

**No. 18-20780**

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In The United States Court Of Appeals  
For The Fifth Circuit

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UNITED STATES OF AMERICA,  
*Plaintiff - Appellee,*

v.

STEPHEN E. STOCKMAN,  
*Defendant - Appellant.*

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

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**REPLY BRIEF FOR APPELLANT**

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## **INTRODUCTION**

In its Answering Brief, the Government doubled-down on the tactic it used to convict Appellant Stephen E. Stockman (“Stockman”) at trial. It contorted a couple of failed conservative non-profit projects and political activity into a multiple year scheme to defraud two sophisticated conservative donors in order to charge and convict Stockman of multiple counts of mail and wire fraud, money laundering, and federal campaign finance and tax crimes. Under the standard proffered by the Government, anyone who raises seed money for a non-profit project but cannot raise the entire budget is in danger of finding themselves accused of several federal felonies. The Government has taken the position that the key element of specific intent can be proved simply by repeatedly asserting the existence of a “scam”.

## **ARGUMENT**

I. THE JURY INSTRUCTIONS ON 501(c)(3) AND 501(c)(4) ORGANIZATIONS WERE UNNECESSARY, WERE NOT APPLICABLE TO ANY ELEMENT OF THE CHARGED CRIMES, AND CLEARLY CONFUSED THE JURY.

In his Opening Brief, Stockman explained in detail how the district court’s jury instructions gave the erroneous impression that any money spent by an Internal Revenue Code § 501(c)(3) or § 501(c)(4) organization that benefitted any individual, other than salary paid to employees, or that any activity that was in any way political in nature was illegal. Stockman Br. at 29-37. In response, the Government asserts

repeatedly that the district court could not possibly have instructed the jury erroneously because the court quoted directly from the Internal Revenue Code: “[t]here can be no dispute that [the nonprofit definition] is an accurate statement of law; it is the language of the statute.” Gov’t Brief at 37; *see also id.* at 2, 25, 34-36.

The Government argued such “instruction provided the jury with context regarding the nature and purpose of such entities.” Gov’t Br. at 7. The district court did not confine the application of these definitions to any specific count. ROA.5273-5274. Here, the instructions were unnecessary and confused the jury and unfairly prejudiced Stockman, because it allowed the Government to misuse this “context” to make up for the lack of evidence on the intent element of the mail and wire fraud charges. Stockman Br. at 29-37.

Jury instructions must (1) correctly state the law, (2) clearly instruct the jurors, and (3) be factually supportable. *See United States v. Fairley*, 800 F.3d 198, 208 (5th Cir. 2018). “The trial court’s charge must not only be ‘legally accurate, but also factually supportable’ [and] ‘the court may not instruct the jury on a charge that is not supported by evidence.’” *United States v. Mendoza-Medina*, 346 F.3d 121, 132 (5th Cir. 2003) (quoting *United States v. Lara-Velasquez*, 919 F.2d 946, 950 (5th Cir. 1990)). On review, jury instructions are analyzed as a whole and in the context of the entire trial including arguments made to the jury. *See Fairley*, 800 F.3d at 208; *United States v. Chagra*, 807 F.2d 398, 402 (5th Cir. 1986).

The elements of mail and wire fraud are straightforward and do not include any element that requires instruction on nonprofit organizations. To convict Stockman of mail and wire fraud, the Government had to prove: (1) a scheme to defraud using false material representations, pretenses, or promises; (2) use of the mails or wire to execute the scheme; and (3) the specific intent to defraud. *See United States v. Simpson*, 741 F.3d 539, 547 (5th Cir. 2014).

Notwithstanding the lack of any element relating to nonprofit organizations, both crimes have a specific intent element that must be satisfied to sustain a conviction. Yet, despite three weeks of trial, as recounted in more than twenty-five pages of briefing on Stockman's supposed bad acts, the Government did not provide a single citation to the record of a single fact that proves that Stockman had the intent to defraud the two donors at the time the solicitations were made. *See* Gov't Br. at 4-27. Instead, the opposition brief doubled down on the tactic the Government used at trial by reciting a litany of facts appended with conclusory statements to support its contention that the "evidence of Stockman's guilt was overwhelming." Gov. Br. at 42. Indeed, while the Government's explications may be "overwhelming" in terms of their sheer volume, its attempt to use its own loaded phrases to conjure evidence of specific intent not otherwise in the record must fail. Much as it did during trial, throughout its opposition brief, the Government repeatedly referred to "sham nonprofits", "bogus charities", "sham charity", "shell entity", and

