

No. 20-103

IN THE
Supreme Court of the United States

STEPHEN E. STOCKMAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

**Brief *Amicus Curiae* of
Public Advocate of the United States,
The Constitution Party National Committee,
Texas Representative Briscoe Cain,
Former Virginia Senator Dick Black,
Former Virginia Delegate Bob Marshall,
Restoring Liberty Action Committee,
Tradition, Family, Property, Inc., and
WallBuilders in Support of Petitioner**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICI CURIAE</i>	1
BACKGROUND	3
SUMMARY OF ARGUMENT.	15
 ARGUMENT	
I. THE FIFTH CIRCUIT’S DECISION THAT ANY DISBURSEMENTS MADE IN “COOPERATION, CONSULTATION, OR CONCERT” WITH A CANDIDATE ARE SUBJECT TO THE FEDERAL ELECTION CAMPAIGN ACT IS IMPROPER AND THREATENS TO CRIMINALIZE EDUCATIONAL EFFORTS BY NONPROFIT ORGANIZATIONS.	16
II. THE FIFTH CIRCUIT’S CRIMINALIZATION OF NONPROFIT SOLICITATIONS THAT FALL SHORT OF RAISING SUFFICIENT FUNDS TO FULLY FUND PROJECTS IS IMPROPER AND THREATENS THE ABILITY OF NONPROFIT ORGANIZATIONS TO RAISE SEED MONEY FOR FUTURE PROJECTS	20
CONCLUSION	23

TABLE OF AUTHORITIES

	<u>Page</u>
<u>U.S. CONSTITUTION</u>	
Amendment I	16, 19, 20
<u>STATUTES</u>	
18 U.S.C. § 1341	20, 21, 22
18 U.S.C. § 1342	20
18 U.S.C. § 1343	20, 21, 22
26 U.S.C. § 501(c)(4)	17
52 U.S.C. § 30116(a)(7)(B)(ii)	17
<u>CASES</u>	
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	18, 19
<i>Center for Individual Freedom v. Carmouche</i> , 449 F.3d 655 (5th Cir. 2006)	18
<i>Citizens United</i> , 558 U.S. 310 (2010)	19
<i>Crandon v. United States</i> , 494 U.S. 152 (1989) . .	17
<i>Liparota v. United States</i> , 471 U.S. 419 (1985) . .	17
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003)	19
<i>Nixon v. Shrink Missouri Government PAC</i> , 528 U.S. 377 (2000)	20
<i>Reno v. American Civil Liberties Union</i> , 521 U.S. 844 (1997)	20
<i>United States v. Bass</i> , 404 U.S. 336 (1971)	17
<u>MISCELLANEOUS</u>	
R. Alexander, “Dinesh D’Souza Criminally Sentenced While John Edwards and Other Liberals Skated,” Townhall (Sep. 29, 2014)	9
R. Bade, “Pro Report,” Politico (July 11, 2013)	5

H. Bader, “Politicization of Justice Department Worsens,” Competitive Enterprise Institute (Aug. 23, 2011)	9
M. Berkman and E. Plutzer, “Republicans no longer trust the FBI,” The McCourtney Institute (Feb. 20, 2018)	6
L. Bernstein, “Wray: FBI could reopen Clinton investigation after independent review,” Sinclair Broadcast Group (Dec. 7, 2017).	11
S. Chapman, “Politicized Justice: It’s time to restore public trust in the Department of Justice,” Reason.com (June 26, 2008).	7
A. Cohen, “A Tale of DOJ Corruption,” RealClearPolitics (Dec. 15, 2017)	12
H. Dellinger, “Convicted former U.S. Rep. Steve Stockman tests positive for COVID-19 in prison, family says” Houston Chronicle (July 31, 2020)	21
J. DiGenova, “The Politicization of the FBI,” 47 Imprimis 2 (Feb. 2018)	14
Fox News, “Gingrich: At the Very Top, the Justice Department and FBI ‘Became Corrupted,’” (Dec. 7, 2017)	7
B. Gertz, “FBI Increasingly Politicized Under Comey and Mueller,” FreeBeacon.com (Dec. 6, 2017)	10
G. Gibson, “Obama’s No. 1 needler: Stockman,” Politico (Feb. 11, 2013)	4
N. Gingrich, “Gingrich: Comey Showed How ‘Amazingly Political’ He Is,” Fox & Friends (Mar. 21, 2017).	13
R. Hagelin, “Retribution by Obama officials keeps courageous congressman in prison,” Washington Times (Aug. 4, 2019).	4, 5, 15

