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22 UNITED STATES DISTRICT COURT
 23 CENTRAL DISTRICT OF CALIFORNIA

24 UNITED STATES OF AMERICA,

25 Plaintiff,

26 v.

27 PIERCE O'DONNELL,

28 Defendant.

No.: 2:08-CR-872 (SJO)

**REPLY BRIEF IN SUPPORT OF
 DEFENDANT'S MOTION TO
 DISMISS THE INDICTMENT**

Date: May 4, 2009

Time: 10:00 a.m.

Place: Courtroom 880

Estimated Time to Present

Motion: 30 minutes

INTRODUCTION

Crediting the basis for the Government's Opposition to Mr. O'Donnell's Motion to Dismiss the Indictment ("Opp. Br.") would turn fundamental principles of our system of jurisprudence on their head:

- The government seeks to shift the burden to Mr. O'Donnell, arguing that the

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1 “Defendant’s analysis . . . does not show that § 441f *allows* for
2 reimbursement of conduit contributions.” Opp. Br. at 5 (emphasis added).
3 But individuals do not bear the burden of establishing their innocence; rather,
4 the government bears the burden of establishing a violation of the statute
5 charged. This principle is particularly important when, as here, the defendant
6 was engaged in conduct protected by the First Amendment.

- 7 • The text of 2 U.S.C. § 441f simply prohibits an individual from making a
8 contribution and providing a false name; it does not even mention, let alone
9 expressly prohibit, reimbursements of contributions made by others, the
10 offense charged in the Indictment. Apparently recognizing this, the
11 government does not argue that a reimbursement is a “contribution in the
12 name of another person.” Rather, it argues that Mr. O’Donnell “*essentially*
13 made a contribution in the name of another,” Opp. Br. at 5 (emphasis added),
14 or “*basically* [made] a contribution in the name of another person.” Opp. Br.
15 at 10-11 (emphasis added). The government is constitutionally precluded,
16 however, from extending criminal proscriptions beyond the statutory text to
17 cover conduct that the government thinks is “essentially” or “basically”
18 prohibited.
- 19 • The government also tries to stretch the definition of “contribution” to cover
20 reimbursements, stating that a reimbursement is “something of value, and,
21 therefore, within the definition of ‘contribution.’” Opp. Br. at 6.¹ A
22 fundamental tenet of statutory construction, however, requires that this
23 general definition and its “something of value” clause (relied on by the
24 government to render a reimbursement of a “contribution” a “contribution”)

25 ¹ “The term ‘contribution’ includes—(i) any gift, subscription, loan, advance,
26 or deposit of money or anything of value made by any person for the purpose of
27 influencing any election for Federal office; or (ii) the payment by any person of
28 compensation for the personal services of another person which are rendered to a
political committee without charge for any purpose.” 2 U.S.C. § 431(8)(a) (Supp.
II 2000).

1 not be construed so as to render other portions of the Federal Election
2 Campaign Act (“FECA”) superfluous. Including reimbursements within the
3 definition of “contribution” would impermissibly render superfluous portions
4 of § 441a(a)(8)² and other sections of the FECA— such as § 441e’s
5 prohibition of “direct or indirect” contributions by foreigners. This construct
6 would impermissibly render § 441f identical to prohibitions which expressly
7 include “direct or indirect” language in regulating certain types of
8 contributions, violating another fundamental principle of statutory
9 construction: when Congress includes language in one section of a statute but
10 omits it in another of the same act, it is presumed that Congress intended the
11 sections to have different meanings.

- 12 • The government also relies on dicta or decisions that do *not* hold that § 441f
13 prohibits reimbursements. The government does not—and cannot—dispute
14 the fact that *no* court has ever held that § 441f prohibits reimbursements of
15 campaign contributions made by others using their true names.

16 The government’s attempt to contort § 441f to encompass Mr. O’Donnell’s
17 alleged conduct runs afoul of bedrock principles of due process and federal criminal
18 law, especially in the context of conduct protected by the First Amendment.
19 Consequently, Counts One and Two must be dismissed.

