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* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Buckley v. Valeo*, this Court narrowly construed the Federal Election Campaign Act of 1974's restriction of independent expenditures as limited to "express advocacy" in order to avoid constitutional problems. When it enacted the Bipartisan Campaign Reform Act of 2002, Congress expanded its restriction to also reach "electioneering communications," defined as a communication that mentions a candidate for federal office 30 days before a primary election or 60 days before a general election. 52 U.S.C. § 30104(f)(3). Although this Court upheld the BCRA against a facial challenge in *McConnell v. FEC*, 540 U.S. 93 (2003), it subsequently held in an as-applied challenge that the BCRA was unconstitutional to the extent that the ban on "electioneering communications" reached issue advocacy that was not the "functional equivalent" of "express advocacy." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 481 (2007). Addressed in this brief is the count against former Congressman Stockman arising out of a communication, financed by a long-time supporter, that was concededly neither express advocacy nor its functional equivalent. The question presented is therefore:

> Whether Congress can constitutionally treat a supporter's financing of an issue-based communication through a 501(c)(4) entity controlled by a candidate as if it were a campaign expenditure and contribution when it does not contain express advocacy or its functional equivalent?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that the First Amendment protects uninhibited and robust debate on political issues. The Center has previously represented parties or participated as amicus curiae in a number of significant cases involving the First Amendment's Freedom of Speech clause, including *National Institute of Family and Life Advocates, et al. v. Becerra*, 138 S. Ct. 2361 (2017), and *Citizens United v. FEC*, 558 U.S. 310 (2010). The Center believes that this case presents an important opportunity for the Court to clarify its jurisprudence in this regard and to avoid draconian penalties on political debate that chill free speech.

SUMMARY OF THE ARGUMENT

Party members and opposing candidates have criticized each other in accusatory and pointed terms since the earliest days of our Republic. The "cloudy crystal ball gazing" of campaign-finance law fails to protect this important form of speech as the First Amendment demands. The principles that underlay

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1. Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

the seminal *Buckley* decision are largely being ignored, and, as a consequence, the Government is criminalizing speech on legitimate political issues without compelling interests for doing so. These principles led *Buckley* to provide strict protection for expenditures through the requirement that the speech they purchase contain words of express advocacy or, as subsequently expanded in *Wisconsin Right to Life*, their functional equivalent.

This case is one example, of many that will follow, of how the Government can punish candidates and organizations for their political speech when they have no objective measure of which speech is prohibited and which speech is not. The test of express advocacy or its functional equivalent provides this objective measure, and it should not be so easily cast aside as it was by the court below merely because the "expenditure" at issue was coordinated with a candidate rather than independent. In either case, to be an "expenditure" that can be regulated consistent with the First Amendment, it should be express advocacy or its functional equivalent. The petition for writ of certiorari should be granted to clarify that the restriction on coordinated *expenditures* contained in 52 U.S.C. § 30116(a)(7)(B)(i) can constitutionally only be triggered by expenditures that *expressly* advocate for the election or defeat of a candidate or are the functional equivalent of express advocacy.

REASONS FOR GRANTING THE WRIT

I. Harsh Criticism of Political Adversaries is an American Tradition Dating to the Founding

The government's indictment charged former Congressman Stockman with causing an excessive contribution to his campaign in the form of a coordinated expenditure. A wealthy supporter provided money to the Center for American Future, so it could distribute *The Conservative News*. The Fifth Circuit characterized *The Conservative News* as a political communication that accused Stockman's primary opponent, Senator John Cornyn, of various ethical misdeeds, while "promoting" the Stockman campaign. Pet.App. 11a. To show just how helpful *The News* was for Stockman, the court listed a few scurrilous accusations toward Senator Cornyn, namely, that he was "lying to voters," filing "false donor reports," and "falsifying ethics reports to hide income." *Id.* at 6a. These choice words for Stockman's colleague certainly caused some indignation, but they were concededly not "express advocacy" or its functional equivalent.

Political party infighting is far from new. It might be uniquely American: the Founders themselves proved that they were capable character-assassins. Richard Scher, *The Modern Political Campaign: Mudslinging, Bombast, and the Vitality of American Politics* 32 (1997). In the 1800 election, for instance, Alexander Hamilton delighted in stirring up Federalist-Party primary trouble for the incumbent President Adams (who was already under fire from all sides for his part in the Alien and Sedition Acts). *Id.* at 30. In one letter, Hamilton attempted to turn Federalist

leaders against Adams, describing him as petty, mean, egotistic, erratic, eccentric, jealous-natured, and hot-tempered. Adams, he said, possessed "defects in his character which unfit him for the office of Chief Magistrate." *Id.*

Everyone knows that criticism from one's friends can be more deadly than criticism from one's foes: it can alter the course of an election. Unfortunately for Adams, Aaron Burr got a hold of Hamilton's letter and published it as *The Public Conduct and Character of John Adams*, which undoubtedly satisfied Republicans everywhere. Paul F. Boller, *Presidential Campaigns: From George Washington to George W. Bush* 11 (2004). Hamilton's "Thunderbolt," as Madison described it in 1800, caused an angry Adams to call Hamilton "an intriguant, the greatest intriguant in the world—a man devoid of every moral principle—a bastard …." *Id.* Adams lost the 1800 election.

The very nature of political campaigns, from the early days of the Republic, is fraught with "charges of gross incompetence, disregard of the public interest, communist sympathies" along with "hints of bribery, embezzlement, and other criminal conduct." *New York Times v. Sullivan*, 376 U.S. 254, 273 n.14 (1964) (internal citation omitted). In *Sullivan*, this Court held that "[i]njury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error." *Id.* at 272-73. This is true because criticism of official conduct does not lose its constitutional protection merely because it is effective. *Id.* at 273.

