No. 18-601

IN THE
Supreme Court of the United States

JOHN FREDERICK TATE, AKA JOHN M. TATE,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF FORMER FEDERAL ELECTION COMMISSION CHAIRMAN LEE E. GOODMAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Lee E. Goodman is a former Commissioner (2013-2018) and Chairman (2014) of the Federal Election Commission ("FEC"). Before and since serving on the FEC, Mr. Goodman has practiced campaign finance law in a private law firm, advising citizens on how to comply with complex campaign finance statutes, regulations, and guidance documents published by the FEC.

As a former FEC Commissioner, Mr. Goodman has many years of experience in interpreting the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"); implementing regulations; devising enforcement policy; and investigating violations. And, as a practitioner in the field, Mr. Goodman has an interest in advising the Court about the legal complexities and practical difficulties of the FEC disclosure issues presented in this case. This interest includes underscoring for the Court the profound implications of over-criminalizing ordinary political practices that conform to FEC guidance and common political practice. The activity at issue here

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, or its counsel, made a monetary contribution to its preparation or submission. The parties have been given appropriate notice, and the parties have consented in writing to the filing of this brief.

should not trigger criminal prosecution under the FECA or unrelated criminal statutes.

SUMMARY OF THE ARGUMENT

The government's prosecution of the defendants for publicly and accurately describing payments to an intermediary vendor as "audio/visual expenses," while not reporting the name of the ultimate payee on reports filed with the FEC, represents severe over-criminalization of political activity. Indeed, the prosecution here does not directly advance a governmental interest in preventing *quid pro quo* corruption of federal officeholders or providing voters with information useful to making an informed electoral choice. The government alleges that the defendants inaccurately reported the *purpose* of campaign disbursements, which were used to compensate an individual who spoke publicly, appeared on television, and recorded telephone messages in support of a federal candidate, as "audio/visual services." The government prosecuted on the theory that failure to describe those services as an "endorsement" (which is not a descriptor approved by the FEC), without paying the individual directly, constituted several overlapping crimes. Yet, pursuant to FEC guidance to the public and common practice by thousands of political committees, "audio/visual services" is a literally accurate description of the individual's work for the campaign. Moreover, payments to people other than the "ultimate payees" is a common practice countenanced in FEC interpretations of the FECA,

and any obligation to disclose an ultimate payee would have been unclear at the time of defendants' actions.

The Court should grant certiorari to consider the appropriateness of defendants' convictions, which at bottom, resulted from the government criminalizing common political practices that arguably conform with FEC guidance and that do not affect the anti-corruption objectives of the FECA.

ARGUMENT

I. The Conduct At Issue Is A Common Political Practice That Has Not Been Proscribed by Statute or Regulation.

In 2012, the Ron Paul presidential campaign compensated Iowa State Senator Kent Sorenson for Sorenson's services to the campaign. According to the trial record, Sorenson recorded audio messages disseminated to voters via telephone calls ("robo calls"), spoke on behalf of the Paul candidacy in Iowa and South Carolina, made appearances and spoke on behalf of the Paul candidacy in visual media appearances, signed campaign messages disseminated via electronic mail, and traveled on behalf of the campaign and appeared with Dr. Paul at campaign events. For these services, Sorenson received a total of $73,000 over a period of several months from the Paul campaign. Trial Tr. Vol. I at 24:9-21, *United States v. Benton*, No. 4:15-cr-103 (S.D. Iowa April 26, 2016), ECF No. 693; Trial Tr. Vol. V at 948:25-957:12, *United States v. Benton*, No. 4:15-cr-103 (S.D. Iowa May 2, 2016), ECF No. 697.

The compensation itself was not unlawful. According to the Superseding Indictment, defendants violated the law by reporting the disbursements to Sorenson "in a filing with the FEC as a payment to Film Production Company W for 'AUDIO/VISUAL EXPENSES,' omitting any reference to Senator Sorenson or Grassroots Strategy [Sorenson's consulting outfit]." Superseding Indictment ¶¶ 29.g, 29.h, 29.o, 29.v, 29.bb, 29.jj, *United States v. Benton*, No. 4:15-cr-103 (S.D. Iowa Nov. 19, 2015), ECF No. 323 (hereinafter "Superseding Indictment").

