No. 20-103

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 United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

INTRODUCTION

The Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") submits this brief as amicus curiae in support of Petitioner Stephen E. Stockman.[1]

INTEREST OF AMICUS CURIAE

Founded by the late Phyllis Schlafly in 1981, the Eagle Forum ELDF is an Illinois nonprofit corporation dedicated, among other things, to upholding the First Amendment rights of both individuals and corporations in the political arena, including the area of campaign contributions. It has long defended the principle that the judiciary should interpret the law—be it a statute or a constitutional provision—according to its original meaning and plain text. A failure to do so—particularly when the law concerns the First Amendment—can have disastrous repercussions beyond the interests of the actual parties to the case.

The Eagle Forum ELDF has a direct interest in bringing to this Court's attention how the Fifth Circuit's decision below will, if left uncorrected, make it practically impossible for anybody to utilize coordinated expenditures as a means of expressing their First Amendment rights in the political arena without fear of government reprisal. This is because

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[1] Eagle Forum ELDF provided timely notice to both parties of its intent to file this amicus brief, and both parties provided Eagle Forum ELDF with written consent to file this brief. No counsel for either party authored this brief in whole or in part, nor did counsel for either party make any monetary contribution intended to fund the preparation or submission of this brief.

"coordinated expenditures" constitute "contributions" under campaign finance law, and are subject to the relevant statutory contribution limits. In addition, this is an issue on which this Court has granted certiorari even in the absence of any explicit split between the lower federal appellate courts.

SUMMARY OF THE ARGUMENT

In 2003, this Court upheld in part Congress's enactment of the Bipartisan Campaign Reform Act ("BCRA"), which amended the Federal Election Campaign Act. *See McConnell v. Federal Election Com.*, 540 U.S. 93, 202-203 (2003) (*overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010)). Specifically, it rejected the argument "that coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions [under *Buckley v. Valeo*, 424 U.S. 1 (1976)]." *McConnell*, 540 U.S. at 202. So long as the coordinated expenditures met the statutory definition for "electioneering communications," it was irrelevant whether or not they amounted to express advocacy. *Id*. at 202-203. In short, this Court concluded, "[t]here is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." *Id*. at 203. Both before and after *McConnell*, this Court has limited the term "other coordinated expenditures" to those amounting to express advocacy per the "magic words" test of *Buckley*. *See Buckley*, 424 U.S. at 44 n. 52.

In a blatant departure from the basic canons of statutory interpretation, the Fifth Circuit below took

the above language from *McConnell* to mean that "other coordinated expenditures" include non-electioneering communications that do not engage in express advocacy. Apx. 12a-14a. In doing so, it has opened a pandora's box of potential criminal liability under campaign finance law that has never before existed, and that contradicts the plain meaning of BCRA's text.

The proper interpretation of campaign finance law to protect First Amendment rights is an issue on which this Court regularly grants review, even in the absence of a circuit court split. This Court should grant Stephen E. Stockman's petition for a writ of certiorari and reverse the Fifth Circuit's unwarranted expansion of campaign finance liability.

ARGUMENT

I. THE VALIDITY OF CAMPAIGN FINANCE LAWS IN LIGHT OF THE FIRST AMENDMENT IS A CRITICAL FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW, EVEN ABSENT A CIRCUIT SPLIT.

This Court has pulled no punches in emphasizing the importance of construing laws limiting campaign contributions in a manner consistent with the First Amendment. "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality opinion). Indeed, "[p]olitical speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." *Id*. at 228 (Thomas, J., concurring in the judgment) (cleaned up). To that end, "the First Amendment has

its fullest and most urgent application to speech uttered during a campaign for political office." *Ariz. Free Ent. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (cleaned up). Not surprisingly, this Court has granted certiorari on this issue even in the absence of any apparent circuit split or split between state supreme courts. *See, e.g., id.* at 732-734; *Nixon v. Shrink Mo. Gov. PAC*, 528 U.S. 377, 385 (2000) ("[W]e granted certiorari to review the congruence of the Eighth Circuit's decision with *Buckley*.").