P. Hasson, “Democrats Cheered An Investigation Into Anti-Clinton Bias At The FBI. It Keeps Finding Pro-Clinton Bias Instead,” The Daily Caller (Jan. 30, 2018) . . .	11
Q. Hillyer, “Justice, Denied,” The American Spectator (Nov. 2, 2010)	8
A. McCarthy, “For Politicized Justice Department, Zimmerman ‘Civil Rights’ Case Is CIA Interrogators Case All Over Again,” National Review (July 15, 2013)	9
M. Morris, “Liberal GW Professor: Obama Guilty of ‘Violations of His Oath of Office,’” CNS News (Jan. 30, 2015).	10
“Politicization of Department of Justice: Ideological hiring and firing policies lead to resignation of top DOJ officials,” The Center for Public Integrity (Dec. 10, 2008).	7
J. Schindler, “Politicization of the FBI Threatens American Democracy,” Observer (Oct. 5, 2016)	10
A. Shaw, “FBI’s Strzok and Page spoke of ‘secret society’ after Trump election, lawmakers say,” Fox News (Jan. 23, 2018)	14
R.L. Simon, “What Do We Do about the Biased and Incompetent FBI?” PJ Media (Feb. 16, 2018)	8
B. Singman and J. Gibson, “Ex-FBI lawyer Kevin Clinesmith pleads guilty in first criminal case arising from Durham probe,” FoxNews.com (Aug. 19, 2020)	5
J. Solomon, “The road not taken: Another FBI failure involving the Clintons surfaces,” The Hill (Aug. 22, 2019)	12

J. Timm, “Rep. Steve Stockman calls on House GOP to arrest Lois Lerner,” MSNBC.com (July 11, 2014)	4
J. Turley, “Horowitz report is damning for the FBI and unsettling for the rest of us,” The Hill (Dec. 9, 2019).	5
R. Weiner, “Rep. Steve Stockman threatens to impeach Obama over guns,” Washington Post (Jan. 14, 2013)	4

INTEREST OF THE *AMICI CURIAE*¹

Public Advocate of the United States is a nonprofit educational organization, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code of 1986. Public Advocate's tax-exempt mission and purposes include education and litigation to protect the family, traditional values, civil liberties, including, but not limited to, freedoms and rights guaranteed by the U.S. Constitution, and proper interpretation of our federal and state constitutions, statutes, and regulations. Public Advocate is particularly concerned about overreach of campaign finance law into the area of First Amendment-protected issue advocacy, and the weaponization of federal law to criminalize involvement in politics. Public Advocate's principal office is located in the Commonwealth of Virginia.

The Constitution Party National Committee ("CPNC") (www.constitutionparty.com) is a qualified national party committee, incorporated in the Commonwealth of Pennsylvania in 2001. CPNC is organized, operated, and dedicated to attempting to influence the selection, nomination, election, or appointment of individuals to federal, state, and local public office. As an organization operating under IRC

¹ All parties have consented to the filing of this brief *amicus curiae*. Counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

section 527 and the Federal Election Campaign Act, it is deeply concerned about the over-reach of campaign finance law into protected First Amendment activity.

Briscoe Cain is a member of the Texas House of Representatives. He was named Briscoe in honor of his lineal ancestor, Andrew Briscoe who signed the Texas Declaration of Independence in 1836, and was the first Chief Justice of Harrisburg County, Texas. In the state legislature, Rep. Cain has a record of defending the unborn and religious liberty. He is a lifelong resident of Harris County.

Richard “Dick” Black served as a member of the Virginia House of Delegates from 1998 to 2006, and as a member of the Virginia State Senate from 2012 to 2020. He served in both the U.S. Marines and in the U.S. Army JAG Corps, and retired with the rank of colonel.

Robert G. “Bob” Marshall served as a member of the Virginia House of Delegates from 1992 to 2018. He was a candidate for the U.S. Senate in 2008. He was the author of the Virginia Marriage Amendment to the Virginia state constitution, which was adopted by the voters of Virginia in 2006.

Restoring Liberty Action Committee is an educational organization.

Tradition, Family, Property, Inc., is an IRC § 501(c)(4) cultural, non-profit organization of Catholic inspiration that defends the perennial values of Christian Civilization and acts in favor of tradition,

family and private property with its two-fold purpose: individual and social. It is based in Spring Grove, Pennsylvania.

WallBuilders, a national pro-family (nonprofit educational) organization that presents America's forgotten history and heroes, with an emphasis on our moral, religious and constitutional heritage.