This conduct, however, did not violate clearly established FEC rules and regulations. As an initial matter, in light of the actions taken by Sorenson on behalf of the campaign, the purpose description is literally accurate. Moreover, the practice of paying campaign vendors and consultants through intermediaries is a common practice in federal elections. There were no restrictions on that common practice in 2011 and 2012 when the conduct occurred, and subsequent FEC interpretations have only made the appropriateness of such conduct even less clear. Thus, prosecuting and punishing this conduct as a "knowing and willful" violation of the FECA is dubious at best.

A. The Descriptor "Audio/Visual Expenses" Was Literally Accurate and Is a Common and Appropriate Designation for the Work Performed by Sorenson.

According to the government, the Paul campaign's use of the descriptor "audio/visual expenses" constituted a false statement of the *purpose*

of the campaign's payments to Sorenson. But this conclusion is based on a faulty application of federal election law.

The FECA requires political committees to report "the date, amount, and *purpose* of . . . operating expenditures." 52 U.S.C. § 30104(b)(5)(A) (emphasis added). FEC regulations define "purpose" as "a brief statement or description of why [a] disbursement was made," 11 C.F.R. § 104.3(b)(3)(i)(A), or "the reasons for [an] expenditure," 11 C.F.R. § 104.9(a).

The FEC periodically publishes guidance on reporting standards and issues lists of approved purpose descriptors for disbursements by campaign committees. The list of approved descriptors in 2012 was published in the federal register on January 9, 2007. *See* Statement of Policy: "Purpose of Disbursement" Entries for Filings With the Commission, 72 Fed. Reg. 887-01 (Jan. 9, 2007) (codified at 11 C.F.R. §§ 104.1-104.22). That guidance sets forth two non-exhaustive lists of purpose descriptions, the first identifying descriptions that the FEC considers "sufficient," and the second identifying descriptions "that generally lack sufficient detail." *Id.* at 888.

The guidance also makes clear that the FEC receives and accepts many other descriptors and that "the Commission [will] not automatically take any particular action" if a committee fails to describe sufficiently the purpose of a disclosed disbursement. *Id.* According to the guidance, pursuing further action for such a violation is a "rare circumstance[]." *Id.* A filer whose purpose does not appear on the list of

approved examples is advised to include a "brief description" (typically one to three words) subject to the following general proviso: "Could a person not associated with the committee easily discern why the disbursement was made when reading the name of the recipient and the purpose?" *Id.*

It is that general proviso that the government effectively treated as the criminal standard violated by the defendants here. That is, the government rejected the defendants' contention that "audio/visual expenses"—which is not identified on either FEC list of descriptors—was accurate and sufficiently descriptive. And it prosecuted on the theory that only one descriptor—*which also did not appear on the FEC's lists*—was truthful and therefore legal: "Endorsement."

In other words, the prosecutors based their case on the gray area of unidentified purpose descriptors. But on its face, the word "endorsement" is a vague description because it would not inform the public of the specific activities Sorenson performed. The word "endorsement," standing alone, is similar to other words deemed too general and non-specific on the list of deficient descriptors, such as "General Consulting" and "Get-Out-The-Vote." Statement of Policy, 72 Fed. Reg. at 888. Even were "endorsement" deemed an acceptable descriptor, it would nevertheless be underinclusive because it would not inform the public of the many services performed to advance the endorsement.

"Audio/visual expenses," on the other hand, is an accurate, specific description of the work

performed by Sorenson. That is, Sorenson's work for the campaign included both "audio" work, by recording telephone messages, and "visual" work, by appearing on television and before audiences supporting Ron Paul's presidential candidacy. How else could one communicate one's "endorsement" for a candidate other than doing so in both "audio" and/or "visual" formats? An endorsement requires some manner of communication.

