No. 18-_____

In the Supreme Court of the United States

DIMITRIOS N. KESARI,

Petitioner,

–v–

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Election Campaign Act ("FECA") requires that candidates for federal elected office report certain disbursements to the Federal Election Commission. Among other information, FECA requires the disclosure of the name of payees and the purpose of disbursements. If a candidate pays a vendor, who in turn pays a subvendor with campaign funds, FECA does not require that the candidate disclose the subvendor's name. The FEC keeps only a non-exhaustive list of acceptable and unacceptable purpose statements, but it does not always provide candidates or campaign professionals with clear guidance as to whether or not a specific purpose will be deemed acceptable by the Commission in advance of the report's filing.

The question presented is whether and under what circumstances a report to the Federal Election Commission that does not specify the ultimate recipient of a campaign disbursement or a report that inaccurately describes the purpose of a disbursement can constitute a false report for purposes of federal criminal law.

PARTIES TO THE PROCEEDINGS

Petitioner

- Dimitrios N. Kesari

Respondent

- United States of America

Other Defendants-Appellants Below

- Jesse R. Benton
- John Tate

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JURISDICTION

The Eighth Circuit issued its opinion on May 11, 2018. (App.1a) It denied rehearing en banc on July 6, 2018. (App.63a).

Justice Gorsuch granted an extension of time to file this petition on September 26, 2018. Order, *Kesari v. United States* (18A321).

28 U.S.C. § 1254(1) confers jurisdiction upon this Court.

STATUTORY PROVISIONS

- 18 U.S.C § 2

  (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

  (b) Whoever willfully causes an act to be done which if directly performed by him or another

would be an offense against the United States, is punishable as a principal.

- 18 U.S.C. § 371

  If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

  If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

- 18 U.S.C. § 1001

  (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

  (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

  (2) makes any materially false, fictitious, or fraudulent statement or representation; or

  (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism

(as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

- 18 U.S.C. § 1519

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the inves-

tigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

- **52 U.S.C. § 30104**

  is reproduced at (App.63a).

- **52 U.S.C. § 30109(d)(1)(A)(i)**

  (d) Penalties; defenses; mitigation of offenses

  (1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

  (i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or

  (ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

STATEMENT OF THE CASE

Dimitrios Kesari was a political professional who had served many candidates for public office over the years. During the 2012 presidential election, he was the deputy campaign manager of Ron Paul's pre-

sidential campaign. (App.3a). He also had a pre-existing friendship and political alliance with Iowa State Senator Kent Sorenson. Sorenson was the Iowa chairman for Congresswoman Michelle Bachmann during her bid for the 2012 Republican presidential nomination. (App.3a).

Eventually, Mr. Kesari and Sorenson engaged in discussions about Sorenson switching his support from Congresswoman Bachmann to Dr. Paul. (App.3a-4a). Sorenson made it clear that if he did switch his support, he wanted to be paid for his efforts.[1] (App.4a). On December 28, 2011, Sorenson formally endorsed Dr. Paul and withdrew his support from Congresswoman Bachmann at a rally in Iowa. (App.6a-7a).

After the endorsement, Congresswoman Bachmann accused Sorenson of switching his support for financial gains. (App.7a). Sorenson lied; he denied the accusation in media interviews. (App.7a).

Sorenson subsequently campaigned on behalf of Dr. Paul. (App.9a). He travelled to South Carolina to meet with legislators and appear at rallies. *Id.* He lent his name to bulk emails sent on the Paul campaign's behalf. *Id.* He also recorded calls supporting Dr. Paul. *Id.*

During his engagement with the Bachmann effort, Sorenson had not been paid directly by the Bachmann campaign but rather through a third-party intermediary. He asked Mr. Kesari to arrange a similar system to pay him for his work on behalf of the Paul campaign. Mr. Kesari then arranged for a company

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[1] It is not unlawful for a campaign to pay an individual for his or her endorsement.

called Interactive Communication Technology, Inc. ("ICT") to serve as that third-party intermediary. (App.8a). Under that arrangement, the Paul campaign paid ICT, who would take a commission and then pay Sorenson's company, Grassroots Strategies, Inc. When reporting the expenditures to the Federal Election Commission, the Paul campaign did not report Sorenson as a payee. Instead, it correctly reported that it paid ICT. (App.10a). It also listed the purpose of the disbursements as being for audio-visual services. (App.10a).