BACKGROUND

The Fifth Circuit's decision below opens by noting that ex-Congressman Stephen E. Stockman was convicted by a jury of 23 felonies relating to defrauding elderly philanthropists to "finance his personal life and political career." The opinion fails to mention that these 23 felonies were manufactured from four checks written by two sophisticated donors, neither of whom had any issue with how the funds were spent – until the Government got involved. Ultimately, as is typical for many fundraising activities, the funds in one case were insufficient for the planned project, so some funds were used in a different manner, which led to the fraud charges for which Stockman was convicted. In the other case, the full mailing project could not be carried out as planned, with the same result. Circuit Judge E. Grady Jolly's majority opinion flippantly characterized Stockman's resultant appeal as motivated to "avoid this career detour" and "the next item on his résumé" (prison time), rather than addressing the serious legal issues raised by Petitioner.

Regrettably, the troubling political context of Stockman’s prosecution was completely ignored by the Fifth Circuit. Stockman served two terms in the U.S. Congress, the second of which occurred under the Obama Administration, from 2013 to 2015. During this second stint, Stockman earned the reputation of being the most outspoken congressional critic of the Administration and its agencies.² Not only was Stockman one of the first congressmen to call for President Obama’s impeachment,³ but he also called for Attorney General Eric Holder’s impeachment, and led the fight to publicize Lois Lerner’s abuse of power as the head of the exempt organizations division of the Internal Revenue Service (“IRS”).⁴ He even introduced a resolution calling for Ms. Lerner’s arrest.⁵ Stockman also aggressively pushed for the use of the so-called

² G. Gibson, “Obama’s No. 1 needler: Stockman,” Politico (Feb. 11, 2013), <https://www.politico.com/story/2013/02/stockmans-full-speed-ahead-as-obamas-top-foil-087494>.

³ R. Weiner, “Rep. Steve Stockman threatens to impeach Obama over guns,” Washington Post (Jan. 14, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/01/15/rep-steve-stockman-threatens-to-impeach-obama-over-guns/>.

⁴ R. Hagelin, “Retribution by Obama officials keeps courageous congressman in prison,” Washington Times (Aug. 4, 2019), <https://www.washingtontimes.com/news/2019/aug/4/steve-stockman-kept-prison-obama-officials-retribu/>.

⁵ J. Timm, “Rep. Steve Stockman calls on House GOP to arrest Lois Lerner,” MSNBC.com (July 11, 2014), <http://www.msnbc.com/msnbc/will-the-gop-put-lois-lerner-under-house-arrest>.

“blue slip” process to block President Obama’s signature legislation on immigration and gun control bills.⁶ After this vociferous opposition to the Administration, Stockman decided not to seek another term in the House but, instead, announced a run against one of the most powerful incumbent Republicans in the United States Senate (and on the Senate Judiciary Committee), John Cornyn.⁷

We now know that at the same time Stockman was leading the opposition to the Obama Administration, and continuing thereafter, numerous individuals in important positions in the U.S. Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”), and the IRS were involved in historically unprecedented scandals.⁸ During that same scandal-

⁶ R. Bade, “Pro Report,” Politico (July 11, 2013), <https://www.politico.com/tipsheets/pro-report/2013/07/pro-report-presented-by-powerjobs-house-passes-farm-bill-sans-food-stamps-senate-marches-on-toward-historic-rule-change-house-to-vote-to-delay-obamacare-reid-sets-up-votes-on-nominees-011130>; *see also* R. Hagelin, “Retribution by Obama officials keeps courageous congressman in prison,” Washington Times (Aug. 4, 2019), <https://www.washingtontimes.com/news/2019/aug/4/steve-stockman-kept-prison-obama-officials-retribu/>.

⁷ “2014 United States Senate election in Texas,” Wikipedia, https://en.wikipedia.org/wiki/2014_United_States_Senate_election_in_Texas#Republican_primary.

⁸ *See, e.g.*, J. Turley, “Horowitz report is damning for the FBI and unsettling for the rest of us,” The Hill (Dec. 9, 2019), <https://thehill.com/opinion/judiciary/473709-horowitz-report-is-damning-for-the-fbi-and-unsettling-for-the-rest-of-us>; B. Singman and J. Gibson, “Ex-FBI lawyer Kevin Clinesmith pleads guilty in first criminal case arising from Durham probe,” FoxNews.com

plagued timeframe, DOJ was preparing its case against Stockman, resulting in an indictment that took years to obtain and required convening multiple grand juries in Houston, Baltimore, and Washington, D.C.

Given Stockman's prominence, not just as one of the Obama Administration's most vocal critics, but also as a credible challenger to one of the Republican Establishment's favored sons, former judge and U.S. Senator John Cornyn, conservative supporters were shocked and dismayed to learn about his indictment in 2017. Stockman's subsequent prosecution, along with the now-public scandals involving the DOJ, FBI, and IRS, helped fuel the crisis of faith that many conservatives now have in federal institutions.

