

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

PETITION FOR REHEARING EN BANC

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RULE 35(B)(1) STATEMENT

Stephen E. Stockman was convicted of federal campaign finance violations, conspiracy, mail and wire fraud, money laundering, and filing a false tax return. The panel affirmed the judgment, but the decision regarding the federal campaign finance violation (Count Twelve) conflicts with the United States Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) and this Circuit's precedent in *Center for Individual Freedom v. Carmouche*, 449 F.3d 665 (5th Cir. 2006), *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 192-93 (5th Cir. 2002), and *In re Cao*, 619 F.3d 410, 418 (5th Cir. 2010). Additionally, the panel opinion's application of the plain error standard of review, rather than *de novo* review, to Stockman's challenge to the jury instructions regarding his mail and wire fraud convictions is in conflict with *United States v. Guevara*, 408 F.3d 252, 257 (5th Cir. 2005).

Stockman was convicted of making an excessive campaign contribution to his 2014 campaign for the United States Senate, pursuant to 52 U.S.C. §§ 30116(a)(1)(A), 30116(a)(7)(B)(i), 30109(d)(1)(A)(i) and 18 U.S.C. § 2, by coordinating a third-party communication that discussed publicly available and footnoted information about Stockman's voting record and political positions in contrast with those of his opponent, but without any "express advocacy" language expressly advocating for or against the election of either Stockman or his

opponent. The jury was instructed that under the Federal Election Campaign Act (“FECA”) no “express advocacy” was required because any “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, are considered to be a contribution to the candidate.” ROA.927. And the jury was instructed that FECA defined “expenditures” as: “any purchase, payment, distribution, loan, deposit, or gift of money or anything of value, made by any individual, corporation, or organization, for the purpose of influencing any election for federal office.” ROA.939.

In *Buckley*, the Supreme Court determined that the First Amendment demanded FECA’s definition of “expenditure” be cabined to reach only funds spent on communications that expressly advocated for or against a federal candidate. *Buckley*, 424 U.S. at 43-44. This Circuit has followed and applied *Buckley*’s limitation in *Carmouche*, *Moore*, and in *Cao* where, applying *Buckley*, this Court held that coordinated expenditures that did not contain express advocacy could not be treated as contributions to a candidate—the precise question at issue in Count Twelve. The panel opinion failed to apply *Buckley*’s limitation to FECA’s definition of “expenditure” putting it in conflict with long-held United States Supreme Court and Fifth Circuit precedent and as such, warrants rehearing *en banc*.

Additionally, the jury was instructed on the statutory definition of non-profit organizations under 26 U.S.C. §§ 501(c)(3) and 501(c)(4). ROA.917-949 (written instructions), ROA.5273-5374. The statutory definitions of these organizations were not elements of any of the crimes for which Stockman was tried, and certainly they were not elements of the federal crimes of mail and wire fraud. Yet, the district court applied these instructions to all counts in the jury instructions as if compliance with non-profit law under the tax code was an element of these crimes. ROA.917-949 (written instructions), ROA.5273-5374. These instructions caused jury confusion, as demonstrated by the jury's only substantive question that was not correctly answered by the district court. The panel opinion applied the plain error standard to its review because no contemporaneous objection to the inclusion of these instructions was made. The panel was in error. *United States v. Guevara*, 408 F.3d 252, 257 (5th Cir. 2005) compels *de novo* review because "where there is the possibility that the jury instruction misstated an element of the crime . . . that is an issue of statutory construction." The government's use of §§ 501(c)(3) and 501(c)(4) to satisfy the specific intent to defraud element of the federal mail and wire fraud crimes under 18 U.S.C. §§ 1341 and 1343, respectively, and the jury instruction on nonprofit organizations implicitly sanctioned that argument, is subject to *de novo* review under *Guevara* and the panel opinion is in conflict with that decision.

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ISSUES PRESENTED

1. Whether the definition of “expenditure” under the Federal Campaign Election Act is still subject to the limitation imposed by *Buckley v. Valeo*, 424 U.S. 1 (1976) that limits the scope of that term to reach only funds spent for communications that “expressly advocate” the election or defeat of a federal candidate, or whether *Buckley*’s limitation was overruled by *McConnell v. FEC*, 540 U.S. 93 (2003)?
2. Whether this Court’s decision in *Center for Individual Freedom v. Carmouche*, 449 F.3d 665 (5th Cir. 2006) is controlling authority that was erroneously distinguished and effectively overruled by the Panel?
3. Whether the proper standard of review in cases where it is asserted a jury instruction and district court response to a jury question misstated, supplanted, or confused an element of a crime is *de novo* or plain error?

COURSE OF THE PROCEEDINGS AND DISPOSITION OF CASE

Indictment and Arrest

A sealed criminal complaint was filed against Stockman on March 15, 2017, and Stockman was arrested that day. [ROA.4240](#). On March 28, 2017, the Government filed a First Superseding Indictment (“Indictment”) against Stockman and co-defendant Jason Posey (“Posey”). [ROA.64](#). Stockman was charged with multiple felony counts: eight counts of mail and wire fraud, one count of conspiracy, two counts of and false statements to the FEC, one count of making excessive contributions to his 2014 Senate campaign, eleven counts of money laundering, and one count of filing a false tax return. [ROA.64-109](#).

Pre-trial Motions

Stockman filed several dispositive motions to dismiss as well as a motion to strike, all of which were denied without a written order or opinion. [ROA.1216-25](#).

Trial and Conviction

Trial began on March 20, 2018 and concluded on April 12, 2018. [ROA.1857](#), [5342](#). The jury found Stockman guilty on all counts except for one count of wire fraud. [ROA.5333-34](#).

Rule 29 Motions for Judgment of Acquittal

At the close of the Government's evidence, Stockman filed a Rule 29 Motion for Judgment of Acquittal ("Rule 29 Motion") which the district court denied after oral argument on April 4, 2018. [ROA.5002](#). Stockman renewed his Rule 29 Motion post-trial ([ROA.1014](#)), which the district court denied on June 13, 2018. [ROA.1073-79](#).

Judgement, Sentence, and Appeal

The district court issued its Judgment on November 14, 2018, adjudicating Stockman guilty on Counts One through Five, Counts Seven through Twelve, Counts Fourteen through Twenty-Two, Twenty-Four, Twenty-Seven, Twenty-Eight, and acquitted on Count Six. [ROA.1104](#). Stockman was sentenced to 120 months' imprisonment, with three years of supervised release following such term of imprisonment, and monetary penalties totaling \$1,017,018.51 plus post-judgment interest. [ROA.1107-10](#). Stockman timely filed his Notice of Appeal on November 14, 2018. [ROA.1112](#).