20 The government’s efforts to save Count Three are equally unavailing.
21 Because campaign financing is not otherwise corrupt conduct, a § 1001 violation
22 arising in that context requires additional elements of knowledge—specifically, that
23 the defendant knew of the unlawfulness of his actions. The Ninth Circuit has held
24 that an indictment must allege *all* elements of an offense, including those required
25 by caselaw. Because the Indictment here does not do so, it is fatally defective. The
26 government has simply ignored this rule. Moreover, the challenged statement was

27 ² Mr. O’Donnell assumes that the government’s references to 2 U.S.C. §
28 441a(a)(1)(8), which does not exist, were intended to be references to § 441a(a)(8).

1 literally true, because it correctly reported the names of the contributors. If those
2 contributors did not comply with their statutory obligation to report the “original
3 source” of their contributions, that does not make the Treasurer’s statement false or
4 make, on a causation theory, Mr. O’Donnell liable under § 1001.

5 ARGUMENT

6 I. COUNTS ONE AND TWO FAIL TO ALLEGE A CRIME, AND 7 THEREFORE MUST BE DISMISSED.

8 A. The Government Concedes That the Clear Language of § 441f 9 Does Not Prohibit the Alleged Activities.

10 The government’s opposition concedes, as it must, that the express language
11 of § 441f does not prohibit reimbursing someone for a contribution made using his
12 or her true name. *See* Opp. Br. at 5, 10-11.

13 B. Contrary to the Government’s Pleading, There Is Not and Cannot 14 Be Any Burden on Mr. O’Donnell to Show That His Conduct Was 15 Allowed.

16 The government does not and cannot show that § 441f expressly prohibits
17 reimbursements. Rather, as noted, the government seeks to engage in
18 constitutionally impermissible burden-shifting, asserting that “Defendant’s analysis
19 . . . does not show that § 441f allows for reimbursement of conduit contributions.”
20 Opp. Br. at 5. It is axiomatic that there is no federal common law of crime and that
21 the only federal crimes are those that are prohibited by statute. *United States v.*
22 *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). The burden is on the government to
23 allege in an indictment (and prove at trial) facts that constitute all the elements of
24 the crime charged and this burden may never constitutionally shift to the defendant.
25 *United States v. Omer*, 395 F.3d 1087, 1088-89 (9th Cir. 2005); *Carella v.*
26 *California*, 491 U.S. 263, 265, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (stating
27 that jury instructions relieving the government of its burden to prove beyond a
28 reasonable doubt every element of the charged offense violated the defendant’s due
process rights). This rule must be strictly applied when the government alleges

1 conduct that is otherwise constitutionally protected. *See Buckley v. Valeo*, 424 U.S.
2 1, 40-41, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

3 The government concedes that the text of § 441f does not prohibit
4 reimbursements:

- 5 • “[W]hen defendant channeled that money through a
6 conduit contributor, defendant *essentially* made a
7 contribution in the name of another person.” Opp. Br. at
8 5 (emphasis added).
- 9 • “Funneling money to another person (through either an
10 advance or reimbursement) in order for that person to
11 make a contribution is *basically* a contribution in the
12 name of another person.” Opp. Br. at 10-11 (emphasis
13 added).

14 However, a criminal statute prohibits only that conduct which it expressly prohibits,
15 and not other conduct that is “essentially” or “basically” like that which is
16 prohibited. Moreover, the rule of lenity³ would clearly bar construing the statute to
17 prohibit conduct which is not expressly prohibited but rather “essentially” or
18 “basically” like that prohibited.⁴ And of course these rules apply with even greater
19 force in the context of campaign-related activity otherwise protected by the First
20 Amendment.

21 The government’s argument that the definitional section of the FECA saves
22 the Indictment fails on the express terms of the statute. Section 441f specifically
23 does not include “indirect” contributions within those contributions subject to its
24 proscriptions. 2 U.S.C. § 441f. The government attempts to blur this point before
25

26 ³ The Supreme Court has repeatedly recognized the rule as a fundamental
27 component of due process. *See, e.g., United States v. Santos*, 553 U.S. ---, 128 S.
28 Ct. 2020, 2028, 170 L. Ed. 2d 912 (2008) (Scalia, J., plurality opinion); *United*
States v. Bass, 404 U.S. 336, 347, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971); *United*
States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95, 5 L. Ed. 37 (1820).