Never before in any of our lifetimes has the public had less confidence that the rule of law is controlling law enforcement decisions of the FBI, the IRS, and DOJ, especially with respect to prosecutions originating in the prior Administration. The McCourtney Institute conducted a Mood of the Nation Poll two years ago asking a random sample of 1,000 Americans how often they feel that they can trust the FBI to do what is right. "Among Democrats, 67% trust the FBI to do what is right 'most of the time' or 'just about always.' This contrasts with only 39% of Republicans."⁹ Among all citizens, "only 49% of

(Aug. 19, 2020), <https://www.foxnews.com/politics/ex-fbi-lawyer-kevin-clinesmith-pleads-guilty-durham-probe>.

⁹ M. Berkman and E. Plutzer, "Republicans no longer trust the FBI," The McCourtney Institute (Feb. 20, 2018),

Americans felt that “most FBI agents enforce the law fairly. . . .”¹⁰

Admittedly, there has existed concern about the politicization of law enforcement in prior administrations.¹¹ However, as former Speaker of the House Newt Gingrich has commented, it was under President Obama that the Justice Department and FBI “[a]t the very top . . . became corrupted and I think we have to be honest and use that language.”¹²

Consider the following statements by journalists:

Under attorney general Eric Holder, the Obama Department of Justice (DOJ) is dangerously politicized, radically leftist, racist, lawless, and at times corrupt. . . .

https://democracy.psu.edu/documents/Mood%20of%20the%20Nation_022018.pdf.

¹⁰ *Id.*

¹¹ *See, e.g.*, S. Chapman, “Politicized Justice: It’s time to restore public trust in the Department of Justice,” Reason.com (June 26, 2008), <https://reason.com/2008/06/26/politicized-justice/>; *see also* “Politicization of Department of Justice: Ideological hiring and firing policies lead to resignation of top DOJ officials,” The Center for Public Integrity (Dec. 10, 2008), <https://publicintegrity.org/politics/politicization-of-department-of-justice/>.

¹² Fox News, “Gingrich: At the Very Top, the Justice Department and FBI ‘Became Corrupted’,” (Dec. 7, 2017), <https://insider.foxnews.com/2017/12/07/gingrich-fbi-agents-mueller-probe-justice-department-and-fbi-became-corrupted>.

The abuses by the Holderites are legion. They range from DOJ's infamous abandonment of the already-won voter-intimidation case against several New Black Panthers to multifaceted assaults on traditional standards of voting rights and obligations; from a growing list of lawsuits deliberately destructive of border security and citizenship laws While doing all this, the Holderites operate the least transparent DOJ in decades, treat congressmen and independent agencies with contempt, and claim breathtakingly spurious "privileges" against disclosure of public information.¹³

* * *

[O]ur FBI is not the stuff of legend, if it ever was, although, obviously, good, hard-working people work there. But it doesn't seem to be doing its job. In fact, it seems to be doing the *wrong job*. The bias and incompetence have infected each other to a degree that is indeed lethal. They are a bureaucratic organization gone rotten.¹⁴

During the Obama Administration, there was sincere concern expressed that the DOJ would hire

¹³ Q. Hillyer, "Justice, Denied," *The American Spectator* (Nov. 2, 2010), <https://spectator.org/justice-denied/>.

¹⁴ R.L. Simon, "What Do We Do about the Biased and Incompetent FBI?" *PJ Media* (Feb. 16, 2018) (*italics original*), <https://pjmedia.com/rogerlsimon/2018/02/16/biased-incompetent-fbi-n218714>.

only liberal lawyers.¹⁵ Highly regarded former federal prosecutor Andrew McCarthy recognized Obama’s and Holder’s politicization of the Justice Department as it colluded with Al Sharpton with respect to the state trial of George Zimmerman.¹⁶

Conservative author Dinesh D’Souza was prosecuted for a contribution in the name of another — allegedly reimbursing another person for contributions made to a federal campaign. The district judge denied his motion to dismiss for selective prosecution even though liberal activists were not prosecuted by the DOJ for similar activities.¹⁷

George Washington Law School Professor Jonathan Turley testified that the Obama and Holder Department of Justice were “at the epicenter of a constitutional crisis, a crisis that consumed [Holder] and his department. . . . In my view, Attorney General

¹⁵ See H. Bader, “Politicization of Justice Department Worsens,” Competitive Enterprise Institute (Aug. 23, 2011), <https://cei.org/blog/politicization-justice-department-worsens>.