STATEMENT OF FACTS

This statement of facts is limited to the facts pertinent to this request for rehearing *en banc*.¹

Count Twelve—Making an Excess Campaign Contribution

In 2014, Stockman challenged United States Senator John Cornyn (“Cornyn”) in the Texas Republican primary for United States Senate. [ROA.2139-40](#). During the course of that primary, donor Richard Uihlein (“Uihlein”) was asked by others, including Jason Posey (“Posey”), on behalf of Stockman, to contribute to a non-profit, the Center for American Future (“CAF”). CAF was run by Posey. Uihlein was asked to donate to CAF to pay for postage to mail a newspaper style communication called *The Conservative News* that contained a number of statements reporting that Stockman had acted consistently with conservative ideology and Cornyn, Stockman’s opponent, had not. [ROA.13106-21](#). Importantly, the Panel found that *The Conservative News* did not contain any “express advocacy,” i.e., statements that advocated for or against either Stockman or Cornyn. App. A at 11. Uihlein ultimately contributed of \$450,571.65 that was paid directly to the United States Postmaster, rather than to CAF, for the postage to mail *The Conservative News*. [ROA.2157](#). Stockman was involved in the mailing of *The Conservative News*. According to the Indictment ([ROA.97-98](#)), the funds

¹ The Panel Opinion statement of facts is found at App. A at 2-6.

expended to mail *The Conservative News* were an “expenditure under FECA, and subject to treatment as contributions to Stockman’s campaign because of his involvement in the mailing.

Non-Profit Organization Jury Instructions

Between 2010 and 2014, Stockman, and others, worked together on behalf of multiple ideologically-oriented nonprofit organizations and political campaigns. All of Stockman’s acts for which he was indicted and convicted took place in the context of raising and spending money for non-profit organizations and political campaigns. Pertinent to this petition, in 2012 and 2013, Stockman and Dodd solicited money from Stanford Rothschild Jr. (“Rothschild”), a wealthy philanthropist who frequently donated to conservative political causes. [ROA.3549, 3935-37.](#)²

In 2012, Stockman asked for Rothschild’s assistance. [ROA.11127-28, 11196-97, 11201-02.](#) Rothschild donated a total of \$140,000 to Life Without Limits, a § 501(c)(3) organization during 2012 in connection with these solicitations. [ROA.11113, 11175, 11380.](#) Most of these funds were transferred to other accounts controlled by Stockman, including the account for his campaign

² The Panel Opinion discusses Rothschild donations to Stockman related nonprofit organization in 2010. App. A at 2-3. Stockman was not charged with any crime related to the 2010 Rothschild contributions and they are not discussed here because they are not pertinent to issues addressed by this petition.

committee. [ROA.11176](#), [11250-51](#). Rothschild made no further contributions to Life Without Limits or any other Stockman-controlled entity after 2012.

In 2013, Dodd and Stockman met with Richard Uihlein (“Uihlein”), another wealthy philanthropist, to solicit a donation to a new project entitled the “Congressional Freedom Foundation.” [ROA.2122-23](#), [3942-43](#). The Congressional Freedom Foundation project was to be run by and through Life Without Limits. [ROA.3943](#). A central part of the project was an intern-training program, similar to that run by another nonprofit organization, The Leadership Institute. [ROA.2124](#), [3942](#). This training program was planned to be run out of a residential home in Washington, DC to be purchased and renovated to allow several interns to live and work in the home, referred to as the “Freedom House.” [ROA.2123-24](#). However, the project presented to Uihlein had many other budget items other than the purchase and renovation of the Freedom House. [ROA.2131](#), [2133](#). The Congressional Freedom Foundation project had a total proposed budget of \$2,464,000. [ROA.3948](#). Of that, \$1,299,000 was proposed for the purchase and renovation of the Freedom House. [ROA.2131](#). Dodd and Stockman did not represent to Uihlein that they had raised any other funds for the project, and Dodd understood, and the Panel agreed (App. A at 4) that the donation they solicited from Uihlein, as the Panel found, was “seed money” and would need to be augmented with other donations to meet the project’s proposed budget. [ROA.3944](#).

App. A at 4. Dodd and Stockman also did not represent to Uihlein during their solicitation that they had already, contracted for, purchased, or possessed the residential home to be used as the Freedom House. [ROA.3946](#). Dodd and Stockman originally requested a donation of approximately \$1,000,000 from Uihlein. [ROA.3944-45](#). Uihlein ultimately contributed \$350,000 to Life Without Limits in response to the solicitation. Uihlein did not inform Dodd or Stockman that his contribution was restricted to be spent on only one part of the project. [ROA.2178](#).

Posey and Dodd continued worked to identify a suitable property for the Freedom House, but ultimately Life Without Limits did not acquire any property to use for the Freedom House. [ROA.4242](#), [4923-25](#). Dodd and Stockman attempted to raise contributions from several other individuals and organizations in connection with the Congressional Freedom Foundation project but did not receive any additional contributions. [ROA.3676-82](#). Dodd was paid a fundraising commission of \$60,000 from the funds donated by Uihlein. [ROA.4502](#). \$10,000 was donated to Safari Club International, another nonprofit organization. [ROA.3677-78](#).

On or about March 12, 2014, in response to a request by Uihlein's office for documentation of the donation for tax purposes, Posey wrote a letter to Uihlein's office thanking him for his donation to Life Without Limits and representing the donation "allowed Life Without Limits to deliver medical supplies to third-world

nations and support Freedom House.” [ROA.4710](#). Uihlein raised no objection in response.

During trial, the Government had repeatedly elicited testimony regarding witnesses’ understanding of the activities in which 501(c)(3) or 501(c)(4) organizations could and could not legally engage. *E.g.*, [ROA.2159](#), [3453](#), [3561](#), [4116](#), [4867](#).

At the Government’s request, the district court included in its final written instructions the legal definition of 501(c)(3) and 501(c)(4) organizations using the statutory language from the Internal Revenue Code defining their legal purposes. [ROA.917-949](#) (written instructions), [ROA.5273-5374](#).