The government's theory discounted the actual "audio" and "visual" services performed by Sorenson, theorizing before the jury that the true object of the Paul campaign's compensation was for Sorenson's formal imprimatur, rather than the actual services he performed to advertise and communicate his support. Criminal liability turned on that subtle distinction. But the subtle distinction between reporting Sorenson's communication of support as "endorsement" (the government's *post hoc* preference) versus "audio/visual expenses," should hardly give rise to criminal liability and a prison sentence, particularly in light of the FEC's guidance regarding the use of descriptors.

Recent FEC enforcement matters demonstrate as much. For example, the FEC dismissed allegations that a campaign committee violated the "purpose" requirement where a disbursement for several activities, including direct mail, radio advertising, and door-knocking voter contacts, was described under the umbrella term "Door-to-door-get-out-the-vote (GOTV)." *United Ballot PAC*, Statement of Reasons of Chairman Matthew S. Petersen and

Commissioners Caroline C. Hunter and Lee E. Goodman at 4-5, MUR 6698 (FEC Dec. 5, 2016). The FEC's controlling statement of reasons concluded that "'[d]oor-to-door-get-out-the-vote (GOTV),' the description used by the Boustany Committee for its $35,000 disbursement, is an adequate purpose description." *Id.* at 5. "[T]he Boustany Committee's funds were indeed used for GOTV. Although a portion of the disbursement was ultimately used for another kind of GOTV activity, we concluded this minor discrepancy did not render the description inadequate . . . ." *Id.* Similarly, the FEC dismissed another matter where a Super PAC reported a disbursement to license an email list as "online advertising," although the FEC's Office of General Counsel had recommended a finding that the description "list rental" was required. *Ready for Hillary PAC*, Statement of Reasons of Commissioner Lee E. Goodman at 4, MUR 6775 (FEC Mar. 29, 2016).

Even the Eighth Circuit acknowledged that "Sorenson performed some work for the campaign that might arguably be described as an audio/visual expense . . . ." App. 16a. Nevertheless, the Eighth Circuit concluded that the accuracy of the description of Sorenson's services was "beside the point," because a member of the FEC staff, presented by the government,

> testified that "audio/visual" does not appear on either the list of adequate or the list of inadequate responses. This testimony thus did not establish that 'audio/visual' was an accurate

> description of the purpose for the disbursements to ICT [the payment intermediary], nor did it establish that Defendants could not have accurately described the purpose for the disbursements in a manner that would have been accepted by the Commission.

App. 17a.

In other words, the Eighth Circuit concluded that although "audio/visual" was arguably *accurate*, it was not necessarily *adequate* under FEC standards. But even a cursory search of the FEC's campaign finance database reveals that "audio visual" or some variation of those two words appears thousands of times in campaign committee reports. Moreover, the phrase has been routinely accepted as *adequate* by the FEC. The literal *accuracy* is thus not "beside the point"; it is the point.

Here, although "endorsement" may accurately describe discrete aspects of Sorenson's work for the Paul campaign, so does "audio/visual expenses." Sorenson indeed "endorsed" Ron Paul *and* he performed actual "audio" and "visual" services in support of Ron Paul. Importantly, because "audio" and "visual" services were in fact performed, the description entered on the campaign's financial reports was literally *true* and, under FEC guidance at the time, it would not even have formed the basis for FEC enforcement. That description, therefore, should not form the basis of criminal liability.

B. The FECA and FEC Regulations Do Not Require Public Disclosure of "Ultimate Payees," and the FEC Had Not Issued Public Guidance to the Contrary as of 2012.

The government also asserted that the Paul campaign was required to identify Sorenson as the "ultimate payee" of its disbursements to an intermediary firm. But that requirement does not appear in the FECA, FEC regulations, or FEC guidance. Instead, the FEC has issued guidance in the Federal Register suggesting that campaigns generally are *not* required to disclose the name of all "ultimate payees" of their disbursements and prescribing rules for the disclosure of certain categories of ultimate payees not implicated in this case. The only place the defendants would have located the reporting norm prosecuted in this case is in an obscure conciliation agreement buried within the agency's files ten years before the activity at issue here occurred.

