

**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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**BRIEF FOR APPELLANT**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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## **STATEMENT REGARDING ORAL ARGUMENT**

This is Appellant Stephen E. Stockman’s appeal of criminal convictions on twenty-three felony counts involving two of the most complicated and confusing areas of federal law—the Internal Revenue Code and the Federal Election Campaign Act. The activity for which the Appellant was charged and convicted all occurred in the First Amendment protected areas of charitable solicitation and spending and political activity. Because of the numerous novel and erroneous theories of criminal liability on which these convictions are based, and the complex areas of law involved, Appellant respectfully submits that oral argument will aid the Court in deciding the issues before it.

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## **JURISDICTIONAL STATEMENT**

This is a direct appeal from a final decision of the United States District court for the Southern District of Texas, entering judgment of criminal conviction against Stephen E. Stockman. The district court had jurisdiction pursuant to 18 U.S.C. § 3231, as Stockman was accused of committing an offense against the laws of the United States.

A criminal defendant who wishes to appeal a district court judgment must file a notice of appeal in the district court within 14 days after the judgment's entry. Fed. R. App. P. 4(b)(1)(A)(i). The district court entered a final judgment on November 14, 2018 (ROA.1104). Stockman filed a timely notice of appeal on November 21, 2018. (ROA.1112). *See* Fed. R. App. P. 4(b)(1)(A)(i). Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court erred in issuing jury instructions on non-profit organizations under 26 U.S.C. §§ 501(c)(3) and 501(c)(4), that were incomplete statements of the law, unnecessary, and confusing to the jury?
2. Whether the district court erred by issuing jury instructions that failed to limit the definition of “expenditure” under federal campaign finance law only to communications that contain “express advocacy” as required well-settled Supreme Court and Fifth Circuit precedent under *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (2006)?
3. Whether the district court erred in failing to give good faith instructions on the campaign finance, false statement and filing a false tax return counts where the issues of law were exceedingly complex and confusing?
4. Whether the district court erred in failing to grant appellant’s Fed. R. Civ. P. Rule 29 Motion for Judgment of Acquittal because the Government failed of prove essential elements of the mail and wire fraud and campaign finance counts?
5. Whether the district court erred in failing to grant appellant’s Fed. R. Civ. P. Rule 12(b)(3)(B) Motion to Dismiss because Count Twelve failed to state a claim under federal campaign finance law?

## STATEMENT OF THE CASE

Stephen E. Stockman (“Stockman”) served as a member of the U.S. House of Representatives first from 1995 to 1997 and again from 2013 to 2015. ROA.1927. After he left Congress for the first time, Stockman was affiliated with The Leadership Institute, a nonprofit organization that offers training in a variety of political and public policy-related skills. ROA.3997-98. Through The Leadership Institute, Stockman met Thomas Dodd (“Dodd”) and Jason Posey (“Posey”). Dodd was a professional fundraiser specializing in soliciting large donations from wealthy individual donors. ROA.3735. Posey was an intern with The Leadership Institute. ROA.3997. Both men would later work for Stockman’s political campaigns, as staffers in his Congressional office, and also with Stockman on independent ventures. ROA.3547, 3997-4000.

Stockman and Dodd worked together on behalf of multiple ideologically-oriented nonprofit organizations, including The Leadership Institute, wherein Dodd would enlist Stockman in soliciting money from, and performing work for, Dodd’s target donors and clients. ROA.3547-48, 3552. In 2010, Stockman and Dodd solicited Stanford Rothschild Jr. (“Rothschild”), a wealthy philanthropist who frequently donated to conservative political causes. ROA.3549, 3935-37. Dodd had previously solicited Rothschild on behalf of The Vanguard Organization, another nonprofit foundation for which Dodd raised money. ROA.3578-79. In 2010, these

solicitations included Stockman and Dodd seeking Rothschild's monetary support for the production and distribution of a book designed to convince Jewish voters to support conservative political causes. ROA.3556-57. Rothschild also provided Dodd and Stockman with lists of candidates for political office whose candidacies he wanted to facilitate or impede. ROA.3559-60.

Rothschild's contributions were made as donations from his private foundation to the Ross Center, which at the time was a non-profit 501(c)(3) organization.<sup>1</sup> ROA.4004. The Ross Center was originally organized by Posey to conduct certain charitable projects, including providing orthodontic care for children and funding drug-treatment services. ROA.4004-05. Posey later gave Stockman permission to take over the operations of the Ross Center. The Ross Center later lost its 501(c)(3) status for failure to file Form 990 informational tax returns with the IRS. ROA.4006.

Rothschild, to pursue his objectives, contributed a total of \$285,000 to Stockman and Dodd during 2010 as a result of Dodd and Stockman's solicitations. ROA.10636, 10642, 10662, 10705-06. In email correspondence with Rothschild, Dodd presented Rothschild with the option of donating either to a 501(c)(4) organization (the Vanguard Organization) or a 501(c)(3) organization (Ross Center).

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<sup>1</sup> References to 501(c)3 and 501(c)(4) relate those sections of the Internal Revenue Code (the "IRC") that govern non-profit organizations.

ROA.10644-45. Dodd presented the option of donating to the Ross Center as a way to obtain additional tax advantages. ROA.10644-45. Rothschild informed, via email, Sharron Angle, a Republican candidate for the U.S. Senate in 2010, that his donations to the Ross Center were part of his “substantial support” to her candidacy. ROA.10738.

Stockman set aside a portion of Rothschild’s donation to fund the production of the book described in the initial solicitation to Rothschild, and Stockman produced a draft of the book, which he sent to Rothschild. ROA.10772-830. Stockman’s email transmitting the book draft indicated he was still awaiting additional information from, *inter alia*, Rothschild himself before the book could be finalized. ROA.10772.

Ultimately, the book was not finalized and was not sent to voters as originally envisioned. A total of \$75,995.50, or approximately 26.7% of the total funds donated by Rothschild to the Ross Center, was remitted to Dodd as “commission checks”. ROA.3555, 3574, 3585-86. Other portions of the funds were used to pay for a variety of operating expenses incurred before and after the 2010 election. *See* ROA.10568, 10585.

After the 2010 election, Dodd and Stockman began soliciting Rothschild for donations in connection with Stockman’s campaign for the House of Representatives. ROA.3599. Rothschild donated \$25,000 to the Ross Center on

December 30, 2011, but did not donate to the Ross Center any more afterwards because the Ross Center's nonprofit status had expired. ROA.11087. Dodd received \$5,000 of this \$25,000 donation as a fundraising commission, and further amounts were remitted to Donald Ferguson ("Ferguson") and Pat Murphy ("Murphy"). ROA.11088. Ferguson worked on Stockman's campaign and later worked in Stockman's congressional office as press secretary. ROA.4531, ROA.4610. Murphy owned an empty commercial space that had previously been a motorcycle shop that Stockman rented as a campaign headquarters. ROA.4354, 4529.

To facilitate further donations, Stockman obtained information related to another non-profit 501(c)(3) organization, Life Without Limits. ROA.4129-30. Stockman set up bank accounts in the name of Life Without Limits to receive donations to that foundation. ROA.10562. During 2012, Dodd and Stockman solicited Rothschild for contributions in support of Stockman's Congressional campaign. In a series of letters and other communications sent to Rothschild, Stockman explicitly referenced his candidacy and the upcoming election and asked for Rothschild's assistance in defeating his electoral opponents. ROA.11127-28, 11196-97, 11201-02. Stockman also instructed Dodd to explicitly reference Stockman's electoral prospects in his communications with Rothschild. ROA.11284. Rothschild donated a total of \$140,000 to Life Without Limits 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 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, variously, the “Congressional Freedom Foundation” and the “Congressional Freedom Caucus.” ROA.2122-23, 3942-43. Dodd had previously solicited Uihlein for donations on behalf of The Leadership Institute and the Vanguard Organization. ROA.2122. Dodd understood the Congressional Freedom Foundation project 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 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 had many other budget items which were presented to Uihlein other than the purchase and renovation of the Freedom House. ROA.2131, 2133. The Congressional Freedom Foundation project had a total planned budget of \$2,464,000. ROA.3948. Of the total budget, \$1,299,000 was allocated to purchasing and renovating 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 that the donation they solicited from Uihlein was seed money and would need to be augmented with other donations to meet the project's budget. ROA.3944. 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 working for over a month 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 solicited several other individuals and organizations in connection with the Congressional Freedom Foundation project but did not receive any additional contributions. ROA.3676-82. Dodd received a commission of \$60,000 of the funds donated by Uihlein. ROA.4502. Stockman donated \$10,000 to Safari Club International. ROA.3677-78.

