App. No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

DIMITRIOS N. KESARI

Applicant,

v.

UNITED STATES

Respondent.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUT

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PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Gorsuch, as Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner Dimitrios N. Kesari respectfully requests that the time to file a petition for a writ of certiorari in this case be extended for thirty days to November 5, 2018. The Eighth Circuit issued its opinion on April 6, 2017, Appendix ("App.") A, entered an amended judgment on May, 15, 2018, App. B, and denied a timely petition for rehearing and rehearing *en banc* on July 6, 2018, App. C. Absent an extension of time, the petition will be due on October 4, 2018. Petitioner files this application at least ten days before that date. *See* Sup. Ct. R. 13.5. The Court has jurisdiction under 28 U.S.C. § 1254(a) to review this case.

Background

This case involves important and recurring issues concerning the intersection of campaign-finance laws and federal false-statement statutes:

1. Kesari was Ron Paul's deputy campaign manager for his 2012 presidential candidacy. In late 2011, Iowa state senator Kent Sorenson

offered to leave Michelle Bachman's campaign and join the Paul campaign. Sorenson wanted to be paid for joining and working for the Paul campaign, just as he was paid by the Bachman campaign. Soon thereafter, Sorenson began working for the Paul campaign by, *inter alia*, recording robocalls, publicly appearing in person and on television, and traveling in support of Paul's candidacy. The campaign arranged to pay Sorensen in monthly installments that were invoiced by and routed through Interactive Communications, Inc. ("ICT"). *See* App. A, at 3-8.

The Federal Election Campaign Act of 1971 ("FECA") requires campaigns for federal office to report its expenditures to the Federal Election Commission ("FEC"). *See* 52 U.S.C. §§ 30104(a)(1), (b)(5)(A). Consistent with the invoices it received and the payments it sent out, the Paul campaign reported the payments as going to ICT for "audio/visual services." Federal law does not prohibit the use of intermediaries to pay vendors or reporting only the immediate, rather than ultimate, recipient of campaign expenditures. Federal law also does not prohibit paying an individual for his or her endorsement. *See* App A, at 21.

2. The government nevertheless charged three officials from the Paul campaign—including Kesari—with multiple felonies. Because the

conduct described above is not criminal, the charges were premised on an unusually narrow theory: that the defendants had caused reports to be filed with the FEC that falsely described the purpose of the payments as "audio/visual expenses" and that the campaign misidentified the payment's recipient as (correctly) being to ICT rather than Kent Sorenson. Furthermore, the government charged that these reports not only violated FECA, but the statute prohibiting false statements to federal agencies (18 U.S.C. § 1001), the Sarbanes-Oxley Act (18 U.S.C. § 1519), and the conspiracy statute (18 U.S.C. § 371). *See* App A, at 9.

A first trial resulted in the jury deadlocking on offenses against Kesari requiring the heightened *mens rea* of willfulness, specifically the conspiracy, FECA, and § 1001 counts; a partial mistrial was declared. The jury did convict Kesari of the Sarbanes-Oxley count and acquitted him of obstructing justice. The government responded by electing to re-try Kesari on the hung counts, and re-charging Tate and Benton, in a superseding indictment that was substantially identical to the first four counts of the original indictment. All three defendants were tried together on the remaining charges. At the second trial, Kesari was convicted on all charges. *See* App A, at 9.

3. The Eighth Circuit affirmed. The court rejected Kesari's argument that the government failed to prove materiality as required by the false-statement statute. The court also rejected the argument that the government failed to prove that, by filing the expenditure reports, Kesari obstructed "a matter within the jurisdiction" of the FEC. Moreover, the Court rejected Kesari's argument that the campaign's expenditure reports complied with FECA. *See* App A, at 16.

Reasons For Granting An Extension Of Time

The time to file a petition for a writ of certiorari should be extended for thirty days, to October 4, 2018, for several reasons, including:

The forthcoming petition will present two important questions of federal law this Court should resolve. First, the petition will present an important question about the application of campaign finance law. Campaign treasurers must disclose to the Federal Election Commission "the name and address of each [] person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee" along with, among other things, the purpose of such operating expenditure. 52 U.S.C. § 30104(a)(1), (b)(5)(A). The Federal Election Commission recently failed to find legal violations

in *Boustany, Jr. MD for Congress*, MUR 6698 (FEC Feb. 23, 2016),[1] a case that set forth allegations similar to those in this case.