1. No statute, regulation, or published rule requiring the reporting of ultimate payees existed at the time the conduct at issue occurred.

The FECA requires political committees to disclose "the name and address of each . . . person to whom an expenditure in an aggregate amount of value in excess of $200 within the calendar year is made[.]" 52 U.S.C. § 30104(b)(5)(A). The FECA does not require political committees to report the people or entities who are paid by the direct recipient of the political committee's payment, *i.e.* the "ultimate

payees." Nor do FEC regulations require political committees to report the ultimate payees that received payment. And, of particular significance in this case, the FEC has recognized that "neither the Act nor the Commission's regulations require authorized committees to report expenditures or disbursements to their vendors' sub-vendors." *Kirk for Senate*, Factual and Legal Analysis at 11-12, MUR 6510 (FEC Jul. 16, 2013).

The reporting activity at issue in this case occurred in 2011 and 2012. At that time, in the absence of any statute or regulation prescribing a rule for reporting ultimate payees, the FEC had issued one advisory opinion and conciliated one enforcement matter involving the reporting of ultimate payees in vendor/sub-vendor contexts. Neither of these non-binding regulatory actions could form the basis for criminal liability.

a. Mondale for President Advisory Opinion

In 1983, the FEC advised the Mondale for President Committee that it could report its payments to campaign vendors without disclosing those vendors' payments to other vendors. *Mondale for President*, Advisory Opinion, AO 1983-25 (FEC Dec. 22, 1983) (hereinafter "Mondale opinion"). The FEC observed that "[t]he regulations are silent with respect to any definition or description of the person to whom an expenditure is made. Moreover, they do not address the concepts of ultimate payee, vendor, agent, contractor, or subcontractor in this context." *Id.* at 2.

Thus, in the absence of any statutory or regulatory text, the FEC opined that "the Committee may report its payments to Consultants as expenditures without further itemization of payments made by Consultants to others." *Id.* at 3.

Although this advisory opinion would seem to have allowed the Paul campaign to disclose only its vendors, the government reached the opposite conclusion. That is, the government divined an affirmative requirement to report an ultimate payee if the ultimate payee's services are not "in connection with" the vendors' services. *Id.* at 3. But the government's use of the Mondale opinion to prosecute here was improper for at least two reasons.

First, the Mondale opinion does not offer a clear standard against which to judge criminal conduct. The "rule" applied by the government is inferential at best and does not appear on the face of the opinion. In light of this absence of any clear standard, prosecution based on the Mondale opinion was plainly inappropriate. *See McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) (rejecting criminal liability based on a statutory term that was "not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement'" (citation omitted)).

Second, advisory opinions cannot form the basis for an enforcement action. As the Second Circuit Court of Appeals stated:

> Advisory Opinions are binding only in the sense that they may be relied on affirmatively by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or activity. . . . On the other hand, to the extent that an advisory opinion does not *affirmatively approve a proposed transaction or activity, it is binding on no one* – not the Commission, the requesting party, or third parties.

U.S. Def. Comm. v. FEC, 861 F.2d 765, 771 (2d Cir. 1988) (hereinafter "*USDC*") (emphasis added).[2] And the FEC itself has observed this limitation on the legal effect of its advisory opinions: "Congress included an express prohibition in the FECA against the Commission using advisory opinions to establish rules of conduct." Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom on the Audits of Dole and Clinton Campaigns at 2 (FEC June 24, 1999). A majority of the FEC went on to observe that "[w]here the law is of uncertain application, advisory

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[2] *See USDC*, 861 F.2d at 771 (citing 2 U.S.C. §§ 438(d) and 437f(b)&(c)); *see also Weber v. Heaney*, 793 F. Supp. 1438, 1452 n.9 (D. Minn 1992) ("Commission advisory opinions are binding in the sense that they may be relied upon affirmatively by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or opinion."), *aff'd* 995 F.2d 872 (8th Cir. 1993); *Stockman v. FEC*, 138 F.3d 144, 149 n.9 (5th Cir. 1998) (same).

opinions cannot be used as a sword of enforcement." *Id.* at 3.

b. Jenkins for Senate 1996 Committee Conciliation Agreement

In 2002, the FEC conciliated an allegation that the Jenkins for Senate 1996 Committee filed a false report when it paid a vendor which in turn paid a different vendor for services it rendered to the campaign. *Jenkins for Senate 1996*, Conciliation Agreement, MUR 4872 (FEC Feb. 15, 2002) (hereinafter "2002 conciliation agreement" or "agreement"). The government's reliance on this agreement to prosecute defendants here was also inappropriate for at least two reasons.

