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 *AMICI CURIAE* OF AMERICAN TARGET ADVERTISING, INC., *ET AL.* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

American Target Advertising, Inc. is a direct mail marketing agency that provides services to nonprofit organizations communicating with members of the general public and soliciting contributions nationally. Its chairman pioneered political direct mail in the 1960s and 70s. Its clients include Internal Revenue Code §§ 501(c)(3) and 501(c)(4) nonprofit organizations. 37 *amici* are individuals (1) formally associated with nonprofit organizations, (2) providing services to nonprofits (including legal representation or fundraising), and/or (3) are former elected officials or candidates for elected office. These *amici* are concerned for the rights of nonprofit organizations and political committees to communicate, fundraise, build files of supporters, and associate with prospective donors and voters. Because of their experience in nonprofit or political missions central to this case, your *amici* wish to bring to the attention of the Court relevant matters not already briefed by the parties that may be of considerable help to the Court.

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[1] It is certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Failing to even mention the First Amendment, and failing to apply the standards of review in criminal matters this Court has articulated in areas of nonprofit political spending and charitable solicitation, the Fifth Circuit upheld the 10-year conviction of former Member of Congress Stephen Stockman. By wrongly using this Court's analysis applied solely to certain broadcast communications, the Fifth Circuit erred in finding a print publication lacking express advocacy was an expenditure under federal election law. That court also failed to require the Government to prove fraudulent intent at the time donations were solicited from just two wealthy donors for nonprofit projects that later underachieved. And, that court failed to find fault with jury instructions that omitted the important political activities in which nonprofit organizations may engage, despite this being a criminal case about nonprofit political expenditures. The Fifth Circuit creates chilling dangers to lawful day-to-day operations of nonprofit organizations in their fundraising communications protected by First Amendment. *Certiorari* should be granted to remedy the harms to First Amendment rights.

ARGUMENT

Stockman's Petition for Writ of *Certiorari* comes before this Court at a time of often-bitter disagreement in this country about political and ideological differences. At times such as these, there may be even greater temptation by those who wield authority to criminalize the free exercise of First Amendment rights. And, at such times, there may be no greater need for the courts to ensure those sacred rights are robustly protected.

Following his unsuccessful primary challenge to unseat an incumbent U.S. Senator, Stockman was convicted of various charges related to the types of nonprofit and political communications that this Court has stated repeatedly have protections under the First Amendment, and he was sentenced to ten years in prison. He petitions this Court from an opinion of the Fifth Circuit that *not once mentions the First Amendment* in its analysis upholding his conviction.

I. *McCONNELL v. FEC* DOES NOT APPLY HERE

Stockman was convicted under Count 12 of his indictment for causing an excessive campaign contribution through unlawful coordination between him as a candidate for U.S. Senate and an Internal Revenue Code § 501(c)(4)[2] organization. The unlawful coordination on which he was convicted was he (and his paid associates) raised money from just one wealthy Republican donor for the § 501(c)(4) organization to

[2] 26 U.S.C. § 501(c)(4).

make an independent expenditure aiding his Senate campaign. Stockman's argument on this issue, from his appeal to the Fifth Circuit, now through his Petition before this Court, is that there was no "expenditure" under the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq*. *Certiorari* should be granted so the conviction on Count 12 may be reversed.

Stockman claims "[i]n upholding [his] conviction, the Fifth Circuit relied on the *McConnell*[3] discussion on BCRA[4] § 202 to find *Buckley*'s[5] narrowing construction had been displaced for non-BCRA activity," and the "*McConnell* discussion is at best opaque." Petition 17.

Your *amici* respectfully argue that *McConnell* on these key points is not opaque, but that the Fifth Circuit distorts *McConnell*' through selectively editing the key passage from that opinion to agree with, and reach, the government's incorrect and unconstitutional position. The Fifth Circuit would make new campaign finance law by selectively editing *McConnell*. These *amici* respectfully argue the Fifth Circuit's opinion is more plainly harmful to First Amendment freedoms of

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[3] *McConnell v. FEC*, 540 U.S. 93 (2003).

[4] Bipartisan Campaign Reform Act of 2002, (McCain–Feingold Act, Pub.L. 107–155,("BCRA").

[5] *Buckley v. Valeo*, 424 U.S. 1 (1976).

speech, the press, and association[6] than mere misinterpretation of *McConnell* caused by its being opaque on this issue.