Occasionally, this Court will grant a petition for a writ of certiorari, immediately vacate the court of appeals' judgment, and remand for further consideration in light of specified caselaw. *See, e.g. Flowers v. Mississippi*, 136 S.Ct. 2157 (Mem) (2016) ("This Court often 'GVRs' a case…."). But normally, a GVR is appropriate only to enable a lower appellate court to "give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Id.* Less than a year ago, in November 2019, this Court took the rare step of issuing a unanimous, per curiam GVR in a campaign contribution limits case for further consideration in light of a precedent this Court handed down thirteen years earlier. *Thompson v. Hebdon*, 140 S.Ct. 348, 349-351 (2019) (remanding to the Ninth Circuit to consider the validity of Alaska's campaign contribution limits in light of *Randall v. Sorrell*, 548 U.S. 230 (2006)).

The fact that this Court has been willing to GVR a petition for a writ of certiorari for further consideration

of campaign finance precedent more than a decade old demonstrates how important it considers this issue, even in the absence of a split among the lower federal appellate court. As discussed below, the Fifth Circuit's holding not only misconstrues *McConnell*—which would be bad enough—it also unravels over 40 years of jurisprudence limiting the application of laws imposing caps on campaign contributions to those amounting to express advocacy.

II. BY HOLDING THAT THE BCRA OBVIATED *BUCKLEY'S* EXPRESS ADVOCACY REQUIREMENT AS TO *ALL* FORMS OF COMMUNICATION, THE FIFTH CIRCUIT RESOLVED AN IMPORTANT FEDERAL QUESTION IN A MANNER DIRECTLY REPUGNANT TO *MCCONNELL*.

Stockman's petition correctly summarizes the development of the law in this area from the issuance of *Buckley* up to the present day. To avoid unnecessary duplication, Eagle Forum ELDC will refrain from restating that history, and instead focus on how the Fifth Circuit's opinion violates basic canons of statutory interpretation, misconstrues *McConnell*, and opens the door to campaign finance prosecutions on matters that Congress never contemplated.

A. The Fifth Circuit's opinion violates the Omitted-Case Canon.

Under 52 U.S.C. §30116(a)(7)(C)(i), an "electioneering communication" amounts to a campaign contribution. In turn, 52 U.S.C. §30104(f)(3)(A)(i) defines "electioneering communication" to be "any broadcast, cable, or satellite communication…." The

direct mailings at issue here plainly do not fall within this definition of "electioneering communication," and thus cannot be considered "contributions" under §30116(a)(7)(C).

"The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it….Yet some authorities assess the judicial power…to supply words or even whole provisions that have been omitted." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* §8 (West 2012). Nowhere in §30104(f)(3)(A)(i) does it define "electioneering communication" to include written, non-broadcast material. Yet despite this, the Fifth Circuit has effectively read such a definition into the statute.

The Fifth Circuit's opinion attempts to skirt this obvious conclusion by insisting that this Court in *McConnell* held that the BCRA preempted former caselaw on *all* expenditures, not just those involving electioneering communications. (Apx. 13a-14a). This is simply wrong. The BCRA did not in any way amend the preexisting language defining contributions as they related to coordinated expenses. Rather, it *added* a new section to include within its definition of contributions "electioneering communications." It is only within materials that constitute "electioneering communications" that the "magic words" test of express advocacy no longer applies. Because the written, non-broadcast material at issue here does not fall within the definition of "electioneering communications," it is still subject to the traditional definition under *Buckley* that limits "coordination contributions" to those materials that amount to express advocacy.

B. Left uncorrected, the Fifth Circuit's opinion will wreak havoc on the ability to exercise First Amendment rights via coordinated expenditures.

Taken to its logical conclusion, the Fifth Circuit's opinion in effect holds that *all* coordinated expenses—be they express advocacy or not, be they electioneering communications or not—are now subject to the BCRA's contribution limits. The plain text of the BCRA makes such an interpretation impossible. In passing the BCRA, Congress was concerned about what it perceived to be the potential for corruption in the broadcasting media. Indeed, the Fifth Circuit's opinion itself seems to admit as much, conceding that "[t]he *McConnell* decision is largely…concerned with Congress's regulation of [broadcast media]." Apx. 13a-14a n. 6. Nevertheless, the Fifth Circuit insists, without any supporting citation, that *McConnell* was not "exclusively" concerned with such matters. Apx. 13a-14a n. 6. But if Congress had, in fact, been concerned with tightening restrictions on non-broadcast media, it would have said so in the statutory text. But it did not.

Under the Fifth Circuit's ruling, any non-broadcast coordinated expenditure, no matter the nature, is now subject to BCRA's contribution limits. This goes far beyond what Congress enacted, and this Court should not allow it to stand.

CONCLUSION

Stockman's petition for a writ of certiorari should be granted.

Respectfully submitted,

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