“shams...that existed to deceive”. Gov’t Br. at 4, 6, 9, 41. After repeatedly making those type of references to “sham non-profits” at trial, in closing, the Government attempted to use its own prejudicial characterizations as a substitute for evidence by referring to “sham non-profits” to demonstrate Stockman’s fraudulent intent: “this idea that there is a real charity doing real charitable work is a false pretense, **which is another marker of fraud.**” ROA.5248 (emphasis added). Yet, there was no proof that these entities were not actual non-profit organizations in good standing with both the IRS and their state of incorporation.<sup>1</sup>

With this misdirection set in place by the jury instruction’s “context,” it is not surprising that the jury’s first and only substantive question was:

JURY NOTE 1

Is Mail/~~check~~ wire fraud related to:

1) Reason for the check was written?

or

2) The destination the funds were deposited to (C3)  
and that's "destination" ability to use those funds.

4/10/18

Date

FOREPERSON

<sup>1</sup> The organizations involved appear to still have their exemption recognized by the IRS.

ROA.963. After three weeks of trial, the very first question the jury asked was about where the funds that were the subject of the mail and wire fraud counts were deposited—a § 501(c)(3) organization—and whether that § 501(c)(3) could legally use those funds. ROA.963. What is abundantly clear from this question is that the jurors were questioning whether the § 501(c)(3) could use the funds in a manner allowable under the definition of a § 501(c)(3) non-profit organization as instructed constituted a required element of mail or wire fraud.

In response, the Government argues that the district court’s response “reiterat[ed] the elements of the mail and wire fraud offenses and referr[ed] the jury to the instructions’ definition of relevant terms, including ‘specific intent to defraud.’” Gov’t Br. at 40-41.

The Government’s characterization of the district court’s instructions is incomplete. The district court instructed the jury that they “should consider these elements in the context of the **entire jury instructions**, including the definitions of ‘knowingly,’ ‘scheme to defraud,’ ‘specific intent to defraud,’ and ‘false’ and ‘material’ representations, pretense, or promise on page 11” of the jury instructions. ROA.964.

The instructions on §§ 501(c)(3) and (c)(4) organizations were presented under the heading, “Specific Instructions for This Case.” ROA.917. In response to the jury’s very specific question regarding whether mail and wire fraud related to

the “reason” for the check, the “destination” of the funds “deposited to” a (c)(3), and whether that non-profit organization had the (legal) ability to use those funds, the district court clearly instructed the jury to consider the elements of mail and wire fraud “in the context of the entire jury instructions,” which included the instructions on §§ 501(c)(3) and (c)(4) organizations. ROA.963-64.

When presented with the question of whether the mail and wire fraud related to whether the § 501(c)(3) that received the funds could legally use it, the district court’s answer should have been: NO.

The Government argues that there is no problem with that because: 1) the §§ 501(c)(3) and (c)(4) instructions are direct quotes from the statute; and 2) that the instructions “only” stated that the net earnings of the organization cannot benefit an individual and that a 501(c)(3) organization “may not participate or intervene in any political campaign on behalf of any candidate for public office.” Gov. Br. at 37-39.

The response to the Government’s argument, that the instructions are direct quotes from the statute is simple: so what? Stockman never argued that the language deviated from the statute. Stockman’s argument is that the inclusion of these instructions was unnecessary and confused the jury, as evidenced by their first and only substantive question.

II. THE GOVERNMENT’S ASSERTION THAT AN INSTRUCTION THAT QUOTES THE LANGUAGE OF A STATUTE CANNOT MISLEAD A JURY IS PATENTLY FALSE.

Any lawyer who has worked to discern the meaning of Internal Revenue Code provisions, would quickly recognize the false logic being employed to deflect Appellant’s argument. The statutory terms used in the instruction §§ 501(c)(3) and (c)(4) entities originated with the Internal Revenue Code of 1954, and the district court should not have assumed those terms have the meaning the jury would impute to them based on common use. Those statutory terms are informed by 65 years of interpretative gloss. Just as it would be malpractice *per se* for a lawyer to advise a client based on the words of this statute alone, without examining applicable regulations and other administrative and judicial pronouncements, it is error to treat the language of federal tax statutes as having their colloquial meaning, rather than as technical terms requiring technical definition. In the context of nonprofit tax law, relying only on the statute is not just facile, it is misleading. Indeed, as Seventh Circuit Judge Frank Easterbrook explains:

“Plain meaning” as a way to understand language is silly. In interesting cases, meaning is not “plain”; it must be imputed, and the choice among meanings must have a footing more solid than a dictionary — which is a museum of words, a historical catalog, rather than a means to decode the work of legislatures.

Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla. L. Rev. 1, 18 (2004).

The government ardently defends the correctness of the judge’s instruction which described an IRC § 501(c)(3) organization using the statutory terms as follows: “a nonprofit corporation, fund, or foundation organized and operated exclusively for religious, charitable, scientific, or educational purposes.” Gov’t Br. at 35. While the colloquial meaning of the statutory term “exclusively” would be “solely”—that every single dollar spent by such an organization must be directly related to one of the four purposes identified, that is most certainly not the law. In *The Law of Tax-Exempt Organizations*, long the leading treatise on the law of nonprofit organizations, former IRS attorney Prof. Bruce R. Hopkins comments as follows on the statutory meaning of the word “exclusively”:

It is clear that the term exclusively as employed in this context does not mean solely but rather primarily.... That is, as a general precept, any type of tax-exempt organization must operate primarily for its exempt purpose to remain exempt. This is the primary purpose test.

Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* 61-62 (1998); *see also id.* at 71-74 (discussing “The Exclusively Standard”).

Thus, no nonprofit tax lawyer would assume, as the judge did, that “exclusively” could be understood by its colloquial, common, or lay meaning. It is understood to be a technical term that must be given its technical meaning. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 69 (2012). Indeed, IRS regulations interpret the statutory phrase “organized and operated exclusively” as requiring two

tests, one which determines whether an organization is **organized** exclusively for the permissible purposes and one which determines whether an organization **operates** exclusively for those purposes. *See* 26 C.F.R. § 1.501(c)(3)-1(a)(1). The operational test permits an organization to “be regarded as *operated exclusively* for one or more exempt purposes only if it engages *primarily* in activities which accomplish one or more of such exempt purposes” as long as not “more than an **insubstantial part** of its activities is not in furtherance of an exempt purpose.” 26 C.F.R. § 1.501(c)(3)-1(c)(1) (emphasis added). The jury was misled in this same way with respect to activities of § 501(c)(4) organizations.

The Government claims it only charged fraud in the solicitation of the donations—not a violation of nonprofit tax law. Gov’t Br. at 41. The Government justifies its use of the naked statutory definitions because “the question before the jury was not whether Stockman complied with the requirements of §§ 501(c)(3) and (c)(4), but rather whether he was guilty of the charges in the indictment.” Gov’t Br. at 39. The Government’s argument to this Court demonstrates how that same argument could have misled the jury. Having no evidence of intent to defraud at the time of the solicitation, the Government’s theory at trial and before this Court is that any later use inconsistent with the exempt purposes (under the colloquial, legally incorrect “exclusively” standard) of the nonprofit organizations should substitute for proof of specific intent to defraud.

The jury's question requested assistance in understanding the relevant legal standard for whether the intent was present at the time of the solicitation, asking whether the fraud was: "related to: 1) Reason for the check was written? Or 2) The destination the Funds were deposited to (c3) and that[sic] 'destination' ability to use those funds." ROA.963. Although somewhat inartfully written, the jury's question was whether the fraud related to how the tax-exempt organizations were able to use the money. Instead of clarifying the standard for the jury's deliberation, the Court perpetuated the confusion by, as the Government explains, "reiterating the elements of the mail and wire fraud offenses and referring the jury to the instructions' definition of the relevant terms." Gov't Br. at 40.

