No. __-_____

In the Supreme Court of the United States

STEPHEN E. STOCKMAN,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Former Congressman Stockman was sentenced to a decade in prison for First Amendment activity in campaign finance and charitable fundraising. Until the Bipartisan Campaign Reform Act of 2002, this Court's the narrowing construction of the term "expenditures" from *Buckley v. Valeo* applied to the Federal Election Campaign Act. BCRA adopted a new rule for "electioneering communications" (*i.e.*, broadcast ads), which *McConnell v. FEC* upheld from facial challenge. In doing so, *McConnell* used opaque language about *Buckley*'s ongoing application to *non-BCRA* parts of FECA, which were not even at issue in *McConnell*. The Fifth Circuit cited that opaque language to reject *Buckley* for non-BCRA activity, working a repeal by implication of non-BCRA parts of FECA.

Campaign-finance issues infect other charges (*i.e.*, fraud, tax evasion, money laundering) the government piled on for nonprofit fundraising for ideological purposes: If the print media were issue advocacy – and not express advocacy for federal candidates – under *Buckley*, the fraud case and elements of other related counts evaporate. Even without the campaign-finance issue, it would chill crucial First Amendment rights under the exacting standards of *Illinois ex rel. Madigan v. Am. Telemarketing Assocs.* to make it a crime – after the fact – for fundraisers to raise insufficient funds to complete projects for which they raised seed money.

The questions presented are:

1. Whether *Buckley*'s narrowing construction applies to non-BCRA activity (*i.e.*, non-electioneering communications) in FECA enforcement actions.

2. Whether the government's fraud claims meet the exacting First Amendment standards in *Madigan.*

PARTIES TO THE PROCEEDING

The caption lists all parties to the appellate proceeding.

RELATED CASES

The following cases relate directly to this case for purposes of this Court's Rule 14.1(b)(iii):

- *U.S. v. Stockman,* No. 4:17-cr-116-2 (S.D. Tex.). Filed March 15, 2017; judgment issued November 14, 2018; emergency motion for compassionate release or transfer to home confinement filed July 16, 2020 and still pending.
- *U.S. v. Stockman,* No. 18-20780 (5th Cir.). Filed November 23, 2018; decided January 10, 2020; petition for rehearing filed January 24, 2020; petition denied March 2, 2020.
- *Stockman v. U.S.*, No. 20A2 (U.S.). Application for transfer to home confinement filed July 9, 2020; denied July 14, 2020.

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PETITION FOR WRIT OF *CERTIORARI*

Former Congressman Stephen E. Stockman – the defendant-appellant below – respectfully petitions for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit to review its affirmance of his conviction under campaign-finance and fraud laws for engaging in activity protected by the First Amendment.

OPINIONS BELOW

The Fifth Circuit panel's decision is reported at 947 F.3d 253 and reprinted in the Appendix ("App.") at 1a. The district court's unreported order denying Petitioner's motions for acquittal is reprinted at 21a and available at 2018 U.S. Dist. LEXIS 98961.

JURISDICTION

On January 10, 2020, the Fifth Circuit issued an opinion (App. 1a) affirming the district court's judgment. On January 24, 2020, Petitioner timely sought rehearing *en banc*, which the court denied by order dated March 2, 2020 (App. 28a). By order dated April 15, 2020, this Court extended by 60 days the time within which to petition for a writ of *certiorari*. The district court had jurisdiction under 18 U.S.C. §3231, and the court of appeals had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix ("App.") includes excerpts from the relevant statutes, which are summarized here.

Campaign Finance Law

Count 12 of the indictment arises under the Federal Election Campaign Act, 52 U.S.C. §§30101-

31046 ("FECA"), which Congress originally enacted in 1972. PUB. L. NO. 92–225, 86 Stat. 3 (1972). Two sets of amendments are relevant: (1) the Federal Election Campaign Act Amendments of 1976, PUB. L. NO. 94-283, 90 Stat. 475; and (2) the Bipartisan Campaign Reform Act of 2002, PUB. L. NO. 107-155, 116 Stat. 81 ("BCRA").

In *Buckley v. Valeo*, 424 U.S. 1, 75 (1976), FECA's regulation of campaign "expenditures" was narrowed to reach only "express advocacy" to avoid reading FECA to violate the First Amendment by restricting speech. *Buckley* held "express advocacy" to include only communications that use certain terms such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Buckley*, 424 U.S. at 44, n.52. "These are the well-known 'magic words.'" *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006).

After *Buckley*, Congress amended FECA to incorporate *Buckley*. *See* H.R. CONF. REP. NO. 94-1057, at 38 (1976) (quoted *infra*). Congress also introduced provisions for coordinated and independent expenditures, including the following:

> (7) For purposes of this subsection—
>
> (A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;
>
> (B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their

> agents, shall be considered to be a contribution to such candidate; …[.]

Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §112(2), 90 Stat. 475, 488 (originally codified at 2 U.S.C. §441a(a)(7)). Under this new provision, however, the *Buckley* definition of an "expenditure" was universally understood to continue to govern FECA. *See McConnell v. FEC*, 540 U.S. 93, 278 n.11 (2003) (Thomas, J., dissenting) (collecting cases), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010).

In 2002, Congress amended FECA to address – among other things – electioneering communications, which Congress limited to certain "broadcast, cable, or satellite communication[s]." BCRA §201(a), 116 Stat. at 89 (now codified at 52 U.S.C. § 30104(f)(3)(A)(i)). In Title II of BCRA, Congress made two relevant changes to campaign-finance law for broadcast electioneering: (1) limits on campaigns in BCRA §202, and (2) limits on corporations and labor unions in BCRA §203. In BCRA §202, Congress made the following changes to FECA §315(a)(7): (1) it "redesignat[ed] subparagraph (C) as subparagraph (D)," and (2) it inserted new subparagraph (C) to read as follows:

> (C) if –
>
> (i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 304(f)(3)); and
>
> (ii) such disbursement is coordinated with a candidate …;
>
> such disbursement or contracting shall be treated as a contribution to the candidate

> supported by the electioneering communication …[.]

BCRA §202(2), 116 Stat. at 90-92 (now codified at §315(a)(7)(C)). In addition to this section, BCRA §203 added parallel provisions for electioneering communications by corporations and labor unions. 116 Stat. at 90-92 (now codified at 52 U.S.C. § 30118(c)). In *McConnell*, BCRA §§202-203 withstood a facial challenge.