The Government indicted Mr. Kesari, along with Paul campaign manager John Tate, and Paul campaign chairman Jesse Benton in 2015. The three were charged with causing false campaigns expenditure reports in violation of FECA, 52 U.S.C. § 30104(a)(1), (b)(5)(A), and 30109(d)(1)(A)(i), conspiracy in violation of 18 U.S.C. § 371, causing false records in violation of the Sarbanes-Oxley Act, 18 U.S.C. § 1519, and false statements under 18 U.S.C. § 1001(a)(2). (App.2a, 10a-11a). Mr. Kesari was also charged with, and subsequently acquitted of, obstructing justice under 18 U.S.C. § 1512(b)(3). (App.11a, 58a).

Except for the obstruction of justice count, of which he was acquitted, each of the charges against Mr. Kesari arose from Government's interpretation of the FECA statutes. Specifically, the Government alleged that Mr. Kesari violated FECA when he caused the FEC reports to show that the Paul campaign had paid ICT for audio-visual services instead of the reports showing that Sorenson had been paid for his endorsement. (App.14a, 50a). Not only did the Government argue that such an act violated FECA, but

it also argued that the act violated § 1519, the Sarbanes-Oxley count, § 1001(a)(2), the false statements count, and that it amounted to an unlawful conspiracy because he allegedly acted with Sorenson, Tate, and Benton.

Mr. Kesari objected to the Government's interpretation of his duties under FECA. Specifically, he argued that he was not prohibited from arranging payment to a subvendor (*i.e.*, Sorenson) through a third-party intermediary (*i.e.*, ICT). Indeed, he argued that such "umbrella vendor" arrangements were normal in campaigns. As such, he was only required to cause the Paul campaign to report the payment to ICT; neither he nor the Paul campaign were required to report ICT's payment to Sorenson. That the purpose of the arrangement may well have been to disguise the disbursements at issue was immaterial.

Mr. Kesari also argued that he did not cause a false purpose to be reported to the FEC because much of Sorenson's activities (*e.g.*, television appearances, recording phone calls, and appearing at rallies) could correctly be identified as being audio-visual in nature. Even so, he explained that he could not be held liable for failing to label the expenditures as being for an endorsement, because that was not a category that the FEC would accept as being sufficient. Mr. Kesari cited multiple FEC decisions that supported his positions.

The district court disagreed with Mr. Kesari and the parties proceeded to a jury trial. Instead of separating the issues into two separate inquires (*i.e.*, whether Mr. Kesari caused a false payee to be reported to the FEC and whether Mr. Kesari caused a false

purpose to be reported to the FEC) the district court lumped them together and considered them as one.

After the trial concluded, the jury was unable to reach a verdict on the FECA count, the conspiracy count, and the false statements counts; a partial mistrial was declared. (App.58a). The jury did convict Mr. Kesari of the Sarbanes-Oxley false records count (almost certainly because that count had a lesser *mens rea*) and acquitted him of obstructing justice. (App.11a). Mr. Kesari moved for a judgment of acquittal, which was denied. (App.56a-61a).

The Government elected to re-try Mr. Kesari on the counts on which the original jury could not reach a unanimous verdict. This time, he was convicted of each of the remaining counts. (App.11a). Subsequently, he was sentenced by the district court. (App.35a-43a). He appealed and the panel affirmed his convictions. (App.34a).

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

This petition presents a critical question that is worthy of this Court's review. The Federal Election Campaign Act regulates the reporting of campaign disbursements to the Federal Election Commission. It is common for campaigns to arrange to pay some vendors through a third-party conduit, which is not

prohibited by law. Here, the courts below adopted the Government's expansive interpretation of the statute that uses judicial gloss to essentially add a good faith requirement into the statute, which expands far past its plain text. That interpretation uses the criminal law to contest unpopular but lawful political behavior, without clearly delineating between the two. The panel's construction of the statute also unnecessarily triggers the constitutional principles of vagueness and lenity.

In formulating its interpretation, the panel rejected decisions of the Federal Election Commission, even though it is a regulatory body to which deference is owed. The FEC had previously decided at least two cases that were directly contrary to the decision of the panel.