⁴ Defendant agrees that the rule of lenity cannot be used to “dictate an
implausible interpretation of a statute.” Opp. Br. at 10 (quoting *United States v.*
Carr, 513 F.3d 1164, 1168 (9th Cir. 2007)). What the rule does do, however, is
confine a criminal statute to its textual expression. It is the government’s
interpretation of § 441f that is an “implausible” interpretation because the text does
not mention reimbursements or indirect contributions.

1 the Court by citing the definition of contributions under 2 U.S.C. § 441a(a)(8),
 2 which includes indirect contributions for purposes of prohibiting more than the
 3 aggregate amount allowed for individual contributions. That definition is expressly
 4 limited to that section of the statute setting contribution limits and it does not apply
 5 to § 441f, the statute under which the government chose to charge Mr. O'Donnell.

6 The prosecutor cannot ask the Court to misapply a statute, whether to seek a
 7 greater penalty or for any other reason.⁵ It is the job of the Legislature to establish
 8 crimes and the Executive is constitutionally prohibited from exceeding the express
 9 provisions of a criminal statute. *United States v. Sanchez-Vargas*, 878 F.2d 1163,
 10 1168 (9th Cir. 1989) (stating “the power to define federal criminal offenses and to
 11 prescribe their punishments rests wholly with Congress”). When the Executive
 12 attempts to do so, the Judicial branch has no choice but to curb its excess.

13 C. No Court Has Held That § 441f Prohibits Reimbursements.

14 The government does not—and cannot—dispute the point that no court has
 15 ever held that § 441f prohibits reimbursements of campaign contributions made by
 16 others using their true names.⁶ Nonetheless, citing dicta or decisions that simply do
 17

18 ⁵ Section 441f has a lower aggregate threshold for a felony prosecution than §
 19 441a. Compare 2 U.S.C. § 437g(d)(1)(D) (\$10,000 felony threshold for a violation
 20 of 2 U.S.C. § 441f), with 2 U.S.C. § 437g(d)(1)(A) (\$25,000 felony threshold for a
 violation of 2 U.S.C. § 441a).

21 ⁶ The government's citations to Federal Election Commission (“FEC”)
 22 advisory opinions and regulations are also unavailing. Although the Ninth Circuit
 23 has not yet ruled on the issue, see *United States v. Douglas*, 974 F.2d 1046, 1047
 24 n.1 (9th Cir. 1992) (“it is unclear whether an agency's interpretation of a *criminal*
 25 statute is entitled to deference”) (emphasis in original), the better view is that there
 26 is no deference whatsoever to agency interpretations in criminal cases because, as
 27 Justice Scalia has explained, “[t]he law in question, a criminal statute, is not
 28 administered by any agency but by the courts.” See *Crandon v. United States*, 494
 U.S. 152, 177, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring);
 see, e.g., *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (“[u]nlike
 environmental regulation or occupational safety, criminal law and the interpretation
 of criminal statutes is the bread and butter of the work of federal courts”); but see
United States v. Crop Growers Corp., 954 F. Supp. 335, 357 (D.D.C. 1997)
 (deferring to an agency interpretation in a criminal case). In any event, even if
 deference were appropriate in criminal cases, courts are not required to give any
 deference to agency interpretations where, as here, the statute is clear and

1 not address whether § 441f prohibits reimbursements, the government's pleading
2 would have the Court conclude otherwise.

3 As the government admits, the Third Circuit in *Mariani* merely "noted" its
4 view that § 441f proscribed "conduit contributions." Opp. Br. at 4 (citing *Mariani*
5 *v. United States*, 212 F.3d 761, 775 (3d Cir. 2000)). Whether § 441f proscribed
6 conduit contributions was not before that court and was not decided by it.

7 Similarly, before the D.C. Circuit in *Sun-Diamond* was the defendant's argument
8 that it could not be vicariously liable under § 441f for an employee's actions that
9 harmed Sun-Diamond, not whether § 441f prohibited reimbursements. *See United*
10 *States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970 (D.C. Cir. 1998).