A. The Government's Effort to Impute Deception into Activity Sanctioned by the Supreme Court Must Be Rejected.

The Government paints a picture of a "sophisticated fraudulent scheme" but all that it does is demonstrate its own misunderstanding of the complex area of federal tax law. Gov't Br. at 4. It claims that Stockman used a "web of sham nonprofit organizations" or "several bogus charitable entities." *Id.* Similarly, in its argument, the Government claims that it provided evidence "regarding the formation and operation of multiple § 501(c)(3) and § 501(c)(4) organizations." *Id.* The jury should not have been permitted to draw negative inferences from the use of both types of organizations, which is a routine practice among nonprofits. It is common that § 501(c)(3) organizations regularly work with 501(c)(4) organizations,

including with organizations under common control. For example, the ACLU, which is a § 501(c)(4) organization, has a § 501(c)(3) sister organization, the ACLU Foundation. The Supreme Court sanctioned both types of organizations being operated by the same persons in *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) (where the respondent could “obtain tax-deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying.”). There is nothing negative about these types of organizations working with each other, but the Government concedes that it used such an inference to convict Stockman of mail and wire fraud.

B. The Convictions Must Be Reversed Because of the Unnecessary §§ 501(c)(3) and (c)(4) Non-profit Organization Instructions.

*De novo* review of the non-profit jury instructions is appropriate because the jury instructions as given unnecessarily imported statutory language regarding 501(c)(3) and 501(c)(4) organizations into the elements of the crimes of mail and wire fraud and therefore misstated the elements of those crimes. *See* Stockman Br. at 26.

The mail and wire fraud statutes cannot be read so broadly to include violation of nonprofit tax law to support the intent and scheme elements of those crimes. *See Skilling v. United States*, 561 U.S. 358 (2010). The Government ignores this and argues that the inclusion of the instructions on § 501(c)(3) and § 501(c)(4) non-profit

organizations should not matter because their inclusion does not rise to the level of plain error. Gov't Br. at 34. Setting aside the fact that *de novo* review applies, even under the plain error standard, these jury instructions fail.

Error is plain only when it is clear or obvious and it affects the defendant's substantial rights. *United States v. Hickman*, 331 F.3d 439, 443 (5th Cir. 2003) (internal citations omitted). A defendant's substantial rights are only affected if the error "affected the outcome of the district court proceedings." *Id.* (internal citations omitted).

Even under the plain error standard, it is clear from the foregoing discussion that the inclusion of the instructions on the § 501(c)(3) and § 501(c)(4) organizations was improper. It is also clear from the Government's arguments to the jury that it used those instructions to prove the intent element of the mail and wire fraud charges: "this idea that there is a real charity doing real charitable work is a false pretense, which is another marker of a fraud." ROA.5248. Absent the ability of the Government to bootstrap intent using the "sham non-profit" refrain, the lack of any facts to show that Stockman possessed the requisite intent to defraud at the time of the solicitation meant that the Government would not have been able to satisfy an essential element of the mail and wire fraud charges.

The Government concedes that the jury instructions must be considered as a whole. Gov. Br. at 39, citing *United States v. Aldawsari*, 740 F.3d 1015, 1019 (5th

Cir. 2014). The Government also concedes that the jury is presumed to follow the law as instructed by the court. Gov't Br. at 41. If the jury is wrongly instructed, however, it follows that result cannot stand. And, as here, considered as a whole, there can be no serious argument that the jury instructions did not confuse the jury and allowed Stockman to be convicted under a faulty standard.

### III. THE GOVERNMENT IS WRONG THAT *MCCONNELL V. FEDERAL ELECTION COMMISSION* IS APPLICABLE TO THIS CASE.

As Stockman detailed in his opening brief, this Circuit has consistently applied the limitation on FECA's definition of "expenditures" to include only those "funds used for communications that expressly advocate for the election or defeat of a clearly identified candidate" as first set forth in *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). Stockman Br. at 37-39 (citing *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-64 (5th Cir. 2006) and *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 192-93 (5th Cir. 2002)).

The Government argues in response that *Buckley* is no longer good law, that the limitation on the definition of expenditures has been effectively overruled by *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and that, regardless, *Buckley's* limitation has never been applied in the context of contributions. Gov't Br. at 50-51.

The Government is wrong. *McConnell* does not control here; *Carmouche* does.

A. *McConnell v. Federal Election Commission* is Inapposite Here.

The Government asserts that “Stockman and *amici* do not address the *McConnell* decision in their briefs.” Gov’t Br. at 53. That was not an omission—*McConnell* does not govern here.

Unlike here, at issue in *McConnell* was the constitutionality of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which amended the FECA in pertinent part by creating a third category of regulated speech called “electioneering communications” that was neither “express advocacy” nor “issue advocacy” as set forth in *Buckley*. *McConnell*, 540 U.S. at 189.