Mail and Wire Fraud Statutes

Counts 1 through 8 of the indictment arise under the mail and wire fraud statutes. 18 U.S.C. §§1341, 1343. The common element of these statutes is a "scheme or artifice to defraud," *id.*, which requires the government to show: (i) that the defendant knowingly devised a scheme to defraud; (ii) false material pretenses; and (iii) specific intent to defraud. *U.S. v. Imo*, 739 F.3d 226, 236 (5th Cir. 2014); *Neder v. U.S.*, 527 U.S. 1, 20 (1999) ("both prohibit, in pertinent part, "any scheme or artifice to defraud' or to obtain money or property 'by means of false or fraudulent pretenses, representations, or promises'"); *Carpenter v. U.S.*, 484 U.S. 19, 28 (1987).

While mail and wire fraud arise under generally applicable statutes, this Court has read them more narrowly in the First Amendment fields of charitable and political fundraising.

> The First Amendment protects the right to engage in charitable solicitation[s].... ("charitable appeals for funds ... involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the

> advocacy of causes — that are within the protection of the First Amendment")...[.]

Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 611-12 (2003). Under the "*Schaumburg* trilogy," this Court has held that regulation of fundraising cannot chill these First Amendment interests.[1] Given the need to protect the First Amendment interests in charitable and political fundraising, *Madigan* left only a narrow "corridor open for fraud actions" in this area. *Madigan*, 538 U.S. at 617. That corridor is a very narrow one:

> In a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a fundraiser to fraud liability. … [T]o prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false and made the representation with the intent to mislead and succeeded in doing so.

Madigan, 538 U.S. at 620 (court alterations omitted). "Simply labeling an action one for 'fraud' ... will not carry the day," *id.* at 617, and fraud is not merely a matter of proof at trial, but also a matter of sufficiency of the indictment. *Id.* at 617-18.

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[1] *See Village of Schaumburg v. Citizens for a Better Envt.*, 444 U.S. 620, 627 (1980) ("regulation must be done with narrow specificity when First Amendment interests are affected") (interior quotations omitted); *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 969 (1984); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 (1988).

STATEMENT OF THE CASE

Stephen E. Stockman ("Stockman" or "Petitioner") served as a member of the U.S. House of Representatives first from 1995 to 1997 and again from 2013 to 2015. ROA.1927. After he left Congress for the first time, Stockman worked with multiple ideologically oriented nonprofit organizations, including The Leadership Institute, a nonprofit organization that offers training in a variety of political and public policy-related skills. ROA.3997-98. While there, he met professional fundraisers with whom he subsequently associated on other ventures, including Thomas Dodd and Jason Posey. Dodd was a professional fundraiser specializing in soliciting large donations from wealthy individual donors. ROA.3735. Both Dodd and Posey would later work for Stockman's political campaigns, as staffers in his Congressional office, and with him on independent ventures. ROA.3547, 3997-4000. The facts that underlie this case relate in large part to the intersection of Stockman's political career and his efforts – with others – to raise funds for voter education and charitable purposes.

The charges most relevant to this petition are one count of accepting a "coordinated expenditure" over FECA's annual cap on contributions, *see* 52 U.S.C. §30116(a)(1)(A); and (2) eight counts of mail and wire fraud predicated on the allegedly fraudulent intent to collect money for a charity without the intent to implement the projects pitched to the donors contemporaneously with the donations. *See* 18 U.S.C. §§1341, 1343.[2] Many of the remaining counts derive

[2] The jury acquitted Stockman on one of the eight fraud counts. ROA.957. For simplicity, the petition refers to the eight fraud counts as a group.

from the alleged unlawfulness – or alleged unlawful proceeds – of the fraud and campaign-finance charges.

Significantly, the fundraising here occurred with sophisticated individual and foundation donors, who would understand a donor's option to restrict grants or contributions to nonprofits. During the years at issue, donations or grants could be "unrestricted," "temporarily restricted," or "permanently restricted." As of December 15, 2017, the Financial Accounting Standards Board changed that to two categories: "donor-imposed restrictions" and "without donor-imposed restrictions." Restricted funds must be recorded in organizations' books and records and expended consistent with any restrictions. *See* PPC's 990 Desk Book, at 7-18 (Thompson Reuters 25th ed. Jan. 2017). None of the grants or contributions at issue involve any donor restrictions.

Fundraising from Stanford Rothschild, Jr.

Stockman and Dodd solicited Stanford Rothschild, Jr., a wealthy philanthropist who donated to conservative causes. ROA.3549, 3935-37. Dodd had previously solicited Rothschild on behalf of another nonprofit foundation for which Dodd raised money. ROA.3578-79. In 2010, these solicitations included Stockman and Dodd seeking Rothschild's monetary support for the production and distribution of a book designed to convince Jewish voters to support conservative political causes. ROA.3556-57.

Rothschild contributed $285,000 through Dodd and Stockman during 2010. ROA.10636, 10642, 10662, 10705-06. Stockman set aside a portion of Rothschild's donations to fund the production of the book described in the initial solicitation to Rothschild, and Stockman produced and sent a draft of the book,

ROA.10772-830, indicating the need for information *inter alia* from Rothschild himself before the book could be finalized. ROA.10772. A total of $75,995.50, or approximately 26.7% of the total funds donated by Rothschild was remitted to Dodd as "commission checks". ROA.3555, 3574, 3585-86. Other portions of the funds were used to pay for a variety of operating expenses incurred before and after the 2010 election. See ROA.10568, 10585. Rothschild donated a total of $140,000 to Life Without Limits – a §501(c)(3) – during 2012 in connection with solicitations by Stockman and Dodd. ROA.11113, 11175, 11380.

Fundraising from Richard Uihlein

In 2013, Dodd and Stockman met with Richard Uihlein, also a wealthy philanthropist, to solicit a donation to a new project entitled the "Congressional Freedom Foundation" and the "Congressional Freedom Caucus." ROA.2122-23, 3942-43. A central part of the project was an intern-training program based in a residential home in Washington to be purchased and renovated to allow several interns to live and work in the home, referred to as the "Freedom House." ROA.2123-24. As presented to him, the project had many budget items beyond purchasing and renovating Freedom House, ROA.2131, 2133, with a total proposed budget of $2,464,000, ROA.3948, with $1,299,000 for purchasing and renovating the Freedom House. ROA.2131. Dodd and Stockman intended Uihlein's donation as seed money to be augmented with other donations. ROA.3944. Uihlein contributed $350,000 to Life Without Limits for the project. Uihlein never suggested that his contribution was restricted to be spent on only one part of the project. ROA.2178.

