No. 18-20780

In the United States Court of Appeals
For the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

STEPHEN E. STOCKMAN,
Defendant - Appellant.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division
USDC No. 4:17-cr-00116-2

Brief *Amicus Curiae* of American Target Advertising, Inc. *et al.** In Support of Appellant and for Reversal

MARK J. FITZGIBBONS**
AMERICAN TARGET ADVERTISING
9625 Surveyor Court, Suite 400
Manassas, VA 20110
(703) 392-7676
mfitzgibbons@americantarget.com
Attorney for Amici Curiae

**Attorney of Record

May 31, 2019

* Individual *amici* include (titles and organizations shown for identification purposes only):

Arthur D. Ally
Maitland, FL

Jim Babka
President, DownsizeDC.org, Inc
Akron, OH

Pastor Chuck Baldwin
Liberty Fellowship
Kila, Montana

Bob Barr
Former Congressman, Georgia
Founder and President, Liberty Guard
Atlanta, GA

L. Brent Bozell, III
Founder and Chairman, Media Research Center
Reston, VA

Floyd Brown
Chairman, America Fighting Back PAC
Washington State

Ken Campbell
Lincoln, CA

Sandy Campbell
Lincoln, CA

James N. Clymer, Esq.
Clymer Bodene, P.C.
Lancaster, PA

Chad Connelly

President, Faith Wins
Prosperity, SC

The Honorable Donald J. Devine
Former Director, U.S. Office of Personnel Management

William J. Federer
Ft. Meyers, FL

Ellen Grigsby
Dallas, TX

Rebecca Hagelin
Columnist, The Washington Times
Placida, FL

Colin Hanna
Chairman, Let Freedom Ring
West Chester, PA

Charles Daniel Key
Former Oklahoma state representative

James L. Martin
Founder/Chairman, 60 Plus Association
Arlington, VA

Jenny Beth Martin
Honorary Chairman, Tea Party Patriots Action
Woodstock, GA

Colby May, Esq.
Director and Senior Counsel, Washington Office
American Center for Law & Justice
Washington, D.C.

The Honorable Bob McEwen
U.S. House of Representatives

Former Member, Ohio
Washington, D.C.

Barry Meguiar, President
Revival Outside the Walls
Irvine, CA

Joseph Miller, Esq.
Law Offices of Joseph Miller, LLC
Fairbanks, AK

Malcolm Morris
Houston, TX

Pat Nolan
Director, Center for Criminal Justice Reform
The American Conservative Union Foundation
Alexandria, VA

Richard Norman
Founder and President, The Richard Norman Company
Leesburg, VA

Reverend Rick Scarborough, D. Min.
Rick Scarborough Ministries
Lufkin, TX

Richard A. Viguerie
Chairman, American Target Advertising, Inc.
Manassas, VA

CORPORATE DISCLOSURE STATEMENT

American Target Advertising, Inc. is a corporation organized under the laws of Virginia. Its parent corporation, The Viguerie Company, is a corporation organized under the laws of Virginia, and no publicly held corporation owns 10% or more of the stock of either.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

U.S. Constitution

Cases

Statutes, Regulations, and Legislative Material

Rules

Miscellaneous Authorities

STATEMENT OF INTEREST[1]

American Target Advertising, Inc. ("ATA") is an agency that provides services to nonprofit organizations that communicate with members of the general public and solicit contributions nationally. Its chairman, Richard A. Viguerie, pioneered political direct mail in the 1960s and 70s. Its clients include Internal Revenue Code §§ 501(c)(3) and 501(c)(4) nonprofit organizations. Twenty-seven (27) *amici* are individuals who are (1) formally associated with nonprofit organizations (other than as just donors), (2) provide services to them (including legal representation or fundraising services), and/or (3) former elected officials or candidates for elected office who join this brief because they are concerned for the rights of nonprofit organizations and political committees to communicate, fundraise, build files of donors and non-donor supporters, and to associate with prospective donors and voters.

[1] Appellant and Appellee have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or contributed money to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

The Brief for Appellant Stephen E. Stockman at 27 - 29 explains that laws governing tax-exempt entities and campaign finance can be complex despite repeated pronouncements by courts about First Amendment[2] protections associated with the communications of these endeavors, including fundraising. Your *amici* agree. We even further emphasize that the practices of lawyers advising and representing entities engaged in fundraising by nonprofit organizations and political committees tend to be specialized in those areas.