The Fifth Circuit's flawed analysis of an unlawful coordinated expenditure under FECA starts at page 10 and ends at page 14 of its Opinion (Pet. App. 10a-14a). The Fifth Circuit said that Stockman "caus[ed] an excessive campaign contribution in the form of a coordinated expenditure, an offense covered by Count 12 of the indictment," and governed by FECA. Pet. App. 10a.[7]

The *sole communication* at issue for Count 12 was a print publication distributed via direct (targeted) mail called *The Conservative News*. The print publication was issued by a § 501(c)(4) nonprofit organization with which Stockman allegedly "unlawfully" coordinated the payment for

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[6] The right of association has been at the heart of donations to causes and candidates, as expressed in *Buckley*:

> And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. *See NAACP v. Alabama*, 357 U.S. at 357.

Buckley, 424 U.S. at 22.

[7] The Opinion's Note 7 (Pet. App. 12a) says the Fifth Circuit's precedents about independent expenditures referenced herein at *amici*'s Note 8 are distinguishable from the Stockman case.

dissemination of the publication. *The Conservative News* was critical of Stockman's opponent in his U.S. Senate primary race, and favorable to Stockman. Stockman was clearly involved in the arrangement of financing for that publication. *See* Pet. App. 11a-12a. The Fifth Circuit does not identify that the nonprofit organization reported this publication to the Federal Election Commission as an "expenditure" under FECA, nor any complaints filed with the FEC or legal adjudications that the organization should have reported the publication as an expenditure under FECA. Indeed, under Fifth Circuit law for over a decade before, and at the time of, the Stockman trial, there was no objective reason to believe the publication constituted an expenditure subject to FECA. In fact, just the opposite was true.[8]

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[8] The test about "express advocacy" for purposes of independent expenditures was addressed in 2006 by the Fifth Circuit in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006). The court acknowledged the Fifth Circuit's existing use of the "magic words" test for express advocacy from *Buckley*, stating, "[w]ords of express advocacy include terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Center for Individual Freedom*, 449 F.3d at 664. Prior to the *Center for Individual Freedom* decision, the Fifth Circuit in *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002) was even more expansive in explaining what constitutes express advocacy for independent expenditures. The court concluded that "the Chamber's advertisements do not expressly advocate the election or defeat of a candidate . . . because the advertisements do not contain explicit terms advocating specific electoral action by viewers. As a consequence, the advertisements are not subject to mandatory disclosure requirements for independent campaign expenditures." *Id*. at 190.

From the seminal *Buckley* opinion (which the Fifth Circuit had expressly acknowledged before the Stockman trial as to "*independent* expenditures") "expenditures" for purposes of FECA are only those communications that expressly advocate for the election or defeat of a named candidate. *Buckley* limited the "express advocacy" test to expenditures for communications that use the "magic words," such as "vote for," "vote against," "elect," "defeat," and certain other terms,[9] which were entirely absent from *The Conservative News* for which Stockman was charged with the crime of excessive contributions via coordinated expenditure, a term codified at 52 U.S.C. § 30116(a)(7)(B)(ii).

As explained more fully below, with the enactment of the Bipartisan Campaign Reform Act (BCRA) in 2002, a second type of communications called "electioneering communications" were legislatively defined as "expenditures" under FECA, and thus made subject to FECA's law that prohibits coordination between a candidate and an entity making the expenditure. The Fifth Circuit's Note 6 accurately describes "electioneering communications" as "any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office and is made within 30 days of a primary or 60 days of a general election." Pet. App. 12a.

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[9] *Buckley*'s widely acknowledged "magic words" test is found at Footnote 52 of that opinion, and reads, "[t]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support, 'cast your ballot for,' 'Smith for Congress,' 'vote against, 'defeat,' 'reject.'"

The print publication that formed the basis for which Stockman was convicted for unlawful coordination, *The Conservative News*, was clearly not an "electioneering communication," and undisputedly lacked *Buckley*'s magic words that would otherwise qualify it as an "expenditure" under FECA. ("It is clear and uncontested that *The Conservative News* does not contain direct instructions to 'vote for' or 'defeat' any candidate. It would follow, Stockman argues, that Uihlein did not effect an 'expenditure' when he funded *The Conservative News*." Pet. App. 12a-13a.) Therefore, as Stockman argues and these *amici* agree, *The Conservative News* could not as a matter of law be subject to FECA's unlawful coordination rules. This conclusion should have precluded bringing Count 12 *ab initio*.