¹⁶ A. McCarthy, “For Politicized Justice Department, Zimmerman ‘Civil Rights’ Case Is CIA Interrogators Case All Over Again,” *National Review* (July 15, 2013), <https://www.nationalreview.com/corner/politicized-justice-department-zimmerman-civil-rights-case-cia-interrogators-case-all/>.

¹⁷ See R. Alexander, “Dinesh D’Souza Criminally Sentenced While John Edwards and Other Liberals Skated,” *Townhall* (Sep. 29, 2014), <https://www.christianpost.com/news/dinesh-dsouza-criminally-sentenced-while-john-edwards-and-other-liberals-skated.html>.

Eric Holder has moved his department outside of the navigational beacons of the first and second articles of the Constitution.”¹⁸

John Schindler, a former National Security Agency counterintelligence officer and no fan of President Trump, wrote that “[u]nder Comey, the FBI has become unprecedentedly politicized at the top levels, and this rank partisanship is ruining the Bureau. . . . For the sake of our democracy, we need our secret police force to be non-partisan. . . .”¹⁹ Reporter Bill Gertz also sounded the alarm: “the FBI has become one of the more liberal political agencies of government, and some critics say appears increasingly to operate outside normal constitutional controls.”²⁰

The FBI’s Office of the Inspector General (“OIG”) conducted a review of the DOJ and FBI’s handling of the Hillary Clinton email (so-called) investigation, “including looking at issues of political bias, impartiality and whether the agency’s leadership

¹⁸ M. Morris, “Liberal GW Professor: Obama Guilty of ‘Violations of His Oath of Office,’” *CNS News* (Jan. 30, 2015), <https://www.cnsnews.com/blog/michael-morris/liberal-gw-professor-obama-guilty-violations-his-oath-office-0>.

¹⁹ J. Schindler, “Politicization of the FBI Threatens American Democracy,” *Observer* (Oct. 5, 2016), <https://observer.com/2016/10/politicization-of-the-fbi-threatens-american-democracy/>.

²⁰ B. Gertz, “FBI Increasingly Politicized Under Comey and Mueller,” *FreeBeacon.com* (Dec. 6, 2017), <https://freebeacon.com/national-security/fbi-increasingly-politicized-comey-mueller/>.

followed due process.”²¹ The late Rep. Elijah Cummings (D-MD) and Rep. John Conyers (D-MI) first requested the “IG investigation into the FBI over alleged illegal leaks damaging to Clinton.”²² Although Rep. Adam Schiff (D-CA) initially praised the OIG investigation, “[m]uch to Schiff’s chagrin, the IG investigation has revealed instances of political bias at the FBI — in favor of Clinton.”²³ Ultimately, DOJ Inspector General Michael E. Horowitz’s report uncovered evidence that:

the FBI’s chief lawyer originally thought Clinton should be indicted, and the bureau wrote a draft supporting the felony standard, but then walked back its decision. And agents focused more on unsubstantiated Trump collusion than Clinton emails in what the IG feared might be a sign of bias.

And now we learn the FBI willfully chose to ignore highly classified evidence in the Clinton email case It’s exactly that sort of

²¹ L. Bernstein, “Wray: FBI could reopen Clinton investigation after independent review,” Sinclair Broadcast Group (Dec. 7, 2017), <https://wjla.com/news/nation-world/wray-fbi-could-reopen-clinton-investigation-after-independent-review>.

²² P. Hasson, “Democrats Cheered An Investigation Into Anti-Clinton Bias At The FBI. It Keeps Finding Pro-Clinton Bias Instead,” The Daily Caller (Jan. 30, 2018), <https://dailycaller.com/2018/01/30/democrats-andy-mccabe-hillary-clinton-investigation/>.

²³ *Id.* (emphasis added).

behavior that leaves many Americans wondering whether there are two systems of justice inside the FBI — one for the Clintons, and one for the rest of the country.²⁴

Nationally syndicated columnist Adriana Cohen put it this way:

Imagine living in a country where the federal government decides whether you're exonerated from criminal wrongdoing or hauled off in handcuffs based on how you vote.

Welcome to the U.S. Justice Department, a politicized agency that has become a weaponized arm of the Democratic National Committee.

First it was corrupt agents at the IRS who abused its authority during the Obama years, targeting conservative groups. Now we're witnessing corruption at the highest echelons of the FBI and DOJ, where high-ranking officials have become transparently politicized, causing corrosive distrust in our justice system.²⁵

²⁴ J. Solomon, "The road not taken: Another FBI failure involving the Clintons surfaces," *The Hill* (Aug. 22, 2019), <https://thehill.com/opinion/criminal-justice/458478-the-road-not-taken-another-fbi-failure-involving-the-clintons>.