Although fundraising for nonprofit organizations -- with its attendant costs, including payments to professional solicitors -- is protected by the First Amendment, fraud is not. Fundraising by political committees and their communications are protected by the First Amendment, as the U.S. Supreme Court has stated repeatedly. Courts have recognized exceptions that may be subject to

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution, Amendment I.

regulation and reporting for purposes of limiting corruption of the election processes.[3]

Your *amici*, who are associated in various ways with nonprofit organizations and/or political committees, understand the need to raise seed money for projects, and the need to finance operational costs and growth of nascent tax-exempt missions, otherwise the projects expire or fail without ever achieving their beneficial ends.

Stockman's conviction based on fundraising communications involving his associates cascaded into charges of mail fraud, wire fraud, money laundering, and failures to report or file informational and tax returns with the government. The predicate act of fundraising in fact cascaded into a sentence of 120 months in jail.[4] To reach a conviction and this draconian sentence for the outspoken former

[3] *E.g.*, "[w]e are mindful that disclosure serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations." *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

[4] That is three dozen months longer than the sentence of William Aramony, the late former CEO of United Way, who was convicted in the case dealing with the greatest nonprofit fundraising scandal of the 20th century. "William Aramony, was sentenced today to seven years in prison for fraudulently diverting $1.2 million of the charity's money to pay for a romance with a teen-age girlfriend and other benefits for himself and friends." K.W. Arenson, "Ex-United Way Leader Gets 7 Years for Embezzlement," *The New York Times*, (June 23, 1995), https://www.nytimes.com/1995/06/23/us/ex-united-way-leader-gets-7-years-for-embezzlement.html.

Congressman Stockman, the Government confused the law governing nonprofit fundraising and campaign finance, and presented its case in a manner that confused the jury.

Your *amici* respectfully suggest that the standards used by the Government, and stated in multiple Jury Instructions, were wrong as a matter of law. Such standards used by the Government punished normal logistics, lawful strategies, or *failure* as fraud. Unless reversed, Stockman's conviction will have a tendency to chill and even prohibit the flexibility nonprofit organizations and political committees need to raise and apply their funds for their tax-exempt missions, especially when using donations that are not clearly and expressly restricted. Your *amici* also fear that the incorrect standards used by the Government to prosecute Stockman, unless reversed, may make them and others engaged in ideological, political, or even religious education, discourse, advocacy, and missions easier marks for, and vulnerable to, selective, discriminatory, or politically motivated investigations and prosecutions.

ARGUMENT

The First Superseding Indictment against Stockman and Jason T. Posey states that Stockman "obtained hundreds of thousands of dollars in charitable

donations by representing to individuals that he was raising funds on behalf of tax-exempt organizations." ROA.64. These predicate acts formed the bases from which the cascading charges of money laundering, mail fraud, and wire fraud flowed. The funds, however, were raised legally and without fraud. The cascading charges therefore must fall.[5] Additionally, the Brief for Appellant makes points, which these *amici* further emphasize, (1) that the federal laws governing the activities of Internal Revenue Code ("IRC") §§ 501(c)(3) and 501(c)(4) organizations, particularly when political activity is involved, are complex or often uncertain, (2) that the Government's case relied on that complexity to confuse the jury, (3) that multiple Jury Instructions were incorrect about the law, and (4) that "the legality, *vel non*, of the 501(c)(3) or (c)(4)'s use of the funds was not an element of any of the mail or wire fraud claims, nor was it an element of any crime for which Stockman was charged." Brief for Appellant at 31 - 32.

[5] "Violation of the wire-fraud statute requires the specific intent to defraud ...." *United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006). Wire fraud is (1) the formation of a scheme or artifice to defraud, and (2) use of the wires in furtherance of the scheme. *See Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Caldwell*, 302 F.3d 399, 406 (5th Cir. 2002). Violation of the wire-fraud statute requires the specific intent to defraud, *i.e.*, a "conscious knowing intent to defraud." *United States v. Reyes*, 239 F.3d 722, 736 (5th Cir. 2001); Wire fraud and money laundering are both acts that constitute "racketeering activity." 18 U.S.C. § 1961(1)(B). To plead a claim of wire fraud, a plaintiff must plead "(1) a scheme to defraud, (2) the use of, or causing the use of, wire communications in furtherance of the scheme," and (3) the defendant's "specific intent to defraud." *United States v. Radley*, 632 F.3d 177, 184-85 (5th Cir. 2011) (quoting *United States v. Ingles*, 445 F.3d 830, 838 (5th Cir. 2006)); *see* 18 U.S.C. § 1343.