Instead, the Fifth Circuit reached its errant conclusion that *The Conservative News* was an expenditure under FECA by selectively editing a passage from *McConnell*. That passage when read in its entirety, however, provides a distinctly different result than what the Fifth Circuit reached. As shown below, that passage applied solely to BCRA § 202, which reads:

> SEC. 202. COORDINATED COMMUNICATIONS AS CONTRIBUTIONS.
>
> Section 315(a)(7) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(7)) is amended--
>
> [[Page 116 STAT. 91]]

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following:

(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 or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee; such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and.[10]

The full passage at issue from *McConnell* is clearly and inescapably anchored in a *congressional* decision that "electioneering communications" may be "expenditures" for purposes of FECA and its unlawful coordination prohibitions:

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[10] Bipartisan Campaign Reform Act of 2002, (McCain–Feingold Act, Pub.L. 107–155, https://www.govinfo.gov/content/pkg/PLAW-107publ155/html/PLAW-107publ155.htm, (last visited Aug. 10, 2020).

> 6. The District Court's judgment is affirmed insofar as it held that plaintiffs advanced no basis for finding unconstitutional BCRA §202, which amends FECA §315(a)(7)(C) to provide that disbursements for electioneering communications that are coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party, 2 U. S. C. A. §441a(a)(7)(C). That provision clarifies the scope of §315(a)(7)(B), which provides that expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of a candidate or party constitute contributions. BCRA pre-empts a possible claim that the term "expenditure" in §315(a)(7)(B) is limited to spending for express advocacy. Because *Buckley*'s narrow interpretation of that term was only a statutory limitation on Congress' power to regulate federal elections, *there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats other coordinated expenditures*.

McConnell, 540 U.S. at 202-03 (emphasis added). Compare that full passage from *McConnell* with the Fifth Circuit's edited version and verbal jockeying to reach its incorrect outcome:

> 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. See *McConnell*, 540 U.S. at 202. The *McConnell* Court explained that a post-*Buckley* statutory enactment had "clarifie[d] the scope" of this language, "pre-empt[ing]" a possible claim that "coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions." 540 U.S. at 202. 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." Id. at 219 (cleaned up).

The Fifth Circuit's confounding that passage from *McConnell* goes beyond interpreting opaque language, and instead invades the legislative function, making new (and incorrect) law. Neither BCRA nor *McConnell* eliminated the *Buckley* test that should apply to *The Conservative News* and the Stockman case.

BCRA did add, and *McConnell* did confirm, that electioneering communications are to be considered expenditures under FECA, and as explained below were legislatively designated a "functional equivalent" of expenditures subject to FECA. Nowhere, though, does *McConnell* say or imply that its language quoted above ("there is no reason why Congress may not treat coordinated disbursements for electioneering

communications in the same way it treats other coordinated expenditures") -- or *anything* from *McConnell* -- overruled the *Buckley* test for non-electioneering communications. The following passage from *McConnell* further helps illuminate the context of its very limited holding:

> In light of our precedents, plaintiffs do not contest that the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office. Nor do they contend that the speech involved in so-called issue advocacy is any more core political speech than are words of express advocacy. After all, "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), and "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Buckley*, 424 U.S., at 48. *Rather, plaintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications.*

McConnell, 540 U.S. at 205-06 (emphasis added.) That First Amendment challenge to BCRA's making electioneering communications "expenditures" under FECA did not succeed because:

> This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the *functional equivalent* of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect.

Id. at 206 (emphasis added).

In campaign finance law one may rarely say something is clear, but this is: In a First Amendment challenge, *McConnell* decided a very narrow issue about specific legislation governing expenditures under FECA. The Court held that electioneering communications are the functional equivalent of independent expenditures *for purposes of Congress's authority to regulate in this area of communications protected by the First Amendment*. Any reading beyond that, like what the Fifth Circuit construed, is not supported. FECA's regulation of non-electioneering communications remains limited by the *Buckley* magic words test.