Life Without Limits paid Dodd \$12,000 and Posey \$12,500. ROA.3653-58. After the November election, Posey and Dodd wrote checks to Stockman's

campaign totaling \$15,000 (\$7,500 each from Posey and Dodd). ROA.3659, 4489. These contributions were listed in a report filed with the Federal Election Commission (“FEC”) as being from Posey’s father and Dodd’s mother, respectively. ROA.4328-30. This FEC report was prepared by Rabiah Zeidan (“Zeidan”), a Certified Public Accountant with a PhD in accounting, whose role with the Stockman campaign was to prepare the FEC filings. ROA.4325. Zeidan asked both Posey and Dodd to provide personal information for their parents to use in the FEC report. ROA.4325-27. Zeidan later filed an amended report with the FEC listing Posey and Dodd as the contributors, after a report published by a media organization called The Sunlight Foundation. ROA.4339-41. Stockman’s campaign then reimbursed Posey and Dodd for the full amount of the contributions. ROA.4348-50.

On or about March 12, 2014, in response to a request by Uihlein’s office for documentation of the donation, 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.

In January 2014, Stockman met with Uihlein to gauge Uihlein’s support for Stockman’s candidacy for the Republican nomination in the U.S. Senate election in Texas that year. ROA.2139-40. Stockman did not solicit any donation from Uihlein at that time. ROA.2140. Posey later solicited Uihlein for a donation on behalf of the

Center for the American Future (“CAF”) by phone and email. Larry Pratt (“Pratt”), another friend of Uihlein, informed Uihlein that Posey was planning an independent expenditure in support of Stockman’s candidacy. ROA.2152-53. Uihlein did not make any donations in direct response to Posey’s solicitations. However, Kurt Wagner (“Wagner”) also solicited Uihlein for a donation in support of the Stockman campaign. ROA.2155-57. Wagner was an employee of CESI, a mailing company. ROA.4652, 4676. Wagner represented that CAF had printed a large number of “newspapers” and requested a donation of \$450,571.65 for postage to deliver them to Texas voters. ROA.2157. Those “newspapers” contained a number of statements reporting that Stockman acted consistently with conservative ideology and that John Cornyn (“Cornyn”), Stockman’s opponent during the Senate primary election, had not. ROA.13106-21. Uihlein made the requested donation with a check payable to the U.S. Postmaster for the amount requested. ROA.2159-60. Uihlein’s donation was deposited into CESI’s postage account. ROA.4651-52. CESI was retained to provide mailing services to deliver the newspapers. ROA.4676. However, the scale of the newspaper mailing project was too large for CESI to handle alone, so another company, PremierIMS, was also retained. ROA.4676. Posey paid for printing the newspapers using accounts he set up for CAF. ROA.4677, 10563. Posey transferred funds to the CAF accounts from Life Without Limits. ROA.4677-78, 10563. Stockman then caused Wagner to “refund” a portion of the funds in CESI’s postage

account to CAF. ROA.4699. These funds were to be used to repay the amounts used in producing and distributing the newspaper, including amounts that came from Life Without Limits. ROA.4699. CAF received \$214,718.51 from CESI. ROA.4701. The balance of the \$450,571.65 donation from Uihlein was used by CESI to pay for mailing the newspapers or was retained by CESI as compensation for the mailing services. ROA.4700.

### **PROCEDURAL HISTORY**

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 Posey. ROA.64. Stockman was charged with multiple felony counts pertinent here: eight counts of mail and wire fraud, one count of conspiracy to make conduit contributions to a political campaign and false statements to the FEC, two counts of making false statements to the FEC, one count of making excessive contributions to Stockman’s Senate campaign, eleven counts of money laundering, and one count of filing a false tax return. ROA.64-109. The predicate for the money laundering charges were the mail and wire fraud counts charged in the indictment. ROA.101-05. Despite a lengthy description of Stockman and Dodd’s solicitations of Rothschild (“Person A”) for donations to the Ross Center, none of the mailings or

wire communications serving as predicate for the mail and wire fraud counts relate to donations solicited on behalf of or made to the Ross Center. ROA.75-77, 86-87.

### **STOCKMAN’S MOTIONS TO DISMISS**

On October 24, 2017, Stockman filed a Motion to Dismiss Count Twelve. ROA.166. Therein, Stockman argued that the Government failed to allege a crime because the “specific advertising” that was the subject of the crime alleged, i.e. the newspapers mailed by CAF did not contain “express advocacy”. ROA.166-80. Stockman argued that the newspapers’ description of Stockman and Cornyn’s respective acts and voting records did not fall within the scope of “express advocacy”, a necessary element of that charge against him under the Federal Election Campaign Act (“FECA”). ROA.166, 172.

On October 26, 2017, Stockman filed three additional motions to dismiss:

- a. *Motion to Dismiss Counts One Through Eight.*<sup>2</sup>

Relying on the strong First Amendment protections for charitable solicitations Stockman argued, *inter alia*, the Indictment failed to sufficiently allege fraud because the funds donated to Life Without Limits and CAF were used in ways consistent with a reasonable donor’s expectations. ROA.186-87, 191.

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<sup>2</sup> ROA.185-203.

b. *Motion to Dismiss Counts Nine Through Eleven 11.*<sup>3</sup>

In this motion Stockman argued, *inter alia*, the Indictment did not sufficiently allege that the donations to Stockman’s campaign by Dodd and Posey were not made using funds that genuinely belonged to Dodd and Posey. ROA.206-07.

c. *Motion to Dismiss Counts Fourteen Through Twenty-Two, Twenty-Four, and Twenty-Seven.*<sup>4</sup>

Here Stockman argued that these counts unconstitutionally infringed on protected First Amendment interests because of the possibility that they would criminalize the use of the funds involved in the charges for legitimate charitable ends. ROA.214.

On October 26, 2017, Stockman also filed a Motion to Strike Prejudicial Surplusage From the Indictment (“Motion to Strike”) arguing the allegations referencing solicitations on behalf of the Ross Center were surplusage because no count in the indictment was based on these allegations, Stockman had no way to respond to the allegations because the subject of the solicitation (Rothschild) was dead, and Stockman could not be charged for conduct based on these allegations because the statute of limitations had passed. ROA.222-2256. Stockman also filed a Request For Pretrial Notice of Rule 404(b) and Rule 609 Material on October 26, 2017.

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<sup>3</sup> ROA.205-11.

<sup>4</sup> ROA.213-20

On November 15, 2017, the Government filed its Consolidated Opposition (“Consolidated Opposition”) to all of Stockman’s pending motions. ROA.247-315. Stockman filed his Reply to the Government’s Consolidated Opposition (the “Consolidated Reply”) on November 27, 2017. ROA.353-87. The district court denied all of Stockman’s dispositive motions, as well as the Motion to Strike, during a hearing on December 29, 2017, without a written order or opinion. ROA.1216-25.

### **JURY INSTRUCTIONS**

In the Government Proposed Jury Instructions (“Government Jury Instructions”), ROA.551-88, were requested instructions on 501(c)(3) and 501(c)(4) organizations. ROA.579. Stockman’s requested instructions did not ask for any such instruction. ROA.591-627. When the district court entered its final written instructions and instructed the jury it included the Government’s requested instruction on 501(c)3 and 501(c)(4) organizations. ROA.917-949(written instructions), ROA.5273-5374.

Trial began on March 20, 2018 and concluded on April 12, 2018. ROA.1857, 5342. Before trial, Dodd and Posey pleaded guilty to various crimes. ROA.3544-45, 3994. Both testified as part of the Government’s case-in-chief. ROA.3544, 3994. During trial, the Government repeatedly elicited testimony regarding witnesses’ understanding of the activities in which a 501(c)(3) or 501(c)(4) organization could and could not legally engage. *E.g.*, ROA.2159, 3561, 4116, 4867.

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/~~Wire~~ 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. ROA.964. The jury found Stockman guilty on all counts except for Count Six. ROA.5333-34.

### **STOCKMAN’S RULE 29 MOTION**

At the close of the Government’s evidence, Stockman filed a Rule 29 Motion for Judgment of Acquittal (“Rule 29 Motion”). ROA.818. Stockman argued that Rothschild and Uihlein knowingly made excessive contributions to Stockman’s campaign through their donations to the Ross Center, Life Without Limits, and CAF. ROA.818, 821. Stockman argued that the Government’s evidence showed the “victims” alleged in the Indictment were fully aware of the true purpose of their donations and were “better identified as participants in giving excessive contributions to [Stockman]” than as victims of mail or wire fraud. ROA.821. Therefore, Stockman contended, the Government did not prove there was a scheme to defraud those donors in connection with the mailings and wire transmissions at issue, an essential element of mail and wire fraud. ROA.820-21.