Based on the testimony of the *only donor* who testified at trial, the Government confused the standard of what constitutes fraud in the solicitation of donations for tax-exempt causes, confused the law applicable to what is allowable political speech and press rights exercised by tax-exempt organizations, and misstated the law governing "express advocacy" that forms the basis of "independent expenditures" made in the context of federal campaign finance law. Stockman's conviction was therefore based on a series of Government errors of law regarding predicate acts. The Government confused the jury to make lawful acts of fundraising appear unlawful, and failed to show unlawful intent.

I. THE SOLICITATIONS WERE NOT UNLAWFUL ACTS

The United States Supreme Court has repeatedly addressed fraud in the context of charitable solicitations. *See, e.g., Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980), S*ecretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Federation of Blind of N. C., Inc*., 487 U. S. 781 (1988). Noting first that "[t]he First Amendment protects the right to engage in charitable solicitation. See *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');', 487

U. S., at 788-789," the Court emphasized that "the First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Associates, Inc*., 538 U.S. 600, 611-12 (2003). As to costs of fundraising, specifically the fees paid to solicitors acting on behalf of a nonprofit organization, 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." Id. 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.

Just as to the Jury Instructions on Count 9 (ROA.928), then, payments to fundraisers Dodd and Posey were lawful under such standards, and the cascading charges flowing therefrom must be reversed.

A review of the First Superseding Indictment demonstrates the Government failed to adequately describe the elements of the fraud it claims was the predicate illegality necessary for the other charges. 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 foundations and individuals "the donations would be used for charitable and educational purposes, or for lawful independent political advocacy …." ROA.74. In reality, however, the Government seeks to make after-the-fact results -- successful or not -- determinative of intent. Such *faux* look-back determinations of intent -- based on success or failure of the projects for which funds were raised -- are contrary to the standards required by the First Amendment and articulated in *Telemarketing Associates*.

The 2014 solicitations of Richard Uihlein ("Uihlein") to contribute to an "independent expenditure" in the form of a newspaper sent via direct mail illustrate the confusion and how the wrong principles of law were applied. Uihlein is CEO

of a family-owned direct mail catalogue company, and runs the family foundation that donates as much as $12 million per year. ROA.2115-17. Uihlein, a wealthy, sophisticated, and loyal donor to conservative causes, not only had known Stockman and previously supported him, but had prior solicitation dealings with Stockman's associate Dodd. Uihlein testified he told one solicitor he had "no problem" with donating to an "independent expenditure" for Stockman. ROA.2143. Uihlein testified he was aware the so-called "independent expenditure" 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. Uihlein testified that Wagner -- who worked for CESI, a mailshop 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 Uihlein's extant, documented pledge to Center for American Future*.

Uihlein testified he was told the quantity of newspapers would be "830-some thousand," and the mailing needed postage of $450,571.65. ROA.2157. The payment of that amount by Uihlein forms the bases of Jury Instructions on Counts 3 and 4. ROA.919. Uihlein made his check for the advertisement payable to the

U.S. Postmaster. Center for American Future ended up mailing fewer than 830,000 newspapers, which reduction in quantity was not planned but was due to circumstances explained in the Brief for Appellant at 10. CESI, which apparently affixed the names, addresses, and postage to the newspapers that were mailed, returned to Center for American Future $214,718 from Uihlein's donation to this project. The Government claims that the Center for American Future should have refunded that money to Uihlein -- as if it were an illegal act to have applied that balance to other costs of the so-called "independent expenditure," even though Uihlein's testimony shows he understood the money was for the benefit of Center for American Future. Those involved with soliciting Uihlein would have understood the donation was for the benefit of Center for American Future.

To know nonprofit direct mail and the fundraising and necessary to finance it is to know why these acts are not fraudulent or illegal predicate acts. In other words, the Government would make potential predicate criminal acts out of *standard, everyday occurrences* in direct mail, and the fundraising and financing attendant to it.