During its closing argument the Government argued to the jury that these nonprofits were shams ([ROA.5130-5167](#)), and that Stockman’s use of them demonstrated fraudulent intent: “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](#).

The jury submitted three questions to the court during their deliberations. [ROA.963-967](#). The first question submitted by the jury was as follows:

JURY NOTE 1

Is Mail/~~and~~ 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

ROA.963. The district court responded by restating the jury instructions listing the elements of mail and wire fraud and referring to the definitions of certain terms in the Final Jury Instructions and instructed the jury to review the elements of those crimes in the context of all the jury instructions, including those instructions on the permissible activities of 501(c)(3) and 501(c)(4) organizations. ROA.964.

ARGUMENT

- I. The Panel Opinion conflicts with Fifth Circuit and United States Supreme Court precedent limiting the definition of “expenditure” under federal campaign finance law only to communications that contain “express advocacy”.

Stockman argued that the jury instruction to Count Twelve was unconstitutional because it used the term “expenditure” without limiting that term to funds spent for communications that contained “express advocacy” as required by Supreme Court precedent in *Buckley v. Valeo*, 424 U.S. 1 (1976) and this Circuit’s precedent *Center for Individual Freedom v. Carmouche*, 449 F.3d 665 (5th Cir. 2006) and *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 192-93 (5th Cir. 2002), which follow *Buckley*. Stockman argued that because the communication at issue, *The Conservative News*, contained no “express advocacy,” if properly instructed, the jury could not have found him guilty of Count Twelve.

Buckley held that the reach of any campaign finance regulation regarding expenditures had to be limited to the use of “funds for communications that expressly advocate for the election or defeat of a clearly identified candidate” to avoid First Amendment problems. *Id.* at 80. With regard to the regulation of expenditures, *Buckley* set forth a distinction between funds used to pay for express advocacy and those used to pay for “issue advocacy,” the former category subject to regulation under FECA, the latter category not subject to any regulation under FECA. *Id.*

The Panel Opinion seeks to escape that limitation reasoning that 1) *Carmouche* and *Moore* did not analyze “whether *Buckley*’s limiting construction...[applied] to coordinated expenditures;” and 2) because *McConnell v. FEC*, 540 U.S. 93 (2003) previously rejected the argument that the regulation of “expenditures” was subject to the *Buckley* limitation. Panel Op. at 12 n.7; 11-12. The Panel Opinion is wrong in both regards.

- A. The Panel Opinion conflicts with the prior holding of this Court that disbursements for communications that are coordinated with a candidate but do not contain “express advocacy” cannot be treated as contributions to that candidate under FECA.

The precise issue in this appeal concerning Count Twelve has already been answered by this Court. That question being—absent any “express advocacy” in *The Conservative News*, whether the money spent to mail *The Conservative News* may be treated as a coordinated expenditure, and thus a contribution to Stockman’s campaign under FECA. This Circuit has held the answer to that question to be no. According to this Circuit sitting *en banc*, “the only coordinated expenditures captured by the statutory reach of FECA are campaign-related ‘expenditures’ and relying on *Buckley*, this Circuit further held that, to be “campaign-related,” a communication must contain ‘express advocacy’ defined as communications that “‘express[ly]...advocate the election or defeat...of a candidate for federal office,’ *i.e.*, communications ‘that contain phrases such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject,’”

In re Cao, 619 F.3d 410, 418 (2010) (*en banc*) (quoting *Buckley*, 424 U.S. at 43-44 & n.52) (answering certified questions related to the treatment of coordinated spending between a candidate and national political party). Simply put, because *The Conservative News* contained no “express advocacy,” it was not an “expenditure” and the funds spent to mail it could not be treated as contributions to Stockman’s campaign under FECA. The Court’s jury instruction was wrong and Stockman’s Count Twelve conviction must be vacated.

B. The Panel Opinion conflicts with *Carmouche* and *Moore*.

In *Center for Individual Freedom v. Carmouche*, 449 F.3d 663-64 (5th Cir. 2006) this Circuit held that *Buckley*’s limiting principle of what constitutes “express advocacy” barred Louisiana from regulating communications that did not contain such “express advocacy.” Likewise, this Circuit held that a Mississippi state law could not regulate an advertisement that did not contain “express advocacy” as defined by *Buckley*. *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 192-93 (5th Cir. 2002).

It was correct for the Panel to say that neither *Carmouche* nor *Moore* “analyzed whether *Buckley*’s limiting construction should apply to coordinated expenditures.” App. A. at 12. That statement, however, misses the point and is irrelevant. *Buckley* cabined the definition of “expenditure” under FECA, but it did not cabin the definition only in select instances under FECA. *Buckley* limited

FECA's scope with regard to "expenditures" in federal elections. *Buckley*, [424 U.S. at 43-44](#) & n. 52. This Circuit followed *Buckley*'s holding in *Carmouche* and *Moore*. While neither decision deals with coordinated expenditures is of no moment and does not remove *Buckley*'s limiting reading of "expenditure." *Carmouche* and *Moore* are the settled law of this Circuit and *Buckley* is still binding precedent as well.

C. *McConnell* does not apply here.

The Panel Opinion wrongly applied *McConnell* to this case even though it is undisputed that the communication at issue here, *The Conservative News*, was not an "electioneering communication" which BCRA narrowly defined as broadcast ads referencing candidates within days of an election, and which is what was at issue in *McConnell*. Indeed, *Carmouche* acknowledged that *McConnell* did not obviate the applicability of *Buckley*'s limitation of the definition of "expenditure" and that is true whether the "expenditure" is coordinated or not. *Carmouche*, [449 F.3d at 665](#).

According to the Panel Opinion, it is "settled" that all coordinated disbursements are treated as contributions to the candidate subject to FECA's contribution limits. App. A at 12. But this is not the case and the Panel Opinion made a fundamental error with respect to its reliance on *McConnell*, to preclude Stockman's challenge to Count Twelve.

The Panel Opinion incorrectly asserts that “[i]n *McConnell*, the Supreme Court considered precisely the statutory language at issue here, namely the rule (now codified at [52 U.S.C. § 30116\(a\)\(7\)\(B\)\(i\)](#))....” App. A at 12. While it is true that Stockman was charged with a violation of § 30116(a)(7)(B)(i), the *McConnell* analysis was addressing a challenge to a very different provision — § 30116(a)(7)(C) involving electioneering communications. Subparagraph (B) addresses a coordinated *expenditure*, under the 1976 definition which was limited by *Buckley* to require “express advocacy.” *McConnell* analyzed subparagraph (C), which was added by BCRA, about coordinated *electioneering communications*, which by definition are not required to contain “express advocacy.”