I. THE PANEL'S EXPANSIVE INTERPRETATION OF CRIMINALLY ENFORCEABLE CAMPAIGN FINANCE STATUTES MERITS THIS COURT'S REVIEW

The Federal Election Campaign Act requires campaign treasurers to 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). Knowing and willful violations of these reporting requirements carry stiff penalties, up to five years' imprisonment if the aggregate amount is $25,000 or more. *Id.* § 30109(d)(1)(A)(i).

A. The Opinions Below Misapplied Campaign Finance Law and Conflated Unlawful Acts with Unpopular Acts

1. This case turns on whether Mr. Kesari caused false reports of campaign disbursements. The basic facts were undisputed below: Mr. Kesari arranged for the campaign to pay Sorenson through an intermediary, ICT. The campaign proceeded to pay ICT, who in turn paid Sorenson. When reporting those disbursements to the FEC, the campaign treasurer listed the payee as ICT and the purpose as audio-visual expenses.

The primary issues at trial should have been twofold: (1) whether the payee was accurately reported on FEC disbursement reports and (2) whether the purpose was accurately reported on those reports. Instead of addressing those questions independently, the courts below combined them into one question, and in doing so, confused the issues and misstated the law. In affirming Mr. Kesari's conviction, the Eighth Circuit quoted the district court's holding that the "combination of a payee used to disguise the true payee, together with a false statement of purpose, was sufficient to violate the statutes alleged in the indictment." (App.13a, 50a). Congress, however, has not made it unlawful to disguise the ultimate recipient of a campaign disbursement when the actual recipient of that disbursement is disclosed. Even if such an act is distasteful, it is not unlawful. By combining the two questions into one, the courts below made it likely that Mr. Kesari would be punished for lawful acts.

2. The panel's theory of criminal liability relating to the question of whether the payee was properly reported is without support from the text of the statutes

or case law. Due process demands notice of what a law requires. *United States v. Harriss*, 347 U.S. 612, 617 (1954); *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 626 (1946). In a criminal case, that notice must come from the text of the statute and cannot be the creation of an agency or the product of judicial gloss. *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("although clarity at the requisite [civil] level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.") (internal citations omitted).

The crux of each count of the indictments is what disbursement information must be recorded and subsequently reported to the FEC. FECA requires that treasurers report 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 to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

52 U.S.C. § 30104(b)(5)(A). Congress could have required that ultimate payees be disclosed; it declined to do so. It could have prohibited payments through conduits or paymasters, but it chose not to. It could have required that payments reaching other entities or persons be paid to a *bona fide* vendor that is otherwise doing work for the campaign. Once again, Congress chose not to enact such a requirement. The FEC

could have attempted to make such requirements or prohibitions in interpreting the statute through their decisions or through regulations. It, too, demurred at such opportunities.

In fact, Congress has specifically set a higher burden on the other side of campaigns' ledgers. When reporting contributions, FECA requires that the true source of contributions be reported and it specifically prohibits any conduit arrangements. 52 U.S.C. § 30122. Congress affirmatively decided to require a higher standard when it required that political committees report source funds for campaign contributions. It could have, but declined to, require the same for reports of disbursements. 52 U.S.C. § 30104(b)(5)(A). Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Government may well desire a law that goes beyond the current specific statutory requirements of § 30104(a)(1) when it comes to reporting payees to the FEC. It may prefer a legal requirement that specifically prohibits campaigns from using umbrella vendors to pay third-parties, like Sorenson. Such a requirement, however, has not been adopted by Congress and it is not the purpose of courts to close loopholes in the law. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 457 (2007) ("The 'loophole,' in our judgment, is properly left for Congress to consider, and to close if it finds such action warranted."); *see also United States v. First Nat'l Bank of Detroit, Minnesota*, 234 U.S. 245,

260 (1914) ("It is the province of the courts to enforce, not to make, the laws.") The district court should have limited its query as to whether Mr. Kesari's actions violated specific, delineable statutory duties, not whether his actions violated some lofty policy-driven goal, no matter how laudable.

3. As to the reported purpose of the disbursement, the use of "audio-visual services" to describe the expenses does not render the reports false. Even if it did, Mr. Kesari would be entitled to a new trial on that specific issue.