In January 2014, Stockman met with Uihlein to gauge Uihlein's support for Stockman's candidacy for the Republican nomination in the U.S. Senate election in Texas, without requesting a donation. ROA.2139-40. Posey and others solicited Uihlein for a donation on behalf of the §501(c)(4) Center for the American Future ("CAF"), ROA.2152-53, which had a project to print and distribute a newspaper-style mailer to Texas voters. ROA.2157. Uihlein made the requested $450,571.65 donation with a check payable to the U.S. Postmaster, which was deposited into the postage account of the mailing company (CESI). ROA.4651-52. Ultimately, the size of the project required retaining an additional mailing company, ROA.4676, and only about half of the planned mailing was sent. CAF received a $214,718.51 refund from CESI. ROA.4701. The balance of the $450,571.65 donation from Uihlein was used by CESI to pay for mailing the newspapers or was retained by CESI as compensation for the mailing services. ROA.4700.

Jury Instructions

As relevant to this petition, the district court's jury instructions defined §501(c)(3) and §501(c)(4) entities as follows:

> A Section 501(c)(3) organization is a nonprofit corporation, fund, or foundation organized and operated exclusively for religious, charitable, scientific, or educational purposes. Section 501(c)(3) organizations are generally exempt from federal taxation, and donations to these entities may be tax-deductible. If an organization is classified as a Section 501(c)(3) organization, none of its net earnings may benefit any private shareholder or individual.

> A Section 501(c)(3) organization may not participate or intervene in any political campaign on behalf of, or opposition to, any candidate for public office.
>
> A Section 501(c)(4) organization is a nonprofit organization operated exclusively for the promotion of social welfare. Section 501(c)(4) organizations are also generally exempt from federal taxation. A Section 501(c)(4) organization may compensate employees for work actually performed, but the net earnings of a Section 501(c)(4) organization must be devoted exclusively to charitable, educational, or recreational purposes. The net earnings of a Section 501(c)(4) organization may not benefit any private shareholder or individual.

ROA.917. These definitions prompted the jury to pose the following questions to the trial judge during their deliberations.

> Is mail/wire fraud related to:
>
> 1) Reason for the check was written?
>
> or
>
> 2) The destination the funds were deposited to (c3) and thats [sic] "destination" [sic] ability to use those funds.

ROA.963. The trial judge summarized her reading of these questions as "whether mail/wire fraud re1ate[s] to: the reason the check was written" and "whether the 50l(c)(3) entity that the check was written to could legally use those funds." ROA.964 (cleaned up). With that understanding, she responded as follows:

> Mail and wire fraud require each of the elements set out on pages 13 and 17 of the Jury Instructions. The elements are that Mr.

> Stockman knowingly devised or intended to devise a scheme to obtain money from individuals or charitable foundations based on false representations, pretenses, or promises; that the scheme employed false material representations, pretenses, or promises; that Mr. Stockman caused something to be delivered through the Postal Service (Count 1), by a private or commercial interstate carrier (Counts 2, 3, and 4), or by way of wire communications (Counts 5, 6, 7, and 8), for the purpose of executing the scheme or attempting to execute it; and that Mr. Stockman acted with a specific intent to defraud. You should consider these elements in the context of the entire jury instructions, including the definitions of "knowingly," "scheme to defraud," "specific intent to defraud," and "'false" and "material" representation, pretense, or promise on page 11.

Id. The definitions of the tax-exempt entities were on page 10 of the jury instructions (*i.e.*, not referenced in the judge's response, except for the implicit cabining of whether the tax-exempt entity "could legally use those funds"). *Id.*

The Jury's Verdict

The jury found Stockman guilty on counts 1-5, 7-12, 14-22, 24, and 27-28. ROA.956-61. The jury acquitted him on count 6. ROA.957.

The District Court's Judgment

The district court issued its Judgment on November 14, 2018, adjudicating Stockman guilty on Counts 1-5, 7-12, 14-22, 24, and 27-28. ROA.1104.

Stockman was sentenced to 120 months' imprisonment, with three years of supervised release following such term of imprisonment, and monetary penalties totaling $1,017,018.51 plus post-judgment interest. ROA.1107-10.

Appeal to Fifth Circuit

Stockman timely filed his Notice of Appeal on November 14, 2018. ROA.1112. A three-judge panel affirmed the district court's judgment, and the Fifth Circuit denied a timely petition for rehearing *en banc*.

REASONS TO GRANT THE WRIT

The petition raises important First Amendment issues under both criminal and campaign-finance law, and it provides an ideal vehicle for this Court to resolve several important issues. This Court should grant the writ of *certiorari* for four reasons.

1. This case provides a compelling reason to consider the application of *McConnell* to non-BCRA activity (*i.e.*, advocacy other than the broadcast electioneering that BCRA addressed). This Court's revisiting is needed not only to prevent the inadvertent or *sub silentio* reversal of a then-uniform view of the federal courts of appeal that – except for BCRA's "electioneering communications – *Buckley* controlled on – and continued to require – express advocacy under FECA, *see McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting), but also because –as Justice Alito foresaw – the status quo "impermissibly chills political speech." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482-83 (2007) ("*WRTL*") (Alito, J., concurring). Moreover, the *McConnell* language on which the Fifth Circuit relied is opaque and – as read by the Fifth Circuit – was both *dictum* and wrong. Indeed, because the expedited BCRA judicial review

that culminated in *McConnell* did not apply to pre-BCRA elements of FECA untouched by BCRA, the continued application of *Buckley* to non-BCRA activity was outside the jurisdiction of the *McConnell* court. Either the Fifth Circuit read *McConnell* correctly and *McConnell* erred, or the Fifth Circuit read *McConnell* incorrectly because of *McConnell*'s opaque language. Either way, this Court must correct the error to avoid continued chilling of core political speech. *See* Section I, *infra.*

2. In this crucial First Amendment context, the fraud charges – let alone the ten-year prison term – trigger the duty of appellate courts to independently review the adequacy of the underlying charges under the *Madigan* line of cases and related authorities. Quite simply, the fraud charges target legal activity and it is likely that the jurors found Stockman guilty of actions that §501(c)(3) and §501(c)(4) entities and their fundraisers lawfully make take. Moreover, there is no evidence that Stockman intended fraud at the time of the donations. Had any number of events gone differently, the various efforts (e.g., voter-education, Freedom House) would have been completed. Courts should not prosecute charities or fundraisers merely for failing to meet fundraising milestones needed to complete projects. Independent appellate review to protect First Amendment rights from chill is *de novo*, but Stockman also meets the plain-error standard for relief under FED. R. CRIM P. 52(b). *See* Section II, *infra.*