In its review of Stockman's criminal conviction, the Fifth Circuit failed to follow this Court's critical baseline from *Buckley*: "Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley*, 424 U.S. at 41. Because *The Conservative News* is not an electioneering communication, *McConnell*'s holding about expenditures does not

remotely apply to the Stockman case as the Government and Fifth Circuit unconstitutionally forced it in to convict Stockman under Count 12.

II. IGNORING FIRST AMENDMENT PROTECTIONS OF NONPROFIT SOLICITATIONS, THE FIFTH CIRCUIT USED WRONG STANDARD OF REVIEW FOR FRAUD

Out of concern if not fear that the standard of review for fraud applied by the Fifth Circuit to fundraising solicitations opens the door for the government to target nonprofit organizations -- whether broadly or selectively -- for common, even everyday failures or underachievement to meet nonprofit project or program goals, your *amici* respectfully urge the Court to issue the writ for *certiorari* sought by the Petitioner.

As the Fifth Circuit explains:

> Stockman was indicted on four counts of mail fraud, four counts of wire fraud, two counts of making false statements in FEC filings, eleven counts of money laundering, one count of conspiracy to make conduit campaign contributions and false statements, one count of causing an excessive campaign contribution, and one count of filing a false tax return.

Pet. App. 7a. As described by the Fifth Circuit, Stockman argued before the court that "the government produced insufficient evidence of Stockman's fraudulent intent. In this context, he argues that the government's evidence does not suggest

a 'contemporaneous' intent to defraud because evidence of Stockman's illicit spending cannot establish bad faith simultaneous with the solicitation and receipt of donor funds." Pet. App. 18a. In its written opinion entirely devoid of any mention of the First Amendment on any matter it decided, the Fifth Circuit disagreed with Stockman: "Notwithstanding Stockman's self-serving view that later misappropriations cannot evidence earlier bad faith, the jury could rationally have inferred Stockman's fraudulent intent from this largely undisputed evidence. We thus find that the government has also met its burden with respect to the 'intent' element of mail and wire fraud." Pet. App. 19a.

Since 1980 this Court has on four occasions prominently addressed the First Amendment protections of fundraising for nonprofit causes in the context of government laws targeting fraud. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781 (1988), and *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

In *Telemarketing Associates* the Court emphasized that "the First Amendment does not shield fraud." *Telemarketing Associates*, 538 U.S. at 611-12. Notably, however, "[t]he First Amendment protects the right to engage in charitable solicitation." *Schaumburg*, 444 U.S. at 632. "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." *National Federation of Blind*, 487 U.S. at 788-789.

As to costs of fundraising, specifically the fees paid to solicitors acting on behalf of nonprofit organizations, the Court said, "[w]hile bare failure to disclose that information directly to potential donors does not suffice to establish fraud, *when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener*, the First Amendment leaves room for a fraud claim." *Telemarketing Associates*, 538 U.S. at 606 (emphasis added). And, "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*," (*id*. at 620) and "the gravamen of the fraud action in this case is not high costs or fees, *it is particular representations made with intent to mislead*." *Id*. at 621 (emphasis added). A cause of action for fraud will survive when those soliciting

> attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, *knowing full well that was not the case* . . . . Such representations remain false or misleading, however legitimate the other purposes for which the funds are in fact used.

Id. at 622 (emphasis added). Lastly, the "mere failure to volunteer the fundraiser's fee when contacting a potential donee, without more, is insufficient to state a claim for fraud." *Id*. at 624.

The Indictment states Stockman and his associates "made false representations in soliciting hundreds of

thousands of dollars in donations from charitable foundations and individuals who ran those foundations," and Stockman *et al*. told these donors "the donations would be used for charitable and educational purposes, or for *lawful independent political advocacy* …." ROA.74 (emphasis added). (*See* Section I above about why *The Conservative News* was lawful advocacy.)

Because of the First Amendment protections of charitable solicitations, your *amici* argue that look-back speculations about intent based merely on success or failure of the projects for which funds were raised are contrary to the standards articulated in *Telemarketing Associates*. By way of example about how the Fifth Circuit erred, your *amici* will reference the Stockman solicitations of donations from Richard Uihlein, which are described at Pet. App. 4a-6a.