First, like the Mondale opinion, the 2002 conciliation agreement hardly established a clear standard on which to impose criminal liability. The agreement set forth, in enumerated paragraphs, the factual circumstances that one would infer the FEC deemed relevant to finding a violation. And from those facts, a discerning lawyer might have concluded that the FEC found a violation because the ultimate payee "was not an 'ultimate vendor' or sub vendor of [the direct payee vendor]" and "had no involvement whatsoever with the services provided by [the direct payee vendor]." *Id.* § IV.9. But the agreement did not articulate a clear rule on the issue, and gleaning the rule applied by the government here would have required a lawyer's careful analysis of one needle in the haystack of over forty years of FEC conciliation agreements. Certainly, the non-lawyer defendants

could not have been expected to derive and understand the standard under which they were prosecuted. *See Citizens United v. FEC*, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day.").

Second, a conciliation agreement cannot form the basis of an enforcement action. It is a document settling an enforcement action prior to litigation. The FECA requires the FEC to attempt to resolve enforcement matters by "informal methods" where possible before resorting to civil enforcement litigation. 52 U.S.C. § 30109(a)(4)(A)(i). While a conciliation agreement in one enforcement matter might reflect the FEC's interpretation of the law in a particular set of circumstances, it cannot substitute for a rulemaking or a public pronouncement to the public of a binding legal rule of law. *Cf. Equal Emp't Opportunity Comm'n v. Contour Chair Lounge Co.*, 596 F.2d 809, 813 (8th Cir. 1979) ("[T]he district court may take into consideration the terms of a conciliation agreement . . . . But the court is not bound by those terms and they are not binding on individual[s] . . . who had not acceded to them." (citation omitted)). Moreover, a conciliation agreement resides in the bowels of the agency's records and certainly fails to provide the kind of public notice necessary to put citizens on notice that they might be committing a crime. *Cf. McDonnell*, 136 S. Ct. at 2372-73 (2016) (rejecting the "standardless sweep of the Government's reading," under which "public officials

could be subject to prosecution, without fair notice, for the most prosaic interactions" (internal citation and quotation marks omitted)).

2. Until very recently, the FEC's approach to reporting ultimate payees has been inconsistent.

Even after the defendants' conduct here, the FEC still waited for years to articulate a clear standard for reporting "ultimate payees." In 2013, after the conduct at issue in this case occurred, the FEC published guidance in the federal register expressly requiring committees to disclose the ultimate payee of each disbursement in certain, limited contexts. *See* Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625-03, 40,626 (July 8, 2013) (codified at 11 C.F.R. §§ 104.1-104.22); *Steve Russell for Congress*, First General Counsel's Report at 3 n.9, MUR 6894 (FEC Aug. 26, 2015) (discussing guidance). Specifically, the Commission determined that committees must identify ultimate payees (1) when committees reimburse individuals who pay certain committee expenses; (2) when committees pay certain credit card bills; and (3) when candidates use personal funds to pay committee expenses. Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. at 40,626. But the 2013 policy does not prescribe a disclosure requirement for any other payments made or received through intermediaries. And the 2013 policy statement specifically advised that it did not set any rule with respect to a vendor "purchas[ing] goods

and services on the committee's behalf from subvendors." *Id.*

Thereafter, the FEC dismissed a series of matters involving pass-through payments to sub-vendors. In 2013, in MUR 6510, the FEC dismissed an allegation that a campaign committee intentionally hid payments to the candidate's girlfriend by paying her through a subcontract arrangement. *See Kirk for Senate*, Factual and Legal Analysis at 1-2, MUR 6510 (FEC Jul. 16, 2013). The girlfriend performed some services directly for the campaign and other services for the vendor who paid the girlfriend with funds paid by the campaign. *Id.* at 5-6. The FEC's legal analysis included this broad statement:

> [N]either the Act nor the Commission's regulations require authorized committees to report expenditures or disbursements to their vendors' sub-vendors. To the contrary, the Commission has concluded that a committee need not separately report its consultant's payments to other persons—*such as* those payments for services or goods used in the performance of the consultant's contract with the committee.