3. Reversing the convictions for the alleged campaign-finance and fraud counts would require the granting of Stockman's motions to dismiss or motion for acquittal or a new trial. The other counts are either derivative of the alleged wrongdoing in counts 1-8 and

12 or the prejudice of the extraneous void allegations denied him of the opportunity to present a complete defense to any remaining charges. *See* Section III, *infra.*

4. This case is an ideal vehicle to resolve the legal issues raised by the campaign-finance and fraud issues in Sections I-II, *infra*. Although fraud generally involves facts, this is not a fact-bound inquiry: This Court's First Amendment decisions require appellate courts to exercise their independent judgment to assess allegations to ensure that regulation does not chill speech. Finally, the Fifth Circuit arguably applied *McConnell*'s literal words to displace *Buckley*, which only this Court can correct or clarify. *See* Section IV, *infra.*

Petitioners respectfully submit that these important reasons warrant this Court's hearing this case.

I. THIS COURT SHOULD CORRECT THE FIFTH CIRCUIT HOLDING THAT *MCCONNELL* DISPLACED *BUCKLEY*.

Count 12 charged aiding and abetting the making of excessive campaign contributions under 52 U.S.C. §§30116(a)(1)(A), 30116(a)(7)(B)(i), 30109(d)(l)(A)(i). ROA.97. Of these provisions, the first sets the dollar limits for campaign contributions, and the third sets the enforcement penalties. The second is the relevant provision here:

> [E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate[.]

52 U.S.C. §30116(a)(7)(B)(i). The core allegation is that Stockman caused CAF to distribute *The Conservative News* to as a coordinated expenditure over the campaign-finance limits to Stockman's campaign. Under the government's view, Stockman thus aided and abetted a campaign-finance violation. According to Stockman, however, there was no FECA violation because *The Conservative News* indisputably did not include express advocacy under *Buckley*, so that CAF's outlays for *The Conservative News* were not even subject FECA regulation.

In the Fifth Circuit, the parties presented these rival views: Stockman argued under *Buckley* that FECA covers only express advocacy; the government argued under *McConnell* that BCRA removed the *Buckley* gloss on FECA, even for communications that were not electioneering communications under BCRA.

Citing *McConnell*, the Fifth Circuit sided with the government's position:

> In *McConnell*, the Supreme Court considered precisely the statutory language at issue here, namely the rule (now codified at 52 U.S.C. §30116(a)(7)(B)(i)) that "expenditures in cooperation, consultation, or concert with" a candidate are to be considered the equivalent of campaign contributions and restricted accordingly. The *McConnell* Court explained that a post-*Buckley* statutory enactment had "clarified the scope" of this language, "preempting" a possible claim that "coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions." In other words, the Court held that *the presence of express advocacy is not a prerequisite* of the "settled" rule that when

> expenditures are "controlled by or coordinated with the candidate and his campaign, they may be treated as indirect contributions subject to FECA's amount limitations.

947 F.3d at 261 (App. 13a) (alterations and citations omitted; emphasis added). Specifically, the Fifth Circuit panel rejected a *Buckley*-based limitation of §30116(a)(7)(B)(i) because "[t]he relevant portion of *McConnell* deals separately with two distinct subsections of FECA, one pertaining to electioneering communications and the other to expenditures 'more generally,'" *id.*, and "[t]he latter subsection, not the former, was the focus of the Court's 'preemption' comment." *Id.* Whether right or wrong, the Fifth Circuit upheld a criminal conviction based on *McConnell*, which the panel believed had overruled the narrowing construction of *Buckley*.

The issue is important and deserves this Court's resolution. As explained in this section, Stockman is correct that *Buckley*'s narrowing construction still applies to §30116(a)(7)(B)(i), notwithstanding BCRA and *McConnell*.

A. The discussion of §315(a)(7)(B) in *McConnell*'s is *dictum* and wrong.

As indicated, the Fifth Circuit read *McConnell* to displace *Buckley*'s narrowing construction from any application to §315(a)(7)(B), *see* 947 F.3d at 261 (App. 13a) (quoted *supra*), but §315(a)(7)(B) was never at issue in *McConnell* or BCRA. It may be that the Fifth Circuit misunderstood *McConnell* or that the *McConnell* majority misunderstood BCRA. In either case, it falls to this Court to correct the error, which has caused a former Congressman to be sentenced to a decade in prison.

Although Stockman has not argued *per se* to overrule *McConnell*, overruling *McConnell* would support Stockman's consistent claim that BCRA did not overturn *Buckley* with respect to FECA's confining its regulation of campaign expenditures to express advocacy. To the extent *McConnell* held otherwise, arguing now to overrule *McConnell* "is – at most – a new argument to support what has been a consistent claim." *Citizens United*, 558 U.S. at 330-31 (alterations and interior quotations omitted).

1. §315(a)(7)(B) was unchanged by BCRA and not at issue in *McConnell*.

In upholding Stockman's conviction, the Fifth Circuit relied on a *McConnell* discussion on BCRA §202 to find *Buckley*'s narrowing construction had been displaced for non-BCRA activity, *see* 947 F.3d at 261 (App. 13a); *McConnell*; 540 U.S. at 202-03, notwithstanding that BCRA §202 applied only to "electioneering communications" (*i.e.*, targeted broadcast communications made shortly before an election) paid for through coordinated funds. 116 Stat. at 91-92. That *McConnell* discussion is at best opaque as to its intended meaning, but the Fifth Circuit read it to displace *Buckley* for non-BCRA activity.

The *McConnell* sentence that most directly divides the parties reads as follows:

> BCRA §202 pre-empts a possible claim that §315(a)(7)(B) is similarly limited, such that coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions.

McConnell, 540 U.S. at 202. All that BCRA §202 did to §315(a)(7) was to renumber its subparagraph (C) to (D), PUB. L. NO. 107-155, §202(1), 116 Stat. at 91, and

insert a new subparagraph (C). PUB. L. NO. 107-155, §202(2), 116 Stat. at 91-92. The *McConnell* sentence could be typographical error with respect to its referring to subparagraph (C), or it may have simply failed to confine its discussion to electioneering communications.