11 The government's reliance on *Goland v. United States*, 903 F.2d 1247 (9th
12 Cir. 1990), is equally misplaced. Goland, who was alleged to have made conduit
13 contributions, argued unsuccessfully in a separate civil suit that § 441f violated his
14 constitutional right to contribute to political campaigns anonymously. *See id.* at
15 1252. Like the courts that decided *Mariani* and *Sun-Diamond*, the Ninth Circuit
16 simply was not faced with a challenge as to whether § 441f prohibited
17 reimbursements. Goland's prosecution under both § 441a and § 441f ended in a
18 mistrial. *See United States v. Goland*, 897 F.2d 405, 407-08 (9th Cir. 1990).
19 Goland was re-indicted and convicted under § 441a, but not § 441f. *See United*
20 *States v. Goland*, 959 F.2d 1449, 1451-52 (9th Cir. 1992). Contrary to the
21 government's reliance on *Goland* to blur further the distinction between §§
22 441a(a)(8) and 441f, the decision underscores the material difference between these
23 distinct provisions in the statute.

24
25
26
27 unambiguous. *See Barnhart v. Walton*, 535 U.S. 212, 217-18, 122 S. Ct. 1265, 152
28 L. Ed. 2d 330 (2002).

1 **D. The Government’s Interpretation of § 441f Renders Portions of §**
2 **441a(a)(8) and Other Sections of the FECA Superfluous and Also**
3 **Reads § 441f, Which Does Not Include “Direct or Indirect”**
4 **Language, as Identical to Prohibitions Which Include Such**
5 **Language, Violating Fundamental Principles of Statutory**
6 **Construction.**

7 Because a textual analysis of the statute under which Mr. O’Donnell is
8 charged is dispositive, we respectfully submit that the government’s arguments
9 concerning its “interpretation” of the statute are irrelevant. Nonetheless, we address
10 the government’s view that § 441f can be interpreted to prohibit reimbursements.

11 The government suggests that the definition of a “contribution” in § 431(8)
12 incorporates the “direct or indirect” language of § 441a(a)(8) and claims that Mr.
13 O’Donnell’s position “defies logic.” Opp. Br. at 6. The government’s position,
14 however, contravenes two fundamental principles of statutory construction.

15 A principal rule of statutory interpretation is that interpretations of statutes
16 that render terms of the statute superfluous should be avoided. *TRW Inc. v.*
17 *Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001). If the
18 definition of “contribution” included reimbursements, § 441a(a)(8) would not need
19 to refer to “either directly or indirectly . . . including contributions which are in any
20 way earmarked or otherwise directed through an intermediary or conduit,” as those
21 would all already be included in the simple term “contribution.” See Def. Mem. of
22 Pts. & Auth. at 15-16. The government’s interpretation would also make
23 superfluous the “directly or indirectly” language included in other prohibitions,
24 such as § 441e(a)(1)’s prohibition of foreign nationals making campaign
25 contributions “directly or indirectly,” because under the government’s theory the
26 definition of “contribution” would already include “indirect” contributions.

27 Moreover, the government’s interpretation would read the prohibition on
28 contributions using in the name of another and that on contributions by foreigners
29 as both reaching “direct or indirect” contributions, even though the text of the latter

1 prohibits “direct or indirect” contributions and the text of the former does not.
 2 Interpreting the former as prohibiting “indirect” conduct like the latter would
 3 violate another fundamental principle of statutory construction: when “Congress
 4 includes language in one section of a statute but omits it in another section of the
 5 same Act, it is generally presumed that Congress acts intentionally and purposefully
 6 in the disparate inclusion and exclusion.” *Barnhart v. Sigmon Coal Co.*, 534 U.S.
 7 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908, (2002) (citations omitted); *see, e.g.*,
 8 *Hamdan v. Rumsfeld*, 548 U.S. 557, 578, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)
 9 (“a negative inference may be drawn from the exclusion of language from one
 10 statutory provision that is included in other provisions of the same statute”). The
 11 government’s contrary argument is wholly unpersuasive.