Stockman approached Mr. Uihlein to donate financing for a printed publication called *The Conservative News* to be sent via direct mail. Mr. Uihlein, a wealthy donor to conservative causes, not only had known Stockman and previously supported him, but had prior solicitation dealings with Stockman's associate Dodd. Mr. Uihlein testified he told one solicitor he had "no problem" with donating to an independent expenditure for Stockman. ROA.2143. Mr. Uihlein testified he was aware the communication would be made by the nonprofit organization Center for American Future. He received a letter acknowledging a pledge of support of $500,000 to Center for American Future, and a request for "an additional large sum of money, $726,000, to mail the entire state of Texas."

ROA.2150-51. Mr. Uihlein testified that Wagner, a direct mail vendor for Center for American Future, then later asked him to "basically, pay for postage for the mailing that is ready to go out." ROA.2156. This request was subsequent to Mr. Uihlein's then-extant, documented pledge to Center for American Future.

Mr. Uihlein testified he was told the quantity of newspapers (*The Conservative News*) would be "830-some thousand," and the mailing needed postage of $450,571.65. ROA.2157. That donation by Mr. Uihlein forms the bases of Jury Instructions on Counts 3 and 4. ROA.919. Mr. Uihlein made his check for the mailing payable to the U.S. Postmaster.

Center for American Future ended up mailing fewer than 830,000 copies of *The Conservative News*. Without referencing anything in the record supporting its assertion -- or reasons why -- the Fifth Circuit nevertheless claims, "Stockman called off the direct mail campaign shortly before the primary, at which point only $214,718.51 remained of Uihlein's … donation." Pet. App. 6a.

The Postal Service requires upfront payment, unlike other direct mail vendors that may work on credit. As Chief Executive Officer of a direct mail catalogue company (ROA.2115-17), Mr. Uihlein would know that. The Fifth Circuit does not say Mr. Uihlein's donation was expressly restricted (see Petition 7 for an explanation of restricted donations). Nor does the Fifth Circuit say whether or not the balance of Uihlein's donation was used to pay the authors of *The Conservative News*, for its printing, or for a mail shop to affix addresses so it could be mailed to its intended

recipients. And, payments to the fundraiser(s) whose services found Mr. Uihlein's donation were likely another cost the Center for American Future needed to pay. Nor does the Fifth Circuit say Mr. Uihlein would have disapproved of such uses of his donation. Based on the record (explained below), it would appear just the opposite is true.

Center for American Future planned to mail 830,000 copies of *The Conservative News*, and the Fifth Circuit points to nothing proven by the Government contradicting that intent when funds were solicited from Mr. Uihlein. Especially since mailing 830,000 copies would have been good for Stockman's political career and "(especially) his political needs" (Pet. App. 5a), it would appear the decrease in the intended quantity mailed worked against Stockman. Indeed, a representative for Center for American Future had asked Mr. Uihlein for a total of over $1.2 million for the project. Mr. Uihlein instead provided $450,571.65, hoping other donors might finance the rest for the "need[ed] millions," and his "half million would get some positive results in other races." ROA.2154. Therefore, even Mr. Uihlein clearly realized his donation would not be sufficient to cover the quantity of mail or projects sought to be executed by Center for American Future before the election.

The fact that Center for American Future mailed fewer than the goal of 830,000 newspapers may also be easily explained when one understands direct mail. Planned direct mail quantities may decrease for any number of reasons: (1) the intended number of names and addresses from lists rented for the mailing may not

be available on time to meet the mail date; (2) the printers of the mail and the mail shops that affix names, addresses, and postage to the pieces of mail may be overbooked; (3) funds projected to pay for the entire costs of the direct mailing may not be available; or (4) the nonprofit organization may simply decide the projected quantity was too high to meets its strategic objectives. (It is not uncommon, for example, that your *amicus* American Target Advertising will reduce its direct mail postage needs budget substantially from one week to the next based on changes in quantities of its nonprofit clients' mail to be sent.)

By concluding there was fraud here, the Fifth Circuit's lack of exacting examination of intent at the time of solicitation would make everyday flexibility of how nonprofits spend their money on projects, everyday logistics of direct mail, or even common failures in nonprofit projects the equivalent of "intentionally misleading statements designed to deceive the listener," articulated under the standards in *Telemarketing Associates*, as quoted *supra*. And as with Stockman's solicitations to Mr. Uihlein for the other tax-exempt projects, such as Freedom House and Life Without Limits (Pet. App. 4a-5a), there is risk of failure in completion of those projects. But even the sole donor to testify at Stockman's trial understood the need to provide seed money to encourage others to fund those projects ("hopefully use [his donation] to encourage others to contribute" while solicitors "continued to attempt to raise additional money"). ROA.2132.