The *McConnell* sentence could mean any of the following (alterations emphasized):

- BCRA §202 pre-empts a possible claim that §315(a)(7)(*C*) is similarly limited, such that coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions.
- *FECA §315(a)(7)(B)* pre-empts a possible claim that *BCRA §202* is similarly limited, such that coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions.
- BCRA §202 pre-empts a possible claim that §315(a)(7)(B) is similarly limited for *electioneering communications*, such that coordinated expenditures for *electioneering* communications that avoid express advocacy cannot be counted as contributions.

But the *McConnell* sentence cannot mean what the Fifth Circuit read it to mean because the scope of §315(a)(7)(B)'s application to non-BCRA activity was not before the *McConnell* court.

If BCRA eliminated *Buckley*'s narrowing construction from §315(a)(7)(B) for all expenditures throughout FECA, BCRA's elimination of *Buckley* for electioneering communications in §315(a)(7)(C) would have been unnecessary. If *McConnell* means what the Fifth Circuit panel held, much of BCRA becomes mere

surplusage, counseling against that reading. *See Maracich v. Spears*, 570 U.S. 48, 68-70 (2013).Under the circumstances, this Court should reject a reading that BCRA *sub silentio* expanded §315(a)(7)(B) to regulate issue advocacy for non-broadcast media like the print media at issue here.

In any event, *McConnell* lacked jurisdiction to expand §315(a)(7)(B). BCRA's provision for expedited judicial review applied only to "any provision of this Act or any amendment made by this Act." BCRA §403(a), 116 Stat. at 113-14. That does not include §315(a)(7)(B) of FECA. Because §315(a)(7)(B) was not amenable to judicial review under BCRA's expedited review, it was not before the *McConnell* court. If the *McConnell* majority intended to rewrite §315(a)(7)(B), therefore, it lacked jurisdiction to do so,[3] and its revision is void.

> For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 101-02 (1998).

2. As enacted in 1976, §315(a)(7)(B) adopted *Buckley*'s narrow construction.

Although Congress occasionally enacts statutes to abrogate decisions of this Court,[4] the 1976 FECA

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[3] The granting of judicial review waives sovereign immunity, which is a jurisdictional boundary to court authority: "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *U.S. v. Bormes*, 568 U.S. 6, 10 (2012).

[4] *Compare*, *e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) *with* Civil Rights Act of 1991, PUB. L. NO. 102-166, §§ 101-102, 105 Stat. 1071, 1072-74.

amendments were not that type of statute. Quite the contrary, the 1976 amendments supported *Buckley*:

> The definition of the term "independent expenditure" in the conference substitute is intended to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo*.

H.R. CONF. REP. NO. 94-1057, at 38 (1976). Even if the 1976 conference report had not expressly supported Stockman's view of the 1976 amendments – which it does – the text of the 1976 amendments would have provided adequate support for two compelling reasons.

First, "absent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985). There is nothing in the 1976 amendments that suggests the reversal of *Buckley* on this point.

Second, even without *Buckley*, Congress would not work such a change in the law without notice: If Congress intended to grant to expand FECA, it would have done so clearly, not through "vague terms or ancillary provisions – it does not, one might say, hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). While that was true for the environmental statute at issue in *Whitman*, it would be doubly true in the First Amendment context, *Citizens United*, 558 U.S. at 324 ("[p]rolix laws chill speech for the same reason that vague laws chill speech"), and triply true in the criminal context. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (preventing arbitrary enforcement is "the more

important aspect of the vagueness doctrine"). There is nothing in the 1976 amendments that suggests the expansion of FECA to regulate issue advocacy.

In summary, the 1976 amendments support Stockman's view that – under *Buckley* – FECA regulates only expenditures that involve express advocacy. Thus, for the FECA conviction to stand, the enactment of BCRA's electioneering-communication provisions must be read to have *sub silentio* amended FECA, which BCRA did not and could not do.

B. This Court should hold that *Buckley* continues to apply to §315(a)(7)(B).

The Fifth Circuit panel read *McConnell* to detach *Buckley* from non-BCRA activity like the print media at issue here. That may or may not be what *McConnell* intended. If not, then *Buckley* never detached, and the Court should clarify *McConnell*. If the Fifth Circuit read *McConnell* correctly, this Court should re-attach the narrowing construction from *Buckley* to non-BCRA activity for the reasons set forth in this section. Either possibility requires reversal by this Court.

If *Buckley* remained applicable – or if the Court restores it because the First Amendment leaves no alternative – the challenged print media do not qualify as "expenditures" under FECA and so it does not (or would not) matter if Stockman coordinated with CAF. Specifically, if the outlay were not an expenditure, it would not fall under FECA, without regard to whether the outlay was coordinated or not. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (rejecting the argument that "*McConnell* eliminates completely the express advocacy/issue advocacy delineation"); *cf. WRTL*, 551 U.S. at 467-69, 474 n.7 (*Buckley* continues to guide as-

applied challenges under FECA, even for BCRA activity) (opinion of Roberts, C.J.). If *Buckley* applies, the FECA conviction must be reversed or, at least, vacated to allow a new trial. *See* Section III, *infra*.

1. The Congress that enacted §315(a)(7)(B) in 1976 intended to incorporate *Buckley*, and no subsequent act altered that.

As indicated in Section I.A.1, *supra*, BCRA did not give the *McConnell* court occasion to reinterpret the non-BCRA parts of FECA. As indicated in Section I.A.2, *supra*, Congress intended those pre-BCRA parts of FECA to continue to fall under *Buckley*. Under the circumstances, this Court is "absent an expression of legislative will" and should be "reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n,* 470 U.S. at 128. In the arenas of federal elections and charitable fundraising, *Buckley* certainly qualifies as "an important decision." *Id.* When Congress alters other portions of an act for other purposes, courts assume that Congress did not intend a change to the prior interpretation, *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227 (1957) ("no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed"), which would be a disfavored repeal by implication. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007). It would be reckless for this Court to ignore the absence of any congressional intent to displace *Buckley* for non-BCRA activity.

2. No alternate reading of §315(a)(7)(B) would satisfy the avoidance canon.

Absent *Buckley*'s narrowing construction, FECA and §315(a)(7)(B) would trench First Amendment rights for issue advocacy. Even if Congress had not intended to include *Buckley*'s narrowing construction in §315(a)(7)(B), this Court would need to adopt it in FECA enforcement cases. In civil pre-enforcement challenges, the Court appears to have recognized as much. *WRTL*, 551 U.S. at 467-69, 474 n.7. Now this Court should mirror that result for civil and especially criminal FECA enforcement actions.