A grave error in direct mail would be to under-budget for any project; and a grave mistake in fundraising would be to solicit too little money to cover costs of missions and projects. Both "sins" would potentially under-fulfill the tax-exempt

mission of nonprofit organizations. Center for American Future purportedly planned to mail over 800,000 advocacy newspapers, and its representative had asked Uihlein for a total of over $1.2 million for the project. Uihlein instead provided $450,571.65, understanding 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. Uihlein made no instruction to restrict his donation, or return any portion of it.

The vendor for Center for American Future asked Uihlein to cut his check payable to the U.S. Postmaster. A simple reason for that, *which anyone in direct mail would know*, is that the U.S. Postal Service requires upfront payment, unlike other vendors that may work on credit, invoice later, and may be paid after the mailing is sent.

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 be less than projected, or may not be available on time; (2) the printers of the mail and the mailshops 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

mail project may not be available, and quantities are cut back; or (4) the nonprofit organization may simply decide the projected quantity was too high -- for any other of many legitimate or prudent reasons. (It is not uncommon, for example, that your *amicus* American Target Advertising will reduce its direct mail postage needs budget by over $100,000 from one week to the next based on changes in quantities of its nonprofit clients' mail to be sent.)

The final amount Center for American Future asked Uihlein for the project was $450,571.65 to mail a projected 830,000 newspapers (after Uihlein received a confirmation of a pledge for $500,000). That translates to a little over 50 cents apiece, which, depending on the type of postage used, stock of paper, print colors, name and address labeling, and many other factors determining costs of direct mail, might have covered the entire costs of mailing 830,000 pieces. If, however, First Class U.S. postage were used instead of a cheaper nonprofit bulk rate (closer to 13 cents apiece at the time), then $450,571.65 would have covered the postage only (or substantially only). If Center for American Future did not have a nonprofit postage mailing permit, it would have been ineligible to mail at the cheaper nonprofit bulk postage rates. Also, solicitations to further fund the newspaper beyond what Uihlein pledged may have (indeed, seem to have) failed. But there is nothing unusual or illicit in these many scenarios.

Whatever the reason(s) why Center for American Future did not mail the entire 830,000 newspapers, there were costs other than postage to pay, such as the writers and designers of the newspaper content, costs of physical production (printing) of the newspaper, data processing names and addresses, affixing postage to the pieces mailed, costs to pay staff or agencies to oversee the production, and costs of lists of names and addresses of recipients. And, of course, payments to the fundraisers are another cost. The Government's case ignores the legality of paying professionals to solicit contributions, which costs encompass their time and expertise, the value of their contacts and relationships with potential high-dollar donors, travel, and other expenses related to their services. These costs are, as a matter of law, not indicia of a scheme or artifice to defraud, as we know from the *Telemarking Associates* opinion, *supra*. And while Uihlein's check was made payable to the U.S. Posmaster, almost assuredly for expedience purposes as the *first and earliest cost* of the project to be paid, there was no direction or indication to Center for American Future based on the numerous solicitations made about the project, that Uihlein intended his money was to be restricted *solely for postage*. Even *Uihlein* testified it was for "advertising." ROA.2161.

The Government may not take the position, whether for the alleged "independent expenditure" or other projects at issue in the Stockman case, that

everyday flexibility of how nonprofits spend their money on projects, everyday logistics of direct mail, or even common *failures* in nonprofit projects, are the equivalent of "intentionally misleading statements designed to deceive the listener," articulated under the standards in *Telemarketing Associates*.[6] And as with the solicitations for the other tax-exempt projects, such as Freedom House and Life Without Limits, there is risk of failure. Unlike the statutory requirements for advance disclosure as with securities, *Telemarketing Associates* tells us a far different standard applies to fundraising. But even the sole donor to testify at the trial understood the need to provide seed money to encourage others to fund these projects ("hopefully use [his donation] to encourage others to contribute" while solicitors "continued to attempt to raise additional money"). ROA.2132. He knew -- or reasonably and objectively should have known -- his donations were to assist in funding budgets that included more than the physical newspaper or building.