The *Boustany*[2] precedent is important because, in matters of statutory interpretation, the FEC is "precisely the type of agency to which deference should be presumptively afforded." *Republican National Senatorial Committee,* 966 F.2d at 1476 (*citing Federal Election Commission v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 37 (1981). The panel's attempt to distinguish *Boustany* from this case fails for at least two reasons. First, as were the allegations in this case, the Boustany campaign was alleged to have

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[1] In the *Boustany* matter, the FEC split three-to-three and dismissed the complaint. When the FEC deadlocks and dismisses a complaint, however, the commissioners voting to dismiss the complaint are the controlling group for purposes of the decision and "their rationale necessarily states the agency's reasons for acting as it did." *Federal Election Commission v. Republican National Senatorial Committee*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

[2] The *Boustany* decision is in accord with other FEC decisions. *See Mondale for President,* FEC Advisory Opinion 1983-25; *Kirk for Senate,* FEC MUR 6510 (FEC July 16, 2013). The only FEC precedent to the contrary is *In The Matter of Jenkins for Senate 1996 and Woody Jenkins,* MUR 4872 (FEC Feb. 15, 2002). The *Jenkins* matter was a conciliation agreement and so the legal arguments were not "litigated" before the FEC. Nevertheless, in the sixteen years since *Jenkins,* the FEC decided *Kirk* and *Boustany,* thus effectively repudiating the parts of *Jenkins* conciliation to which those decisions are inconsistent.

paid the expenses through a third-party and labeled the expenditures as "door-to-door GOTV" activities for the purpose of hiding the final recipient and true purpose of the expenditure. This is materially indistinguishable from the allegations against Kesari.

Second, the decision fails to provide candidates and campaign professionals with a clearly delineated rule explaining when an inaccurate purpose description is *sufficiently* incorrect to result in criminal liability. The result is a rule that is unbounded in scope. When campaigns are charged with labeling campaign expenditures, the amount of accuracy required is not defined by the panel "with sufficient definiteness that ordinary people can understand what conduct [is] prohibited or in a manner that does not encourage arbitrary and discriminatory enforcement." *McDonnell v. United States,* 136 S. Ct. 2355, 2373 (2016). Indeed, Kesari, and all campaign professionals, are entitled to "fair warning... that the common world will understand, of what the law intends to do if a certain line is passed." *Marinello v. United States,* 138 S. Ct. 1101, 1106 (2018) (internal quotation omitted). Kesari never had such fair warning and the decision fails to define the line of culpability with any definiteness.

Second, the petition will present an important question about materiality under Section 1001—which, here, requires Kesari to have "knowingly and willfully ... falsifie[d] ... a material fact" in a "matter within the [FEC's] jurisdiction." 18 U.S.C. § 1001(a)(1). Under this "rigorous" and "demanding" rule, an agency must demonstrate that it would have acted differently if the defendant had told the truth. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2002-03 (2016). In other words, "what is relevant" for purposes of establishing materiality "is what would have ensued from official knowledge of the misrepresented fact ... not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood." *Kungys v. United States*, 485 U.S. 759, 775 (1988).

Numerous circuit courts have adopted and applied this interpretation of the materiality requirement. *See, e.g. United States v. Moyer*, 674 F.3d 192, 208 n.8 (3d Cir. 2012); *United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996); *United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994); *United States v. Johnson*, 530 F.2d 52, 55 (5th Cir. 1976). Yet the Eighth Circuit ignored it. The government never proved

that the FEC would have made a different decision had the Paul campaign reported the payments to ICT as attributable to "Sorenson's endorsement" instead of "audio/visual expenses." In overriding this essential requirement, the Eighth Circuit has rendered every statement in an expenditure report material and thus read "materiality out of the statute." *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004). As Judge Easterbrook has observed, for example, "[d]eliberately using the wrong middle initial ... is not a felony—not unless the right middle initial could be important." *United States v. Kwiat*, 817 F.2d 440, 445 (7th Cir. 1987) (emphasis added). The Court's guidance is needed on this recurring federal question that the Eighth Circuit incorrectly decided.

2. No prejudice would arise from the extension. Whether or not the extension is granted, the petition will be considered during this Term and the case would be heard either this Term or next Term should the Court choose to grant the writ. The judgment below will be in force and effect pending the disposition of this petition for a writ of certiorari.

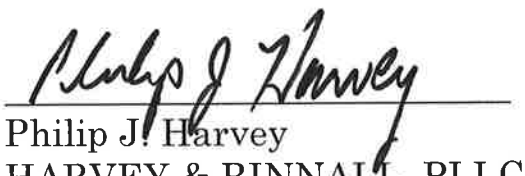
3. The press of other matters before other federal courts makes the submission of the petition difficult absent an extension. Applicant's counsel is counsel in several other cases with impending deadlines.

Conclusion

For these foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended thirty days to and including November 5, 2018.

Dated: September 24, 2018

Respectfully submitted,



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