Stockman also argued that the Government failed to prove that Stockman had the requisite fraudulent intent at the time of the mailing, as necessary to establish mail fraud with respect to Count Two. ROA.823. Stockman also argued the Government failed to establish that there was any false pretenses involved with Stockman’s acquisition or use of Life Without Limits to receive donations or that any material misrepresentation was made to Rothschild in connection with the solicitation of \$15,000 underlying Count Two. ROA.823.

Stockman also argued that the Government failed to prove every element of Counts Five, Six, and Seven because: (1) the evidence established Stockman specifically informed Rothschild that he was seeking funds in connection with his political campaign and therefore did not deceive or intend to deceive Rothschild; (2) the Government identified no material misrepresentations made in soliciting Rothschild's \$100,000 donation underlying these counts; and (3) the Government did not show Rothschild had any particular intent in making the \$100,000 donation and therefore could not prove Stockman used or intended to use those funds at odds with Rothschild's donative purpose. ROA.824-25. Stockman also argued for dismissal of these counts because they were multiplicitous because "[m]ail and wire fraud authorizes prosecution for each execution of a scheme to defraud, not each act in furtherance of such a scheme." ROA.826.

With respect to Counts One and Eight, Stockman argued that (1) the Government presented "no evidence that Stockman intended to defraud Mr. Uihlein of the [\$350,000 donation to Life Without Limits] at the time it was donated"; (2) the Government's evidence established Uihlein understood his donation was towards a broad project, not just to the purchase or renovation of the Freedom House; (3) the funds donated by Uihlein were used consistently with the purposes of the project for which they were donated; and (4) Count One and Eight were

multiplicitous because both were steps in furtherance of the same alleged scheme. ROA.827-28.

Stockman argued that the Government's evidence for Counts Three and Four established Uihlein's donation of approximately \$450,000 was made knowingly and explicitly to fund Stockman's Senate campaign and therefore, while that conduct might constitute a different crime, the donation was not made under false pretenses as necessary to support charges of mail and wire fraud. ROA.829-30. Stockman also argued the Government presented no evidence that Stockman had a specific intent to defraud at the time Uihlein's donation was made. ROA.830.

With respect to Count Nine, Stockman argued that the Government's evidence did not establish there was a conspiracy to make conduit contributions and, alternatively, did not establish that Stockman was part of any such conspiracy. ROA.831-32.

Stockman argued, with regards to Counts Ten and Eleven, that the Government failed to prove beyond a reasonable doubt that Stockman "was responsible for filing the amended FEC reports," in light of evidence that drafts of the amended reports and communications concerning those reports did not involve Stockman. ROA.833.

Stockman argued that the Government failed to prove that the communication at issue in Count Twelve contained any "express advocacy", a necessary element of

the crime charged, and therefore failed to prove the specific manner and means alleged in the Indictment. ROA.834.

With respect to all of the counts of the Indictment between Counts Fourteen and Twenty-Six, all of which allege money laundering, Stockman argued that, because all of these counts require proof that the transactions involved “proceeds of an unlawful activity” and because the unlawful activity alleged in the Indictment was the mail and wire fraud alleged in Counts One through Eight, Stockman was entitled to a judgment of acquittal with respect to each of these counts because there was insufficient evidence to support those underlying mail and wire fraud counts. ROA.822.

With respect to Count Twenty-Eight, Stockman argued that the Government’s evidence proved the allegations in the indictment were inaccurate on their face. ROA.835.

The district court heard oral argument on April 4, 2018. ROA.5002. Stockman’s Rule 29 Motion was denied in its entirety. ROA.5014. With respect to the counts of mail and wire fraud (Counts One through Eight), the district court held that the testimony of the Government’s witnesses was, if believed by the jury, sufficient to establish that Rothschild and Uihlein were in fact misled as to the purpose for which their donations would be used. ROA.5007. The court held the evidence presented was sufficient with respect to the money laundering counts

because the underlying counts of mail and wire fraud were not summarily decided. ROA.5007. The court held Counts Five, Six, and Seven were not multiplicitous without further discussion. ROA.5007. The court held the Government had presented sufficient evidence to support the allegations in the Indictment with respect to Counts Nine, Ten, Eleven, and Twenty-Eight. ROA.5008, 5013. Regarding Count Twelve, the court reviewed the newspaper at issue and found that it “specifically advocated” for Stockman’s election, based on the reasons for its publication and the time at which the newspaper was published. ROA.5012-13.

On May 28, 2018, Stockman filed a renewed Rule 29 Motion for Judgment of Acquittal (“Renewed Rule 29 Motion”) explicitly incorporating and re-asserting all grounds previously asserted in his prior motion and asserting new arguments in support of acquittal. ROA.1014. Those arguments were:

With respect to Counts Three and Four, Stockman argued that Uihlein was either actually aware of Stockman’s involvement in the newspaper project or was “willfully blind” to his involvement, and therefore could not have been deceived as to the coordinated nature of the project. ROA.1016.

Stockman further argued that Uihlein’s testimony with regard to Counts One through Eight was duplicitous, given his testimony with regard to his donation in support of the newspaper project which he knew or should have known was a coordinated expense. ROA.1017. Because Uihlein “was deceptive to the Court and

jury” regarding the purpose of his newspaper donation, any other count which depended on Uihlein’s credibility for its evidentiary support, including Counts One and Eight, and the related money laundering counts must fail. ROA.1017-18.

Stockman argued that the conduct at issue in Counts Two, Five, and Seven, was not a scheme to defraud on the part of Stockman but rather a scheme to avoid paying federal income tax on the part of Rothschild. ROA.1018. Stockman argued Rothschild intentionally made donations to Stockman’s campaign through 501(c)(3) organizations to avoid paying federal income tax on the donated funds. ROA.1018. Because Rothschild had a knowing intent that the donated funds would ultimately be used in Stockman’s campaign, he was not defrauded when the donated funds were actually used consistent with that purpose. ROA.1018-19.

Stockman argued that he must be acquitted of any money laundering counts predicated on mail and wire fraud counts because conviction on those counts are a necessary element of the money laundering counts. ROA.1015.

On June 13, 2018, the district court denied the Renewed Rule 29 Motion in its entirety. In its written opinion, the court did not address any argument previously raised in the Rule 29 Motion and re-asserted in the Renewed Rule 29 Motion, but only addressed arguments asserted for the first time in the Renewed Rule 29 Motion. ROA.1073-79. With respect to Counts Three and Four, the court held “[t]he clear weight of the evidence supported the convictions.” ROA.1076. With respect to

Counts One and Eight, the court construed the Renewed Rule 29 Motion as “ask[ing] the court to weigh Uihlein’s testimony and find it lacking in credibility,” and refused to do so. ROA.1077. With respect to Counts Two, Five, and Seven, the court held there was “ample evidence” to support the jury’s verdict with respect to those counts. ROA.1079.

### **JUDGMENT, 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. 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.

## SUMMARY OF THE ARGUMENT

Stockman was convicted of mail and wire fraud with attendant money laundering counts arising from soliciting contributions to non-profit organizations, conspiracy to make prohibited conduit contributions to his Congressional campaign, making false statements to the Federal Election Commission (“FEC”), causing an excess contribution to his Senate campaign, and filing a false tax return. For these convictions he was sentenced to serve 10 years in federal prison.

Stockman appeals these convictions on two principal grounds: (I) the jury instructions were confusing and legally incorrect, and (II) there was a failure of proof on essential elements of each count.

*First*, the district court’s jury instructions on 501(c)(3) and 501(c)(4) were so broad as to give the impression that any activity that could be considered “political” in nature was illegal. The Government used this misstatement of the law to bolster its argument that Stockman intended to defraud two donors when they were solicited for donations to pay for legitimate 501(c)(3) and 501(c)(4) activities. All of the mail and wire fraud and money laundering convictions were based on activities that took place in the context of these types of organizations. These instructions confused the jury and tainted the entire trial. Absent this improper jury instruction, the jury could have found that the Government failed to prove that Stockman had an intent to defraud when the donor solicitations were made.

Further, the jury instructions with regard to federal campaign finance law was incorrect as a matter of law. According to the jury instruction, any third-party expenditures coordinated by a candidate are contributions to the candidate's campaign. This is a misstatement of the applicable law. The Supreme Court limited the definition of "expenditure" under FECA to only communications that contain "express advocacy." Third-party disbursements that do not contain express advocacy, even if coordinated by the candidate, are not campaign contributions under FECA. The jury instruction's language tracked the Indictment's faulty statement of the law. The Government's own evidence at trial proved that the communication at issue contained no "express advocacy." The district court repeatedly refused to correct this error in pre-trial motions, at the jury charge conference, and in post-trial motions.