Id. at 11-12 (emphasis added) (internal citations omitted) (citing Mondale opinion). That statement suggested that the principle stated in the Mondale opinion was but one example of pass-through payments that are not required to be reported, not a

requirement for other pass-through payments to be reported.

A month later, in MUR 6894, the FEC found no reason to believe that a campaign committee violated section 30104(b) by reporting disbursements to its media vendor but *not* reporting the vendor's subsequent payments to other entities. *Steve Russell for Congress*, Factual and Legal Analysis at 1, MUR 6894 (FEC Oct. 29, 2015). The FEC explained that "the alleged unreported disbursements were in fact reported . . . . The Committee disclosed payments it made directly to [its vendor] for media and advertising services." *Id.* at 2. Significantly, the legal analysis provided to the FEC by its Office of General Counsel had included language that "where a committee vendor makes a payment to a sub-vendor for services or goods used in the performance of the vendor's contract with the committee, a committee need not separately report its vendor's payment," and cited the Mondale opinion, though that language was excised by the full FEC in its legal analysis. *Compare Steve Russell for Congress,* First General Counsel's Report at 3, MUR 6894 (FEC Aug. 26, 2015) (stating the restriction and citing Mondale opinion), *with Steve Russell for Congress*, Factual and Legal Analysis at 2, MUR 6894 (FEC Oct. 29, 2015) (omitting such a restriction).

Finally, right before this case went to trial in 2016, the FEC dismissed two more similar matters. In MUR 6775, the FEC dismissed an allegation that the political action committee, Ready for Hillary, violated section 30104(b) by reporting payment to an

online advertising vendor, which in turn rented an email list from another political committee, but not the ultimate payee political committee. *See Ready for Hillary PAC*, Statement of Reasons of Commissioner Lee E. Goodman at 4, MUR 6775 (FEC Mar. 29, 2016). In another matter, the FEC dismissed allegations that section 30104(b) was violated where a campaign committee disclosed payments totaling $110,000 to a campaign general consultant, including a discrete $35,000 payment for the stated purpose of "Door to Door GOTV." *United Ballot PAC*, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 4-5, MUR 6698 (FEC Dec. 5, 2016). The general consultant paid a second consultant who in turn directed $16,500 to a state-based political organization to conduct get-out-the-vote activities as well as to purchase advertising in support of its get-out-the-vote activities. *Id.* at 2-4. The complaint alleged that the campaign committee structured its payments through two intermediaries to conceal the campaign's financial assistance to the ultimate payee, the state-based political organization, because of a desire for the state-based political organization's support to appear organic, rather than purchased. *Id.* at 2. The FEC dismissed the matter on the basis that "the Act does not require committees to disclose the 'ultimate payees' (that is, final recipients) of the disbursements at issue . . . ." *Id.* at 1.

It was not until after the District Court concluded trial in this matter that the FEC finally determined—apparently because it believed that the

court left it no choice—that payments to "ultimate payees" must be reported under section 30104(b). *See Bachmann for President Committee and MichelePAC*, Factual and Legal Analysis re Respondent Bachmann for President at 1-2, MUR 6724 (FEC July 13, 2017). But of course, this *ex post* determination—which breaks from years of FEC precedent—does not change the fact that the only guidance available to the defendants here was the Mondale opinion and the 2002 conciliation agreement, neither of which establish a regulation or provide clear legal standards to the public. *See* App. 14a-15a (discussing Mondale opinion and the 2002 conciliation agreement). The defendants should never have been prosecuted based on those informal agency actions.