As Justice Scalia explained in his *WRTL* concurrence, the available tests beyond *Buckley* do not solve the problem "with the degree of clarity necessary to avoid the chilling of fundamental political discourse." *WRTL*, 551 U.S. at 493 (Scalia, J., concurring in part and concurring in the judgment). As he continued, that makes *Buckley*'s "magic words" test unavoidable even if inconclusive:

> If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it. … The fact that the line between electoral advocacy and issue advocacy dissolves in practice is an indictment of the statute, not a justification of it.

WRTL, 551 U.S. at 494-85 (Scalia, J., concurring in part and concurring in the judgment). Because the *Buckley* test should have governed this action, the conviction under *McConnell* – or the Fifth Circuit's misreading of *McConnell* – cannot stand.[5]

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[5] Justice Scalia prophetically explained that "[i]n the critical area of political discourse, the speaker cannot be compelled to risk felony prosecution with no more assurance of impunity than

3. This Court should adopt the as-applied pre-enforcement review from *WRTL* for FECA enforcement actions.

In civil pre-enforcement review, courts often must assess whether the plaintiff brings a facial or an as-applied challenge. *See Doe v. Reed*, 561 U.S. 186, 194 (2010). With criminal prosecutions, the party challenging a statute's scope is a *criminal defendant*, not a civil plaintiff. While the analogy may not fully hold, Stockman respectfully submits that enforcement under FECA is more like the as-applied review under *WRTL* than the facial review under *McConnell*. For that reason, the Fifth Circuit's *McConnell*-based facial ruling should be reversed, even if *Buckley* no longer applies facially to the non-BCRA parts of FECA.

The nature of a pre-enforcement civil suit – as facial or as applied – hinges on whether the "plaintiffs' claim and the relief that would follow … reach beyond the particular circumstances of [the] plaintiffs." *Id.*; *Citizens United*, 558 U.S. at 331 ("the distinction between facial and as-applied challenges … is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint"). If the requested relief extends beyond the plaintiff, the challenge if facial. If it does not, the challenge is as applied. With criminal enforcement, the relief does not extend beyond the defendant.

Because plaintiffs in facial challenges must make a greater showing than plaintiffs in otherwise-similar

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his prediction that what he says will be found" to meet *WRTL*'s test for issue advocacy. *Id.* at 493. Of course, Stockman did not even get *WRTL*'s test but rather the surprise announcement that *McConnell* had displaced *Buckley* from non-BCRA activity.

as-applied challenges, the result in the former does not necessarily predict the result in that latter. In a facial challenge like *McConnell*, the plaintiff must "establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). For that reason, "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) (interior and alterations omitted). But the Court need not look to general differences between facial and as-applied challenges because *WRTL* and *McConnell* show the divergence. *Compare McConnell*, 540 U.S. at 202-09 (rejecting *Buckley* in facial challenge to electioneering issue) *with WRTL*, 551 U.S. at 467-69, 474 n.7 (applying *Buckley* in as-applied electioneering challenge) (opinion of Roberts, C.J.). As this Court recognized, the line drawing that the Court does in an as-applied challenge must err on the side of protecting speech: "In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Id.* at 457.

As explained in Section I.A.1, *supra*, it is by no means clear what *McConnell* intended to say about the continued application of *Buckley*'s narrowing construction to non-BCRA activity. Even if *McConnell* intended what the government argued and what the Fifth Circuit held, that facial holding should not govern in FECA enforcement actions. Instead, this Court should adopt the *WRTL* as-applied standard, which would require reversal or, at least, retrial.

II. THE FRAUD COUNTS DO NOT SUPPORT THE EXISTANCE OF A CRIME.

Regardless of the outcome on the FECA issue in count 12, *see* Section I, *supra*, this Court should find the mail and wire fraud charges in counts 1-8 wholly inadequate under the *Madigan* line of charitable-fundraising decisions. As such, the Court should reverse the denial of Stockman's motions to dismiss to give Stockman's protected First Amendment activity the "sufficient breathing room" that the First Amendment and this Court's decisions require. *Madigan*, 538 U.S. at 620. Otherwise this Fifth Circuit precedent stands for the proposition that the government can prosecute any charity or fundraiser that puts out a prospectus for a fundraising project and raises seed money, but then falls short of fully funding the proposed project.

In addition, there is enough uncertainty about what the jury found to require reversal:

> [T]he Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict.

Mills v. Maryland, 486 U.S. 367, 376 (1988); *accord Yates v. U.S.*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. U.S.*, 437 U.S. 1 (1978). In First Amendment cases, appellate courts "exercise[] independent judgment" on the legal sufficiency of claims. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984), which this Court should do here under *Madigan*, 538 U.S. at 617-18. Otherwise, this action and its Fifth Circuit precedent will chill speech rights.

This prosecution ably demonstrates the *Bose Corp.* observation about First Amendment litigation:

> In each of these [First Amendment] areas, the limits of the unprotected category as well as the unprotected character of particular communications, have been *determined by the judicial evaluation of special facts that have been deemed to have constitutional significance*. … [T[he Court has regularly conducted an *independent review of the record both to be sure that the speech in question actually falls within the unprotected category* and to confine the perimeters of any unprotected category within *acceptably narrow limits in an effort to ensure that protected expression will not be inhibited*.

Bose Corp., 466 U.S. at 504-05 (emphasis added). The alternative of having a jury decide what "content is unworthy of protection" has neither "served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 505. It thus falls to appellate courts to police these important lines between permissible and proscribable speech.

As set forth in this Section, reversal is warranted even if the Court does not hold that *Buckley* continues to apply to Stockman's non-electioneering conduct and *a fortiorari* if *Buckley* does apply. This entire prosecution – to say nothing of the decade of incarceration – will impermissibly chill speech:

> [I]n every such case the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe

> that the fee was in fact fair. *This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates*.

Riley, 487 U.S. at 794 (emphasis added). While this Court cannot restore the time lost to the wrongful incarceration, it can end that incarceration and lift the chill from charitable and political fundraising by all others, regardless of their ideological stripe.