And finally with regard to this first ground of appeal, Stockman was entitled to "good faith" instructions on the campaign finance counts as well as the false tax return count because there was evidence to support a defense of good faith given the complexity of the laws involved.

*Second*, the Government failed to prove essential elements of the crimes of which Stockman was charged and convicted.

There was a failure of proof on mail and wire fraud charges because the Government indicted Stockman for a single "scheme to defraud." The jury was

instructed to consider all of his acts as part of this one, all-encompassing scheme, but the jury was not instructed to consider the separate solicitations of different donors over different time periods as individual schemes. Thus, if one of the constituent acts of the single scheme failed as a fraud, all of the fraud counts and their corresponding money laundering counts must fail because the jury did not specify which particular mail and wire communications related to the individual scheme. The Government also failed to prove an intent to defraud with respect to each individual scheme.

Further, there was no proof of “express advocacy”, a necessary element of the crime, in the communication upon which Count Twelve was predicated.

## STANDARD OF REVIEW

In Sections I and II of his appeal, Stockman challenges the legal statement of the law in the jury instructions and the district court's failure to grant his Rule 29 Motion for Judgment of Acquittal, therefore the appropriate standard of review is *de novo*. This Court reviews *de novo* the district court's jury instructions "where there is the possibility that the jury instruction misstated an element of the crime, because that is an issue of statutory construction." *United States v. Guevara*, 408 F.3d 252, 257 (5th Cir. 2005). This Court also reviews the denial of a Rule 29 motion *de novo*. *United States v. Xu*, 599 F.3d 452, 453 (5th Cir. 2010).

In Section II, Stockman also challenges the district court's denial of his motion to dismiss Count Twelve. That challenge is also subject to *de novo* review. *United States v. Arrieta*, 862 F.3d 512, 514 (5th Cir. 2017) ("A denial of a motion to dismiss an indictment and issues of statutory interpretation are reviewed *de novo*.").

## ARGUMENT

### I. THE JURY INSTRUCTIONS WERE CONFUSING AND INCORRECTLY STATED THE APPLICABLE LAW

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—activities that involve sacrosanct First Amendment freedoms. *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600, 611 (2003) (Holding that the First Amendment protects the right to engage in charitable solicitation and 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). “[C]haritable appeals for funds ... involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.” *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). The Court has repeatedly affirmed the First Amendment speech, press, association, and petition protections of charitable fundraising first recognized in the *Schaumburg* trilogy. *See also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); and *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988).

The case involves two highly complex areas of law—the federal tax code (the “IRC”) and the Federal Election Campaign Act (“FECA”). Indeed, it is well-settled

that federal tax law is complex and often difficult to understand. *Cheek v. United States*, 498 U.S. 192, 199–200 (1991) (It is “difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws.”) And federal campaign finance laws have been “termed ‘baffling and conflicted.’” *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 296 (4th Cir. 2008) (quoting *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004)). “It is an area in which speakers are now increasingly forced to navigate a maze of rules, sub-rules, and cross-references in order to do nothing more than project a basic political message. Only those able to hire the best team of lawyers may one day be able to secure the advisory opinions or otherwise figure out the myriad relevant rulings with any degree of assurance that they will escape civil and criminal sanctions . . .” *Id.* (internal citation omitted).

Given the complexities of federal tax and campaign finance law, and the First Amendment activities involved, it was critical that the district court instruct the jury in a way that correctly and accurately reflected the factual issues in the case and accurately stated the applicable law. *United States v. Montgomery*, 747 F.3d 303, 310 (5th Cir. 2014). Due process requires an accurate jury instruction because it prohibits criminal liability for acts one would not reasonably understand to be prohibited. *United States v. Harris*, 347 U.S. 612, 617 (1954). An incorrect or incomplete jury instruction can sweep within its ambit non-prohibited conduct,

thereby resulting in a conviction where none should be had. The evidence is necessarily insufficient to sustain a conviction when the jury convicts the defendant of “conduct that [the] criminal statute, as properly interpreted [in jury instructions], does not prohibit.” *Fiore v. White*, 531 U.S. 225, 228 (2001).

- A. Improper and Unnecessary Instruction on 501(c)(3) and (c)(4) Organizations Prejudiced Stockman Because it Confused the Jury as to the Elements of the Crimes of Mail and Wire Fraud.

At the behest of the Government, as part of “Specific instructions for this case...that apply to more than one count,” the district court instructed the jury on 501(c)(3) and 501(c)(4) organizations:

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 those -- 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 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. A 501(c)(4) organization -- I'm sorry[sic]. 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.**

ROA.5273-74. (emphasis added).

These instructions gave the jury the mistaken impression that any money spent by a 501(c)(3) and (c)(4) non-profit organizations that benefited an individual was illegal.<sup>5</sup> Furthermore, with regard to the 501(c)(3) instruction, it instructed that such organizations were prohibited from undertaking any “political” activity, and thus any activity that seemed “political” would be illegal. In the context of this case, the instructions’ limitations on the exclusive nature of allowable conduct, without further explanation of what activity these types of organizations could legally undertake, left the jury with a legally incorrect statement of the law concerning such organizations, and confused the jury as to the elements of mail and wire fraud.

Most of Stockman’s activity at issue in this case occurred in the context of 501(c)(3) and (c)(4) organizations. These instructions served as a backdrop for the entire trial. Misstatements and omissions with regard to the law concerning these types of organizations sowed confusion and caused Stockman to be convicted for

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<sup>5</sup> At Stockman’s request, the district court included language stating that a 501(c)(4) organization, “may compensate employees for work actually performed.” ROA.5081-83. Curiously, this additional language is absent from the instruction on 501(c)(3) organizations.

activity that was neither charged nor an element of the crimes alleged. *See Fiore v. White*, 531 U.S. 225, 228 (2001).

That the jury was confused by this instruction is evident from the first jury question which asked:

JURY NOTE 1

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

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1) Reason for the check was written?

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or

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2) The destination the funds were deposited to (c3)  
and that's 'destination' ability to use those funds.

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4/10/18  
Date

FOREPERSON

ROA.963. 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. *Id.* That is precisely how the district court interpreted the jury's question:

The court understands Jury Note 1 to ask whether mail/wire fraud is related to: (1) the reason the check was written; or (2) whether the 501(c)(3) entity that the check was written to and that deposited the check could legally use those funds. If that is an accurate understanding of the questions in Jury Note 1, the court responds as follows:

ROA.964. The legality, *vel non*, of the 501(c)(3) or (c)(4)'s use of the funds was not an element of any of the mail and wire fraud claims, nor was it an element of any

crime for which Stockman was charged. The district court could have taken this opportunity to clarify this confusion, but instead, the district court's response compounded the error:

Mail and wire fraud require each of the elements set out on pages 13 and 17 of the Jury Instructions. The elements are that Mr. Stockman knowingly devised or intended to devise a scheme to obtain money from individuals or charitable foundations based on false representations, pretenses, or promises; that the scheme employed false material representations, pretenses, or promises; that Mr. Stockman caused something to be delivered through the Postal Service (Count 1), by a private or commercial interstate carrier (Counts 2, 3, and 4), or by way of wire communications (Counts 5, 6, 7, and 8), for the purpose of executing the scheme or attempting to execute it; and that Mr. Stockman acted with a specific intent to defraud. You 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" representation, pretense, or promise on page 11.

Lee H. Rosette  
4/10/2018  
4:07 p.m.

*Id.*

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 broad sweep of these jury instructions substantially prejudiced Stockman. The Government used the backdrop provided by these instructions to bootstrap evidence of fraud in the mail and wire fraud counts. The Government argued to the jury that any of the money solicited for use by these non-

profits that was used in a manner that the jury deemed political or that had any incidental benefit to Stockman was evidence of fraudulent intent at the time of the solicitation. The Government repeatedly exploited these misleading instructions at trial. ROA.5273-74. By giving these instructions and applying them to each Count, the 501(c)(3) and (c)(4) instructions became an element of the crimes for the jury, or at least a way the Government could bootstrap its intent evidence. Either way, these instructions misstated the law. *United States v. Fairley*, 880 F.3d 198, 210-11 (2018). Reversal is appropriate if the instruction was (1) not a substantially correct statement of the law, (2) not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the given instruction seriously impaired the defendant's ability to present a given defense. *See United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011) (internal citations omitted).

