No. 18-601

In the Supreme Court of the United States

JOHN F. 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 *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an agency's receipt of information over which it has no authority implicate a "matter within" the agency's "jurisdiction" under 18 U.S.C. § 1519, as the Eighth Circuit held below in conflict with decisions from three other circuits?

2. Can a false statement be deemed "material" under 18 U.S.C. § 1001 even if the government would have acted no differently had the statement been true?

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INTEREST OF *AMICUS CURIAE*

Founded by Bradley A. Smith, former Chairman of the Federal Election Commission, the Institute for Free Speech is a nonpartisan, nonprofit organization that defends the rights to free speech, assembly, press, and petition. It represents individuals and civil society organizations, pro bono, in cases raising First Amendment objections to the regulation of core political activity. The Institute has had extensive interactions with the Federal Election Commission and is familiar with its history, practices and authority. Additionally, the Institute publishes analyses of regulations proposed and newly promulgated by the Commission, and the effect of those regulations on political actors and the political speech rights of all Americans. It regularly files *amicus* briefs in cases when First Amendment rights could be strengthened by this Court's intervention.[1]

SUMMARY OF ARGUMENT

Petitioner correctly explains the Eighth Circuit's flawed application of Sarbanes-Oxley and the federal false statements statute. He also correctly analyzes the Eighth Circuit's incorrect application of those statutes, which improperly expanded criminal liability and creates circuit conflicts that this Court

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[1] Pursuant to Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of *amicus's* intent to file this brief, and have provided their consent.

should resolve. *Amicus* will not repeat those arguments.

Here, *Amicus* urges the Court to correct the Eighth Circuit's importation of *civil* enforcement decisions of the Federal Election Commission (FEC) to impose *criminal* liability under the Federal Election Campaign Act (FECA).

To properly evaluate the Petition, two fundamental facts should be kept in mind. First, Petitioner is correct that federal law does not expressly prohibit the use of intermediaries to pay vendors, or reporting only the immediate, rather than ultimate, recipients of campaign expenditures. Pet. 7. Second, he is also correct that federal law does not prohibit paying an individual for his or her endorsement. *Id.* Despite these facts, the decision below finds criminal liability by importing concepts from civil enforcement proceedings at the FEC and reading Sarbanes-Oxley and the federal False Statements statute so broadly that it undermines Congress's intent in enacting FECA. This approach has several problems.

First, the federal prosecution in this case, and prosecutions threatened in others like it, short-circuits Congress's carefully structured protection of political speech rights in FECA. The FEC is specifically structured to protect political speech, and borrowing concepts from the FEC enforcement arena for application in criminal prosecutions outside the structure of FECA and the FEC threatens to undermine the rights Congress sought to safeguard.

Second, the approach below raises due process and vagueness problems because Mr. Tate cannot have been on notice that criminal liability would flow from FEC enforcement principles never used to impose criminal liability previously, as they are not included in or discernable from the plain language of FECA, or the other primary statutes of his conviction. Because no notice through customary channels could have informed Mr. Tate of the possible criminal liability of his acts, his conviction threatens to chill the speech of others working in the political arena.

Third and finally, this Court has recognized in the arena of political speech and campaign finance regulation that prolix rules are anathema to clarity and threaten to chill speech. Consequently, this case calls out for application of the rule of lenity.

For each of these reasons the Court should grant the petition and review the decision of the Eighth Circuit, whether for purposes of correction or clarification. Such correction or clarification is sorely needed. Consequently, the Court should grant the petition and vacate Petitioner's conviction for improper application of each of the three primary statutes of conviction, or else grant the petition to provide notice to all regarding why the Eighth Circuit's reasoning is correct.

ARGUMENT

I. Congress Carefully Structured FECA, and created the FEC, to Protect Political Speech Rights, and the Eighth Circuit's Decision Undermines These Protections.

In reviewing Petitioner's conviction, the Eighth Circuit made a significant error meriting this Court's correction: it used FEC civil enforcement actions to interpret the scope of criminal liability under vastly different criminal statutes, statutes designed for purposes different from or foreign to the regulation of political speech and campaign finance. Consequently, the Eighth Circuit's decision is at cross purposes with Congress's clear intent in FECA. Congress acted affirmatively to balance interests and liabilities to protect political speech and association. The Eighth Circuit's willy-nilly importation of political regulation concepts to support general prosecutions outside the federal campaign finance enforcement system upsets the statutory balance.