It appears that the government's concern here was that the defendants' intent to "hide" the payments to Sorenson converted the intermediary payment arrangement into something more insidious than a garden variety business arrangement.[3] But campaigns have many legitimate purposes for paying vendors through intermediaries, including necessary acquisition of skills through subcontracts, operational efficiency, financial ease, and, yes, "hiding" or "obscuring" the ultimate payee. For example, opposition research is a commonly subcontracted

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[3] Indeed, subcontracting of vendors is quite commonplace for most campaigns and political committees, and billions of dollars have been disbursed to vendors who in turn have paid other vendors and purchased other goods and services, with little interest from Congress or the FEC. *See* Lee Aitken, *There's No Way to Follow the Money*, The Atlantic (Dec. 16, 2013).

service, and it is often associated with a desire to hide it from public view. Over a year ago, it came to light that the presidential campaign committee of Hillary Clinton had paid British citizen Christopher Steele, or his foreign research firm Orbis Business Intelligence, hundreds of thousands of dollars in 2016 to perform opposition research services through an intermediary law firm. The purpose for those services was publicly reported as "Legal Services." Kenneth Vogel, *Clinton Campaign and Democratic Party Helped Pay for Russia Trump Dossier*, The New York Times (Oct. 24, 2017). There may have been sound business reasons to subcontract the work. One could also speculate that among the Clinton campaign's reasons for paying the British national through an intermediary was to "hide" or "obscure" the sensitive opposition research being performed, as well as the employment of a foreign national. But the Department of Justice has made no indication that it intends to prosecute criminally the Clinton campaign. Indeed, most practitioners would be very surprised if it did and would disagree with such an approach. Nor has the FEC undertaken a systematic review of campaigns' subcontracting practices to question the purposes or so-called *bona fides* of each subcontract arrangement.

Analyzing these defendants' criminal culpability under an arcane, non-statutory standard of *bona fide* subcontract, as the government and Eighth Circuit did, is, at best, a suspect approach to defining criminal liability. And, moreover, in comparison to recent FEC interpretations and commonplace campaign practices, this criminal

prosecution *sub judice* has a novel, discriminatory quality that surprised many practitioners and these defendants. The conduct at issue here hardly appears to be so outside the norm of campaign business practices that it should have merited a criminal prosecution.

II. The Government Should Not Expand Campaign Finance Regulation By Augmenting the FECA With Sarbanes-Oxley Liability.

Because the Paul campaign's description of Sorenson's work was literally true, and ultimate payees were not required to be disclosed, it is difficult to see how the campaign report constituted a criminal "false expenditure report" under the FECA, a false statement under 18 U.S.C. § 1001(a)(1), or a "false entry" under 18 U.S.C. § 1519.

More fundamentally, however, Congress never could have intended the Sarbanes-Oxley Act to criminalize political activity regulated by the FEC. When Congress passed the FECA, it established high standards for the criminal prosecution of violations. Likewise, when Congress passed the Sarbanes-Oxley Act, it had a very clear idea of the kinds of activities subject to its coverage. Yet, here, the government has expanded Sarbanes-Oxley to punish core First Amendment activity in the political sphere, and fundamentally diminished the heightened standard that Congress intended regarding liability related to FEC reporting. Furthermore, to the extent that Congress intended the Sarbanes-Oxley Act to be applied to core First Amendment activity like that at issue here, the statute is not narrowly tailored to

advance the kind of anti-corruption objectives necessary to regulate political speech and association.

III. The Government's Prosecution Ignores Important First Amendment Implications.

It is also important to point out that the government's prosecution here implicates important First Amendment rights. And the government appears to have ignored those implications in prosecuting this case.

Supreme Court precedent does not clearly establish that criminalizing the disclosure of ultimate payees of campaign disbursements serves a sufficient governmental interest or would be adequately tailored to advance any such interest. As an initial matter, the Supreme Court recently clarified that, at least with respect to the restriction of campaign *contributions*, each campaign finance restriction must "target what we have called '*quid pro quo*' corruption or its appearance." *McCutcheon v. FEC,* 572 U.S. 185, 191 (2014) (internal citations omitted). Compelled disclosure of *disbursements*, however, does not appear to target such corruption.