Elsewhere, in the same paragraph of *McConnell* erroneously quoted by the Panel Opinion, the Supreme Court made clear that “[i]n *Buckley* we construed the statutory term ‘expenditure’ to reach only spending for ‘express advocacy.’” *McConnell*, [540 U.S. at 202](#). Accordingly, the *McConnell* Court recognized and restated that the *Buckley* limitation applies and continues to apply to the treatment of a coordinated *expenditure* under subparagraph (B). The issue before the Court in *McConnell* was only BCRA’s addition of subparagraph (C) governing the narrow class of “electioneering communications,” which was triggered by use of a candidate’s name in certain broadcast ads even without any “express advocacy.” It is undisputed that the charges against Stockman were under subparagraph (B) and

in no way related to “electioneering communications.” Thus, while the *McConnell* decision does “pre-empt” a claim that the *Buckley* “express advocacy” limitation applies to *electioneering communications* — it has no application to the disbursements relevant here, which remain limited by *Buckley*.

Furthermore, if the Panel’s reading of *McConnell* were correct, Congress would not have had to specifically legislate in BCRA that coordinated “electioneering communications” may be treated as contributions to the candidate, because any coordinated disbursement—for any reason—would be treated as a contribution. If the Panel Opinion were correct, even absent BCRA’s amendment to FECA, coordinated “electioneering communications” would already be subject to regulation under FECA as coordinated “expenditures.”

The Panel Opinion’s sweeping interpretation of the reach of *McConnell* is wrong. *McConnell* did not define “expenditure” or alter *Buckley’s* definition of “expenditure.” *McConnell* upheld the constitutionality of restrictions on a very limited universe of “electioneering communications,” which Congress narrowly defined as broadcast ads referencing candidates within days of an election. Critically, *The Conservative News* was not an “electioneering communication,” so neither Congress nor the Court in *McConnell* expanded the definition of ‘expenditure’ to encompass it. The Panel’s invocation of *McConnell* was error.

This Circuit, in *Carmouche*, *Moore*, and *Cao*, has consistently applied *Buckley*'s limitation on the definition of "expenditure[s]" under FECA. The Panel Opinion creates a conflict within this Circuit that requires *en banc* review to correct.

- II. The Panel Opinion applied the wrong standard of review to Stockman's challenge to the jury instructions.

In his appeal, Stockman argued for, and was entitled to *de novo* review of the jury instructions because the inclusion of the instructions on §§ 501(c)(3) and 501(c)(4) organizations that were incorporated by the district court into the instructions on mail and wire fraud changed the elements of those crimes and improperly allowed allegations of non-profit mismanagement to satisfy the specific intent to defraud element of the federal crimes mail and wire fraud. "[W]here there is the possibility that the jury instruction misstated an element of the crime . . . that is an issue of statutory construction" and is entitled to *de novo* review. *United States v. Guevara*, 408 F.3d 252, 257 (5th Cir. 2005). Instead, the Panel Opinion applied the plain error standard. App. A. at 9.

Jury instructions are analyzed in the context of arguments made to the jury. *United States v. Chagra*, 807 F.2d 398, 402 (5th Cir. 1986) ("We review claimed deficiencies in a jury charge by looking to the entire charge as well as the arguments made to the jury."). The Government used these instructions as a substitute for the specific intent to defraud element of mail and wire fraud.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January 2020, an electronic copy of the foregoing Petition for Rehearing En Banc 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 35(b)(2)(A) not to exceed 3,900 words, because it contains 3,898 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

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

January 10, 2020

Lyle W. Cayce
Clerk

No. 18-20780

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

STEPHEN E. STOCKMAN,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY, GRAVES, and HIGGINSON, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Stephen E. Stockman served four years in Congress and now faces ten years in prison. He seeks to avoid this career detour. He must admit that a jury convicted him on twenty-three felony counts after the government accused him, *inter alia*, of defrauding philanthropists and using their money to finance his personal life and political career. Acknowledging the convictions, Stockman argues, nevertheless, that prison should not be the next item on his résumé because the convictions were tainted by improper jury instructions and unsupported by the evidence. We affirm.

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I.

Stockman served two nonconsecutive terms in the United States House of Representatives, first from 1995 to 1997 and then from 2013 to 2015. During his first term, Stockman began working with an organization called the “Leadership Institute,” where he became acquainted with Jason Posey and Thomas Dodd, two members of its staff. His relationships with these two men would grow and then wither. Stockman employed Posey and Dodd as campaign staffers, congressional aides, and business consultants. Their most recent roles were as witnesses against Stockman.

Posey and Dodd worked with Stockman to raise money for various “nonprofit” entities between 2010 and 2014, the period in which Stockman is alleged to have orchestrated a criminal scheme to obtain charitable donations under false pretenses and to then enrich himself with the proceeds. Though initially named as codefendants, Posey and Dodd abandoned Stockman, pleaded guilty, and testified against him. Their testimony helped reveal the details of the scheme, which unfolded in four parts, targeted two donors, and ultimately netted over a million dollars for Stockman and his aides.

The 2010 Rothschild Donations

Stockman’s scheme began in May 2010, when Stockman and Dodd started soliciting Stanford Z. Rothschild, Jr., an elderly donor acting through his foundation. Over the next five months, Stockman and Dodd managed to persuade Rothschild to donate \$285,000 to the Ross Center, a Section 501(c)(3)¹ nonprofit organization under Stockman’s control. Rothschild was told that his money would fund “voter education material” for Jewish voters in Florida. Dodd testified that “voter education material[s]” are print publications that

¹ This case involves so-called “501(c)(3)” and “501(c)(4)” organizations. Those designations refer to provisions of the Internal Revenue Code that give tax-exempt status to qualifying nonprofit entities. See 26 U.S.C. §§ 501(c)(3)–(4).

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“educate voters in the general public about public policy positions and public policy issues.” Specifically, Rothschild was pitched on a book about radical Islam that would be mailed to voters in the lead-up to the 2010 midterm elections.