This section addresses FECA's liability regime because that design supports Petitioner's statutory arguments. The Eighth Circuit's decision in this case is at cross purposes with Congress's design in FECA, and this Court should correct the Eighth Circuit's error for that reason or clearly explain why the Eighth Circuit was correct.

Congress carefully structured FECA and the FEC to protect political speech. "Unique among federal administrative agencies," the FEC exists to enforce statutes whose "sole purpose is the regulation of core constitutionally protected activity – 'the behavior of

individuals and groups insofar as they act, speak and associate for political purposes.'" *Am. Fed'n of Labor-Congress of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)). Perhaps unsurprisingly, regulation in this area is sometimes found to be unconstitutional. *See, e.g.*, *Mass. Citizens for Life, Inc. v. Fed. Election Comm'n*, 479 U.S. 238 (1986); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). That is because the rights at issue in those cases, as in this, are sacrosanct.

While campaign finance and its attendant political speech regulation began over a century ago with the Tillman Act of 1907,[2] which was followed by the Corrupt Practices Act (CPA) of 1925[3] and the Taft-Hartley Act of 1947,[4] the scope of liability under these acts was tempered over subsequent decades as the Court decided several high-profile campaign finance cases generally regarding the alleged influence of unions. *See*, *e.g.*, *Pipefitters Local No. 562 v. United*

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[2] Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (prohibiting corporate contributions "in connection with any election to any political office").

[3] Federal Corrupt Practices Act of 1925, ch. 368, title III, 43 Stat. 1070 (2 U.S.C. § 241 et seq.) (repealed 1972).

[4] Taft-Hartley Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159-60 (prohibiting contributions or expenditures by labor organizations in connection with federal elections).

States, 407 U.S. 385, 414 (1972) (holding a labor union must segregate political funds from the union treasury, and that political funds may only be volunteered by union members); *United States v. UAW-CIO*, 352 U.S. 567, 585 (1957) (holding union's use of dues to finance campaign television commercials to influence the 1954 elections is a prohibited "expenditure" under the CPA); *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 121-24 (1948) (holding that the CPA does not bar a corporation or union from expressing views on candidates).

Consequently, Congress acted over several decades to bring us the present regime. It enacted FECA in 1971, a comprehensive legislative scheme which incorporated much of the Court's jurisprudence of the previous quarter-century.[5] FECA was amended in 1974 in large part to create the FEC,[6] and the 1974 amendments were challenged generally in *Buckley v. Valeo*, 424 U.S. 1, 9 (1976) (per curiam), where this Court upheld FECA's limits on campaign contributions, *id.* at 35, but invalidated, on First Amendment grounds, the limits FECA placed on expenditures, *id.* at 58. Additionally, the *Buckley* Court distinguished independent expenditures from those that are not independent, treating the latter as

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[5] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 52 U.S.C. §§ 30101-30104 (2012)).

[6] *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 201(a), 208(c)(1), 88 Stat. 1272, 1286 (establishing the FEC and enacting contribution and expenditure limits); 52 U.S.C. § 30106 (2012) (authorizing the FEC); *Id.* § 30107 (2012) (defining the FEC's powers).

contributions and upholding their limitation. *Id.* at 51. Congress again amended FECA in 1976—partly in response to *Buckley*[7]—and again in 1979, when it reset the monetary thresholds for criminal violations such as those at issue here.[8]

The next major FECA amendments came with the Bipartisan Campaign Reform Act of 2002 (BCRA).[9] BCRA included enhancements for criminal penalties, such as some of those relevant to this case. 52 U.S.C. §§ 30109(d)(1)(A)(i), (d)(1)(D)(i) (providing for five-year penalty maximums for FECA violations aggregating over $25,000 and two-year felony offense for conduit contributions of $10,000 or more).

The Court is well familiar with the successful political speech challenges to BCRA's amendments. It is against this historical backdrop that the present case should be considered, as in those decisions this Court has carefully considered the scope of speech

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[7] Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §§ 102, 115(d), (h), 90 Stat. 478, 495, 496 (correcting constitutional defects in the FEC's appointive process) (codified at 52 U.S.C. §§ 30101, 30104, 30107 (2012)). The legislative record of the 1976 Amendments is replete with examples that Congress's purpose was to amend FECA to be in accord with *Buckley*. *See*, *e.g.*, Federal Election Commission, Legislative History of the Federal Election Campaign Act Amendments of 1976 at 89 (written statement of Sen. James L. Buckley of New York),

https://transition.fec.gov/pdf/legislative_hist/legislative_history _1976.pdf (hereinafter "FECA 1976 Legislative History").