A. The fraud counts fail if the FECA count is reversed.

Before he directly addresses the fraud counts, Stockman first points out that much of the fraud case hinges on whether *Buckley*'s narrowing construction applies to non-BCRA activity (*i.e.*, to advocacy other than electioneering communications that BCRA regulated). If *Buckley* continues to apply, issue-advocacy spending was neither spending on Stockman's campaign nor personal spending but First Amendment speech on which the tax-exempt entities "could legally use those funds." ROA.964. Consequently, if Stockman prevails on the *Buckley* issue in Count 12, this Court either should reverse the fraud convictions or at least vacate them to allow a new trial.

An accused can defend against charges of willfulness by presenting evidence that he did not *intentionally* violate a known legal duty. *Cheek v. U.S.*, 498 U.S. 192, 202-03 (1991). The trial court's willfulness instruction was determined to supplant Stockman's rival good-faith instruction that he relied on the advice of counsel and accountants, 947 F.3d at 262 (App. 15a),[6] that argument collapses if the underlying

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[6] *See id.* (citing *U.S. v. Pomponio*, 429 U.S. 10, 11-12 (1976)) ("an additional good faith instruction is not required when the charge already requires proof of willfulness, properly cabined to

"known legal duties" were not legal duties at all under *Buckley* or otherwise.

For example, the Fifth Circuit – and presumably the jury – found that Stockman deceived Uihlein into supporting Stockman and his campaign:

> Each donation from each donor, Uihlein included, was given under the false pretense that the donor's money would be used for specific purposes, including "voter education" and independent political advocacy. The money was not used for those purposes.

947 F.3d at 263-64 (App. 18a). Under Stockman's reading of *Buckley* and *McConnell*, however, Uihlein received what he sought (namely, issue advocacy that was not a FECA campaign expenditure). Fraud laws cannot "restrict protected speech that cannot be shown to be fraudulent as a matter of fact." *Commodity Trend Serv. v. CFTC*, 233 F.3d 981, 994 (7th Cir. 2000). Put simply, the money *was used* for its lawful, intended, and protected purposes.

B. Even without the FECA count, the fraud counts fail to establish a crime.

Even if this Court adopts the Fifth Circuit's view that *McConnell* held that *Buckley* has ceased to apply to non-BCRA activity, this Court nonetheless should reverse the convictions for mail and wire fraud under the "breathing room for protected speech" that the Court required in *Madigan*, 538 U.S. at 620. Under *Mills* and *Yates*, *supra*, if the verdict is unsupportable on grounds that the government pressed, this Court should reverse. *See Mills*, 486 U.S. at 376; *Yates*, 354

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cover only voluntary, intentional violations of known legal duties") (interior alterations and quotations omitted).

U.S. at 312. This Section explains how the verdicts are unsupportable under the *Madigan* line of charitable-fundraising decisions.

1. The government has not and cannot show fraud at the inception.

As indicated, mail and wire fraud require specific intent to defraud, *Imo*, 739 F.3d at 236; *Carpenter*, 484 U.S. at 28, and the charitable-fundraising line of cases requires the same. *Madigan*, 538 U.S. at 620 ("representation [must be] … made … with the intent to mislead"). A finding that Stockman had the intent to deceive at the inception is simply not credible or even possible here.

First, as to Stockman's taking of a fundraising fee from the proceeds, this Court's charitable-fundraising decisions allow fundraising fees that Stockman took for himself or those who helped in the fundraising process. *Schaumburg*, 444 U.S. at 633-34; *Joseph H. Munson Co.*, 467 U.S. at 969; *Riley*, 487 U.S. at 793; *cf. Riley*, 487 U.S. at 804 (Scalia, J., concurring) ("donors are assuredly aware that a portion of their donations may go to solicitation costs and other administrative expenses"). As such, the Fifth Circuit's fixation with Stockman's personal spending of Stockman's personal funds is irrelevant to whether the *net* proceeds of fundraising were used for the intended purpose.

Second, the various efforts all were continued after the donations in question. Because Uihlein did not fully fund the Freedom House, he knew that his donation was "seed money" that would allow building toward that project. For example, had Stockman won the Texas senatorial primary – and thus presumably the general election – he would likely have had more

access to fundraising channels. As such, there is no reason whatsoever to think that he would not have finished the Rothschild book and funded the Freedom House in Washington. Similarly, had the fulfillment centers had more capacity, Stockman may well have shipped the full complement of *The Conservative News*. For the Fifth Circuit to hold otherwise locks charitable fundraisers into the impossible position of facing fraud charges whenever the plans in their prospectuses fall short for any reason (*e.g.*, insufficient funds, changed conditions).

Third, with respect to the CAF donations for issue advocacy, there was no fraud if this Court finds that *Buckley* controls non-BCRA activity such as the print media used for *The Conservative News*. But even if the CAF donation violated FECA without *Buckley*, that could support conviction only for count 12: Stockman distributed *The Conservative News* substantially as promised.[7]

Under the circumstances, Stockman did not engage in "illicit spending" as the Fifth Circuit held, so that court's rejection of Stockman's lack of intent to defraud when the donors contributed was error. *See* 947 F.3d at 264 (App. 18a-19a). Under these circumstances, no reasonable juror "could reasonably infer that Stockman had the intent to defraud from the time the money was donated." *Id.* That inference would require conjecture on future events that might not have gone the way they went and would have to disallow – without legal basis – the charitable-fundraising authorities that allow fundraising fees.

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[7] Although CAF did not refund the undispersed portion of the CAF contribution, no one knew when the donation was solicited how many copies of *The Conservative News* would ship.

2. The jury instructions for §501(c)(3) and §501(c)(4) entities covers lawful activity.

The jury instructions for tax-exempt entities were confusing in their differential treatment for employee pay. For both types of entities, the net earnings may not benefit private shareholders or individuals, ROA.917, but the instruction for §501(c)(4) indicates that the entity "may compensate employees for work actually performed." *Id.* That rival treatment suggests to a lay juror – by negative implication – that §501(c)(3) entities may not similarly pay employees. Under that reading of the instructions, the jury may have believed that Life without Limits could not pay Stockman or other staff fees for soliciting donations. Under the circumstances, the jury may have believed that only the CAF, as §501(c)(4), could pay staff fees on donations. But neither of the entity types could accept funds for political purposes such as *The Conservative News* under the misconstruction of FECA restrictions for issue advocacy.