Indeed, Uihlein testified he was aware that the planned budget for the Congressional Freedom Foundation, the entity to own the Freedom House, was $2,464,000, while the budgeted cost of the Freedom House itself was $1,299,000. ROA.2131. He was therefore not deceived to believe that the project had a budget exclusively dedicated to acquisition costs of the building itself. Also, Uihlein had

[6] *Telemarketing Associates*, 538 U.S. at 606.

prior dealings on other projects with the professional solicitor, and surely had to know (or have reason to believe) the solicitor was not working for free. In donating $350,000, Uihlein testified the project would "hopefully, use that to encourage others to contribute to the facility" (ROA.2132). Thus, he was aware that the project might not be fully funded without further effort and costs, *and with the potential of failure in its goal of purchasing a building*.

Under the theory of fraud used by the Government, few if any charitable endeavors -- particularly start-ups -- could proceed. They would 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, which has innate benefits *and* attracts more donations. The Government's position would not only severely impede the First Amendment rights of tax-exempt organizations to educate the public and promote their missions, it would smother and extinguish many organizations.

The approach by the Government not only has the tendency to chill the exercise of rights protected by the First Amendment, but is especially concerning to many of these *amici* who, from time to time, may be high-profile, outspoken critics of government officials and politicians, as was Stockman. Another grave

concern is that Stockman was subject to an order pursuant to a Motion in Limine restricting his full Sixth Amendment defense rights at trial to refer to Lois Lerner,[7] the once-head of the Tax-Exempt unit at the Internal Revenue Service and suspected critic of the 2010 *Citizens United* opinion[8] confirming First Amendment rights of 501(c)(4) organizations to engage in independent expenditures.[9]

II. JURY INSTRUCTIONS FOR EXPRESS ADVOCACY WERE WRONG

[7] Your *amici* are also concerned about the "Court's limine order on political bias matters or selective or vindictive prosecution." ROA.2201. The Government's Motion in Limine is apparently under seal. The trial court, however, largely precluded Stockman from presenting any evidence related to the bias of the investigators and complaining witnesses in the case, and related retaliation.

The failure to permit the questioning about the bias of the witnesses and investigators resulted in a denial of due process -- procedural and substantive -- and violation of Stockman's Sixth Amendment constitutional rights, thus the conviction should be overturned. The failure to permit the evidence of bias and prejudice of the witnesses and their supervisor(s) resulted in a violation of Appellant's constitutional right to a fair trial. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Ross v. Oklahoma*, 487 U.S. 81, 91 (1988).

The Sixth Amendment requires the opportunity to show some evidence of bias. *See United States v. Abel*, 469 U.S. 45 (1984). The rules of evidence addressing bias of witnesses include Rule 401, relevancy, Rule 608, reputation and credibility, and Rule 608(b) provides for impeachment on cross-examination with acts other than convictions if probative of the witness's credibility, particularly if the evidence tends to show bias or motive for the witness to testify untruthfully. *See United States v. Thorn*, 917 F.2d 170, 176 (5th Cir.1990).

[8] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[9] "Former IRS official Lois Lerner and her colleagues mired in the debacle seemed concerned that the 2010 ruling striking caps on corporate political donations would influence the political activities of nonprofits, according to emails in a draft of a new Oversight and Government Reform Republican report, obtained by POLITICO." R. Bade "GOP: IRS staff obsessed with ruling," *Politico.com* (March 5, 2014), https://www.politico.com/story/2014/03/lois-lerner-citizens-united-104279.

The Jury Instructions on Count 12 were wrong as a matter of law about what is "express advocacy" for purposes of an "independent expenditure." The description used in the Jury Instruction was, "expenditures by The Center for the American Future for specific advertising advocating for Mr. Stockman's election or attacking Mr. Stockman's opponent." ROA.938.

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*.[10] The court acknowledged the Fifth Circuit's use of the "magic words" test for express advocacy from *Buckley v. Valeo* (*supra)*, 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.' Id. at 44 n. 52, 96 S.Ct. 612." *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*[11] 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

[10] 449 F.3d 655 (5th Cir. 2006).

[11] 288 F.3d 187 (5th Cir. 2002).

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." *Chamber of Commerce of the United States* at 190.