[8] Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339 (1980).

[9] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. §§ 30125-30145 (2012)).

regulation under campaign finance laws. *See generally McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 95-106, 109-10 (2003) (upholding the "soft money" ban and the "issue ads" provision while striking down the prohibition on contributions by minors); *Wis. Right to Life*, 551 U.S. 449 (holding that the electioneering communications provision of BCRA, as applied, violated the free speech rights of corporate-funded non-profit corporations engaged in issue advocacy); *Citizens United*, 558 U.S. 310 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and portions of *McConnell*).

Despite the complexity of these rulings, it is nonetheless true that Congress deftly designed a system recognizing political speech is an area deserving of careful policymaking and regulation, and this is particularly true concerning criminal liability. Similarly, this Court has been particularly mindful of how carefully criminal liability must be apportioned given the political speech interest at issue. *See*, *e.g.*, *Wis. Right to Life*, 551 U.S. at 470. Thus, the criminal provisions of FECA only apply to contributions and expenditures, *see* 52 U.S.C. § 30109(d)(1), a fact recognized expressly by the Justice Department. Yet the Justice Department ignored this design when it commenced the present prosecution and blatantly disregarded FECA's heightened scienter requirement of "knowing and willfully" violations for criminal liability.[10]

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[10] *See* U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 13-16, 147-48 (7th ed. 2007),

Congress generally intended that civil enforcement of federal campaign finance laws be handled by a bipartisan enforcement agency, the FEC. *See* 52 U.S.C. § 30109(a) (detailing civil enforcement procedures and possible penalties). This design was not without good reason, and it is "worth remembering that the enforcement history of modern campaign finance regulation" pre-FEC "began with the attempted suppression of a small group of ACLU activists who had advocated the impeachment of Richard Nixon." Samuel Issacharoff and Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform," 77 TEX. L. REV. 1705, 1712 (June 1999).

With the dangers of partisan enforcement in mind, Congress designed the current FEC, and FECA's regulatory regime, so that it could not "become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate," given that "the FEC has such a potential for abuse." FECA 1976 Legislative History at 89 (written statement of Sen. Alan Cranston of California).[11] Members of Congress similarly observed that the FEC, as FECA's primary enforcer, required a bi-partisan structure because the Department of Justice, by contrast, answered to a president from a single political party. *See id*. at 86 (written statement of Sen. Walter Mondale of Minnesota).

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http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf (hereinafter "DOJ Manual").

[11] *Available at*:

https://transition.fec.gov/pdf/legislative_hist/legislative_history _1976.pdf [hereinafter FECA 1976 Legislative History].

Hence the Commission's present structure, which has been unchanged since the 1970's: "No more than 3 members" of the six-member Commission "may be affiliated with the same political party," 52 U.S.C. § 30106(a)(1), and the Commission cannot take meaningful action without the votes of four commissioners. 52 U.S.C. § 30109. In practice, this means that the Commission has two equal blocs – one generally affiliated with the Democratic Party and one with the Republican Party. This "purposefully bipartisan structure . . . ensures" that the FEC "cannot be abused by one party or the President to hamper political opponents." Luke Wachob, *Bipartisanship works for the FEC*, Washington Examiner (Oct. 19, 2014).[12]

Such careful balancing of political interests and protections of political speech is lost in prosecutions such as the one in this case, where alleged malefactors are charged in parallel fashion with federal crimes covering the same conduct, but with lower standards of proof and higher penalties, a practice which, as Petitioner correctly notes, thwarts the purposes of FECA and BCRA. Pet. 15-18, 24-28.

The government's failure to include FECA's culpability requirement is at odds with Congress's care in detailing both criminal and civil enforcement liability under FECA. *See generally* 52 U.S.C. § 30109 (detailing penalties and enforcement procedures). Congress is specific and direct: violations of FECA

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[12] Available at:

https://www.washingtonexaminer.com/bipartisanship-worksfor-the-fec.

merit criminal punishment only if such violations have been committed "knowingly and willfully." 52 U.S.C. § 30109(d). The prosecution here, however, used parallel charges to avoid that culpability requirement, a practice expressly acknowledged by the Department of Justice, DOJ Manual at 4, as the prosecution at issue here sought to avoid that FECA *mens rea* standard for imposition of criminal liability by instead pursuing parallel Sarbanes-Oxley charges. *See* Pet. 15-18. The Eighth Circuit's decision erroneously endorsed this approach.