²⁵ A. Cohen, "A Tale of DOJ Corruption," *RealClearPolitics* (Dec. 15, 2017), https://www.realclearpolitics.com/articles/2017/12/15/a_tale_of_doj_corruption_135790.html.

Former Speaker of the U.S. House of Representatives Newt Gingrich appeared on television to discuss the testimony of then-FBI director James Comey, and reported that:

97 percent of the money given to politics by the Justice Department employees went to Hillary Clinton — 97 percent. The place is filled with liberal lawyers who are very eager to destroy the Trump Administration. . . . It gets to be very, very dangerous. Cause what happens is they go to the lowest guy on the totem pole and they trade up. They say, “Hi, would you like to have 10 years in jail or would you like to testify, and here is some really good testimony.” And read Judith Miller’s book. When a New York Times reporter can have that done, you know it’s really dangerous.²⁶

Former U.S. Attorney for the District of Columbia Joseph diGenova outlined how the FBI and DOJ have broken long-standing protocols to throw the investigation into Hillary Clinton’s email server, meanwhile throwing efforts into an investigation into rumors of collusion between Russia and a politically disfavored presidential campaign. “No amount of sugar coating or post hoc explanation of this and other texts can conceal [FBI lawyer Lisa Page and FBI

²⁶ N. Gingrich, “Gingrich: Comey Showed How ‘Amazingly Political’ He Is,” Fox & Friends (Mar. 21, 2017), <https://video.foxnews.com/v/5366866040001#sp=show-clips>.

Deputy Director Peter Strzok's] animus against Trump and support for Clinton."²⁷

Deputy Director Strzok and FBI lawyer Page even discussed a "secret society" which exists within the FBI.²⁸ Irrespective of whatever may eventually be learned about this secret group, it is clear many have burrowed into the bureaucracy who have absolutely no respect for the voice of the People expressed in elections or the Rule of Law. These individuals revealed in their emails that their political views should override the votes of the American people. And it appears they believed that their illegal actions would be protected by others. To date, there has been no meaningful accountability for the malicious and even criminal actions of anyone in law enforcement, save FBI lawyer Kevin Clinesmith.

This hyper-politicized DOJ and FBI undertook the multi-year investigation and, ultimately, the prosecution of President Obama's primary congressional nemesis, Steve Stockman. Beginning in 2013, it took Obama's DOJ multiple grand juries, with at least three refusing to return a true bill against

²⁷ J. DiGenova, "The Politicization of the FBI," 47 *Imprimis* 2 (Feb. 2018), <https://imprimis.hillsdale.edu/the-politicization-of-the-fbi/>.

²⁸ A. Shaw, "FBI's Strzok and Page spoke of 'secret society' after Trump election, lawmakers say," Fox News (Jan. 23, 2018), <https://www.foxnews.com/politics/fbis-strzok-and-page-spoke-of-secret-society-after-trump-election-lawmakers-say>.

Stockman.²⁹ One grand jury was convened out of the Baltimore office headed by Rod Rosenstein.³⁰ Signing Stockman's spring 2017 indictment was DOJ lawyer Raymond Hulser, party to Lois Lerner's emails evidencing her targeting of conservative groups.³¹ After all this, the DOJ then pushed for a rapid trial date with jury selection starting on March 19, 2018, less than a year from the issuance of Stockman's Superseding Indictment, despite the complexity of the charges and enormity of discovery (over 140,000 pages), and despite the fact that Stockman had been represented by three different lawyers since the DOJ's indictments. He was ultimately convicted of all charges but one at trial and sentenced to 10 years in prison.

SUMMARY OF ARGUMENT

In upholding the convictions of Petitioner Stockman, the Fifth Circuit disregarded its established approach to disbursements made in cooperation, consultation, or concert with a federal candidate,

²⁹ Washington DC - GJ No. 13-1 Nov 1, 2013; US District Ct., Baltimore, May 28, 2015; Houston January 7, 2016 (GJ No. 14-4); Houston Sept. 13, 2016 (GJ 16-2), Nov 10, 2016. There may have even been a fifth grand jury convened, just to obtain an indictment.

³⁰ *Id.*

³¹ R. Hagelin, "Retribution by Obama officials keeps courageous congressman in prison," Washington Times (Aug. 4, 2019), <https://www.washingtontimes.com/news/2019/aug/4/steve-stockman-kept-prison-obama-officials-retribu/>.

abandoning this Court's bright line test in defining what constitutes express advocacy. This *ex post facto* approach creates impermissible vagueness and will work to chill the First Amendment rights of exempt organizations seeking to educate the public on political matters.