To be safe from the approach taken by the Fifth Circuit, organizations would likely need to put

donations in a lockbox while not being able to use those donations for administrative overhead (including even regulatory compliance costs), the costs of conducting more fundraising, or costs of promoting and marketing their missions in ways to educate the public about causes (the last having innate benefits, including attracting more donations). The Fifth Circuit's approach could smother and extinguish many organizations.

The Fifth Circuit failed to adequately address the issue of whether the Government proved donations were solicited with intent to defraud, and instead relied on after-the-fact results that individual programs failed or under-achieved, examples of which are "Stockman appears to have promised" one mailing (Pet. App. 3a), and "Stockman failed to mail any 'voter education material' as promised." Id. Another example is that the quantity of the direct mail publication *The Conservative News* mailed was less than what was originally intended (*see* Pet. App. 6a), but the Fifth Circuit does not identify any fraudulent intent at the time of the solicitation was made to Mr. Uihlein.

That the jury *may have* viewed failure or underachievement of the projects for which funds were solicited, and "rationally have *inferred* Stockman's fraudulent intent" (*see* Pet. App. 19a (emphasis added)), is contrary to the more exacting First Amendment standards required for charitable solicitations. The Government must prove "money [was obtained] on false pretenses or by making false statements," (*National Federation of Blind*, 487 U.S. at 800) and "particular representations made with intent

to mislead." *Telemarketing Associates*, 538 U.S. at 621. The Fifth Circuit, which never mentioned the First Amendment or its role in protecting charitable solicitations, failed to hold the Government to the standard of proving fraudulent intent at the time of the solicitations. Instead, it served a thin (and bitter) gruel to uphold Stockman's conviction.

III. JURY INSTRUCTIONS ON TAX-EXEMPT MISSIONS WERE INADEQUATE ABOUT THE LAW ALLOWING POLITICS, AND THEREFORE MISLEADING

The Petition addresses the inadequate and therefore misleading jury instructions about the tax-exempt missions of § 501(c)(3)[11] and § 501(c)(4) organizations, and how the "net earnings" of such organizations may not "benefit any private shareholder or individual." Petition 9-10. Those missions and issues are central to the Stockman case, and key to understanding why the Fifth Circuit's opinion failed to protect, and is dangerous to, First Amendment rights.

As the Fifth Circuit states:

> With respect to the jury instructions, Stockman contends that the district court erred by defining 501(c)(3) and 501(c)(4) organizations in the charge and by failing to instruct the jury on Stockman's "good faith" defense to the tax and campaign finance counts.

Pet. App. 7a-8a. And,

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[11] 26 U.S.C. § 501(c)(3).

> Stockman concedes, however, that no contemporaneous objection was made at trial; instead, he now argues that the district court should have excluded the 501(c)(3) and 501(c)(4) definitions from the charge *sua sponte*.
>
> Given Stockman's failure to object at trial, our review is for plain error.

Pet. App. 10a. Then,

> [W]e cannot agree that the district court's statutory instructions merit reversal under the plain error standard. An instruction that mirrors relevant statutory text "will almost always convey the statute's requirements," *United States v. Lebowitz*, 676 F.3d 1000, 1014 (11th Cir. 2012), and Stockman has not identified any authority rendering it "clear or obvious" that a district court's jury instructions must go beyond the language of the statute in this context.

Pet. App. 11a.

Nonprofit political spending and missions played a pivotal role in the Fifth Circuit's upholding Stockman's conviction. Though issues about tax-exempt purposes may be complicated, it is without doubt that § 501(c)(3) and § 501(c)(4) tax-exempt organizations do and lawfully may engage in "politics."

The federal statutes quoted in the trial court's jury instructions (and re-quoted by Fifth Circuit (Pet. App. 9a) and the Petition at 9-10) about the lawful tax-exempt purposes of § 501(c)(3) and § 501(c)(4)

organizations are *completely devoid of any mention of politics*. Yet nonprofits are very politically active, and per this observer, "[m]any of the most visible and politically active nonprofit organizations in the United States are classified by the Internal Revenue Service (IRS) as 501(c)(4) social welfare groups." Jeff Krehely, *501(C)(4) Organizations: Maximizing Nonprofit Voices & Mobilizing the Public*, National Committee for Responsive Philanthropy, January 30, 2005 https://www.ncrp.org/publication/501c4-organizations-maximizing-nonprofit-voices-mobilizing-public (last visited Aug. 10, 2020).