FECA could not be clearer on the standard of liability that ought to be applicable when reviewing actions such as those at issue here: violations of FECA merit criminal punishment only if such violations are committed "knowingly and willfully." 52 U.S.C. § 30109(d). And establishing knowing and willful *mens rea* requires proof that the offender was aware of what the law required, and that he or she violated that law notwithstanding that knowledge, i.e. that the alleged offender acted in conscious disregard of a known statutory duty or prohibition. *See*, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135 (1994) ("willful" violation of *malum prohibitum* regulatory statute prohibiting the structuring of financial transactions to avoid currency reporting requirements requires proof that defendant was aware of the duty violated and violated that duty *not withstanding that knowledge*); *accord United States v. Curran*, 20 F.3d 560 (3d Cir. 1994); *Nat'l Right to Work Comm. v. Fed. Election Comm'n*, 716 F.2d 1401 (D.C. Cir. 1983); *AFL-CIO v. Federal Election Comm'n*, 628 F.2d 97 (D.C. Cir. 1980); DOJ Manual at 135 ("When there is doubt concerning whether the law applies to the facts of a

particular matter, the offender is more likely to have an intent defense.").

For those FECA violations for which the *mens rea* does not satisfy the "knowing and willful" threshold required for criminal prosecution the violation is subject only to civil enforcement through the FEC. 52 U.S.C. §§ 30109(a), (d) (detailing civil enforcement procedures and thresholds for criminal liability); 2 U.S.C. § 437g(a) (providing for civil rather than criminal proceedings absent "knowing and willful" *mens rea*); *see also* Daniel Murner *et al.*, "Election Law Violations", 55 AM. CRIM. L. REV. 1002, 1018-20 (2018) (describing system of FECA civil and criminal penalty allocations).

II. The Eighth Circuit's Interpretation of the Three Primary Statutes of Petitioner's Conviction are Contrary to Congress's Plain Intent in FECA, Provides no Notice in Conformity with Due Process, and will Chill Core Political Speech.

Petitioner correctly notes that federal law does not expressly prohibit using intermediaries to pay vendors or reporting only the immediate – rather than ultimate – recipient of campaign expenditures. The Petitioner also correctly observes that federal law does not prohibit paying an individual for his or her endorsement. Yet, the importation of principles from FEC civil enforcement decisions, the application of the Sarbanes-Oxley obstruction charge, and the use federal false statement charges in this case ultimately criminalize activities that FECA would not otherwise criminalize.

Petitioner aptly and concisely highlights the primary infirmities with the Eight Circuit's reasoning, and *Amicus* will not repeat them. Rather, *Amicus* points out the ways in which the Eighth Circuit's decision threatens the coherence of the FECA regime, and its careful and measured protections of core political speech. Consequently, the Court should correct the Eighth Circuit's improper imposition of criminal liability which is at odds with the FECA regime outlined in the previous section.

There are three problems with the application of criminal liability here and each is addressed in turn:

First, the Eight Circuit presumed that a "knowing and willful" violation of FECA was supported by the evidence because civil enforcement decisions by the FEC should have put Mr. Tate on notice, as "the district court's analysis [of the false reporting] did not conflict with the Commission's decisions." App. 14a. This reasoning, however, conflicts with FECA's notice requirements for criminal *mens rea* and raises due process and First Amendment overbreadth concerns.

Second, the Eighth Circuit's affirmance of Sarbanes-Oxley false records liability – under the facts of this case – renders FECA superfluous and allows for increased penalties under a lower standard of proof at odds with the provisions of FECA and this Court's decisions.

Third, the Eighth Circuit's "materiality" analysis under the False Statements Act vastly increases criminal liability, again in a manner at odds with FECA, the unconstitutional vagueness doctrine, and norms of due process.

A. The Eighth Circuit Inappropriately Applied Reasoning from FEC Civil Enforcement Decisions to Justify the Application of Criminal Liability.