When the FEC evaluates whether a purpose listed on a report is adequate, it uses lists of adequate descriptions and inadequate descriptions. (App.15a). These lists, however, are non-exhaustive, (App.16a), so filers cannot know in advance of the filing whether a specific delineation will comply with the FEC's facial review. (App.15a). For instance, the term "audio-visual" is not on the *per se* permissible list, nor is it on the *per se* impermissible list of terms. (App.16a). Moreover, the term endorsement—which the Government suggested to be the true purpose of the disbursement—would not have been an adequate description of the purpose. (*See* App.15a).

Simply put, the Government never suggested what purpose Mr. Kesari should have caused to be listed on the reports so as to avoid criminal liability. Instead, the panel turned the burden on its head and held that Mr. Kesari failed to show that "he could not have accurately described the purpose for the disbursements in a manner that would have been acceptable to the [FEC]." (App.16a). Due process demands more.

Absent some clear guidance as to the appropriate category to describe what Sorenson did for the campaign, the purpose label alone cannot be grounds for criminal liability. It is undisputed that the Paul campaign paid ICT and there is no dispute as to the date paid or the amounts. The only potential falsity is the purpose description that was reported by the Paul campaign on its disbursement reports. Sorenson testified that he performed various services for the Paul campaign, including posing for photographs, making television appearances, sending emails, recording telephone calls, appearing at out-of-state rallies, and meeting with legislators on behalf of Paul. (App.9a). Consequently, even if Mr. Kesari could be held criminally liable for causing a false report because of an incorrect purpose description, there is ample evidence to show he would be acquitted. Consequently, Mr. Kesari is at least entitled to a new trial on the discreet issue of whether he caused a false reporting of purpose to be filed with the FEC.

4. The courts below should have interpreted FECA narrowly so as to avoid unnecessary constitutional conflicts. When there are multiple interpretations of a statute and one construction raises "serious constitutional problems," then courts must "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo, Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979)). Here, the Government's construction of the requirements of § 30104(b)(5)(A) raise serious due process questions. The panel's construction of the statutes would raise the question of

whether the statutes at issue are unconstitutionally vague and whether the Rule of Lenity is applicable.

This Court has shown a desire to preserve the will of Congress by narrowing the interpretation of a vague provision of a statute rather than striking down the law. *See Skilling v. United States*, 561 U.S. 358, 405-406 (2010). When the Government takes actions that ignore limitations on a statute in favor of broad prosecutorial discretion, however, it demonstrates a need for Congress, rather than the courts, to more clearly indicate its intent by amending the statute. Courts should not "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Nor should courts judicially amend a vague statute in the face of prosecutorial abuse.

In *McDonnell v. United States*, this Court vacated the conviction of a former Virginia Governor because the jury instruction defining an "official act" in the federal bribery statute, was characterized as "boundless." 136 S.Ct. 2355, 2375 (2016). Indeed, "official act" was not defined with "'sufficient definiteness that ordinary people can understand what conduct was prohibited' or 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 2373 (internal citation omitted). Under the "'standardless sweep'" proffered by the Government, "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." *Id.* (internal citations omitted). Such an expansive and shifting interpretation, the Court held, "does not comport with the Constitution's guarantee of due process." *Id.*

The panel's statutory interpretation also unnecessarily triggers the Rule of Lenity. The Rule of Lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. *United States v. Santos*, 553 U.S. 507, 514 (2008) (money laundering statute's term "proceeds" was ambiguous and the Rule of Lenity applied). The Rule of Lenity is a "canon of strict construction" that has constitutional underpinnings in both the accused's Fifth Amendment right to due process and the legislative branch's exclusive "power to define crimes and their punishment." *United States v. Parker*, 762 F.3d 801, 806-07 (8th Cir. 2014) (quoting *United States v. Lanier*, 520 U.S. 259, 265 & n. 5, 266 (1997).

By granting review, the Court can avoid these questions entirely by construing § 30104 to simply require that a committee report the name and address of a recipient of a qualifying disbursement, together with the date, amount, and purpose of the disbursement without any concern as to whether the recipient is being used as a conduit to pay another or whether the recipient is providing *bona fide* services to the political committee. Aside from being the most logical and appropriate construction of the statutes at issue, such a construction avoids the constitutional issues of vagueness and lenity.