Like the newspaper at issue in this appeal, which may "clearly champion[] the election of a particular candidate" (id. at 191), "we iterate that the language of the communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate. See *Buckley*, 424 U.S. at 44, 96 S.Ct. 612 (interpreting federal election statute to 'apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate.'" *Chamber of Commerce of the United States* at 194-95. And, "a narrow interpretation of 'express advocacy' is faithful to the language and spirit of *Buckley* . . . It clearly avoids the pitfalls of making application of the First Amendment dependent on the understanding of the reasonable person under the circumstances. Accordingly, we hold that a communication constitutes express advocacy -- and may therefore be subject to mandatory disclosure regulations -- only if it contains explicit words advocating the election or defeat of a clearly identified candidate." *Chamber of Commerce of the United States* at 195-96.

The key, as the opinion explains -- and what is missing from *The Texas Conservative News* -- is that:

> express advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a candidate. If the language of the communication contains no such call to action, the communication cannot be 'express advocacy.' Thus, communications that discuss in glowing terms the record and philosophy of specific candidates, like the advertisements at issue here, do not constitute express advocacy under *Buckley* . . . unless they also contain words that exhort viewers to take specific electoral action for or against the candidates.

Chamber of Commerce of the United States at 197.

Explicit words of advocacy of election or defeat were *completely absent* from the alleged "independent expenditure," i.e., the newspaper called *The Texas Conservative News*. The absence in the Jury Instruction of the test about explicit words (vote for/against, elect/defeat) makes the instruction incorrect as a matter of law and misleading.

After soliciting over $1 million from Uihlein alone for the alleged "independent expenditure" newspaper, not to mention others who may have been solicited, it may seem odd that Center for American Future did not use explicit words of advocacy of election or defeat, such as "vote for/against" or "elect/defeat" in the newspaper. It may seem odd, that is, unless one understands

that nonprofit organizations may wisely and frugally seek to write their ads to legally avoid the burdens and costs of reporting independent expenditures to the Federal Election Commission ("FEC"). This may be done in any number of ways to address policy and politics, and the flaws or virtues of those who hold (or are running for) elected office, yet not subject to the expense and burdens of reporting to the FEC. One way is by crafting ads that do not use the "magic words." The First Amendment, after all, still allows many communications about public policy to breathe without intercessions by, or reporting them to, the government.[12]

A review of the contents of *The Texas Conservative News* (ROA.13106-121), indicates that is exactly what Center for American Future did. Subject matters addressed within *The Texas Conservative News* were legislative or policy in nature: funding Obamacare, veterans placed on a gun ban list, the debt limit, illegal alien amnesty, a gun owner registry bill, an open carry law, surveillance over phones, nomination of a judge, legislative ethics reports, congressional Benghazi investigation, auditing the Fed, and others.

[12] "A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that, in ordinary circumstances, constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective, or, if the restraint is not permissible, less pernicious, than the restraint on freedom of discussion imposed by the threat of censorship." *Thornhill v. Alabama*, 310 U.S. 88, 97 - 98 (1940).

Page 16 of the newspaper (ROA.13121) also included a legislative scorecard, which is another lawful "political" exercise for 501(c)(4)s under the "primary purpose test" described below. Here it is helpful to understand the lawful versus prohibited activities of 501(c)(3)s compared to 501(c)(4)s.

A 501(c)(3) organization may engage in activities that are "electoral," i.e., involved in the "political" process, such as voter registration and conducting get out the vote ("GOTV") projects, *but those activities may not be partisan*. *See* Internal Revenue Service Revenue Ruling 2007-41.[13] A 501(c)(4) organization, on the other hand, may engage in partisan political activities, so long as those activities do not become the "primary purpose" of the organization, which is commonly interpreted as allowing political activity so long as it is less than 50 percent of the activities of the 501(c)(4) organization.[14] Center for American

---

[13] "Voter Education, Voter Registration and Get Out the Vote Drives

> "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, http://www.irs.gov/pub/irs-drop/rr-07-41.pdf (emphasis added).

[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

Future is a 501(c)(4) organization eligible to engage in political activities under the primary purpose test.

The solicitations made to Uihlein for the "independent expenditure" by Center for American Future therefore were entirely lawful even if read as partisan. There was no unlawful scheme or artifice for the solicitation, because Uihlein was not deceived about the lawful and partisan political purposes of the advertisement. So, while the law governing these activities is or may be confusing even to professional solicitors, not to mention juries, the Uihlein testimony demonstrated no intent to violate the law, or to engage in a scheme or artifice to defraud, or to violate tax-exempt or campaign finance laws.