The Government repeatedly asked witnesses questions regarding the proper use of funds with regard to these types of organizations. For example, the Government asked Rothschild's assistant, Jean Dellman, if Rothschild believed "his money that he gave to the Ross center was actually being used for voter education?" and whether he was told anything about "donating to Ms. Angle's Senate campaign?" ROA.3453.

The implication of this line of questioning and testimony was that Stockman was doing something illegal with regard to how money could be spent by these non-

profits, therefore he must have had the intent to defraud the donors at the time of the solicitation. This case became more about non-profit management and administration rather than donor fraud.

In closing argument, the Government repeatedly referred to “sham non-profits.” ROA.5130-5167. The Government used the non-profit instructions to bolster its argument that Stockman’s activities in this context 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. There was never any analysis or instruction as to whether the activities undertaken by Stockman and these non-profits were allowable as “charitable” or “educational” activities under the IRC.

Stockman was not charged with violating tax law for mismanagement of any of 501(c)(3) or (c)(4) organization. Nor was he charged with any other crime related to the existence or conduct of such organizations or even with fraudulently misusing those organization’s funds. He was charged with several counts of mail and wire fraud for defrauding two donors. Thus, the legal structure and restrictions on the organizations allegedly used to commit the mail and wire fraud were legally immaterial to the charged claims.

Had the district court properly instructed the jury on what types of activities, including political or educational activities, were permissible for these organizations

to undertake, the jury could have concluded that the use of those funds were neither illegal nor inconsistent with the IRC. Such conclusion would have undercut the Government's argument of Stockman's fraudulent intent. Regardless, the inclusion of the instruction regarding these types of organizations was superfluous and not necessary to sufficiently instruct the jury on the law applicable to the case; it served only to bolster the Government's fraudulent intent argument.

To be sure, there are limitations on the types of activities that 501(c)(3) and (c)(4) organizations may undertake. But they are not barred from conducting many activities that members of the jury, with no specific knowledge of federal tax law in this area, might understand as prohibited because they are not "charitable" or "educational" activities as an uninstructed juror might understand. Yet, many types of activities in the political context can fall within the educational mission of such organizations and remain compliant with the federal tax law. According to the IRS:

Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case. Certain 'voter education' activities conducted in a non-partisan manner may not constitute prohibited political activity under section 501(c)(3) of the Code. Other so-called 'voter education' activities, however, may be proscribed by the statute.

IRS Rev. Rul. 78-248, 1978-1 C.B. 154.<sup>6</sup> The district court never analyzed whether any of the conduct fit within permissible limits under the law. If it did not include these instructions, the district court would not have needed to delve into this nuance, but since it did, failure to instruct the jury fully constituted an error that prejudiced Stockman.

This Court must analyze the jury instructions in the context of the whole trial, including the arguments made to the jury. *Chagra*, 807 F.2d at 402 (“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’s repeated references to “sham non-profits” and illegal activity in the 501(c)(3) and (c)(4) context misled the jury as to the elements of mail and wire fraud as evidenced by the jury’s very first question.

Furthermore, in light of the table-setting done by these jury instructions there is simply no way for Stockman to discern of what acts he was convicted of performing to sustain these convictions. The Verdict Form is of no help because it is a simple boilerplate statement for each count, “We, the jury, unanimously find the Defendant, Stephen E. Stockman” with the choice of “Guilty” or “Not Guilty” to be written on a line below. The elements of the individual crimes are not stated in the Jury Verdict Form. The table-setting superfluous addition of the 501(c)(3) and (c)(4)

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<sup>6</sup> <https://www.irs.gov/pub/irs-tege/rr78-248.pdf> (last visited May 24, 2019).

instructions, renders the statement of the law in the Jury Instructions fatally flawed. For these reasons, Stockman's convictions on Counts One through Five, Seven, and Eight should be reversed.

B. Stockman's Count Twelve Conviction Must be Vacated Because it is Predicated on the Jury Instruction's Incorrect Statement of the Law.

According to the Government, Stockman caused an excess contribution to his campaign by coordinating a "specific advertising advocating for" Stockman's election "or attacking Stockman's opponent." ROA.5292. The "specific advertising" was a newspaper-style mailing made by the Center for the American Future ("CAF") that favorably discussed Stockman's voting record and political positions in contrast with those of his opponent. *Id.* This newspaper-style mailing was titled *The Conservative News*. ROA.13106-13121. According to the Government, because Stockman had a role in causing *The Conservative News* to be mailed, its cost should have been treated as a contribution to his campaign. Because that cost exceeded \$2,600, the statutory contribution limit for 2014 pursuant to 52 U.S.C. § 30116(a)(1)(A), Stockman caused an illegal excess contribution to his own campaign. Important here however, according to the Government's own case agent, FBI Agent Spencer Brooks, *The Conservative News* did not contain any "express advocacy." ROA.2495-96. The absence of "express advocacy" is fatal to Stockman's conviction on Count Twelve.

Only certain types of “expenditures” made “in cooperation, consultation, or concert” with a candidate can be treated as a “contribution” to that candidate. 52 U.S.C. § 30116(a)(7)(B)(i). FECA defines “expenditures” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A)(i). The jury was instructed using this definition from the statute. ROA.5293.

C. The Jury Instruction’s “Expenditure” Definition Was Unconstitutionally Broad and Legally Incorrect.

A jury instruction must: 1) correctly state the law, 2) clearly instruct the jurors, and 3) be factually supportable. *Fairley*, 880 F.3d at 208. Count Twelve’s instruction fails on all three of these requirements.

1. To be an “expenditure” a communication must contain “express advocacy”.

Over four decades ago, to exclude First Amendment protected activity, 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.” *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). It did this to avoid the “shoals of vagueness” in the statutory definition. *Id.* at 78. This Court has recognized that limitation, discussed the Supreme Court’s relevant jurisprudence, and followed it in *Center for Individual Freedom v. Carmouche*, 449

F.3d 655, 663-64 (5th Cir. 2006) (holding that *Buckley's* limiting principle of what constitutes “express advocacy” barred regulating communications that did not contain such “express advocacy”) and *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 192-93 (5th Cir. 2002) (holding Mississippi state law could not regulate advertisement that did not contain “express advocacy” as defined by *Buckley*). There is no doubt that *Buckley's* limited definitions of “express advocacy” and “expenditure” are well-settled law in this Circuit.

*Buckley* held “express advocacy” to include only communications that use certain terms such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.” *Buckley*, 424 U.S. at 44, n.52. “These are the well-known ‘magic words.’” *Caramouche*, 449 F.3d at 664.

2. The Jury Instruction Misstated the Law on the Definition of “Expenditure”.

Instead of properly instructing the jury on the required elements of the law (that the definition of “expenditure” was limited only to communications containing “express advocacy”), the district court instructed the jury using the generalized language of the indictment that also failed to properly state the law. The jury was instructed that Stockman:

coordinated **expenditure** contributions by The Center for the American Future to Mr. Stockman’s principle campaign committee, in the form of **expenditures** by The Center for the American Future **for specific**

**advertising advocating for Mr. Stockman’s election  
or attacking Mr. Stockman’s opponent.**

ROA. 5292. (emphasis added).

The jury instruction for Count Twelve failed to account for *Buckley’s* “express advocacy” limitation and instead incorrectly instructed the jury in a way that allowed them to consider that any type of purchase, payment, etc.... would be treated as a campaign contribution if Stockman had a role in causing it to occur. Such an instruction is unconstitutionally vague as it would permit a guilty finding for engaging in constitutionally protected activities. For this reason alone, Stockman’s conviction on Count Twelve must be vacated.

D. Stockman was Entitled to Good Faith Instructions.

Stockman requested good faith instructions for Counts Ten through Twelve. ROA.5101-04. The district court failed to give a good faith instruction on the 18 U.S.C. § 1001(a)(2) false statement counts arising from the allegation of filing false FEC reports related to two prohibited conduit contributions to his congressional campaign. There was ample evidence that Stockman relied on the advice of a CPA with a PhD in accounting who wrongly advised him that having aides contribute money to his congressional campaign in the name of their parents was permissible. ROA.2233.

Ultimately, the campaign filed amended reports with the FEC that reflected the unwinding of these contributions and accurately reported the campaign’s

finances. The FEC allows campaigns to amend their reports as many times as necessary to get the reporting correct. ROA.2287:8-10. In this context and where willfulness is required, a good faith instruction should have been given.