There is no express federal prohibition against using intermediaries to pay vendors or reporting the immediate, rather than ultimate, recipient of campaign expenditures, and federal law also does not prohibit paying an individual for his or her endorsement. Yet the Eighth Circuit concluded that "the government 'was properly permitted to argue 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 [including FECA]." App. 14a (quoting D. Ct. Order). The Eighth Circuit justified its conclusion by reasoning that the "district court's analysis does not conflict with the [FEC]'s [civil] decisions." *Id*.

The problem with this rationale is that the FEC has engaged in no rulemaking, and Mr. Tate could not be on notice for criminal liability under the requisite "knowing and willful" intent if his only guidance – as is apparent from the cases the Eighth Circuit cites – came from FEC civil enforcement actions. Consequently, the Eighth Circuit's decision improperly expands criminal liability in a manner that does not comport with due process and threatens unconstitutional vagueness. The knowing and willful criminal violation at issue in this case was of vague principles the Eighth Circuit garnered from FEC civil opinions of which Mr. Tate should not have been aware carried *criminal* liability, and which it is unlikely any normal person would have been aware of

in the first place. *See* App. 14a. This is simply insufficient notice to justify a criminal conviction.

The Eighth Circuit correctly observed that FECA requires the treasurer of a political campaign committee to file with the FEC a report disclosing

> 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.

App. 14a, citing 52 U.S.C. § 30104(a)(1), (b)(5)(A). "Violations of the Act's reporting requirements committed 'knowingly and willfully' and 'aggregating $25,000 or more during a calendar year' may be punished by up to five years' imprisonment." *Id.*, citing 52 U.S.C. § 30109(d)(1)(A)(i).

But the FEC has promulgated no regulation pursuant to proper administrative law notice and comment proceedings that would put Mr. Tate on notice that his possibly inaccurate reporting could be a knowing and willful violation of FECA as written. Nor do the somewhat conflicting FEC decisions cited by the Eighth Circuit stand as a substitute that would provide Mr. Tate notice. If anything, those decisions provide no notice to Mr. Tate that his actions might run afoul of FECA and carry criminal liability.

For instance, "[i]n *Mondale for President*, the FEC opined that a campaign may report expenditures to a

media services corporation without reporting the corporation's expenditures to sub-vendors. FEC Advisory Opinion 1983-25 (Mondale for President)." App. 14a. "And in *Kirk for Senate*, the Commission concluded that a campaign had not violated the Act's reporting requirements by paying a vendor, who in turn payed a sub-vendor that allegedly used some of the funds to pay for the personal expenses of the candidate's girlfriend." *Id.* (citing *Kirk for Senate*, Matter Under Review (MUR) 6510). But the Eighth Circuit reasoned that these cases contrasted with Petitioner's, because – at least in *Mondale* – "the campaign would report 'specific information describing the various purposes for each expenditure made to the vendor'" in "'language that reflects the actual purpose of each' of the campaign's expenditures to the vendor." *Id.* (citing *Mondale*). The Eighth Circuit then cites a civil matter, where a campaign apparently concealed payment through a conduit, thereby "violat[ing FECA's] reporting requirements as supporting its interpretation of FECA's reporting requirements regarding sub-vendors." *Id.* 15a (quoting *In the Matter of Jenkins for Senate 1996 and Woody Jenkins*, MUR 4872 (FEC Feb. 15, 2002)). And the Eighth Circuit rejected a case nearly on point with Mr. Tate's, simply stating that the commission decided not to investigate because it "would not be 'a prudent use of Commission resources' to investigate such a 'minor discrepancy.'" *Id.* (quoting *Boustany, Jr. MD for Congress*, MUR 6698 (FEC Feb. 23 2016)). One would think this interpretation militated *against* federal criminal charges.

The problems with the Eighth Circuit's treatment of FECA liability are twofold: first, these ambiguous

FEC *civil* enforcement proceedings do nothing to put Mr. Tate on notice that he could be subject to *criminal* liability such that he could "knowingly and willfully" violate the would-be rules from the decisions cited; and second, the Eighth Circuit treats these *civil* proceedings as rules for *criminal* liability even though the FEC has promulgated no rules in accordance with or subsequent to these proceedings such that Mr. Tate would be on actual or constructive notice and be able to knowingly and willfully breach any FEC rule.