Negative, even sensational, campaign-related literature that attacks political adversaries constitutes

an important part of speech in American politics, because campaigns themselves raise political issues. *Buckley v. Valeo*, 424 U.S. 1, 42 (1976). When Congress first regulated campaign finance through the Federal Election Campaign Act (FECA), this Court recognized that such speech spoke to political issues, often through the candidates themselves. *Id.* at 42 (1976). A rule regulating campaign-related expenditures must therefore not only be narrowly-tailored to serve a compelling interest, but must clearly define for individuals and candidates what speech is prohibited. *See id.*

This case provides an opportunity for this Court to reinvigorate a bright-line rule that (a) protects the traditional form of pointed speech in American politics and (b) clearly defines what speech by donors and candidates is subject to campaign finance restrictions. Doing so will prevent the government from chilling free speech through the heavy hand of criminal enforcement when it lacks a clear compelling interest.

II. The Court Should Take this Opportunity to Correct The Dangerous Trend of Post-*Buckley* Jurisprudence, which Chills Free Speech.

In the courts below, Stockman contended that *The Conservative News* did not contain express advocacy, and therefore that the Government could not regulate it as a coordinated campaign "expenditure." Pet.App. 12a. Said differently, without the "magic words" of express advocacy such as "vote for," "elect," "defeat," etc. (or its functional equivalent), the Government could not count *The Conservative News* as a coordinated

campaign expenditure. *Id.* Even though the Fifth Circuit was correct in noting that the provision of the campaign finance laws at issue—dealing with coordinated expenditures—is different than the independent expenditures provision at issue in *McConnell v. FEC*, 540 U.S. 93 (2003), and *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007), both turn on the definition of "expenditure," and *Wisconsin Right to Life* reaffirms the distinction drawn by this Court in *Buckley* between express advocacy (albeit expanded to include its functional equivalent) and issue advocacy.

The Government's need to prove express advocacy or its functional equivalent prevents the Government from criminalizing the sort of charged and pointed speech that the Founders themselves engaged in. In *Buckley*, this Court provided at least three principles that should continue to govern campaign-finance law:

(1) The people's "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution";

(2) Regulation requires bright lines protecting issue advocacy because campaigns themselves generate issues of public interest; and

(3) The "express advocacy" or "magic words" test, even as expanded to include their functional equivalent, provides a bright line rule that enables the government to regulate only those communications which are "unambiguously related to the campaign of a particular federal candidate" because they contain "express words

> of advocacy," which might include "magic words" such as "vote for," "elect," and so on.

Buckley, 424 U.S. at 14, 43-44, 80.[2]

These principles meant that Congress could regulate speech that directly advocates for the victory or defeat of a particular candidate (express advocacy) but not speech about political issues and candidates' qualifications (issue advocacy). *Id.* This Court made distinction between express advocacy and issue advocacy because regulation of anything more would criminalize political speech that the First Amendment protects. *See id.* Campaigns themselves generate issues of public interest that, when spoken about, fall within protected political speech. *See id.* at 42.

For years, federal courts, with one possible exception, recognized *Buckley's* protection of issue advocacy by applying the express advocacy test through magic words. *See McConnell v. FEC*, 540 U.S. 93, 278 n.11 (2003) (Thomas J., concurring) (collecting cases), *overruled on other grounds by Citizens United v. FEC*, 558

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2. Stockman has argued that the "magic words" must be present for a communication to qualify as a coordinated expenditure. *Amicus* argues that even if the "magic words" are not necessary, *Buckley* still adopted an "express words of advocacy" test that requires, perhaps, not-so-much certain "magic words" but that the words of the communication inescapably advocate election or defeat of a clearly-identified candidate. 424 U.S. at 44 n.52 ("This construction would restrict 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.'") (emphasis added); *see also* James Bopp, Jr. & Richard E. Coleson, *The First Amendment is Still Not a Loophole*, 31 N. Ky. L. Rev. 289, 293 n.25 (2004). This standard is not met here.

U.S. 310, 365–66 (2010). That case upheld against a facial challenge Section 201 of the Bipartisan Campaign Reform Act of 2002 (BCRA), through which Congress also sought to regulate "electioneering communications"—that is, broadcast, cable, or satellite communications naming a candidate for office within 30 days of a primary or 60 days of a general election. 52 U.S.C. § 30104(f)(3)(A)(i). *McConnell* upheld the BCRA against the facial challenge to the extent that "electioneering communications" were the "functional equivalent" of express advocacy. 540 U.S. at 105. As this Court subsequently made clear in *Wisconsin Right to Life*, the distinction between protected issue advocacy, on the one hand, and regulable express advocacy (or its functional equivalent), on the other, remains intact, and important for the protection of core political speech.

Nevertheless, the Court below declined to adhere to that bright line. Perhaps that was understandable, given the somewhat murky state of the jurisprudence in this arena. As the Fourth Circuit has described, the endeavor of understanding the effects of the *Wisconsin Right to Life* decision on *McConnell* is "a point on which no circuit court should engage in cloudy crystal ball gazing." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 285 (4th Cir. 2008).

The petition for certiorari should be granted so that this Court can clarify that the distinction between issue advocacy and express advocacy is as applicable to coordinated expenditures as it is to independent expenditures.

CONCLUSION

This case squarely presents an opportunity to re-assert the principles and protections that the Court put in place in *Buckley* and to protect political speech regardless of its form. Accordingly, the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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