1. The district court Erred in Not Instructing on Good Faith on Count Twelve.

Under federal campaign law committee treasurers are held only to a “best efforts” standard. 52 U.S.C. § 30102(i); 11 C.F.R. §§ 102.9(d) & 104.7(a). While this applies to committee treasurers, the same standard ought to apply when, as here, the evidence demonstrated that Stockman and Posey consciously did not include any “express advocacy” in *The Conservative News* in order comply with federal campaign finance law. ROA.4515-17. Stockman requested a good faith instruction be included in Count Twelve, but his request was denied. ROA.5101-04.

2. The district court Erred in Not Instructing on Good Faith in the False Tax Return Count 28.

Stockman was convicted of filing a false tax return because he allegedly understated his income. The Government alleged that Stockman should have reported as income to him personally certain monies from a contribution made to a non-profit organization for, among other things, purchase of a Capitol Hill townhouse to house congressional interns.

Willfulness is an element of the crime of filing a false tax return. 26 U.S.C. § 7206(1). A defendant cannot act willfully if he believes his actions were not a

violation of the tax laws. *Cheek*, 498 U.S. at 199–200. Where there is no instruction on the meaning of willfulness under the tax code, a defendant is entitled to a specific instruction on good faith. *United States v. Simkanin*, 420 F.3d 397, 411 (5th Cir. 2005). There was an instruction on willfulness for Counts Ten through Twelve. ROA.5274. And a different willfulness definition in Count Twenty-Eight. Compare ROA.5274 with ROA.5298. Yet, in the context of this case, Stockman was entitled to a good faith instruction. This omission affected Stockman’s substantial rights because it prevented him from offering a defense to this charge under the heightened *mens rea* standard required since *Cheek*. This error seriously affected the fairness and integrity of Stockman’s trial, and could have meant the difference between conviction and acquittal on the false tax return charge, therefore Count Twenty-eight must be reversed. *Fairley*, 880 F.3d at 212.

II. THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT STOCKMAN’S RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS A FAILURE OF PROOF ON ESSENTIAL ELEMENTS OF EACH COUNT

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. *United States v. Simpson*, 741 F.3d 539, 547 (5th Cir. 2014). The Government failed to prove a scheme.

A. The Government Failed to Prove a Scheme Necessary to Sustain Stockman’s Mail and Wire Fraud and Money Laundering Convictions.

While the indictment characterized all of the conduct charged under counts One through Eight as being part of a single “scheme to defraud,” the indictment alleges no fewer than four separate “schemes.” According to the indictment, these schemes occurred years apart from one another, targeted different victims, and were carried out by different means. This Circuit has previously recognized that an indictment alleges “separate and distinct fraudulent schemes” under such circumstances. *See United States v. Curry*, 681 F.2d 406, 411 (5th Cir. 1982). These alleged “schemes” are:

1. The 2010 solicitation of Mr. Rothschild for \$285,000 through the Ross Center. ROA.75-76 (Indictment ¶¶ 23-26);

2. The 2011-12 solicitation of Mr. Rothschild for \$165,000 through the Ross Center and Life Without Limits. ROA.77-78 (Indictment ¶¶ 27-31);

3. The 2013 solicitation of Mr. Uihlein for \$350,000 through the Congressional Freedom Foundation and Life Without Limits. ROA.79-82 (Indictment ¶¶ 32-39); and

4. The 2014 solicitation of Mr. Uihlein for \$450,571.65 through the Center for the American Future. ROA.82-85 (Indictment ¶¶ 40-50).

The scheme alleged with respect to the 2014 solicitation of Mr. Uihlein did not involve any harm to the alleged victims of the scheme, as required to constitute mail and wire fraud. According to the indictment, it was fully disclosed to Uihlein that the funds sent to pay for the “newspapers” would be used “in support of Stockman’s Senate campaign.” *See* ROA.83 (Indictment ¶ 43). Uihlein’s funds were in fact used in support of Stockman’s Senate campaign. There was no “false pretense” that the funds would be used for a different purpose. Rather, the indictment alleges that a portion of these funds was later used to support Stockman’s Senate campaign in ways that allegedly violated the campaign finance laws.

Regardless of whether the indictment validly alleges that the funds obtained from Uihlein were used in violation of campaign finance laws, a “scheme” to use a donor’s funds in violation of campaign finance law is not “a scheme or artifice to defraud” or “a scheme or artifice . . . for obtaining money or property by means of

false or fraudulent pretenses” within the meaning of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. The Supreme Court has held that a “scheme to defraud” within the mail and wire fraud statutes is limited to schemes that contemplate harm to property interests or schemes involving “bribery or kickbacks”. *See Skilling v. United States*, 561 U.S. 358, 407–08 (2010); *Cleveland v. United States*, 531 U.S. 12, 18-20 (2000).

There is no allegation of bribery, kickbacks, or any other variety of “honest services fraud” in this case. And the 2014 scheme did not harm the money or property interests of Mr. Uihlein, the scheme’s only alleged victim. Most of the donation received from Uihlein as part of the “newspaper” project was used to pay for postage. When it was determined that the newspaper project could not continue, the remaining donated funds were applied consistent with the donor’s intention to support Stockman’s Senate campaign in other ways. Insofar as the indictment alleges there was a “scheme” involved in the “newspaper” project, that scheme consisted of allowing the Stockman campaign to benefit directly from funds that it was specifically intended to indirectly benefit from.

Allegations of mail or wire fraud not based on allegations of bribes or kickbacks must properly allege a scheme to deprive one or more persons of money or property interests. *See McNally v. United States*, 483 U.S. 350, 360 (1987). The Supreme Court has explicitly cautioned against expanding the reach of the mail and

wire fraud statutes, noting that those statutes may be held to be unconstitutionally vague if their reach expanded further. *Skilling*, 561 U.S. at 412. There is no allegation that Uihlein had a reversionary interest in the donated funds or any other right to a “refund” of those funds once the “newspaper” project ended. And the indictment states directly that the funds donated by Uihlein were used for the purpose he intended until the “newspaper” project ended.

The allegations in the indictment do not support the claim that the 2014 scheme was directed at depriving Uihlein of any money or other property. Instead, in effect it alleges that Uihlein had an interest in assuring that his donation would not be used in violation of campaign finance law. This theory improperly conflates Uihlein’s property interests with the government’s regulatory interests.

Multiple circuits have held that the mail and wire fraud statutes do not protect the government’s regulatory interests, particularly where those interests are already protected by other enforcement mechanisms. *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1521 (7th Cir. 1993); *United States v. Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992); *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988). One federal circuit has held explicitly that private parties do not have a property interest in ensuring that property sold by them will not later be used to violate federal law. *See Bruchhausen*, 977 F.2d at 468. In *Bruchhausen*, the prosecution based its claims of wire fraud on a scheme in which the defendant misled American arms manufacturing

companies by representing that the weapons purchased from them would be used within the United States, when in fact they were to be shipped to Soviet-aligned countries in violation of U.S. export law. *See id.* at 466. The Ninth Circuit held that this scheme was not a “scheme to defraud” because the arms manufacturers had no property interest in the eventual destination of the goods it provided to the defendant, nor did they have an interest in ensuring that those goods would not eventually be used to violate other federal laws. *See id.* at 467-68.

The conduct constituting the alleged 2014 scheme is legally insufficient to sustain charges of mail and wire fraud, thus Stockman’s convictions under Counts Three and Four must be reversed along with his convictions under Counts Twenty-two and Twenty-four because the money used in the transactions underlying these counts were not derived from mail fraud. *See* 18 U.S.C. § 1957(f)(2) (defining “criminally derived property” as “any property constituting, or derived from, proceeds obtained from a criminal offense” for purposes of determining whether a financial transaction constitutes money laundering); *United States v. Evans*, 892 F.3d 692, 708 (5th Cir. 2018) (noting that proof of “property . . . that was derived from specified unlawful activity” is a necessary element of money laundering).

Additionally, as to the remaining convictions for mail and wire fraud, the jury did not specify to which scheme the mailings and wire communications underlying each count related. The jury was not instructed to consider each scheme separately

because the indictment and jury instructions improperly construed the conduct in the indictment as being part of a single scheme to defraud, rather than as several distinct schemes. *See* ROA.73-85, 5276-77. The jury could have found that the mailings and wire communications underlying these counts were related to any of the schemes alleged in the indictment, including the 2014 scheme that was legally insufficient to sustain a conviction for mail or wire fraud. “[W]here the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected,” the verdict must be set aside. *Yates v. United States*, 354 U.S. 298, 312, (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978). And, because Stockman’s convictions for mail and wire fraud must be reversed, the remaining money laundering convictions must also be reversed, because the money used in the transactions underlying these counts were not derived from mail or wire fraud.

