Chuen “Johnny” Chung (August 25, 2000)(\$21,000); MUR 4748 - WPXI, Inc., et al (August 23, 2000)(\$1,000); MUR 4885 - Laredo National Bank, et al. (March 3, 2000)(\$30,000); MUR 4928 - MSBDFM Management Group, Inc. (March 1, 2000)(\$4,000); MUR 4928 - R. Randy Croxton (March 1, 2000)(\$750); MUR 4928 - Stanley W. Tucker (March 1, 2000)(\$2,300); MUR 4928 - Timothy L. Smoot (March 1, 2000)(\$1,100); MUR 4928 - Catherine D. Lockhart (March 1, 2000)(\$750); MUR 4434 - Daniel M. Doyle (January 18, 2000)(\$4,000); MUR 4646 - Amy Robin Habie, et al. (January 3, 2000)(\$50,000); MUR 4884 - Future Tech International, Inc., et al (May 25, 1999)(\$209,000); MUR 4879 - Beaulieu of America, Inc. (May 20, 1999)(\$200,000); MUR 4876 - Cadeau Express, Inc. (March 23, 1999)(\$10,000); MUR 4834 - Howard Glicken (December 15, 1998)(\$40,000).

Section 441f dates back to 1966 and appears in multiple bills considered by Congress in the six-year period that culminated in the passage of the Act in 1972.² Hearings on S. 382, the bill containing the language that ultimately became Section 441f, demonstrate that Congress was acutely aware of the multiplicity of reimbursement schemes that had been used to evade the limits on contributions to federal candidates. These included “donations through brothers, sisters, cousins, aunts and infant children” as well as schemes in which an “employee gets a cash bonus with the understanding that a portion will go to a favored candidate.” *Federal Election Campaign Act of 1971: Hearings on S.1, S. 382, and S. 956 Before the Subcommittee on Communications of the Senate Committee on Commerce, 92nd Cong., 1st Sess. 233-34 (1971)*. The subcommittee also heard evidence that “a large number of wealthy persons thwart the \$5,000 limitation on contributions by attributing some of their excessive political gifts to their children, infants included.” *Id.* at 242. After hearing this evidence, Senator Mathias praised the bill under consideration for “making some limitations on contributions so that rich men can no longer buy elections, either by contributing to their own campaigns or by having families and friends contribute inordinate amounts to various hidden committees.” *Id.* at 347.

² H.R. 10947, 92nd Cong. § 1311 (1971); S. 569, 90th Cong. § 211 (1967); S. 18880, 90th Cong. § 210 (1967); S. 1827, 90th Cong. § 125 (1967); H.R. 4890, 90th Cong. § 330 (1967); H.R. 18162, 89th Cong. § 211 (1966).

During the Senate floor debate on S. 382, one of the bill's principal sponsors directly addressed the problem of wealthy individuals using conduit contributors to evade the individual contribution limits: "If he is limited to \$5,000, what does he do? He has no limitation on his own money. He is a man of influence. He wants to find \$200,000. He finds 40 friends and gives it to them and each of them gives back \$5,000. Let us close that loophole and go after the man who would bribe the election because he is so well fixed." 117 Cong. Rec. S29295 (daily ed. Aug. 4, 1971) (statement of Senator Scott). The statements of sponsors are entitled to great weight when evaluating the legislative history of a statute. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951). The legislative history of the Act shows that when Section 441f was originally enacted Congress was well aware that reimbursing conduit contributors to evade the limits on individual contributions was a serious problem and intended to close that loophole.

Moreover, on two subsequent occasions, Congress has restated its belief that the language of Section 441f prohibits the reimbursement of conduit contributors. The Federal Election Campaign Act of 1971 was substantially amended in 1974 to create the Federal Election Commission and to establish civil penalties for violations of the Act.³ Substantial portions of the 1974 Act were found to be unconstitutional in Buckley v. Valeo, 424 U.S. 1 (1976). To correct these

³ The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-433, 88 Stat. 1297 (the "1974 Act").

constitutional infirmities, Congress enacted the Federal Election Campaign Act Amendments of 1976.⁴ The 1976 Act combined the criminal and civil penalty provisions of the previous iterations of the statute and transferred the language prohibiting contributions in the name of another from 18 U.S.C. § 614 to 2 U.S.C. § 441f. During Senate floor debate on the penalty provisions of the 1976 Act, Senator Clark explicitly stated that both the existing law, 18 U.S.C. § 614, and the legislation transferring that language to 2 U.S.C. § 441f, prohibited reimbursing conduit contributors, a process he referred to as earmarking:

Mr. President, just as both the present law and S. 3065 provide a separate provision against cash contributions so do they also provide a separate provision to prohibit the earmarking of contributions. Earmarking – where a contribution is funneled through an intermediary to a candidate – is a practice which represents a very serious threat to the integrity of the contribution limits provided in the campaign law.