Although not mentioned in the statutes about tax-exempt missions used in the jury instructions, § 501(c)(3) organizations may conduct the political activities of voter registration, get-out-the-vote, and providing voter guides so long as those activities are not partisan.[12] § 501(c)(4) organizations may go further and engage in *partisan* political activities, including

[12] Guidance from the Internal Revenue Service states:

> Section 501(c)(3) organizations are permitted to conduct certain voter education activities (including the presentation of public forums and the publication of voter education guides) if they are carried out in a non-partisan manner. In addition, section 501(c)(3) organizations may encourage people to participate in the electoral process through voter registration and get-out-the-vote drives, conducted in a non-partisan manner. On the other hand, voter education or registration activities conducted in a biased manner that favors (or opposes) one or more candidates is prohibited.

IRS Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007), https://www.irs.gov/pub/irs-drop/rr-07-41.pdf, last visited Aug. 9, 2020.

issue advocacy naming and criticizing candidates, and even express advocacy using "independent expenditures,"[13] so long as the organizations meet a "primary purpose test," and do not exceed some statutorily-unstated threshold of partisan political activity.[14]

Unfortunately for the Stockman jury, and more unfortunately for Stockman himself, the jury received no adequate legal guidance in the instructions that "politics" at the core of this case is authorized under federal law governing tax-exempt missions. Instead, the jury was sent the statutory language devoid of the many political activities in which nonprofits may lawfully engage. In the context of a criminal trial resulting in a 10-year conviction, the trial court's jury instructions about lawful tax-exempt missions were inadequate, confusing, and therefore devastating to Stockman's First and Sixth Amendment rights.

The inadequate jury instructions about lawful and constitutionally protected activity robbed Stockman of a fair trial. The Fifth Circuit, however, decided to look the other way by applying plain-error review (Pet. App. 14a-16a) instead of *de novo* review as was sought by Stockman on appeal, and is re-sought in his Petition at 13 ("Independent appellate review to protect First Amendment rights from chill is *de novo*, but Stockman

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[13] *See Citizens United v. FEC*, 558 U.S. 310 (2010).

[14] "[A] section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity." See, IRS online guidance, 'Social Welfare Organizations, https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations (last visited Aug. 10, 2020.

also meets the plain-error standard for relief under FED. R. CRIM P. 52(b). *See* Section II, *infra*.").

Additionally, the Fifth Circuit was harsh in its criticism of Stockman's allegedly "repurposing" of nonprofit funds for personal use. ("As before, Stockman repurposed the funds. He spent thousands on personal goods, including airline tickets, fast food, and gasoline." Pet. App. 4a). The Fifth Circuit fails, though, to identify whether the day-to-day expenses of many nonprofit executives such as "airline tickets, fast food, and gasoline" were paid by Stockman personally, from the account of a nonprofit organization, or were personal benefits from the net earnings of a nonprofit organization. If the Fifth Circuit's shotgun criminalization of expenditures on "airline tickets, fast food, and gasoline" were to be left unchecked, paid fundraisers, nonprofit executives, and candidates for office best be wary of making such common expenditures.

Given the inadequate instructions by such an experienced, esteemed, and highly respected judge, it would be easy for the jury to conclude that use of nonprofit funds for *any* political purpose was *verboten*, and that yet another slick politician was trying to game the system. Stockman's Petition at 34 says it this way: "[I]t 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." Your *amici* prefer to say it this way: It is probable that Stockman was convicted, at least in part, of engaging in lawful and constitutionally protected nonprofit political activity because the jury

was confused by the legally inadequate jury instructions. The legally and constitutionally inadequate jury instructions clearly may have tainted deliberations, and prejudiced the jury's view of what was lawful in this criminal case where (really) the exercise of First Amendment rights formed the basis for the conviction.

CONCLUSION

The Fifth Circuit failed to adequately review Stockman's criminal appeal in the context of the important constitutional rights involved. Its opinion in areas of campaign finance and nonprofit law is unconstitutional and dangerous to the security of rights, and *certiorari* should be granted to remedy this.

Respectfully submitted,

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