5. The panel's decision also criminalizes normal political activity. Political campaigns often use umbrella vendors as a conduit for payments to a variety of subvendors. The campaign will pay a business entity a large sum of money and that entity will turn around and pay a number of contractors and vendors. *See* Mark Maremont and Rob Barry, *Hide-and-Seek With*

Campaign Cash, The Wall Street Journal, April 12, 2012.

In 2012, for instance, the Romney Campaign reported payments of over $85 million to a vendor called American Rambler Productions, LLC. Maggie Haberman and Alexander Burns, *Mitt Romney's Unusual In-House Ad Strategy*, Politico, October 9, 2012. The Obama campaign paid a similar entity, called GMMB. *Id.*

At best, the panel's decision would result in indistinct precedent as to whether such entities are legal or illegal. At worst, every campaign consultant who has been a part of a campaign that used such umbrella vendors (including virtually every presidential campaign in recent history) would be in danger of prosecution.

6. The panel created an ambiguous new test for reporting campaign disbursements that fails to clearly delineate between lawful and unlawful activity. This is especially troublesome because this matter concerns the regulation of political campaigns.

To allow the Government too much latitude in prosecuting individuals engaged in political campaigns under vague statutory requirements is especially dangerous. The Court has previously warned against the chilling effects present when political speech is too heavily regulated. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) (The First Amendment "has its full and most urgent application to speech uttered during a campaign for public office") (internal quotation omitted); *see also Citizens United v. FEC*, 558 U.S. 310, 334 (2010) (explaining that as campaign finance rules grow more

complex "any speech arguably within their reach is chilled").

B. The Panel's Decision Ignored FEC Precedent, Creating a Split of Authority Worthy of This Court's Review

The panel adopted the Government's theory of criminal liability and cobbled together a legal standard that ignored FEC decisions that support Mr. Kesari's proposed construction of FECA.

1. In 2016, the FEC decided a case with facts that are strikingly similar to this case. In *Charles Boustany, Jr. MD for Congress, Inc., et al.*, FEC MUR 6698 (February 25, 2016) ("Boustany MUR"),[2] a candidate's committee paid for an endorsement, used a third-party vendor, and misreported the purpose so as to hide those payments from the FEC. In fact, the complainant also made conspiracy and false statement allegations related to that activity under 18 U.S.C. §§ 371 and 1001: two statutes at issue here.

The complainant specifically alleged that the Boustany Committee misreported in its FEC filings the committee's expenditures to an entity named United Ballot as a payment to another entity, Campaign Counsel, in an attempt to conceal from the public the Boustany committee's arrangement with United Ballot. *Boustany MUR*. The complainant alleged that the expenditure was mislabeled as "door-to-door GOTV" when it was, in fact, for mailer expenses and for the endorsement of the United Ballot organization. *Id.* at 2.

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[2] Available at: http://eqs.fec.gov/eqsdocsMUR/16044390076.pdf.

The Boustany committee reported that it made $35,000 in payments to Campaign Counsel for "door-to-door GOTV" activity. The complainant alleged that this expenditure to Campaign Counsel was actually a payment to United Ballot for its endorsement and mailings in support of Congressman Boustany's election. *Id.* The complainant alleged that the Boustany committee had funneled money through Campaign Counsel to United Ballot because United Ballot was associated with the Democratic Party and Congressman Boustany, a Republican, did not want the public to know that he was working with the opposing party. *Id.*

In light of this, the complainant claimed that Congressman Boustany entered:

> into a conspiracy with his campaign manager and with the leadership of the "Ballot Access PAC" to gain that committee's endorsement on its slate card while disguising the $35,000 payment required by the "Ballot Access PAC" as a disbursement made to his campaign manager and disclosing it as such to the FEC.

Boustany MUR Supp. Compl. at 2. These allegations are more than analogous to the charges against Mr. Kesari; they are materially indistinguishable. The FEC, however, found no FECA violation and decided to close the file. *Boustany MUR*, Statement of Reasons of Chairman Peterson and Commissioners Hunter and Goodman[3] ("Statement").

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[3] Available at: http://eqs.fec.gov/eqsdocsMUR/16044403706.pdf

The Statement specifically held that the reporting of an ultimate payee was not required. *Id.* at 3-4. It further held that the Boustany campaign's purpose description was adequate. *Id.* at 4-5.