122 Cong. Rec. S3696 (daily ed. March 17, 1976) (statement of Senator Clark).

In 2002, Congress passed the Bipartisan Campaign Reform Act,⁵ which substantially increased both the criminal and civil penalties for violations of Section 441f after a series of conduit contribution schemes came to light following

⁴ Pub. L. No. 94-283, 90 Stat. 475 (the “1976 Act”).

⁵ Pub. L. No. 107-155, 116 Stat. 81 (“BCRA” or “McCain-Feingold”).

the 1996 and 2000 presidential elections.⁶ The Senate floor debate on the increased penalties for violations of section 441f shows unequivocally that Congress has always believed the Section prohibits the reimbursement of conduit contributors.

When offering an amendment to increase the penalties for violations of Section 441f, Senator Kit Bond (R-MO) explained:

Under current campaign finance laws, there is no meaningful punishment of campaign violators. Over the last several years, we have had hearings, investigations, and read about key figures in campaign scandals only to learn later that they walk. It is small wonder that abuse occurs on the scale that we have recently witnessed. It is a misdemeanor offense to make a campaign contribution in the name of another person, knowingly permit your name to be used for a contribution or knowingly accept a contribution made in the name of another, in other words make an illegal contribution through a conduit (2 U.S.C. § 441f).

Despite this clear prohibition, it came to light that during the 1996 presidential campaign millions of dollars in illegal donations from foreign nations were funneled into party and campaign coffers through conduit contributors, some as outrageous as nuns and other

⁶ McCain-Feingold made knowing and willful violations of Section 441f involving \$10,000 or more a felony, punishable by up to 2 years in prison if the amount involved was less than \$25,000 or up to five years in prison if the amount involved was \$25,000 or more. 2 U.S.C. § 437g(d)(1)(D)(i). McCain-Feingold also raised the criminal fine for knowing and willful violations of Section 441f involving \$10,000 or more to not less than 300% of the amount of money involved in the violation and not more than the greater of \$50,000 or 1,000% of the amount of money involved in the violation. 2 U.S.C. § 437g(d)(1)(D)(ii). The civil penalty for a knowing and willful violation of Section 441f was similarly raised to an amount not less than 300% of the amount involved in the violation and not more than the greater of \$50,000 or 1,000% of the amount involved in the violation. 2 U.S.C. § 437g(a)(5)(B).

people of worship. Despite these outrageous abuses, illegal contributions totaling hundreds of thousands of dollars flowed with impunity. Under the circumstances, the punishments handed out to those caught red-handed can barely be considered slaps on the wrist.

147 Cong. Rec. S3187 (daily ed. March 30, 2001) (statement of Senator Bond).

Senator Bond then provided a series of examples of conduit contribution schemes that had been uncovered, including:

Billionaire James Riady agreed on January 11 of this year to pay an \$8.6 million fine and plead guilty to unlawfully reimbursing donors to the 1992 campaign of President Bill Clinton – but he will serve no jail time.

But for a billionaire, \$6 million is like me reaching in my wallet to buy lunch at the sandwich shop. Do you think that hurt him very much? I do not believe so. For \$8.6 million, he has every incentive to come back and do his trick again. That is a small price to pay for being able to exercise inappropriate, unwarranted and illegal influence on a campaign.

147 Cong. Rec. S3188 (daily ed. March 30, 2001) (statement of Senator Bond).

Rep. Dan Burton (R-IN) reiterated Senator Bond's arguments during hearings on McCain-Feingold in the House of Representatives:

Conduit contributions are a serious and growing problem. The integrity of our campaign finance system rests on public disclosure of contributions. When people attempt to avoid disclosure and legal contribution limits, the integrity of the system starts to break down. . . The current penalties are not deterring this corrosive practice, and they are not giving prosecutors the tools they need to crack down on this growing problem. . . If we are serious about reforming the campaign finance system, we must begin by enforcing the laws already on the books.

Hearing on Campaign Finance Reform Before the Committee on House Administration, 107th Cong., 1st Sess. 37-8 (2001).

Thus, the complete legislative history of the Act demonstrates Congress has always considered Section 441f to prohibit the reimbursement of conduit contributors.