The Jury Instructions about express advocacy (and other issues before the court) were also insufficient and confusing about the political activity in which

---

Organizations,' https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations. *H.B.* , Schadler, The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s and Political Organizations, Alliance for Justice (2012):

> No clear test exists for determining when political activity becomes an organization's primary purpose. One common approach is to analyze expenditures. If annual political expenditures are relatively small compared to the organization's overall budget, its tax-exempt status is generally safe. If political activity expenditures exceed 50 percent of total program expenditures, however, social welfare most likely cannot be deemed the primary purpose.

https://www.bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_Ch1_paywall.pdf.

501(c)(4) organizations may lawfully engage, stating only that a "501(c)(4) is a nonprofit organization operated exclusively for the promotion of social welfare." ROA.917. By ignoring and omitting the "primary purpose" test, the Jury Instructions clearly may have left jurors with the impression that the solicitations of Uihlein for a political independent expenditure -- or any advertisement with political content -- were unlawful or legally unauthorized acts.[15]

Your *amici's* explanation of innocent, exculpatory, and even wise scenarios protected by the First Amendment notwithstanding, the Jury Instructions about express advocacy were wrong as a matter of law by ignoring the critically important part of the tests for "express advocacy" that is the cornerstone of what are independent expenditures. If there were no "independent expenditure," as a matter of law there could be no unlawful coordination. The incorrect Jury Instructions about express advocacy therefore cascaded into incorrect Jury Instructions on Counts 9 through 12 (ROA.926-27), and Counts 10 and 11

[15] These Jury Instructions fail even under the two-tier test for electioneering communications, which is a statutorily created category separate from independent expenditures. This category of broadcasts called electioneering communications was statutorily created after *Buckley v. Valeo*, *supra*, without amending the definition of express advocacy for independent expenditures. The two-tier test for electioneering communications was addressed in *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007). But that test for express advocacy has certainly not been extended to independent expenditures in the Fifth Circuit, as the cases cited herein demonstrate. Even if so, the Jury Instructions would be misleading and wrong as a matter of law.

(ROA.936-37), along with any money laundering, mail fraud, or wire fraud counts based on the original acts of lawful solicitation and lawful publication of the newspaper. It is imperative that jury instructions be correctly enunciated, especially when speakers and printers face potential criminal liability.[16]

CONCLUSION

Your *amici* who are involved with, or provide various services to, nonprofit entities that raise funds -- and who themselves often operate with caution or in fear of misinterpreting the complex laws governing fundraising and/or tax-exempt status -- would still be concerned if Stockman or his associates had faced certain civil liabilities for their acts in these areas so clearly protected by the First Amendment. The Government, however, confused the jury by pushing multiple incorrect interpretations of the law about fundraising, tax-exempt law, and campaign finance law, and multiple Jury Instructions were wrong as a matter of law in this criminal matter. The Government unlawfully treated lawful fundraising as predicate acts for other criminal charges. Stockman's conviction should be reversed.

[16] "'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill v. Alabama*, 310 U. S. 88, 102 (1940).

Dated: May 31, 2019

Respectfully submitted,

/s/ *Mark J. Fitzgibbons*__
Mark J. Fitzgibbons
9625 Surveyor Court
Suite 400
Manassas, VA 20110
703.392.7676
mfitzgibbons@americantarget.com

Counsel for Amici Curiae
American Target Advertising, Inc. et al.

CERTIFICATE OF SERVICE

I hereby certify that, on May 31, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Mark J. Fitzgibbons

Mark J. Fitzgibbons
9625 Surveyor Court
Suite 400
Manassas, VA 20110
703.392.7676
mfitzgibbons@americantarget.com

Counsel for Amici Curiae
American Target Advertising, Inc. et al.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

In accordance with Federal Rule of Appellate Procedure 32(a)(5), (a)(6), (a)(7)(B), and (a)(7)(C), I certify that the foregoing brief is proportionately spaced using Times New Roman 14-point font and contains 5,739 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

/s/ Mark J. Fitzgibbons
Mark J. Fitzgibbons
9625 Surveyor Court
Suite 400
Manassas, VA 20110
703 392 5656
mfitzgibbons@americantarget.com

Counsel for Amici Curiae
American Target Advertising, Inc. et al.