This first problem is one of notice and due process, as the Eighth Circuit's decision infuses unconstitutional vagueness into FECA's criminal liability provision. "Vague laws invite arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). "The prohibition of vagueness in criminal statutes . . . is an essential of due process, required by both ordinary notions of fair play and settled rules of law." *Id.* at 1212 (majority op.) (citations and internal quotation marks omitted). And "[p]erhaps the most basic of due process's customary protections is the demand for fair notice." *Id.* at 1225 (Gorsuch, J. concurring) (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) and Note, Textualism as Fair Notice, 123 HARV. L. REV. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law.")). "Criminal indictments at common law had to provide 'precise and sufficient certainty' about the charges involved." *Id.* at 1225 (quoting 4 W. BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 301 (1769) (Blackstone)). Related to basic due process, the "void-for-vagueness doctrine . . . guarantees that ordinary people have 'fair notice'

of the conduct a statute proscribes." *Id*. at 1212 (majority op.) (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)). "And the doctrine guards against arbitrary and discriminatory law enforcement by insisting that a statute provide standards that govern the actions of police officers, *prosecutors*, *juries*, and *judges*." *Id*. (citing *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983)) (emphasis added).

At minimum, fair notice in accord with due process provides "what Justice Holmes spoke of as 'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *United States v. Lanier*, 520 U.S. 259, 265 (1997) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (ellipsis in original)). "'The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Id*. (ellipsis in original, citing and quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) and *Unites States v. Harriss*, 347 U.S. 612, 617 (1954)).

With respect to this first problem, the Eighth Circuit's reading of FECA provided Petitioner with none of these protections. Instead, it simply recited internal agency decisions – which as noted are ambiguous at best – to impart a rule of criminal liability for failing to report payments to a sub-vendor, even when the reporter submitted the report of the vendor expenditure in compliance with FECA's plain terms. In so doing, the Eighth Circuit's interpretation injects vagueness into the statute which provided Petitioner no notice upon which a jury could have

rationally found that he knowingly and willfully violated a FECA prohibition. This Court should correct this error by the Eighth Circuit and grant the Petition, so it can clarify whether FEC proceedings provide any basis for actual notice and consequent liability.

The second problem with the Eighth Circuit's reliance on FEC civil enforcement decisions is that the rule the Eighth Circuit divined from those civil proceedings are the result of its own interpretive exercise, and not a properly promulgated regulation under traditional agency rulemaking authority.

The FEC engaged in no rulemaking under the Administrative Procedures Act to clarify any possible ambiguity in 52 U.S.C. §§ 30104(a)(1), (b)(5)(A), 30109(d)(1)(A)(i). Nor are those provisions on their face ambiguous for purposes of providing agency interpretive discretion. It is true that under *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), federal courts defer, in at least some circumstances, to reasonable agency interpretations of ambiguous statutes "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1996). It is also true that while the cases are not without criticism, this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), require courts to give "controlling weight" to

agency interpretations of ambiguous regulations. *Seminole Rock*, 325 U.S. at 414.

Here, FECA's language is plain, not ambiguous, and the clear language includes no requirement that persons identify expenditures to sub-vendors. *See* 52 U.S.C. § 30104(a)(1), (b)(5)(A); Pet. 7. Nor does federal law prohibit paying someone for their endorsement. Pet. 7. There is no legal precedent for implied rule or law making from civil enforcement proceedings, particularly when such informal rules would impose criminal liability. And it is difficult if not impossible to discern how Petitioner could have been on notice of such a prohibition such that he could have "knowingly and willfully" breached it. Courts facing similar ambiguous determinations by the FEC have rejected even civil liability under such circumstances. *See*, *e.g.*, *Fed. Election Comm'n v. Swallow*, 304 F.Supp.3d 1113, 1115-19, (D. Utah 2018) (criticizing FEC in civil enforcement action for importing rule from another enforcement action in the face of unambiguous statutory language).

This Court should do the same here. Uncertainty in the area of campaign finance chills political speech and association. Even if this Court ultimately finds that the Eighth Circuit was correct to accept rules from FEC civil proceedings as rules of criminal liability, it should grant the petition in this case to provide notice to those who act in that arena and clarify criminal liability guidelines.

B. The Court Below Improperly Expanded Sarbanes-Oxley Liability, Thwarting FECA's *Mens Rea* Requirement, and Thereby Rendered FECA's Criminal Provision Superfluous.