The panel reviewed the *Boustany* decision but did not follow the precedent it set, pointing out that the FEC declined to find a legal violation by a three-to-three vote. (App.15a). 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).

The panel also attempted to distinguish the *Boustany* matter from Mr. Kesari's case, because the mislabeling of the purpose was deemed by the FEC to be "minor" and the panel decided that the listing of payments to ICT as "audio-visual expenses" here, was not. (App.15a). In the next paragraph, however, the panel tacitly acknowledges that "Sorenson performed some work for the campaign that might be arguably described as an audio-visual expense. . . . " *Id.* But it discounts that fact by suggesting that the true purpose of the expenditure was for an endorsement and not for any audio-visual services. *Id.*

In distinguishing the *Boustany* case based only on the degree of inaccuracy, while in its very next breath acknowledging that the "audio-visual" purpose "might arguably" be accurate as to some of the work performed by Sorenson, the panel's 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. If there is a material distinction between the acts of Mr. Kesari and those of the Boustany campaign, it cannot be found within the four corners of § 30104 or any other statute.

The result is a rule that is unbound 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*, 136 S.Ct. at 2373. Campaign professionals like Mr. Kesari 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).

Under the panel's decision, campaign professionals are not on notice as to when a reporting violation will be considered minor, in which case they will not so much as face civil penalties and when a discrepancy will be considered to be more than minor, and they will face prison. The decision fails to define the line of culpability with any definiteness.

2. The *Boustany* decision is in accord with other FEC decisions. More than thirty years ago the FEC advised that committee treasurers need only the name of the person or entity that campaigns pay directly. FEC Advisory Opinion 1983-25 (Mondale for President), 1983 WL 909270, at *2 (DCD. 91-3). In simple terms, § 30104(b)(5)(A) requires a treasurer to report to

whom the committee makes the expenditure check payable.[4] Once a treasurer has reported the name, address, amount, and purpose of an expenditure paid to someone who has received more than $200 in the calendar year, the obligation is fulfilled and compliance with the law achieved. § 30104(b)(5)(A).

In 2013, an FEC complaint was filed against the Mark Kirk for Senate campaign. *Kirk for Senate*, FEC MUR 6510 (July 16, 2013). The complaint alleged that Senator Kirk's campaign had disguised payments that ultimately went to his girlfriend for her personal expenses by routing them through a third-party vendor and then using a false statement of purpose on the campaign's FEC expenditure reports. *Id.*

The FEC focused exclusively on the issue of whether the campaign should have reported payments that ultimately went to Kirk's girlfriend. Because the Kirk campaign had accurately reported the identity of the third-party who ultimately paid Kirk's girlfriend, the FEC found no violation. *Id.* The FEC completely ignored the issue of whether the payments she received, which were allegedly for personal expenses such as yoga lessons, were properly categorized.

Finally, in *Ready for Hillary PAC*, FEC MUR 6775 (Feb. 11, 2016) the FEC rejected the attempt by its own general counsel's office to impose a higher reporting burden on committees than that required by the plain

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[4] The language of this statute has not changed since *Mondale* and the FEC specifically declined to extend reporting requirements any further through its regulatory processes. *See Reporting Ultimate Payees of Political Committee Disbursements*, 78 Fed. Reg. 40625-03, 40626 (July 8, 2013).

language of the statute. *See e.g.,* Statement of Reasons of Commissioner Lee E. Goodman[5] at 4 (explaining that a political committee was not required to disclose an ultimate payee when payment is through a conduit).

3. The panel departed from the textualist construction supported by the statute and these FEC decisions. Instead, it adopted a legal standard derived from a thirteen year-old FEC settlement agreement, accepted by the FEC. (App.14a, n.5). *See Jenkins for Senate 1996*, FEC MUR 4972 (Feb. 15, 2002) ("Jenkins MUR").

The Jenkins MUR was not a decision of the FEC, rather it was a settlement agreement between the FEC and the 1996 Woody Jenkins for U.S. Senate campaign and its treasurer that was entered into *six* years after the end of the campaign. As with many settlement agreement, it contained negotiated facts and resolutions. Nevertheless, in the 16 years since *Jenkins*, the FEC decided *Kirk* and *Boustany*, thus effectively repudiating the inconsistent parts of the *Jenkins* conciliation.[6] If the panel needed to look past the text of the statute, it should have looked at the more recent cases that were actually litigated before the FEC. In those cases, as just explained, the FEC construed the statutes consistent with Mr. Kesari's proposed interpretation.