Moreover, with respect to campaign finance disclosures generally, the Court observed in *Buckley v. Valeo*, that compelled disclosure "allows voters to place each candidate in the political spectrum," "alert[s] the voter to the interests to which a candidate is most likely to be responsive," "deters actual corruption and avoids the appearance of corruption," and assists regulators to "detect violations of . . . contribution limitations." 424 U.S. 1, 67-68 (1976).

Although the Court recognized these as "substantial governmental objectives," it does not necessarily follow that disclosure of the *ultimate payees* of campaign *disbursements* would advance these governmental objectives, as these interests implicate contributions given to a campaign rather than its disbursements of funds.

Buckley also recognized that the disclosure of campaign disbursements "may discourage those who would use money for improper purposes either before or after the election." *Id.* at 67. However, the Court has not considered whether disclosure of *ultimate payees* is necessary to advance this interest. And it is not obvious that it does. Indeed, disbursements generally reveal less about a campaign than its contributions, and tracking the ultimate destination of hundreds of millions of dollars in disbursements is, as a practical matter, very difficult. Nor has the Court addressed whether an ultimate payee disclosure rule, like the one fashioned by the Eighth Circuit, advances any government interest sufficiently to satisfy constitutional scrutiny.

The government here did not even attempt to justify its prosecution under the First Amendment. The only governmental interest gleaned from the Superseding Indictment is that "the FEC could not reveal to the public that [the Ron Paul campaign] paid Senator Sorenson after Senator Sorenson switched his political support from [Michelle Bachmann] to [Ron Paul]." Superseding Indictment ¶ 27. But fundamentally missing from this case is any justification for criminalizing myopic disbursement

reporting choices that do not implicate the corruption of the candidate, per *McCutcheon*, or the "corrupt" and "improper" disbursement purposes discussed in *Buckley*, as the descriptor used was accurate, and there is no dispute that the payment to Sorenson was lawful.

The government's aggressive criminal prosecution of disclosure reporting here contrasts starkly with the FEC's historically more flexible approach.[4] The FEC has allowed non-reporting of ultimate payees in many circumstances summarized above. The FEC also has accepted a wide variety of inexact purpose descriptions. And, the FEC has generally scrutinized campaign disbursements less than contributions. The FEC's flexible approach to disbursements reflects the fact that disbursement disclosure is of less practical usefulness, and as a result, its regulation—and the harsh application here—is suspect under the First Amendment.

CONCLUSION

The rules and practicalities of reporting campaign disbursements is an inexact art governed by appropriately flexible rules. Fittingly, at oral argument before the Eighth Circuit, Judge Wollman commented that the conduct at issue in this case appears to fit Harvey Silverglate's aphorism "three

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[4] Video of the FBI raid on one of the defendant's homes, including treatment of his children, is available online at https://www.gofundme.com/defendliberty (last accessed November 2, 2018). That defendant has since served a federal prison sentence.

felonies a day," due to its vague and ambiguous legal underpinnings. Oral Argument at 29:06-29:32, *United States v. Benton*, 890 F.3d 697 (8th Cir. 2018) (No. 16-3861), http://media-oa.ca8.uscourts.gov/OAaudio/2017/4/163861.MP3 (citing Harvey Silverglate, *Three Felonies a Day: How The Feds Target The Innocent* (2011)). Notwithstanding that doubt, the Eighth Circuit's opinion below labors to avoid or distinguish the vague legal predicates and contradictions found within the FEC guidance at the time of the conduct prosecuted here. Such laborious legal analysis and fine legal distinctions, hardly clear to campaign finance experts, let alone lay campaign personnel, should not form the basis for criminalizing core First Amendment activity. Accordingly, the Court should grant certiorari and reset the proper boundaries for knowing and willful violations of the FECA as well as the extension of unrelated criminal statutes to punish political activity.

Respectfully submitted,

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