The deal was finalized only after Stockman assured Rothschild that his money “was to be spent for public policy [and] voter education that was 100 percent compliant with 501(c)(3) rules.” With this reference to the “501(c)(3) rules,” Stockman appears to have promised that he would spend Rothschild’s money primarily (if not exclusively) in furtherance of the educational goals laid out in the pitch. *See* [26 U.S.C. § 501\(c\)\(3\)](#) (tax-exempt organizations must be operated “exclusively for . . . charitable . . . or educational purposes”).

But this promise soon vanished. Instead of “voter education materials,” Stockman spent the 2010 Rothschild funds charitably on himself, educating himself at Disneyland and other amusement parks, at spas, and riding in hot air balloons. Stockman’s charity to himself was generous; it further included paying his business expenses, including an abortive venture in South Sudan on which Stockman spent about \$13,000 of the 2010 Rothschild funds. Stockman made the trip to South Sudan hoping to win a lucrative lobbying contract with a “performance bonus” that would allow him to take a percentage of any foreign aid appropriated by Congress.

Stockman failed to mail any “voter education material” as promised.

The 2011–2012 Rothschild Donations

Stockman and Dodd were not finished with Rothschild. In 2011, Stockman decided to run for a second term in Congress. This time, rather than pitch a “voter education” project aimed at indirectly influencing elections, Stockman and Dodd requested a loan for Stockman’s campaign. Rothschild refused. Instead, he agreed to give in the same manner as before, *i.e.*, to “mak[e] donations from his foundation . . . to be used for voter education in

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accordance with the 501(c)(3) rules.” Stockman again promised to honor Rothschild’s wishes, so Rothschild made another series of large donations, this time totaling \$165,000, to the Ross Center and Life Without Limits (another Stockman-controlled nonprofit entity).

As before, Stockman repurposed the funds. He spent thousands on personal goods, including airline tickets, fast food, and gasoline. He also diverted 80% of a \$100,000 donation to his congressional campaign account. It was later reported to the Federal Election Commission (FEC) that this deposit was a personal loan from Stockman to his own campaign.

Stockman agrees that most of the 2011–2012 Rothschild funds were, in the words of his brief, “transferred to other accounts controlled by Stockman, including the account for his campaign committee.” Stockman nevertheless reported in a letter to Rothschild that the funds had “helped [Life Without Limits] educate many people last year in traditional American values.” The nature of those “values” was not described.

The 2013 Uihlein Donation

In January 2013, Stockman, now a member of Congress, shifted his attention to Richard Uihlein, a Wisconsin businessman whose foundation has donated millions of dollars to nonprofit organizations that share his conservative values. Stockman and Dodd pitched Uihlein on “Freedom House,” a prospective residential facility in Washington, D.C. that would house interns and provide a home base for a non-existent nonprofit called the “Congressional Freedom Foundation.” Uihlein agreed to endow the project with \$350,000 in seed money. The seed was not planted as promised, and the project died in silence. But the seed money survived to promote a new development in Stockman’s political career: he had decided to run for the United States Senate in 2014.

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Thus, as with the Rothschild donations, Stockman used the 2013 Uihlein funds to meet his personal and (especially) his political needs. For example, Stockman spent over \$40,000 on a plan to surveil a conservative Texas politician whom Stockman believed to be a likely opponent in a future primary. Stockman also gave thousands of dollars to his cohorts, Dodd and Posey, so that they, in turn, could “donate” the money to Stockman’s Senate campaign; the donations were falsely attributed to Dodd’s mother and Posey’s father in FEC filings. In sum, the 2013 Uihlein donation was spent in a long sequence of varying expenditures, including \$5,000 to pay the rent on Stockman’s campaign office, more than \$30,000 to pay off Dodd’s credit card debt, and over \$20,000 to patronize a publishing business owned by Stockman’s brother.

Posey testified that no money was actually spent on the project pitched to Uihlein. Even Stockman agrees that no property was ever acquired for such a project. Nonetheless, Stockman’s team reported to Uihlein that his generosity had allowed Life Without Limits to support Freedom House. The 2014 letter that makes this claim also goes on to advise Uihlein that his “continued support is crucial to our mission.”

The 2014 Uihlein Donation

By early 2014, Stockman was in the midst of his primary challenge to incumbent United States Senator John Cornyn. Stockman met with Kurt Wagner, the president of a direct mail company, and the two men discussed Stockman’s plan to mail Texas voters a faux newspaper called *The Conservative News* on the eve of the Republican primary. *The Conservative News* accuses Senator Cornyn of “falsifying ethics reports to hide income,” “lying to voters,” and filing “false donor reports at least 121 times.” By contrast, *The Conservative News* takes care to highlight Stockman’s policy positions and legislative actions with bold headlines like “Stockman Kills

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Cornyn-Backed Senate Amnesty Bill” and “Stockman’s Sanctity of Life Act Overturns *Roe v. Wade*.”

To finance this direct mail campaign, Stockman instructed Wagner to seek a new donation from Uihlein. Posey also called Uihlein to help induce a donation. Stockman dictated some of the contents of a solicitation letter but told Wagner that the letter would “need[] to come from somebody else, not [Stockman] directly.” The letter, which purported to seek financing for an independent expenditure by the “Center for the American Future,” induced Uihlein to give \$450,571.65. Uihlein testified that he would not have donated the money if he had known of Stockman’s involvement. Posey testified that the Center for the American Future was under Stockman’s control.

The 2014 Uihlein funds were used to print and distribute hundreds of thousands of copies of *The Conservative News*. Stockman called off the direct mail campaign shortly before the primary, at which point only \$214,718.51 remained of Uihlein’s 2014 donation. At Stockman’s direction, Posey proceeded to use these remaining funds to pay bills related to Stockman’s Senate campaigns, including both his Texas campaign and a prospective campaign in Alaska. Posey also testified that Stockman instructed him to flee to Egypt with some of the remaining funds, using them to pay for flights and other travel expenses.²

II.

In March 2017, Stockman was indicted on four counts of mail fraud, four counts of wire fraud, two counts of making false statements in FEC filings, eleven counts of money laundering, one count of conspiracy to make conduit

² By this time, Stockman had wind that he was the target of an FBI investigation. He thought that, by sending Posey to Cairo with the 2014 Uihlein funds, he could evade a potential asset freeze or forfeiture.

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campaign contributions and false statements, one count of causing an excessive campaign contribution, and one count of filing a false tax return.