12 **E. It Would Be Unconstitutional to Apply § 441f to Reach the**
 13 **Conduct Charged Here.⁷**

14 The government incorrectly contends that the constitutionality of § 441f was
 15 already decided by the Third Circuit. The government ignores the fact that the Mr.
 16 O’Donnell’s constitutional challenge is not the challenge considered in *Mariani*.⁸
 17 Congress may only regulate activity that touches on First Amendment values

18 ⁷ It is unclear why the government addresses 2 U.S.C. § 437h’s automatic
 19 certification provision, which applies only to civil proceedings, not to constitutional
 20 defenses in criminal cases. *See Goland*, 903 F.2d at 1256 (“There is nothing in this
 21 system . . . that diminishes the otherwise available options for an individual who
 has been charged with violating a FECA provision.”); *United States v. Clifford*, 409
 F. Supp. 1070, 1072 (E.D.N.Y. 1976) (“There is no need for the expedited review
 provision of § 437h in a criminal action, since review may be had on appeal.”).

22 ⁸ In *Mariani*, the plaintiff argued that § 441f violated the First Amendment
 23 because (1) no compelling state interest supported § 441f’s prohibition on
 24 contributing in the name of another, and (2) § 441f was unconstitutionally
 25 underinclusive, because it could be effectively circumvented through “soft money”
 26 donations to party organizations in support of issue advocacy. *See* 212 F.3d at 775.
 27 The Third Circuit held that § 441f, when combined “with the concomitant
 28 requirement that the true source of contributions be disclosed,” advanced a
 compelling state interest. *Id.* The Third Circuit also held that Congress’s
 determination to limit regulation to hard money donations did not render § 441f
 unconstitutionally underinclusive. *Id.* The court did not address whether Congress
 made the necessary findings and properly tailored the statute as required by the
 Supreme Court. *See id.*; *Randall v. Sorrell*, 548 U.S. 230, 247, 126 S. Ct. 2479,
 165 L. Ed. 2d 482 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 25).

1 through a “closely drawn” statute based on a carefully considered record that
2 establishes the “sufficiently important” government interest in the restriction.
3 *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 25). Assuming *arguendo*
4 that Congress may regulate the reimbursement of campaign contributions, § 441f is
5 certainly not such a “carefully drawn” proscription: the statute does not mention
6 reimbursements and the legislative history contains none of the findings that would
7 support such a restriction on otherwise protected First Amendment activity.
8 *Mariani* did not address, let alone resolve, this challenge.⁹

9 **II. COUNT THREE FAILS TO PROPERLY ALLEGE THAT MR.**
10 **O’DONNELL CAUSED A VIOLATION OF 18 U.S.C. § 1001.**

11 Rather than present any cogent theory that Count Three states the required
12 elements of a violation of 18 U.S.C. § 1001, the government simply takes issue
13 with the application of some of the cases cited by Mr. O’Donnell (and ignores one
14 dispositive case cited by failing to address it).

15 In the context of reimbursements of campaign contributions, § 1001 requires
16 a heightened degree of criminal knowledge. Specifically, an indictment alleging a
17 violation of § 1001 requires an allegation that the defendant knew of the
18 unlawfulness of his actions. *See United States v. Curran*, 20 F.3d 560, 570-71 (3d
19 Cir. 1994).¹⁰ An indictment must allege all elements of an offense, even those
20 required only by caselaw. *Omer*, 395 F.3d at 1089. The government simply fails to
21 address the *Omer* rule. Because Count Three does not set forth all the elements of a
22 § 1001 violation—specifically, it does not allege facts stating that Mr. O’Donnell

23 ⁹ Additionally, applying § 441f to the conduct alleged here would violate due
24 process principles of notice and First Amendment requirements that Congress make
25 careful findings and closely drawn statutes to prohibit conduct otherwise protected
26 by the First Amendment. *See* Def. Mem. of Pts. & Auth. at 20-24.

27 ¹⁰ The government’s contention that *Curran* is inapplicable because the Third
28 Circuit did not address whether the indictment itself was sufficient is unavailing.
The Ninth Circuit made clear in *Omer* that an indictment is sufficient only if it sets
forth all the elements of the crime alleged. 395 F.3d at 1089. *Curran* specifically
set forth the elements required to prove a § 1001 offense in the context of a FECA
violation. *See* Def. Mem. of Pts. & Auth. at 8-11.