III. THE DISTRICT COURT’S INTERPRETATION IS CONTRARY TO ALL PRIOR AUTHORITATIVE INTERPRETATIONS OF THE ACT.

The District Court’s ruling that Section 441f does not prohibit the reimbursement of conduit contributors cannot be reconciled with every other authoritative interpretation of the provision since its 1972 enactment. Every other federal court to consider the meaning of Section 441f has accepted the Justice Department’s interpretation that the provision prohibits the reimbursement of conduit contributors. The Justice Department has adhered to this interpretation of Section 441f for decades.

The District Court devotes one paragraph to two of the prior federal cases interpreting section 441f and then dismisses them as unpersuasive because they “only described section 441f as pertaining to conduits in passing” and “have not actually considered whether section 441f covers indirect contributions or reimbursements.” Slip op. at 6. 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. Hankin, 607 F.2d 611 (3d Cir. 1979). In that case, the appellate panel accepted the Justice Department’s interpretation of section 441f as prohibiting the reimbursement of conduit contributors. Judge Garth, dissenting from the majority’s ruling on the applicable statute of limitations, specifically addressed whether the language prohibiting contributions in the name of another applied to reimbursements to conduit contributors and concluded that it did:

Critical to Hankin’s prosecution were the undisputed facts that he reimbursed the Hilgers and Iacampos for the total amounts of their checks. These facts create the inference that Hankin had, in actuality, made the contributions himself, “in the name of another,” merely using the Hilgers and Iacampos as conduits for his own gift. Mr. Hilger was actually “reimbursed” before he had executed his check.

Hankin at 616 n.4 (Garth, C.J., dissenting).

Every subsequent federal court to consider the language of Section 441f has accepted this interpretation of the statute. See, e.g., Mariani v. United States, 212 F.3d 761, 775 (3d Cir. 2000); United States v. Kanchanalak, 192 F.3d 1037, 1041 (D.C. Cir. 1999); United States v. Hsia, 176 F.3d 517, 524 (D.C. Cir. 1999); Goland v. United States, 903 F.2d 1247 (9th Cir. 1990); United States v. Johnston, 2008 WL 2544779 (E.D. Mich. June 20, 2008); Feiger v. Gonzales, 2007 WL 2351006 at 2 (E.D. Mich. Aug. 15, 2007) (“Contributing money to a candidate in one’s own name but using funds provided by someone else is an example of

activity that would violate [2 U.S.C. § 441f.]’), aff’d, 542 F.3d 1111 (6th Cir. 2008); United States v. Trie, 23 F. Supp. 2d 55 (D. D.C. 1998).

The Department of Justice long has interpreted Section 441f as prohibiting reimbursements of conduit contributors:

Section 441f is violated if a person gives funds to a straw donor, or conduit, for the purpose of having the conduit pass the funds on to a federal candidate as his or her own donation. A violation also can occur if a person reimburses a donor who has already given to a candidate, thus in effect converting the donor’s contribution to his or her own.

U.S. Department of Justice, Criminal Division, Public Integrity Section, Federal Prosecution of Election Offenses 103 (6th ed. Jan. 1995). Significantly, the Justice Department has always considered section 441f to be one of the “core” provisions of FECA, violations of which warrant criminal prosecution. This was true even when violations of section 441f were misdemeanors. Id. at 96-97.

IV. TWENTY-TWO STATES HAVE INCORPORATED THE LANGUAGE OF SECTION 441f INTO THEIR CAMPAIGN FINANCE LAWS AND HAVE INTERPRETED IT TO PROHIBIT REIMBURSEMENTS TO CONDUIT CONTRIBUTORS.

The meaning of the language of Section 441f is so well-established that twenty-two states have incorporated the same or similar language into their own

campaign finance laws.⁷ State court rulings and advisory opinions from state officials also interpret the adopted language as prohibiting reimbursements. See Latchem v. State, No. A-6417, 4084, 1999 WL 587238 (Alaska Ct. App. August 4, 1999); State v. Azneer, 526 N.W.2d 298 (Iowa 1995); State v. Palmer, 810 P.2d 734 (Kan. 1991). See also 1998 Ill. Atty. Gen. Op. 004, 1998 WL 205432 (Ill. A.G.); 1997 Kansas Commission on Governmental Standards and Conduct Op. 1997-45, 2 (Kan. September 11, 1997).

In Azneer, the Supreme Court of Iowa acknowledged that the practice of employers making surreptitious political contributions by reimbursing employees for contributions to selected candidates was a violation of the state's prohibition on contributions in the name of another: "We think Iowa Code section 56.12 addresses conduct that is *malum prohibitum*...It is easy to imagine employers who wish to make political contributions without being exposed to any political consequences. The practice posed by the facts may well not engender admiration. The legislature was obviously prompted to criminalize them." State v. Azneer, 526 N.W.2d at 300.