BCRA defined an “electioneering communication” as: 1) a broadcast ad, 2) clearly identifying a candidate for federal office, 3) aired within a specific time period (60 days before a general election or 30 days before a primary), and 4) targeted to an audience of at least 50,000 viewers or listeners in the relevant electorate. *Id.* at 194. And BCRA specifically amended the FECA to provide that expenditures “for ‘electioneering communication[s]’ that are coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party.” *Id.* at 203.

The Court held that BCRA’s “definition of ‘electioneering communication’ raise[d] none of the vagueness concerns that drove [its] analysis in *Buckley*” and that “the constitutional objection that persuaded the Court in *Buckley* to limit FECA’s

reach to express advocacy [was] simply inapposite” to the case before it in *McConnell*. *Id.* at 194.

*McConnell* sanctioned Congress’ regulation of “electioneering communications”, a narrowly defined category of widely distributed advertisements—even if they did not contain express advocacy. The *McConnell* court held that “electioneering communication” was sufficiently well defined to avoid the vagueness concern that triggered the need for the *Buckley* Court to impress the express advocacy limitation on “expenditure.” *See id.* at 192 (“the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities.”).

The Government misconstrues *McConnell*’s preemption language. Contrary to the Government’s argument (Gov’t Br. at 51-52), *McConnell* held that the express advocacy requirement for expenditures was preempted only with respect to the addition of the narrowly defined “electioneering communication,” whether coordinated (and thus subject to contribution limitations) or done independently. *McConnell*, 540 U.S. at 194. In this case, there is no “electioneering communication” relevant to the charges against Stockman. As the Government readily concedes, Count Twelve relates solely to the publication of the newspaper *The Conservative News*. Gov’t Br. at 17, 42-43. “Electioneering communication”

refers only to “broadcast, cable, or satellite communication[s]”, not print publications. 52 U.S.C. § 30104(f)(3).

B. The Government’s *McConnell* Argument Has Already Been Rejected by This Court in *Carmouche*.

*McConnell* did not change the express advocacy limitation to the definition of “expenditure,” with which Stockman is improperly accused of participating. As recognized in *Carmouche*—and as binding precedent on this Court—*McConnell* “said nothing about the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation.” *Carmouche*, 449 F.3d at 665 n.7. *McConnell* applied to “electioneering communications” only—a new type of disbursement not involved here.

This Court distinguished *McConnell* in its decision in *Carmouche*, which the Government disingenuously claims does not control here.<sup>2</sup> But using the same failed argument employed by the Louisiana State Board to defend the law in *Carmouche*, the Government now “contends that *McConnell* eliminates the express advocacy/issue advocacy delineation.... That reading of *McConnell* is incorrect.... *McConnell* does not obviate the applicability of *Buckley*’s line-drawing exercise

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<sup>2</sup> The Government argues that *Carmouche* and *Moore* were state law cases. The Government ignores that in both of those cases, this Court was applying a standard developed from federal election law.

where, as in this case, we are confronted with a vague statute.” *Carmouche*, 449 F.3d at 665.

Although a coordinated expenditure is subject to the limitations on contributions, such as source and amount, by definition it first and foremost must constitute an “expenditure.” Not every disbursement of money—even in coordination with a candidate—is an expenditure under federal election campaign law. Suppose an incumbent who is also a candidate for re-election for federal office worked with a nonprofit organization to expend funds on ads to lobby for a bill he supports in Congress. Such an expense could in some sense be made “with respect to a federal election,” but it would not be an “expenditure” requiring reporting to the Federal Election Commission and being subject to donor limitations unless it contained “express advocacy,” or met the specific definition of an “electioneering communication.” The definition of “expenditure” must be read as a combination of 52 U.S.C. § 30101(9) and the limiting language of *Buckley*.

C. The Government Disclaimed Reliance on FEC Regulations, But Now, to Save its Case it Seeks Refuge in Them.

At trial, the Government specifically disclaimed any reliance on FEC regulations in its case against Stockman. Stockman Br. at 60, fn. 8, ROA.293-95. Now the Government seeks refuge in them and claims they are “instructive.” Gov’t Br. at 55, n. 15. They are instructive, but not in the way the Government proffers.