In addition, the instructions' definition states that both types of entities must be operated "exclusively" for their tax-exempt purpose, ROA.917, which is simply inaccurate. Indeed, 26 U.S.C. §501(h) allows even §501(c)(3) entities to engage in legislative lobbying up to certain ceilings. Similarly, an "organization will be regarded as operated exclusively for one or more exempt purposes only if it engages *primarily* in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)." 26 C.F.R. §1.501(c)(3)-1(c)(1) (original emphasis omitted, emphasis added); *see also id.* §1.501(c)(4)-1(a)(2)(i) ("organization is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the

common good and general welfare of the people of the community") (emphasis added). While the district court relied on statutory definitions, it did not accurately reflect the nuance of the complicated area of non-profit law. For that reason, it is likely that the jury was confused as to what activities §501(c)(3) entities could lawfully undertake or accept funds to accomplish. It bears emphasis that issue advocacy is an educational activity, which the jury likely also did not understand, given its holding for count 12.

Under *Mills* and *Yates*, *supra*, a verdict that may be supportable on one ground but not another must be set aside. *Mills*, 486 U.S. at 376; *Yates*, 354 U.S. at 312. Stockman respectfully submits that the fraud counts must fall because the jury did not understand the law that the district court asked them to enforce.

Although Stockman did not challenge the jury instructions on §501(c)(3) and §501(c)(4) entities in district court, the Fifth Circuit erred in reviewing the issue under the plain-error standard. *See* 947 F.3d at 259-60 (App. at 10a-11a). First, an appellate court's duty to exercise independent review in First Amendment cases under the *Bose Corp.* and *Madigan* lines of cases trumps deferential plain-error review. But the Fifth Circuit's reasoning is flawed on several other levels:

- The argument that "[a]n instruction that mirrors relevant statutory text will almost always convey the statute's requirements," 947 F.3d at 260 (App. 11a), resolves nothing: "almost always" does not mean "always." *Newman v. Krintzman*, 723 F.3d 308, 314 (1st Cir. 2013); *In re Superior Constr. Co.*, 445 F.3d 1334, 1345 (11th Cir. 2006); *Roldan v. U.S.*, 96 F.3d 1013, 1014 (7th Cir. 1996); *Faigin v.*

Doubleday Dell Publ'g Grp., 98 F.3d 268, 273 (7th Cir. 1996).

- As indicted, subsection (h) of §501 itself demonstrates that the statute does not match the jury instruction about these tax-exempt entities. And the regulations are even more express: they define "exclusively" to mean "primarily," which is not how jurors would understand the instructions: "The regulations …. defining the statutory concept … have the force of law." *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431 (1987). The jury instructions are plainly wrong under controlling law.

Because it is possible that Stockman was convicted of the non-crime of failing to work exclusively for educational or charitable purposes within a §501(c)(3) or §501(c)(4) entity, this Court should set aside the conviction under not only the *Mills-Yates* line of cases but also the *Bose Corp.* and *Madigan* lines of cases.

To the extent that plain-error review applies, it is met: the jury instruction incorrectly restricts the actions that these tax-exempt entities may take, is plain, and narrowed Stockman's First Amendment rights (i.e., "affect[ed] substantial rights"). *See U.S. v. Olano*, 507 U.S. 725, 733-35 (1993); FED. R. CRIM. P. 52(b). While relief under Rule 52(b) is permissive, *Olano*, 507 U.S. at 735. On the question of when to provide relief, this Court has set the bar at error that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (alterations omitted). In addition to the unfairness for this one defendant, moreover, the Fifth Circuit precedent threatens the crucial First Amendment rights of all citizens and charitable organizations in that Circuit, which meets the bar for relief under Rule 52(b).

III. IF THE FECA OR FRAUD VIOLATIONS FALL, THE OTHER CONVICTIONS MUST BE REVERSED OR RETRIED.

Every criminal defendant has a constitutional right to a "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Even if this Court does not reverse the entire conviction, Stockman is entitled to a retrial because of the prejudice of the extraneous charges in counts 1-8 and 12 for which he should never have been charged, much less convicted. *Nilva v. U.S.*, 352 U.S. 385, 401-02 (1957) (opinion of Black, J.). Simply put, Stockman's innocence on counts 1-8 and 12 is part of his defense to the other counts.

If either – or both – the campaign-finance or fraud convictions fall, the remaining counts of the indictment must also fall because those other counts are derivative of the underlying charges in counts 1-8 and 12. At a minimum, Stockman should have a new trial limited to any residual liability that the government continues to claim after reversal of the campaign-finance or fraud convictions.

IV. THIS CASE IS AN IDEAL VEHICLE TO CLARIFY THESE FECA-BCRA ISSUES.

This petition presents an ideal vehicle for this Court to resolve the important legal issues presented here:

- Whether *Buckley* continues to govern the scope of the definition of "expenditure" under FECA outside of the narrow category of "electioneering communications" added by BCRA.
- Whether charging criminal mail and wire fraud for charitable fundraising efforts that fall short of their goal chills important protected First Amend-

ment activity under the *Schaumburg* trilogy or fits within the narrow corridor left by *Madigan*?

The first issue – *Buckley* – is purely legal, and the second issue presents an issue of legal sufficiency under *Madigan*, 538 U.S. at 617-18; *cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989) ("[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law"); *Bose, Corp.*, 466 U.S. at 505 (independent appellate judgment on legal sufficiency in First Amendment cases). Under the circumstances, this case raises important legal questions under the First Amendment for both campaign finance and charitable fundraising, without a fact-bound inquiry.

Importantly, unless the Court avails itself of this vehicle, the Fifth Circuit will be left with a precedent under which the government can threaten prosecution of any politician involved with issue advocacy or any charitable organization that falls short of the fundraising goals that it put to its donors. Protected First Amendment activity cannot survive under that cloud.

With respect to the campaign-finance issue, it may be that only this Court can resolve the issue. For its part, the Fifth Circuit panel can claim to have followed the letter of *McConnell*, even if that were not consistent with *Buckley*:

> [I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to

> this Court the prerogative of overruling its own decisions.

Agostini v. Felton, 521 U.S. 203, 237 (1997) (interior quotation omitted). As explained in Section I.A, *supra*, *McConnell* cannot mean what the Fifth Circuit read it to mean, even if *McConnell*'s literal words support the Fifth Circuit's reading. Under *Agostini*, it falls to this Court to correct or clarify *McConnell* and *Buckley*. In any event, the dangerous Fifth Circuit opinion now threatens First Amendment rights; this Court's correction or clarification is urgently needed.

For all these reasons, this case presents an ideal vehicle to resolve the questions presented.

CONCLUSION

This Court should grant the petition for a writ of *certiorari*.

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Respectfully submitted,

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