The Fifth Circuit also wrongfully upheld Stockman's fraud convictions without requiring proof of his fraudulent intent at the time of the alleged financial solicitations. Instead, the Circuit Court determined that actions distant in time could be used to infer this necessary element. This failure adversely impacts exempt organizations in their efforts to raise seed money, creating substantial risk that any funds subsequently used for purposes different than an original, under-funded project could lead to criminal prosecution.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION THAT ANY DISBURSEMENTS MADE IN "COOPERATION, CONSULTATION, OR CONCERT" WITH A CANDIDATE ARE SUBJECT TO THE FEDERAL ELECTION CAMPAIGN ACT IS IMPROPER AND THREATENS TO CRIMINALIZE EDUCATIONAL EFFORTS BY NONPROFIT ORGANIZATIONS.

Stockman was convicted of Count 12 of the Superseding Indictment alleging that he, as a federal

political candidate, illegally coordinated³² campaign expenditures with a 501(c)(4) organization.³³ In upholding this conviction, the Fifth Circuit determined that *any* disbursement coordinated with a federal candidate is a political contribution subject to the Federal Election Campaign Act (“FECA”).³⁴ Regrettably, this decision abandons that circuit’s precedent and *ex post facto* legislates a new campaign finance rule. This unprecedented approach created not just grave injustice to Stockman,³⁵ it also threatens to criminalize future educational efforts by nonprofit organizations, and others.

The count in question focused on Stockman’s actions while a candidate for the U.S. Senate in 2014. Stockman helped secure funding for an IRC § 501(c)(4) organization to print a newspaper called “Conservative News” and distribute it to thousands of Texas residents. From a conservative perspective, this publication was critical of Stockman’s opponent in the

³² 52 U.S.C. § 30116(a)(7)(B)(ii).

³³ 26 U.S.C. § 501(c)(4).

³⁴ 52 U.S.C. § 30101 *et seq.*

³⁵ *See Crandon v. United States*, 494 U.S. 152, 158 (1989) (“it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute’s coverage. To the extent that the language or history of [the criminal statute] is uncertain, this ‘time-honored interpretive guideline’ serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability”) (*citing Liparota v. United States*, 471 U.S. 419, 427 (1985) and *United States v. Bass*, 404 U.S. 336, 347-348 (1971)).

2014 U.S. Senate race, Senator John Cornyn, and positive of Stockman. But, as the government admitted at trial, nowhere did the newspaper containing express advocacy.

Under *Buckley v. Valeo*, 424 U.S. 1 (1976), the fact that the “Conservative News” publication did not expressly advocate for the election or defeat of a particular candidate would historically have been enough to exclude it as an “expenditure” subject to FECA. In *Buckley*, this Court recognized that election law governing expenditures on “explicit words of advocacy of election or defeat of a candidate” should be invalidated on vagueness grounds absent a clear test.³⁶ Hence, this Court created the *Buckley* test: “express words of advocacy of election or defeat [include] ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”³⁷ It is uncontested that the Conservative News included no such words, and thus the Fifth Circuit decision violates this Court’s ruling in *Buckley*.

Prior to the instant case, the Fifth Circuit correctly used the *Buckley* test to narrowly construe and uphold Louisiana’s Campaign Finance Disclosure Act (“CFDA”).³⁸ The Circuit Court had previously recited the Buckley Court’s reasoning that where a provision

³⁶ *Id.* at 43-44.

³⁷ *Id.* at n.52.

³⁸ *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 658 (5th Cir. 2006).

of FECA “was rendered potentially overbroad by the fact that it could be interpreted to require disclosure when an independent individual or group engages only in issue advocacy” it was necessary to “impose[] a limiting construction on the statute, bringing it within constitutional bounds by drawing a line between express advocacy and issue advocacy.”³⁹ The Court of Appeals then repeated “the well-known ‘magic words,’” and rescued Louisiana’s CFDA by limiting its “purpose of influencing” language to the same test.⁴⁰

Abandoning the *Buckley* test now by misreading *McConnell v. FEC*, 540 U.S. 93 (2003),⁴¹ the Court of Appeals not only wrongly affirms Stockman’s conviction on Count 12, but it simultaneously burdens exempt organizations with renewed ambiguity between express advocacy and issue advocacy. This, of course, endangers constitutionally-protected speech under the First Amendment. Without *Buckley*’s bright-line test to rely on, exempt organizations’ speech will be chilled, particularly those whose primary purposes are to educate the public on contemporary political issues. This Court should not

³⁹ *Id.* at 664.