The Government makes a broad argument that 11 C.F.R. § 109.21 demonstrates that there is no requirement that a communication must contain express advocacy in order to be treated as a “coordinated communication.” Gov’t Br. at 55. The Government now argues that because some communications that do not contain express advocacy may be treated as coordinated communications, then all such communications may be so treated. The Government’s argument is backwards and completely inconsistent with the limiting principles of *Carmouche* as commanded by *Buckley*.

The Government specifically disclaimed reliance on the regulations, and any appeal to them now fails the most basic test of notice required in criminal cases. *United States v. McGilberry*, 480 U.S. 326, 331-32 (2007). The Government cannot go back and fix its case now when it had ample opportunity to charge Stockman under an applicable regulation when it indicted him.

#### IV. THE GOVERNMENT FAILED TO PROVE ESSENTIAL ELEMENTS OF THE MAIL AND WIRE FRAUD AND CAMPAIGN FINANCE COUNTS.

In his opening brief, Stockman argued the district court erred when it failed to grant his Rule 29 motions because there was a failure of proof on essential elements of the mail and wire fraud and campaign finance counts. Specifically, Stockman argued that the Government failed to prove essential elements of mail and wire fraud because it failed to prove: 1) that Stockman had the specific intent to defraud at the time of the solicitation; and 2) that Uihlein was deprived of “money or property” for

his 2014 donation. Additionally, Stockman argued that while the Government charged him with coordinating a “specific advertising advocating for [his] election [and/or] attacking his opponent,” the Government failed to prove that the advertising in question contained any express advocacy as required under FECA.

The Government responded that it proved specific intent for mail and wire fraud purposes because Uihlein’s 2013 contribution was not used to buy the Freedom House and his 2014 contribution was used for a mailing that was coordinated by Stockman rather than independent of him. Gov’t Br. at 29-30. The Government also proffered that they proved intent with regard to Rothschild’s 2012 contributions because the contributions did not go for “voter education” (as understood by the Government) and because Rothschild was supposedly losing his faculties as a result of his age when he was being solicited by Dodd and Stockman. Gov’t Br. at 32-33.

The Government concedes Stockman’s argument that Uihlein lacked a property or money interest in not having his 2014 contribution used to violate federal campaign finance laws. According to the Government, Uihlein’s interest was that “his funds would be used for a genuine independent expenditure, not an unlawful excessive campaign contribution.” Gov’t Br. at 31.

A. The Government Fails to Satisfy the Specific Intent Element of the Mail and Wire Fraud Counts.

To prove the crimes of mail or wire fraud, the Government had to prove: (1) a scheme to defraud using false material representations, pretenses, or promises;

(2) use of the mails or wire to execute the scheme; and (3) the specific intent to defraud. *Simpson*, 741 F.3d at 547.

1. The Government cannot use the post-hoc failure of a non-profit project to go back in time to prove specific intent to defraud.

In 2013, Uihlein made a \$350,000 contribution to a § 501(c)(3) organization, Life Without Limits. The Government argues that Uihlein was solicited solely to provide funds to purchase the Freedom House, a proposed project to, *inter alia*, house interns on or near Capitol Hill. Gov't Br. at 13, 29. Despite the fact that the project for which Uihlein was solicited contained many more objectives and goals other than simply buying a house to serve as the Freedom House and that Uihlein was provided with a written proposal with a broad budget at the time of solicitation that contained a detailed description of the numerous intended goals and objectives of the project (ROA.11741-11747), the Government argues that, because no building was ever purchased to serve as the Freedom House, it has proved Stockman had the specific intent to defraud Uihlein when he solicited him for the \$350,000 contribution. Gov't Br. at 29.

The Government concedes that Uihlein was provided with a proposal that listed much more than just the purchase of a house. Gov't Br. at 29. And there was no testimony that Uihlein ever restricted his contribution to be used solely for the purchase of a building. ROA.2183, *see also* Stockman Br. at 50 n. 7. So, at best, the evidence showed that the Freedom House project was a failure. There was no

evidence that Uihlein ever asked for or expected a refund if the project was a failure; thus he had no reversionary interest in his funds if the project failed. *See Armenian Assembly of Am., Inc. v. Cafesjian*, 772 F. Supp. 2d 129, 135 (D.D.C. 2011) (where donor did not ask for a reversionary interest in her donation, she did not have one).