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[5] Available at: http://eqs.fec.gov/eqsdocsMUR/16044390002.pdf.

[6] The very fact that the same regulatory body that adopted *Jenkins* also adopted *Kirk* and *Boustany* and the fact that the FEC split evenly in *Boustany*, shows that the legal reporting obligations at issue are not nearly certain enough to support criminal liability.

4. The panel should have deferred to the FEC. 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)). Because they failed to do so, there is a split of authority between the federal body regulating campaign finance and the Eighth Circuit. This split will create unnecessary confusion about the reporting obligations of campaign professionals—confusion that calls out for clarity from a higher authority.

5. This matter should have been litigated administratively in the FEC rather than in a criminal courtroom. Indeed, the FEC has a perfectly good system of civil enforcement to handle matters such as those at issue here. Where there is novelty in the interpretation of the law, civil enforcement, rather than criminal prosecution, is the preferred course. *See, e.g.*, *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (holding that there should be "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe"). The appropriate forum for the Government's "pioneering interpretation" of liability is in civil enforcement rather than a criminal prosecution with the "attendant potential loss of freedom." *United States v. Critzer*, 498 F.2d 1160, 1164 (4th Cir. 1974).

C. This Case Provides an Excellent Vehicle for Reviewing This Important Question

This case provides the correct vehicle to address this important issue of statutory construction and whether the Eighth Circuit's expansive holding went too far in allowing unpopular political acts to be criminalized. First, the question presented is fully dispositive of the entire case. If Mr. Kesari was not prohibited from arranging to pay Mr. Sorenson through a third-party, then his FECA conviction, for violating § 30104(a)(1), (b)(5)(A) should be reversed either for final judgment or for remand. Consequently, if Mr. Kesari was not legally culpable for causing false reports to be made to the FEC, then his relevant acts also (1) did not cause the creation of false records in violation of 18 U.S.C. § 1519, (2) did not cause a false statement scheme in violation of 18 U.S.C. § 1001(a)(1), and (3) were not part of an unlawful conspiracy in violation of 18 U.S.C. § 371. The Government's entire theory of culpability rose and fell with its statutory interpretation of § 30104(a)(1), (b)(5)(A).

Second, the material facts are not—and have never been—in dispute. Mr. Kesari does not deny that he arranged to pay Sorenson through an intermediary for the purpose of concealing the payments. The question is simply whether he was legally prohibited from doing so. While there was a factual dispute about whether "audio-visual" was correctly listed as the purpose of the disbursements, such dispute is either immaterial for the reasons discussed in part I(A)(3), or a subject for retrial upon remand, since the courts below incorrectly combined the payee and purpose inquiries

into one question instead of two independent questions, as discussed in part I(A)(1).

Third, Mr. Kesari preserved his objections to the Government's theory of criminal culpability and statutory construction at every turn of the proceedings. Through argument, objections, and briefings at two trials and at the court of appeals, he consistently argued that he did not act unlawfully when he arranged for the Paul campaign to pay an intermediary, who would in turn pay Sorenson. Likewise, he argued that it was not unlawful for the purposes of those disbursements to be recorded as "audio-visual."

Finally, the panel's decision is squarely in conflict with the decisions of the FEC, as discussed in part I(B). Because those decisions provide mutually exclusive views of the legal duties at issue in this case, it provides this Court with the optimal opportunity to settle an important dispute.

II. The Court Should Hold Mr. Kesari's Petition If It Decides to Grant the Writ Petitions Filed by John Tate or Jesse Benton Instead of Mr. Kesari's Petition

This petition raises an important question, worthy of the Court's review. Mr. Kesari's co-defendants below, Jesse Benton and John Tate also have presented or will present this Court with petitions raising other important questions, deserving of consideration. The questions raised in those petitions will apply equally to Mr. Kesari. Should the Court decide to address any of the questions raised in those petitions and decide not to address Mr. Kesari's question, then he requests that the Court hold this petition pending

review and consideration of the Benton or Tate petitions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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