1 knew that his alleged conduct was unlawful—it is defective and must be dismissed.

2 The government’s claim that its inclusion of the boilerplate allegation that
3 Mr. O’Donnell acted “knowingly and willfully” is sufficient is specious. The Ninth
4 Circuit, in *Omer*, rejected the sufficiency of simply quoting the words of the statute
5 where courts had held that additional elements were required for a conviction. *Id.*
6 at 1088-89. The Ninth Circuit held that the government’s failure to allege such
7 additional elements was a “fatal flaw requiring dismissal of the indictment.” *Id.*; *see*
8 *Def. Mem. of Pts. & Auth.* at 8-9. *Omer* relied on *United States v. Du Bo*, which
9 the held that allowing convictions on indictments that do not allege all of the
10 necessary elements of an offense runs the risk that a defendant could be convicted
11 ““on the basis of facts not found by, and perhaps not even presented to, the grand
12 jury that indicted him.”” 186 F.3d 1177, 1179 (9th Cir. 1999) (citations omitted);
13 *see Omer*, 395 F.3d at 1088.¹¹

14 The present Indictment similarly provides no assurance that facts supporting
15 the necessary elements of the offense were found by—or even presented to—the
16 grand jury.¹² The need for the Indictment to allege Mr. O’Donnell’s knowledge of
17 unlawfulness is particularly acute in this case, where the law specifically puts the
18 duty to report the original source of conduit or intermediary contributions on those
19 who actually tender the contributions. *See* § 441a(a)(8).

20 On the face of the Indictment, the statement challenged was literally true as it
21 correctly reported the names of the contributors. *See* *Def. Mem. of Pts. & Auth.* at

22
23 ¹¹ The government argues that *Du Bo* is distinguishable as a case involving a
24 facially deficient indictment and that the deficiency existed because the indictment
25 failed to allege all of the elements of the statutory offense. *See* *Opp. Br.* at 19.
Omer, however, involved an indictment that tracked the language of the statute but
26 nonetheless violated the principles articulated in *Du Bo* for failing to charge
27 judicially-created elements of the offense. *See Omer*, 395 F.3d at 1088-89.

28 ¹² The government’s reliance on *United States v. Hsia*, 176 F.3d 517 (D.C.
Cir. 1999), *Opp. Br.* at 19 n.9, is misplaced because the Ninth Circuit rejected *Hsia*
as the correct standard for willfulness and has recognized that the government must
prove a heightened level of intent when innocent conduct might trigger criminal
liability under complex statutory schemes. *See* *Def. Mot. of Pts. & Auth.* at 10-11.

1 11-13. If those contributors did not comply with their obligation to report the
 2 “original source” of their contributions—an obligation the statute places only on
 3 them and not on the “original source”—that does not make the Treasurer’s
 4 statement false or provide a basis for an adequate allegation that Mr. O’Donnell is
 5 liable under § 1001. The government’s reliance on *Hsia*, 176 F.3d 517, and
 6 *Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1997), is misplaced. *See* Opp. Br. at 20-21.
 7 The D.C. Circuit in *Hsia* and *Kanchanalak* did not discuss the obligation §
 8 441a(a)(8) places on the contributors—and not on the original source—to report the
 9 “original source” of the contribution and thus its decisions, which of course are not
 10 binding on this Court, are not persuasive.¹³

11 CONCLUSION

12 For the reasons stated herein, as well as the reasons stated in Mr.
 13 O’Donnell’s Motion to Dismiss the Indictment and Memorandum of Points and
 14 Authorities in support thereof, the Indictment must be dismissed.

15 Dated: April 27, 2009

Respectfully Submitted,

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 26 ¹³ The only FECA violations involved in these cases were 2 U.S.C. §§ 441b
 27 and 441e, which prohibit contributions by corporations and foreign nationals,
 28 respectively, made “directly or indirectly.” The government did not charge a
 violation of § 441f, which contains no such “direct or indirect” prohibition. Thus,
 the law applicable in those cases was materially different from that applicable here.