Counts One and Eight are mail and fraud counts based on this 2013 contribution and the predicate act is Uihlein's mailing of the contribution. The predicate act for Count Eight is an email sent more than a year later thanking Uihlein for his contribution that Uihlein requested be sent to substantiate his contribution for his tax purposes. ROA.11767-71. Neither act is evidence that Stockman had the specific intent to defraud Uihlein when Stockman solicited him for the 2013 contribution. The Government's case and argument are bald assertions whose reasoning lacks a foundation—because no Freedom House was ever purchased, the Government contends (Gov't Br. at 16-17), it must be because Stockman never intended to purchase it. There is no contemporaneous evidence of such intent. In fact, the evidence is to the contrary. Stockman had a grand vision for this project, to “promote the ideas of liberty,” that included much more than just a house for interns. ROA.12744-12747.

The fact that the project failed, regardless whether it was because Stockman mismanaged the non-profit or simply was unable to raise the other approximately \$2 million in contributions, is not evidence of specific intent to defraud.

Likewise, the Government's argument that it proved specific intent regarding Rothschild's 2012 contributions (Counts Two, Five and Seven) fails because it is based on the same *post-hoc* rationale. *See* Gov't Br. at 32-33.

The Government argues that it proved specific intent because Rothschild wanted his contributions to be used for voter education activities and that Stockman later used some of the proceeds from those contributions to pay for things other than what the Government considers, but never defines, "voter education activities." There was no evidence that, at the time that Rothschild was being solicited, there was an intent to deceive him into contributing. The evidence that Rothschild wanted to support Stockman and other conservative causes and candidates, and gain a favorable tax advantage for his contributions, is uncontroverted. *Stockman Br.* at 54-55.

The Government makes the same argument for Counts Three and Four that are based on Uihlein's 2014 contribution to pay the postage for a mailing by the 501(c)(4) Center for the American Future. The Government contends that, because the mail project was not completed and the remaining portion of the postage funds were not returned to Uihlein, it is evidence to prove evidence of specific intent to defraud. Once again, this argument is based on a spurious attempt to turn a later failure, or change in previous plans, into a specific intent to defraud at the time of

the solicitation. The Government's mail and wire fraud counts are entirely dependent on evidentiary time travel of this nature.

The fact that a non-profit organization project fails, is not fully completed, or even if it is mismanaged, is not evidence of specific intent to defraud the donor at the time the donor was solicited. And the Government offers not a single case to support such a proposition. Such conduct may be evidence of some other civil or criminal crime or claim, but it cannot serve as the basis to prove the specific intent element for the federal crimes of mail or wire fraud.

The Supreme Court has cautioned against using the mail and wire fraud as expansively as they are used in this case. *Skilling*, 561 U.S. at 412. If failure of a non-profit project, mismanagement of such a project so as to cause that failure, or even a change in plans can be used as evidence of specific intent to defraud, then every non-profit organization that fails to complete a contemplated or proposed project would be guilty of those crimes. If you are a commercial or charitable failure, call your lawyer, you have committed mail and wire fraud under this standard.

2. The Government is wrong that Uihlein's interest in not having his 2014 contribution used to violate federal campaign finance laws is a property or money interest sufficient to sustain mail and wire fraud convictions for Counts Three and Four.

In addition to the Government's failure to prove specific intent with regard to Counts Three and Four, these counts fail for another reason: any interest that Uihlein

had in not having his contribution used to violate federal campaign finance laws is not a money or property interest as contemplated by the mail and wire fraud statutes.

The Government tries to distinguish the cases cited by Stockman in support of this principle, arguing that the cited cases all involve an “intangible right to control the downstream disposition” of a product. Gov’t Br. at 31. This is sleight of hand. The cases cited by Stockman all stand for the proposition that there is no property right in not having your goods or money used by someone else to violate some other federal crime. Stockman Br. at 46-47.

According to the Government, Uihlein’s interest was “that his funds would be used for a genuine independent expenditure, not an unlawful campaign contribution.” Gov’t Br. at 48. Simply put, the Government’s argument concedes that Uihlein intended the funds to be used for the purpose they actually were used for: to distribute *The Conservative News*. This concession is fatal to its argument; having conceded that the money Uihlein gave was used for the purpose he intended it for, the Government can only argue that Stockman fraudulently deprived Uihlein of his “right” not to have his money used to violate federal campaign finance laws regarding “unlawful campaign contributions.” It is explained *supra* why the newspaper was not a coordinated expense, but even if it were, such a right is not a property right or monetary interest, a necessary element of mail or wire fraud. Stockman Br. at 47-48.