Amicus will not repeat Petitioner's correct analysis of the Eighth Circuit incoherent interpretation of Sarbanes-Oxley's false reports prohibition in Section 1519. 18 U.S.C. § 1519. Yet it is true that the Eighth Circuit's interpretation is so broad that it renders FECA's criminal sanctions superfluous and allows criminal prosecutions of the same conduct, with higher penalties, on a lower standard of proof, all in conflict with Congress's intent described in Section I above. Pet. 15-18. Petitioner correctly explains the circuit conflict. Pet. 11-14. Petitioner also rightly warns how broadly the Eighth Circuit's decision would render Section 1519 liability to interactions Congress never intended to make illegal. Pet. 19.

Significantly for *Amicus*, Petitioner is also likely correct that Mr. Tate's conviction would not have been affirmed in the Sixth, Ninth or Eleventh Circuits. Pet. 14. In this case, because of the Sarbanes-Oxley count of conviction, Mr. Tate was convicted for the same conduct, on a lesser showing of required *mens rea*, that nevertheless increased his possible maximum penalty fourfold. Just last term, this Court warned yet again that "a statute's meaning does not always 'turn solely" on the broadest imaginable 'definitions of its component words.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (quoting *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015)). The Court noted that "[l]inguistic and statutory context also matter." *Id.*

Just as it did for the reasons noted above, in the discussion of FECA criminal liability, so does that context matter for imposition of parallel criminal liability for similar acts under Sarbanes-Oxley when, as discussed, Congress carefully crafted the FECA liability regime, and did so in a manner the Eighth Circuit completely ignored.

This Court should grant the petition to clarify that those speakers in the political arena can exercise core political speech, and comply with their reporting requirements, with certainty about those requirements, so their speech is not chilled.

C. The Eighth Circuit Inappropriately Expanded False Statement Liability in the FECA Context.

Amicus also will not repeat Petitioner's correct analysis regarding materiality in the context of false statements liability under 18 U.S.C. § 1001, which also correctly explains the circuit conflict. Pet. 20-24. Petitioner rightly explains how the Eighth Circuit's interpretation is wrong because the statement at issue would affect no actual FEC decision. Pet. 24-28.

Amicus merely reiterates that the Eighth Circuit's broad interpretation of "materiality" under Section 1001 undermines Congress's careful purposes in FECA to provide, as described in Section I, a range of sanctions from civil penalties to criminal misdemeanors and felonies that match the seriousness of the possible range of campaign finance infractions. By interpreting materiality so broadly in Section 1001, the Eighth Circuit again, as with its interpretation of Sarbanes-Oxley, risks rendering FECA liability superfluous, and allows blunt

prosecution to replace the careful investigation and policing Congress designed for the sensitive area of campaign activity.

III. Rights to Free Speech are Chilled by Prolix Rules, and this Court Should Apply the Rule of Lenity to Correct the Eighth Circuit's Imposition of Further Complexity on the Regulation of Campaign Activity.

The Eighth Circuit's importation of concepts from FEC civil enforcement actions to delineate the scope of criminal liability under three distinct federal criminal statutory regimes creates a system of prolix rules. This Court has observed that such systems inherently chill First Amendment rights. This Court should grant the petition to correct the Eighth Circuit's errors. The Court should find that lenity applies to all three statutes under the facts of this case and that the Eighth Circuit's overly broad criminal liability interpretation was error.

This Court observed in *Citizens United*:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."

558 U.S. at 413 (quoting *Connally*, 269 U.S. at 391). For this reason, the Court should grant the petition, in part because the Eighth Circuit broadly and incoherently applied numerous unrelated statutes in the campaign finance arena, threatening to chill speakers' core political speech. Even if this Court does not reverse the Eighth Circuit, it should grant the petition so that participants in the campaign finance arena have notice of their responsibilities and liabilities and can act accordingly.

The Court should also grant the petition to consider whether it should apply the rule of lenity to the Eighth Circuit's broad interpretation of the three primary statutes of conviction. This Court has noted that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 135 S.Ct. at 1088 (citations omitted). It "has [also] steadfastly insisted that 'doubt will be resolved against turning a single transaction into multiple offenses,'" as in such a "context[] th[is] principle is a corollary of the rule of lenity." *Simpson v. United States*, 435 U.S. 6, 15 (1978).

Consequently, this is an appropriate case for this Court to correct the Eighth Circuit's broad interpretation of each primary statute of conviction under the rule of lenity, or to provide those who operate in the arena of campaign finance with notice regarding their possible criminal liability in order that their politically expressive activities are not chilled and they may govern themselves accordingly.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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