The district court denied Stockman's motions to dismiss the indictment and to strike surplusage. The case proceeded to a three-week jury trial, after which Stockman was convicted on all counts but one.³ The district court denied Stockman's motions for judgment of acquittal, and later sentenced Stockman to ten years in prison and three years of supervised release. Stockman was also ordered to pay restitution in the amount of \$1,014,718.51. He timely has appealed.

III.

Stockman now argues that the district court erred by issuing problematic jury instructions, by denying Stockman's motions for judgment of acquittal under Federal Rule of Criminal Procedure 29, and by denying his motion to dismiss the indictment. With respect to the jury instructions, Stockman contends that the district court erred by defining 501(c)(3) and 501(c)(4) organizations in the charge and by failing to instruct the jury on Stockman's "good faith" defense to the tax and campaign finance counts. With respect to the denial of his Rule 29 motions, Stockman argues that the government failed to prove the existence of a fraudulent "scheme" devised with the requisite intent to defraud. Stockman also makes three arguments challenging his conviction for causing an excessive campaign contribution under Count 12 of the indictment, all of which essentially assert that the district court erred by failing to recognize that "express advocacy" is a necessary element of the

³ Stockman was acquitted on Count 6, a wire fraud charge related to the Rothschild donations.

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offense. In total, Stockman’s brief presents six alleged errors infecting one or more of his convictions.⁴ We find that each claim lacks merit.

A.

Stockman argues that his convictions for mail and wire fraud cannot stand because the district court issued “improper and unnecessary” instructions that confused the jury. Specifically, Stockman draws our attention to a section of the jury charge that defines 501(c)(3) and 501(c)(4) organizations in the following manner:

A 501(c)(3) organization is a nonprofit corporation, fund, or foundation organized and operated exclusively for religious, charitable, scientific, or educational purposes.

Section 501(c)(3) organizations are generally exempt from federal taxation, and donations to [] these entities may be tax deductible. If an organization is classified as a 501(c)(3) organization, none of its net earnings may benefit any private shareholder or individual. A Section 501(c)(3) organization may not participate or intervene in any political campaign on behalf of or [in] opposition to any candidate for public office.

A Section 501(c)(4) organization is a nonprofit organization operated exclusively for the promotion of social welfare. . . . Section 501(c)(4) organizations are also generally exempt from federal taxation. A Section 501(c)(4) organization may compensate employees for work actually performed, but the net earnings of a Section 501(c)(4) organization must be devoted exclusively to charitable, educational, or recreational purposes. The net earnings of a Section 501(c)(4) organization may not benefit any private shareholder or individual.

⁴ Arguably, Stockman has also preserved a complaint about the district court’s disjunctive Count 12 jury instructions. Stockman appears to argue that the district court erred by allowing the jury to convict Stockman for inducing Uihlein’s 2014 expenditure on advertisements “advocating Mr. Stockman’s election *or* attacking Mr. Stockman’s opponent” because the indictment alleged a conjunction. But the government does not heighten its burden of proof by pleading criminal acts conjunctively. See *United States v. Holley*, 831 F.3d 322, 328 n.14 (5th Cir. 2016). Here, the government was not required to prove that Uihlein’s money was spent on advertising “advocating for Stockman’s election *and* attacking Stockman’s opponent.” We thus decline to find error in the district court’s disjunctive language.

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At oral argument, defense counsel represented that Stockman principally objects that this language of the instructions was “irrelevant” and “unnecessary.” Stockman concedes, however, that no contemporaneous objection was made at trial; instead, he now argues that the district court should have excluded the 501(c)(3) and 501(c)(4) definitions from the charge *sua sponte*.

Given Stockman’s failure to object at trial, our review is for plain error. *United States v. Saldana*, 427 F.3d 298, 303–04 (5th Cir. 2005). Stockman must demonstrate “(1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) [that] the plain error [would] affect [his] substantial rights; and (4) [that] not correcting the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 304 (quotation omitted).

We are not convinced that the district court erred by defining 501(c)(3) and 501(c)(4) organizations in the charge, but, in any event, no such error was sufficiently “clear or obvious” to survive plain error review. Many of the witnesses discussed 501(c)(3) and 501(c)(4) organizations in their testimony, and some of that testimony even went directly to the elements of mail and wire fraud. Stockman has not cited a truly analogous case, and we are not aware of one. We have said that an “error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results.” *United States v. Gomez*, 706 F. App’x 172, 177 (5th Cir. 2017) (quoting *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003)). Similarly, when any analogy to existing authority would be strained, the district court’s actions cannot amount to plain error.

Apart from his objection that the 501(c)(3) and 501(c)(4) definitions were “unnecessary,” Stockman also argues that the definitions, though undisputedly drawn from the text of the Internal Revenue Code, misled the

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jury by framing the obligations of 501(c)(3) and 501(c)(4) organizations in absolute terms. *See, e.g., St. David's Health Care Sys. v. United States*, 349 F.3d 232, 235 (5th Cir. 2003) (suggesting that tax-exempt organizations must be operated primarily, rather than exclusively, for an exempt purpose). But, again, we cannot agree that the district court's statutory instructions merit reversal under the plain error standard. An instruction that mirrors relevant statutory text "will almost always convey the statute's requirements," *United States v. Lebowitz*, 676 F.3d 1000, 1014 (11th Cir. 2012), and Stockman has not identified any authority rendering it "clear or obvious" that a district court's jury instructions must go beyond the language of the statute in this context.

B.

Stockman next seeks to reverse his conviction for causing an excessive campaign contribution in the form of a coordinated expenditure, an offense covered by Count 12 of the indictment. Count 12 alleges that Stockman, acting through various agents, induced Uihlein to spend over \$450,000 on *The Conservative News*, a political communication promoting the Stockman campaign. The government argues that, because Stockman was involved in requesting and spending the money for this project, Uihlein's \$450,000 payment was a "coordinated expenditure" under the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.* (FECA).⁵

⁵ FECA treats "coordinated" expenditures like "campaign contributions," placing an upper limit on the amount of money that donors may spend on them. The government's position is that Stockman, having willfully caused Uihlein to spend more than \$25,000 on a coordinated communication, is subject to the especially severe criminal penalties applicable to those who make campaign contributions in excess of \$25,000. *See* 52 U.S.C. §§ 30116(a)(1)(A) (establishing upper limit on campaign contributions), 30109(d)(1)(A)(i) (authorizing extra punishment for campaign contributions in excess of \$25,000), 30116(a)(7)(B)(i) (equating coordinated expenditures with campaign contributions); 18 U.S.C. § 2(b) (authorizing punishment "as a principal" for those who "willfully cause[] an act to be done which if directly performed by [them] or [others] would be an offense").