B. The Government Failed to Prove Fraudulent Intent.

To convict Stockman of mail and wire fraud, the Government had to prove that he had a specific intent to defraud and that any false representations, pretenses, or promises made by Stockman to the donors were material. *United States v. Simpson*, 741 F.3d 539, 547 (5th Cir. 2014); *Neder v. United States*, 527 U.S. 1, 25 (1999). And the Government had to prove that Stockman had specific-intent to defraud the donors at the time the solicitations and subsequent contributions were

made. *United States v. Gallant*, 537 F.3d 1202, 1229 (10th Cir. 2008). Absent proof of a contemporaneous intent to defraud, there would be no bounds to restrain the use of the mail and wire fraud statutes.

1. Counts One and Eight—\$350,000 Uihlein Contribution.

These Counts relate to donor Uihlein’s 2013 contribution of \$350,000 to the 501(c)(3) Life Without Limits. According to the Government, Stockman induced Uihlein to make that contribution by promising that his funds would be used to purchase a townhome on Capitol Hill in Washington, D.C. to house conservative Congressional interns (the “Freedom House”), but that Stockman never bought the house and instead used Uihlein’s contribution for other purposes. ROA.79-80. The Government’s best evidence that Stockman had the specific-intent to defraud Uihlein was that ultimately the money was used for purposes other than purchasing the Freedom House. ROA.1938-69.

Count One was alleged to be mail fraud because Uihlein sent his contribution via the mail in 2013. Count 8 was premised on a 2014 email sent to Uihlein thanking him and describing how his contribution was spent. Count Eight’s email did not falsely claim that the Freedom House was purchased or make any other false statements regarding how Uihlein’s contribution was spent. ROA.11767-71.

In 2013 Stockman and Dodd approached Uihlein and sought a contribution from him to provide seed money for a project aimed at promoting “the ideas of

liberty.” ROA.2123, 2128, 2173-75. This proposal included many contemplated activities, one of which was the purchase of the aforementioned Freedom House. ROA.11743-51. At the time Uihlein was solicited and sent his check, he was aware that Freedom House did not exist. ROA.2175-76, 3947. He was aware that Stockman and Dodd were looking for a suitable townhouse, but that no townhouse had been purchased. ROA.3947. Neither Stockman nor Dodd ever told Uihlein that Freedom House existed or that his contribution would be used solely to purchase a townhouse to serve as the Freedom House. ROA.3946-47. Importantly, Uihlein never asked that his contribution be restricted to that purpose.<sup>7</sup> ROA.2183.

To the contrary, the evidence was that Stockman and Dodd solicited Uihlein for a contribution towards a broader project. ROA.2173-75. Although that project included the Freedom House as one component, it also included many other activities aimed at promoting the “ideas of liberty,” such as: an activist field training program, organizing like-minded congressmen, mail and email campaign championing conservative policy information, etc. ROA.12744-47. In fact, the

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<sup>7</sup> Sophisticated donors, the type involved here, understand that they have the option to make what are known as “restricted” grants or contributions to nonprofit organizations. During the years in question in the Indictment, grants were of three types: “unrestricted,” “temporarily restricted,” or “permanently restricted.” Effective December 15, 2017, the Financial Accounting Standards Board changed these to two categories: “with donor imposed restrictions” and “without donor-imposed restrictions.” Such grants must be recorded in the organization’s books and records and then expended only consistent with the restrictions imposed. None of the grants or contributions in the Indictment involve any type of restriction. *See* PPC’s 990 Desk Book, Thompson Reuters, 25th ed. (Jan. 2017) at 7-18.

written budget and proposal shown to Uihlein during the solicitation, which he kept for his files, was for \$2,464,000 for a broader project including many activities, only a portion of which (\$1,299,000) was to be for the Freedom House. ROA.11747.

The Government argued that because Stockman did not ultimately use Uihlein's contribution for the purchase of Freedom House, Stockman had the intent to defraud him at the time of the solicitation. ROA.79-80. Yet, the evidence was that Stockman never promised to use Uihlein's contribution solely for the purchase of the Freedom House and Uihlein never restricted his contribution in that that manner. ROA.2173-75, 2183, 3946-47. At best, it may prove that Stockman and Uihlein were not on the same page as to the purpose of the solicitation and contribution, but it does not demonstrate fraudulent intent at the time the solicitation and contribution were made. *Gallant*, 537 F.3d at 1229. Thus, Count One must be reversed.

Count 8 is predicated upon an email sent to Uihlein more than a year after he made his contribution thanking Uihlein for the contribution and what it allowed Life Without Limits to accomplish. It was sent at the request of Uihlein to substantiate the contribution for tax purposes. ROA.11767-71. While it did not contain a full enumeration of how Uihlein's contribution was spent, it did not make any false representations about Freedom House, or any other fact. *Id.* Additionally, because

it was sent in 2014 well after the contribution was made, it suffers from the same temporal deficiency as Count One and must also be dismissed.

2. Counts Three and Four—Uihlein’s \$450,000 Postage Contribution.

Counts Three and Four relate to Uihlein’s \$450,571.65 check to pay for the mailing of *The Conservative News*. ROA.82-85, 87. Uihlein was solicited to pay for this mailing by Posey on behalf of the 501(c)(4) CAF. ROA.2148-50, 2153-54. The mailing was intended to be made in support of Stockman’s Senate campaign and Uihlein was keenly aware of the mailing’s purpose. ROA.2150-53.

The indictment alleged that Uihlein’s contribution was to pay for the postage for that mailing and that the mailing was supposed to be an “independent expenditure.” ROA.83-84. The Government alleged that because Stockman was involved in that mailing, he defrauded Uihlein. By causing a letter to be sent from the mail shop to Uihlein regarding the postage costs (Count Three), ROA.87, 13093-94, and causing Uihlein to send his contribution check by mail (Count Four), ROA.87, 13095, Stockman was charged with mail fraud.

There is no dispute that Uihlein was solicited to pay for postage to mail *The Conservative News*, and that Uihlein knew of and agreed with the purpose of the mailing. ROA.2184. Likewise, there is no dispute that more than half of his contribution was used for that purpose. ROA.4441. At a later point in time, the mail shop was unable to perform the balance of the mailing and was instructed by Posey

to return the balance of the postage money to the CAF. There was no agreement that any unused funds would be returned to Uihlein. The fact that more than half of Uihlein's contribution was used for exactly what he was solicited to pay for cuts against the Government. In fact it proves that there was no fraudulent intent contemporaneous with the predicate solicitation and contribution. The fact that the mail shop was subsequently unable to finish the mailing and refunded the postage money to CAF rather than Uihlein, is not evidence of intent to defraud, particularly where there was no agreement on how to deal with the circumstance that gave rise to refund of the postage money.

Throughout this case, the Government and district court used terms and concepts in ways inconsistent with that federal campaign finance law. Because of the complexity of this area of law, using and apply very technical terms correctly is critical.

The Government and district court repeatedly used the term "independent expenditure" to support the intent element of Counts Three and Four. ROA.82-84, 1074. Indeed, the gravamen of the Government's case on these counts is that the mailing would be "independent," *i.e.* neither Stockman nor his campaign would be involved. Yet, an "independent expenditure" under federal campaign finance law is a very specific creature; it is a communication that "expressly advocates"—another very specific term under federal campaign finance law—for the election or defeat of

a clearly identified candidate. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a). *The Conservative News* did not expressly advocate for or against anybody as is discussed in detail *infra*. Because it was not “express advocacy” there was no bar to Stockman’s participation as charged in Count Twelve.

Uihlein was confused on this point, confusion that was exacerbated by how the Government questioned him in the context of what activities were legally permissible for non-profit organizations to undertake. ROA.2142-43, 2161.

What Uihlein may have understood to be an “independent expenditure” may have been different from what Stockman understood. But this is not the stuff of criminal fraud. And proving the highly technical nature of this area of law, neither the Government nor the district court understood or used that term correctly.

3. Counts Two, Five and Seven—Rothschild Contributions.

Counts Two (mailing), Five (email) and Seven (wire) relate to contributions made by Rothschild to Life Without Limits in 2012. By the time of the trial Rothschild was dead, so he did not testify. Over Stockman’s objection, a 2010 letter written by Rothschild was admitted as evidence to demonstrate Rothschild’s state of mind in making the contributions. What is clear from Gov. Exh. 2010-2z (ROA.10857) is that Rothschild was making a contribution to the Ross Center in 2010 to be used to get “factual information” out to potential supporters of certain politicians based on “their policies or philosophies” in a manner to benefit the

politicians politically. *Id.* The Government's own evidence shows that Rothschild got what he wanted. None of the 2010 conduct, however, is probative of whether Stockman had the intent to defraud Rothschild in 2012.