⁴⁰ *Id.*

⁴¹ *McConnell* applies to “electioneering communications” which consist of targeted broadcast, cable, or satellite communications shortly before an election, see *Citizens United*, 558 U.S. 310, 321 (2010), not to print publications like the *Conservative News*. See *McConnell*, 540 U.S. at 203.

allow this infringement upon political speech,⁴² as “its protection lies at the heart of the First Amendment.”⁴³

II. THE FIFTH CIRCUIT’S CRIMINALIZATION OF NONPROFIT SOLICITATIONS THAT FALL SHORT OF RAISING SUFFICIENT FUNDS TO FULLY FUND PROJECTS IS IMPROPER AND THREATENS THE ABILITY OF NONPROFIT ORGANIZATIONS TO RAISE SEED MONEY FOR FUTURE PROJECTS.

Stockman was convicted of all but one of the first eight counts of the Superseding Indictment alleging fraud in violation of 18 U.S.C. §§ 1341, 1342, and 1343. The Government’s fraud theory rested on the argument that because Stockman raised money for one purpose, but used it for another, he had obtained that money “by means of false or fraudulent pretenses, representations, or promises”⁴⁴ and was therefore guilty of violating 18 U.S.C. §§ 1341 and 1343. In other words, the trial court did not require proof that there was any fraudulent intent at the time Stockman actually solicited the donations, only that the solicited funds were ultimately used on something different

⁴² See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997) (“special First Amendment concerns [where law has] obvious chilling effect on free speech”).

⁴³ *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000).

⁴⁴ 18 U.S.C. §§ 1341, 1343.

than what was originally described in the solicitation. Incredibly, the Fifth Circuit upheld this approach.

But that missing evidence did not stop Stockman's convictions on the fraud counts. On review, the Fifth Circuit excused this lack of proof by stating that "the jury could rationally have inferred Stockman's fraudulent intent" from "later misappropriations." That experienced jurists on the Circuit Court would make such a holding is, frankly, astounding. Once funds are in hand from solicitations where there is no contemporary evidence of fraud, subsequent application of such funds to new purposes lacks the necessary element of fraudulent intent. Put another way, if the money has already been "obtained" without fraud, its subsequent use, for whatever purpose, could not be fraud.⁴⁵

Given the missing evidence of intent, Stockman's fraud convictions should all be set aside. Stockman's devastating personal circumstances⁴⁶ only compound

⁴⁵ See 18 U.S.C. § 1341 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises"); see also 18 U.S.C. § 1343.

⁴⁶ Stockman recently tested positive for COVID-19 while in prison. H. Dellinger, "Convicted former U.S. Rep. Steve Stockman tests positive for COVID-19 in prison, family says" *Houston Chronicle* (July 31, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/STOCKMAN-COVID-15450596.php>. Repeated efforts for compassionate release have been denied by the courts and Bureau of Prisons.

the tragedy of the Fifth Circuit's faulty approach here. Moreover, by determining that fraudulent intent at the time of a monetary solicitation may be inferred solely from subsequent application of such funds to uses not described in the original solicitation – no matter how distant in time from the original solicitation – the Circuit Court upends fundraising in general.

Numerous, if not most fundraising efforts for substantial projects end without sufficient funding. Initial funding for such projects is known as “seed money” – funds used in advertising, for professional fundraisers, for matching funds, or for other means – to generate additional funding. When such fundraising “underachieves,” or fails to raise the funds necessary for the stated project (as in Stockman's case), such funding is necessarily never applied in the exact form described in the original solicitation. According to the Fifth Circuit, this means that any such project – like most fundraising in general – runs significant risk of violating the federal fraud statutes at 18 U.S.C. §§ 1341 and 1343.

Such an approach has not only led to Stockman's loss of freedom and health,⁴⁷ it will also prove devastating to the operation exempt organizations that depend upon donations for their operations and projects, and cannot stand.

⁴⁷ See note 46, *supra*.

CONCLUSION

Given what we now know regarding the extreme politicization of the DOJ and other federal agencies during the last Administration, the conviction of the most outspoken congressional critic of President Obama on charges relatively minor to the excesses of Establishment elected officials is troubling. As a result of prosecutions like this, faith in public institutions continues to crumble, an increasingly dangerous development for the Republic. Judicial decisions upholding convictions arising from vague election law and fraud charges lacking essential elements contribute to this lack of confidence. Granting certiorari here will help restore the public's faith in institutions, remedy grave injustices, and protect exempt organizations in their fundraising and educational activities. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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