⁷ Ala. Code § 17-5-15; Alaska Stat. § 15.13.074(b); Ariz. Rev. Stat. §16-907; Cal. Gov't Code § 91079(c); Del. Code Ann. tit. 15, § 8006; D.C. Code Ann. § 1-1131.01(e); Fla. Stat. ch. 106.08(5)(a); Haw. Rev. Stat. § 11-202; 10 Ill. Comp. Stat. 5/9-25; Ind. Code § 3-14-1-11; Iowa Code § 68A.502; Kan. Stat. Ann. § 25-4154(a); La. Rev. Stat. Ann. § 18:1505.2(A); Me. Rev. Stat. Ann. tit. 21-A, § 1004(3); Mo. Rev. Stat. § 130.031(3); Nev. Rev. Stat. § 294A.112; N.J. Stat. Ann. § 19:44A-20; N.C. Gen. Stat. § 163-278.14; Ohio Rev. Code Ann. § 3517.13(G); R.I. Gen. Laws § 17-25-12; S.D. Codified Laws § 12-27-12; Wis. Stat. § 11.30(1).

The Kansas Commission on Government Standards spells out its interpretation of the prohibition on contributions in the name of another very clearly: “If “A” gives money to “B” with the understanding that the money will then be contributed to “C,” and “B” then contributes the money to “C,” this would be a violation of the law.” 1997 Kansas Commission on Governmental Standards and Conduct Op. 1997-45, 2 (Kan. September 11, 1997). Similarly, the Illinois Attorney General issued a ruling approving a proposed contribution by a subsidiary at the behest of its parent corporation because there was “no suggestion of any transfer or reimbursement of funds between the subsidiary and the parent corporations related to the contributions. The actual source of the funds in these circumstances is not disguised.” 1998 Ill. Atty. Gen. Op. 004, 1998 WL 205432 (Ill. A.G.). Thus, every federal and state authority that has been called upon to interpret Section 441f’s language has reached the same inescapable conclusion: the language prohibits the reimbursement of conduit contributors.

V. THE LOWER COURT FAILED TO DEFER ADEQUATELY TO THE FEDERAL ELECTION COMMISSION’S INTERPRETATION OF THE LANGUAGE OF SECTION 441f.

The FEC, like the Department of Justice, has interpreted Section 441f as prohibiting reimbursements to conduit contributors for decades. 11 C.F.R § 110.4(b)(2)(i). While the FEC regulation interpreting Section 441 was enacted in

1989, the FEC had taken the same position in advisory opinions for many years.

See, e.g., FEC Advisory Opinion 1986-41; FEC Advisory Opinion 1984-52.

It is well established that courts generally must defer to agency interpretations of the statute they are responsible for executing, especially when the agency's interpretation is longstanding and consistently applied. Barnhart v. Walton, 535 U.S. 212, 220 (2002); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, n.30 (1987); Marmolejo-Campos v. Holder, 558 F.3d 903, 920 n.3 (9th Cir. 2009) (Berzon, C.J., dissenting); Arizona Health Care Cost Containment System v. McClellan, 508 F.3d 1243, 1253-4 (9th Cir. 2007). The Supreme Court stated in Barnhart "this Court will normally accord particular deference to an agency interpretation of "longstanding" duration." Barnhart, 535 U.S. at 220. The Ninth Circuit has ruled that the courts must defer to an agency's interpretation of a statute that, like the FEC's interpretation of section 441f, had been in effect and remained consistent for over 20 years. Arizona Health Care Cost Containment System v. McClellan, 508 F.3d at 1253-4 (quoting Barnhart).

The Supreme Court has held the FEC in particular is precisely the type of expert agency whose interpretation of its organic statute merits presumptive deference. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981). Other courts have followed suit. See Federal Election

Comm'n v. Furgatch, 869 F.2d 1256, 1260 (9th Cir. 1989); Federal Election Comm'n v. Ted Haley Congressional Comm., 852 F.2d 1111, 1115 (9th Cir. 1988); California Medical Ass'n v. Federal Election Comm'n, 641 F.2d 619, 630 (9th Cir. 1980). Indeed, the fact that the FEC is “inherently bipartisan... and ... must decide issues charged with the dynamics of party politics, often under the pressure of an impending election” contributed to the Supreme Court’s conclusion that the FEC in particular is entitled to deference. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. at 37. As a result, the FEC’s interpretation should only be rejected by the courts if it is “contrary to law.” Id. Nevertheless, here the District Court inappropriately failed to defer to the FEC’s expertise and experience interpreting the Act.

CONCLUSION

For the above stated reasons, as well as those set forth in the government’s brief, this Court should reverse the District Court’s ruling.

DATED: September 21, 2009

Respectfully submitted,

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