Throughout 2012, Dodd and Stockman solicited Rothschild for contributions in support of Stockman's congressional campaign. In a series of letters and other communications sent to Rothschild, Stockman explicitly referenced his candidacy and the upcoming election and asked Rothschild for assistance in defeating his electoral opponents. ROA.11127-28, 11196-97, 11201-02. Stockman also instructed Dodd to explicitly reference Stockman's electoral prospects in his communications with Rothschild. ROA.11284. Rothschild responded by making contributions to Life Without Limits during 2012 in connection with these election-related solicitations. ROA.11113, 11175, 11380. The majority of these donations were transferred to other accounts controlled by Stockman, including the account for his campaign committee. ROA.11176, 11250-51. Regardless of whether there is evidence that Rothschild had been seeking to obtain an improper tax treatment of his contributions, or that Stockman may have violated federal tax or campaign finance laws governing how Rothschild's money was used, that simply is not evidence of an intent to defraud by Stockman. The evidence was clear that Rothschild contributed money to support Stockman and others and that his contributions were largely used for that purpose.

ROA.11127-28, 11196-97, 11250-51. There was no evidence that Stockman intended to defraud Rothschild in 2012.

C. The Money Laundering Counts Also Fail as the Corresponding Mail and Wire Fraud Counts Fail.

Because the crime of money laundering pursuant to 18 U.S.C. §§ 1956 and 1957 requires an underlying crime, here mail or wire fraud, if any of those counts fail, so too does the corresponding money laundering count. *See United States v. Deason*, 622 Fed. App'x 350, 361 (5th Cir. 2015) (“government had to prove essential elements of wire fraud to establish a violation of 18 U.S.C. § 1957”).

D. The Government Failed to Prove an Essential Element of Count Twelve Because *The Conservative News* Contained No Express Advocacy.

Because *The Conservative News* was not “express advocacy”, there is a failure of proof on Count Twelve.

Similar to the advertisement in *Moore*, *The Conservative News* contained language that reported Stockman’s and his opponent’s public voting record and public positions on certain issues of public concern. It also commented favorably on Stockman’s record and positions and contrasted those of his opponent’s. ROA. 2495-96.

The four television advertisements in *Moore* “extoll[ed] the virtues of” certain candidates. 288 F.3d at 190. In *Moore*, the candidates were running for election to the Mississippi Supreme Court. *Id.* The ads “identified the candidate and described

in general terms the candidate’s judicial philosophy, background, qualifications, and other positive qualities.” *Id.* The ads did not, however, “expressly advocate the election or defeat of a candidate.” *Id.* This Court followed what it described as “a well-worn path” in following the case law which has applied *Buckley’s* bright-line test. *Id.* at 191-93.

Accordingly, we hold that a communication constitutes “express advocacy” . . . only if it contains explicit words advocating the election or defeat of a clearly identified candidate.

*Id.* at 195-96.

Indeed, the Government’s own evidence conclusively proves that *The Conservative News* is not “express advocacy” and cannot meet the FECA’s definition of an “expenditure” under the applicable law, the gravamen of which is the specific call to action to elect or defeat a particular candidate. *Buckley*, 424 U.S. at 80. None of that was present in *The Conservative News*. According to the Government’s own Case Agent, FBI Special Agent Spencer Brooks, *The Conservative News* merely discussed “favorable qualities as to Mr. Stockman and unfavorable qualities as to Mr. Cornyn.”

Q Looking, sir, at *The Conservative News* -- do you still have that publication with you, sir?

A Yes, I do.

Q And that is a publication that's in newspaper form, correct?

A That's correct.

Q And you would characterize this as a publication that discusses conservative or favorable qualities as to Mr. Stockman and unfavorable qualities as to Mr. Cornyn, correct, sir?

A I think that's a good summary.

ROA.2495-96.

Brooks further testified that there was no specific call to action to elect or defeat any candidate:

Q Are you aware of any part of that publication that advertises and requests a reader to elect Mr. Stockman?

A No.

Q You didn't see anything like that within that publication, correct, sir?

A Not that I'm aware of.

Q And you didn't see anything in that publication that advertises or requests the reader to defeat Mr. Cornyn in the election, right?

A I don't believe so.

ROA.2496.

Much like the extolling of the qualities of the judicial candidates in the advertisement at issue in *Moore*, here *The Conservative News* contrasted the policies and position of Stockman and his opponent, without crossing the line of “express

advocacy”—exhorting the reader to vote for or against either candidate. *Id.* Thus, *The Conservative News* is not subject to regulation under FECA, as limited by *Buckley*.

In *Moore*, this Court concluded that the “express advocacy” limitation to the definition of “expenditure” was “compelled by the First Amendment, as interpreted by the Supreme Court in its effort to balance the state’s interest in regulating elections with the constitutional right of free speech.” *Id.* at 199. Nothing here compels a different result. Thus, there is a complete failure of proof on Count Twelve.

E. The district court Erred in Not Granting Judgment of Acquittal on Count Twelve.

The evidence is necessarily insufficient to sustain a conviction when the jury convicts the defendant of “conduct that [the] criminal statute, as properly interpreted [in jury instructions], does not prohibit.” *Fiore v. White*, 531 U.S. 225, 228 (2001).

The jury instruction’s language—“specific advertising advocating for Mr. Stockman’s election or attacking Mr. Stockman’s opponent”—allows a conviction without “express advocacy.” ROA.5292 (emphasis added). The jury instruction language tracked the Indictment’s language with one exception. The Indictment stated that the “specific advertising advocating for Mr. Stockman’s election and attacking Mr. Stockman’s opponent.” ROA.97. (emphasis added). This change from the conjunctive in the Indictment to the disjunctive in the Jury Instructions was

a fundamental change that allowed the jury to convict if only one of the two conditions were proved instead of the conjunctive act alleged. Such a constructive amendment failed to give Stockman notice as required by the Fifth Amendment and alone requires vacating his conviction on Count Twelve. *United States v. McGilberry*, 480 U.S. 326, 331-32 (2007).

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.<sup>8</sup> 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.

The district court repeatedly refused to apply that law to: (1) the indictment, (2) the jury instructions, (3) Stockman's Motion to Dismiss Count Twelve (ROA.166-181), or (4) his Rule 29 Motion (ROA.818-327, 1014-21). Indeed, in its post-trial order denying Stockman's Rule 29 Motion (ROA.1073-79) the district court failed even to address Stockman's argument regarding the failure of proof on Count Twelve.

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<sup>8</sup> The Government's conviction on Count 12 cannot be saved by any *post-hoc* appeal to FEC regulations as it specifically disclaimed reliance upon any regulatory authority in indicting and convicting Stockman and instead decided to rely solely on the statutory language of 52 U.S.C. § 30116(a)(1)(B)(i). ROA.293-95. While FEC regulations establish other circumstances under which a communication may be a coordinated expenditure subject to regulation, but Stockman was not charged with a violation of that regulation. *See* 11 C.F.R. § 109.21(c)(4)(iv).

Because of this failure of proof, the district court erred when it failed to grant Stockman's Rule 29 Motion. ROA.1073-79. "The jury's verdict will be affirmed 'if a reasonable trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt.'" *United States v. Smith*, 804 F.3d 724, 731 (5th Cir. 2015) (internal citations omitted). *United States v. Xu*, 599 F.3d 452, 453 (5th Cir. 2010) (vacating conviction because Government failed to prove essential element of crime). Here, there can be no doubt that, had the jury been properly instructed that *The Conservative News* must have contained "express advocacy" as defined by *Buckley*, no reasonable trier of fact could have convicted Stockman for this offense on these facts and thus his conviction for causing an excess contribution to his campaign must be vacated.

F. Stockman's Motion to Dismiss Count Twelve Should have Been Granted for the Same Reasons.

In his Motion to Dismiss (ROA.166-81), Stockman raised the same objections to Count Twelve and the Indictment's use and interpretation of the law with regard to the definition of expenditure in FECA. His motion was denied.

## CONCLUSION

For the foregoing reasons, Stephen E. Stockman respectfully requests this Court to grant a judgment of acquittal and/or in the alternative to reverse and remand for a new trial.

Dated: May 24, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on May 24, 2019, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

Carmen Mitchell of U.S. Attorney's Office Houston, TX
Robert Heberle of U.S. Department of Justice Washington, DC

/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 13,000 words, because it contains 12,995 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