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Stockman does not deny that, if the Uihlein donation were an “expenditure,” it would be a “coordinated” expenditure of over \$450,000, the equivalent of a campaign contribution well beyond statutory limits. Indeed, he could not argue otherwise: the evidence shows that Stockman at the very least “cooperat[ed]” with Uihlein and Wagner’s distribution of *The Conservative News*. See 52 U.S.C. § 30116(a)(7)(B)(i) (coordinated expenditures are those made in “cooperation, consultation, or concert with” a candidate or his campaign committee). For example, Wagner testified that mailing *The Conservative News* was Stockman’s idea, that Stockman supervised him once distribution was underway, and that Stockman dictated some of the letter that secured funding from Uihlein.

Instead, Stockman’s appellate challenges to the conviction turn on the word “expenditure.” Stockman argues that, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the “Supreme Court cabined FECA’s definition of ‘expenditure’ to encompass only ‘funds used for communications that expressly advocate for the election or defeat of a clearly identified candidate.’” Such “express advocacy” entails the use of “words [like] ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’” *Buckley*, 424 U.S. at 44 & n.52. Stockman maintains that to effect a regulated “expenditure,” donors must spend their money on communications containing these “magic words.” It is clear and uncontested that *The Conservative News* does not contain direct instructions to “vote for” or “defeat” any candidate. It would follow, Stockman argues, that Uihlein did not effect an “expenditure” when he funded *The Conservative News*.

But the Supreme Court rejected this reading of FECA in *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010)). In *McConnell*, the Supreme Court considered precisely the statutory language at issue here, namely the rule (now codified at 52 U.S.C.

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§ 30116(a)(7)(B)(i)) that “expenditures . . . in cooperation, consultation, or concert with” a candidate are to be considered the equivalent of campaign contributions and restricted accordingly. *See McConnell*, 540 U.S. at 202. The *McConnell* Court explained that a post-*Buckley* statutory enactment had “clarifie[d] the scope” of this language, “pre-empt[ing]” a possible claim that “coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions.” 540 U.S. at 202. In other words, the Court held that the presence of express advocacy is not a prerequisite of the “settled” rule that when expenditures are “controlled by or coordinated with the candidate and his campaign[,] [they] may be treated as indirect contributions subject to FECA’s . . . amount limitations.” *Id.* at 219 (cleaned up).

Stockman seeks to distinguish *McConnell* on the ground that “*McConnell* held . . . the express advocacy requirement for expenditures . . . preempted only with respect to . . . narrowly defined ‘electioneering communication[s].’”⁶ Not so. The relevant portion of *McConnell* deals separately with two distinct subsections of FECA, one pertaining to electioneering communications and the other to expenditures “more generally.” 540 U.S. at 202. The latter subsection, not the former, was the focus of the Court’s “preemption” comment. *Id.* We reject Stockman’s construction of the statute.⁷

⁶ An “electioneering communication” is “any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office and is made within 30 days of a primary or 60 days of a general election.” *Citizens United*, 558 U.S. at 321 (cleaned up). The *McConnell* decision is largely, but not exclusively, concerned with Congress’s regulation of these communications. *See* 540 U.S. at 189–02.

⁷ Stockman also attempts to escape *McConnell* by invoking *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), and *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002). But neither case analyzed whether *Buckley*’s limiting construction should apply to coordinated expenditures. *Carmouche* interpreted a Louisiana statute that “link[ed] disclosure requirements for expenditures made by independent individuals” to language that the Supreme Court narrowed in *Buckley*. *Carmouche*, 449 F.3d at 664 (emphasis added). *Moore* found that the relevance of express advocacy was clear because the Mississippi statute under scrutiny had “essentially adopted

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C.

We next consider Stockman’s argument that his tax and campaign finance convictions under Counts 10, 11, 12, and 28 of the indictment were tainted by the district court’s refusal to instruct on “good faith.” Stockman points to evidence that he relied on an accountant who “wrongly advised him that having aides contribute money to his congressional campaign in the name of their parents was permissible.” He also points to evidence that Stockman and Posey intentionally omitted words of express advocacy from *The Conservative News* in order to comply with FECA. He asserts that “[i]n this context and where willfulness is required, a good faith instruction should have been given.”

Again, we disagree. Although the parties dispute the standard of review applicable to the district court’s refusal to instruct on good faith, decisions of this court and the Supreme Court show that the refusal was not erroneous, whether reviewed *de novo* or for plain error. See *United States v. Pomponio*, 429 U.S. 10, 11–12 (1976); *United States v. Simkanin*, 420 F.3d 397, 409–11 (5th Cir. 2005). Stockman argues that a good faith instruction should have been issued because the tax and campaign finance offenses in question all require a showing of “willfulness.”

But it is precisely that requirement that renders any such instruction unnecessary. The Supreme Court held in *Pomponio* that an additional good faith instruction is not required when the charge already requires proof of “willfulness,” properly cabined to cover only “voluntary, intentional violation[s] of . . . known legal dut[ies].” 429 U.S. at 12 (quotation omitted). In so holding, the Court gave its approval to a charge that did not instruct on good faith but

the language” of the *Buckley* limiting construction. *Moore*, 288 F.3d at 196. These cases are distinguishable and neither one casts doubt on the conclusions we draw from *McConnell*.

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did instruct on the need for proof of a “willful” act, meaning an act “done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or disregard the law.” *Id.* at 11–12 (quotation omitted). Drawing from *Pomponio*, we held in *Simkanin* that a “specific instruction” on good faith is not required when the concept is sufficiently subsumed by a general instruction on “willfulness.” 420 F.3d at 409–11. *Simkanin*, like *Pomponio*, approved of instructions alerting the jury to the fact that a “willful” act is done “voluntarily and deliberately,” with the intention of “violat[ing] a known legal duty.” *Id.* at 409–10.

Here, the district court’s instructions mirrored those in *Pomponio* and *Simkanin*. With respect to Counts 10, 11, and 12, the district court instructed the jury that to act “willfully,” the defendant must act “voluntarily and purposely, with the specific intent to do something the law forbids, that is, with the bad purpose either to disobey or disregard the law.” With respect to Count 28, the district court instructed the jury that it could not convict unless it found that Stockman acted “with intent to violate a known legal duty.” We find no merit in Stockman’s “good faith” argument.