The Government has also failed to show that Stockman intended to harm Uihlein by using his donation in a manner that did not comport with federal election campaign law. There can be no mail or wire fraud without an intent to harm the victim of the fraud. *See United States v. Starr*, 816 F.2d 94, 98 (2d. Cir. 1987). Even a demonstrated intent to deceive is insufficient to sustain a charge of mail or wire fraud unless “the deceit [is] coupled with a contemplated harm to the victim”. *Id.* Having conceded that Stockman used Uihlein’s donation for the purpose it was intended—to pay for postage to mail *The Conservative News*—the Government has failed to show that Stockman intended to *harm* Uihlein by exercising what the Government deems to be an impermissible level of control over the content and distribution of those newspapers. It is not clear what harm Stockman possibly could have intended by his actions in that respect; the Government has not contended, for example, that Uihlein was exposed to criminal liability himself as a result of Stockman’s actions.

B. The Government Alleged a Single Scheme But Failed to Prove One.

Mail and wire fraud allegations based on a scheme require proof of the use of a scheme. *Simpson*, 741 F.3d at 547. In his opening brief, Stockman demonstrated that the Government charged a single scheme, and in response the Government concedes this point. Gov’t Br. at 4. But where the Government charges a single scheme, and one component of that scheme fails, the jury may have found that the

mail and wire communications underlying the mail and wire fraud counts were related to the part of the single scheme that was insufficient to sustain a conviction. In other words, unless the jury is instructed to find guilt on the whole and not the component parts, if one of the component parts fails, it is “impossible to tell which [part] the jury selected,” and the verdict must be set aside. *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burk v. United States*, 437 U.S. 1 (1978). Such is the case here.

C. The Government Charged Stockman With Coordinating an Advertisement Advocating for Him and Attacking His Opponent But Failed to Prove It.

The plain language of the indictment and the jury instructions and the applicable law required the Government to prove that *The Conservative News* contained express advocacy as defined by *Buckley* and its progeny. As is evident from reviewing *The Conservative News*, and according to the Government’s own Case Agent, it contains no “express advocacy.” Thus there was a complete failure of proof on Count Twelve. Stockman Br. at 56-61.

In response, the Government ignored the language of its own indictment and the jury instruction and instead proffers a variation of the argument it advanced in response to save Count Twelve’s incorrect jury instruction; that the limitations on the term “expenditure” imposed by *Buckley* do not apply to “campaign contributions, as opposed to genuinely independent expenditures.” Gov’t Br. at 45. That statement

alone demonstrates the problem running through this entire prosecution—the Government, and the district court, used terms that have well-defined meanings under federal campaign finance law as informed by more than four decades of jurisprudence.

Despite using the term “independent expenditure” thirty-six times throughout its brief, it is clear from how the Government uses the term that it understands the term solely in its colloquial sense as the spending of money that is independent of another’s influence or participation. Yet, under FECA an independent expenditure, by definition, must contain “express advocacy.” 52 U.S.C. § 30107(17); 11 C.F.R. § 100.16. This is precisely the fallacy criticized by Judge Easterbrook, *supra*, using colloquial understanding where specific definitions are required.

FECA understands the concept of advocacy very specifically—the term is never used by itself; it is only used in the context of express advocacy or issue advocacy. The Government charged Stockman with coordinating a communication that expressly advocated for his own election. Yet as demonstrated in Stockman’s opening brief, it utterly failed to prove that *The Conservative News* contained any such content; but it proved the opposite. Stockman Br. at 56-61.

## **CONCLUSION**

Stockman was convicted for nonprofit fundraising and political activities subject to protection under the First Amendment. *Illinois ex rel. Madigan v.*

*Telemarketing Associates*, 538 U.S. 600, 611 (2003) (Holding charitable solicitation involves a variety of First Amendment protected speech interests including: communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes). The Government's case against him turned his failure to achieve completion of certain nonprofit political activism and projects into fraud. For this and the foregoing reasons, Stockman respectfully requests this Court grant a judgment of acquittal and/or in the alternative to reverse and remand for a new trial.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of July, 2019 an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/David A. Warrington

## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) not to exceed 6,500 words, because it contains 6,475 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. of App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

/s/David A. Warrington