D.

Finally, we address Stockman’s challenge to the evidence supporting his convictions for mail fraud, wire fraud, and money laundering.⁸ Stockman argues that the district court erred when it denied his motions for judgment of acquittal under Rule 29, contending that the government failed to prove a fraudulent “scheme” that Stockman devised with the necessary intent to

⁸ As to the money laundering convictions, Stockman argues only that the government cannot meet its burden to prove a predicate offense if the fraud convictions lack evidentiary support. See 18 U.S.C. §§ 1956–57. Because we reject Stockman’s challenge to the fraud convictions, we necessarily reject his challenge to the money laundering convictions as well.

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defraud. *See* [18 U.S.C. §§ 1341, 1343](#). We review the denial of a Rule 29 motion *de novo*, asking whether “any rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt.” *United States v. Xu*, [599 F.3d 452, 453](#) (5th Cir. 2010) (quotations omitted).

The elements of mail fraud are “(1) a scheme to defraud; (2) use of the mails to execute the scheme; and (3) the specific intent to defraud.” *United States v. Simpson*, [741 F.3d 539, 547–48](#) (5th Cir. 2014) (quotation omitted). The elements of wire fraud are “(1) a scheme to defraud; (2) the use of, or causing the use of, wire communications in furtherance of the scheme; and (3) a specific intent to defraud.” *United States v. Harris*, [821 F.3d 589, 598](#) (5th Cir. 2016). In evaluating its sufficiency, we view the evidence in the light most favorable to the government. *United States v. Rodgers*, [624 F.2d 1303, 1306](#) (5th Cir. 1980). Stockman challenges the evidence supporting his convictions with respect to both the “scheme” and “intent” elements of mail and wire fraud.

1.

Challenging the denial of his Rule 29 motions, Stockman argues that the government’s evidence does not establish a fraudulent “scheme.” His reasoning is somewhat tortuous. Stockman argues that, although purporting to allege a single scheme, the indictment actually alleges “no fewer than four separate ‘schemes.’” He further asserts that at least one of these four separate schemes, the 2014 Uihlein “scheme,” is not supported by sufficient evidence because the government failed to prove that in the 2014 scheme Uihlein was deprived of money or property. Then, expressly reverting to a single-scheme argument, he contends that, because the jury returned a general verdict without specifying which “scheme within a scheme” it was relying on to satisfy the “scheme” element of mail and wire fraud, all seven mail and wire fraud convictions must be set aside for failure to prove a scheme. *See Yates v. United States*, [354 U.S. 298, 311](#) (1957) (“[A] verdict [must] be set aside in cases where

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the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.”), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978).

Stockman’s arguments are confected on a foundation of sand. The evidence shows that there was only one scheme, a scheme to separate wealthy donors from their money and to spend that money at Stockman’s pleasure and direction. Furthermore, there is no merit in Stockman’s argument that the 2014 Uihlein solicitations did not threaten to deprive Uihlein of money or property. Each donation from each donor, Uihlein included, was given under the false pretense that the donor’s money would be used for specific purposes, including “voter education” and independent political advocacy. The money was not used for those purposes. Instead, it was, at all times, under Stockman’s control. He used it to finance his political career and sustain his self-indulgent lifestyle. It is thus clear that all of Stockman’s solicitations were designed to effectuate a traditional “money or property” fraud.

In short, we hold that there was no failure of proof regarding the “scheme” element of mail and wire fraud. On the contrary, viewing the evidence in the light most favorable to the conviction, we find ample support for the government’s position that Stockman orchestrated a single scheme to appeal to the charity of politically-interested donors for fraudulent purposes.

2.

Stockman further challenges the denial of his Rule 29 motions on the ground that the government produced insufficient evidence of Stockman’s fraudulent intent. In this context, he argues that the government’s evidence does not suggest a “contemporaneous” intent to defraud because evidence of Stockman’s illicit spending cannot establish bad faith simultaneous with the solicitation and receipt of donor funds. From this premise, Stockman concludes that the government’s case is based on nothing more than “evidentiary time

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travel.” Stockman’s time-and-space argument is weakened by the absence of evidence supporting it, but even more by the very strong evidence from which the jury could reasonably infer that Stockman had the intent to defraud from the time the money was donated until it was fully spent.

Stockman does not deny that, shortly *after* receiving donations from Rothschild and Uihlein, he misappropriated the funds by disregarding the purposes for which they were donated. Indeed, Stockman does little to dispute the overwhelming evidence that, shortly after receiving it, he quickly diverted donor money to personal and political projects having nothing to do with philanthropy or education. Notwithstanding Stockman’s self-serving view that later misappropriations cannot evidence earlier bad faith, the jury could rationally have inferred Stockman’s fraudulent intent from this largely undisputed evidence. We thus find that the government has also met its burden with respect to the “intent” element of mail and wire fraud.

IV.

In this appeal, we have held that the district court’s instructions were not erroneous. It was not plain error for the district court to define 501(c)(3) and 501(c)(4) organizations in the charge, and Stockman was not entitled to an instruction on good faith. We have also held that the district court did not err by denying Stockman’s motions for judgment of acquittal under Rule 29. The government provided ample evidence that Stockman fraudulently devised, and implemented, a scheme to deprive two donors of their money and property, thus allowing the jury to rationally find Stockman guilty of mail fraud, wire fraud, and money laundering. And, we have further held that FECA’s contribution limits apply to coordinated spending on political communications,

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irrespective of whether those communications contain magic words of express advocacy. We thus have affirmed Stockman's campaign finance conviction.

In sum, the judgment of the district court is, in all respects,

AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT
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January 24, 2020

Mr. David Warrington
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No. 18-20780 USA v. Stephen Stockman
USDC No. 4:17-CR-116-2

Dear Mr. Warrington,

The following pertains to your rehearing electronically filed on January 24, 2020.

FED. R. APP. P. 35(d) permits a court to state the number of copies required when a party files a Petition for Rehearing En Banc. This rule also permits a court to alter the number of copies for particular cases. While 5TH CIR. R. 35.2 requires a party to provide 20 copies of a Petition for Rehearing En Banc, the court directs that you provide 23 copies of your Petition for Rehearing En Banc in this case, within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

cc: Mr. Mark Joseph Fitzgibbons I
Mr. Robert James Heberle
Ms. Carmen Castillo Mitchell