

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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**MOTION OF AMERICAN TARGET ADVERTISING,  
INC. *ET AL.* FOR LEAVE TO FILE  
*AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT'S  
PETITION FOR REHEARING *EN BANC***

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St. Louis, MO

Donna Rice Hughes  
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The Honorable Andrea Seastrand  
U.S. House of Representatives  
Former Member, California

The Honorable Rebecca Skinner  
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Pursuant to Fed. R. App P. 29(a)(7), movants *amici curiae* American Target Advertising, Inc. *et al.* (“*Amici*”) respectfully request the Court’s leave to file an *amicus curiae* brief in support of Appellant Stephen Stockman’s Petition for Rehearing *En Banc* filed on January 24, 2020 seeking rehearing after the Panel Opinion filed on January 10, 2020, and state the following grounds in support of this motion.

This Court may grant leave to your *amici* to file their *amicus curiae* brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure (see Fed. R. App. P. 29(b)) provided they state their interest and “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3)(B). Rehearing *En Banc* may be granted when *en banc* consideration is necessary to secure or maintain uniformity of the court’s decisions, or the proceeding involves a question of exceptional importance. See, Fed. R. App. P. 35(a).

This case is appropriate for rehearing *en banc*, and your proposed *amici*’s support for Appellant’s Petition for Rehearing *En Banc* desirable and merited in this matter, and supplemental to the Petition for Rehearing *En Banc*, because the Panel’s Opinion conflicts with (1) United States Supreme Court and Fifth Circuit precedent about what is an “expenditure” under the Federal Elections Campaign

Act, which term is the cornerstone for determining unlawful coordination between candidates for federal elected office and third parties, and about which the Panel's Opinion erred in upholding Appellant Steve Stockman's conviction, (2) United States Supreme Court precedent about fraudulent intent that was required to be proven by the Government in the context of charitable solicitations, which are protected by the First Amendment,<sup>1</sup> which the Panel's Opinion neglected, and (3) United State Supreme Court precedent that not disclosing at the point of solicitation costs of charitable fundraising, including compensation to those who solicit contributions, is not fraud, also which the Panel's Opinion neglected.

That the Petition seeks rehearing *en banc* on matters of exceptional importance, such as the chilling effect of the Panel's Opinion on First Amendment rights, may be adequately summarized by the headline of a January 20, 2020 *Townhall.com* article about the Panel's Opinion, "All Nonprofits Should be Terrified of This New Court Decision."<sup>2</sup> The Panel's Opinion neglected to mention *even once* the First Amendment despite the fact that the matters it resolved unfavorably to the Appellant involve rights of speech, the press, and association in

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<sup>1</sup> U.S. Constitution, Amendment I.

<sup>2</sup> Rachel Alexander, "All Nonprofits Should be Terrified of This New Court Decision," *Townhall.com*, January 20, 2020, <https://townhall.com/columnists/rachelalexander/2020/01/20/all-nonprofits-should-be-terrified-of-this-new-court-decision-n2559769>, last visited January 22, 2020.

areas of issue advocacy, political discourse, and charitable opinion and beliefs.

The Panel's Opinion, which criminalized the exercise of what are legal, innocent acts that are also protected by the First Amendment, will have a chilling effect on the rights of nonprofit organizations and candidates for federal office, and such fears are reflected in the composition of your *amici*.

In accordance with 5th Cir. R. 27.4, counsel for your movant contacted counsel for all parties in a timely manner, who have consented to the filing of our *amicus curiae* brief.

### **INTERESTS OF THE PROPOSED AMICI**

American Target Advertising, Inc. ("ATA") is America's oldest and largest conservative agency that provides creative writing and other services to nonprofit organizations that communicate with members of the general public and solicit contributions nationally. Its chairman, Richard A. Viguerie, pioneered political direct mail in the 1960s and 70s. Its clients include Internal Revenue Code §§ 501(c)(3) and 501(c)(4) nonprofit organizations. The 43 co-*amici* are individuals who are (1) formally associated with nonprofit organizations (other than as just donors), (2) provide services to them (including legal representation or fundraising services), and/or (3) former elected officials or candidates for elected office who join this brief because they are concerned for the rights of nonprofit organizations

and political committees to communicate, fundraise, build files of donors and non-donor supporters, and to associate with prospective donors and voters. *Amici* have practical experience in matters at issue in this case, and are therefore well-positioned to inform this Court in ways that would aid its determinations.

**DESIRABILITY AND RELEVANCE OF AMICUS BRIEF,  
AND THE QUESTIONS OF EXCEPTIONAL IMPORTANCE**

*Amici*'s proposed brief, attached hereto as Exhibit A, is desirable and relevant to the issue of whether Appellant's Petition for Rehearing *En Banc* should be granted, by addressing questions of law of exceptional importance from the experienced perspective of those who deal with nonprofit fundraising and/or campaign finance. The proposed *amicus* brief explains that Panel's Opinion erred by affirming criminal convictions for legal activities that are also protected by the First Amendment, thus meriting a review that the Panel's Opinion failed to provide by entirely neglecting the First Amendment considerations. Your *amici* understand the importance of honest and even long-term dealings with donors, whose generosity is the life blood of nonprofit organizations, and with whom the reputations of nonprofits must be secured for their very survival. Your *amici* also understand that legal compliance in nonprofit fundraising is a constant concern. And, your *amici* understand the costs and activities needed for new and start-up programs even within established organizations, and that some programs fail or do

not achieve the level of success desired regardless of best faith, honest efforts. The Panel’s Opinion will have a chilling effect on the exercise of First Amendment rights. Furthermore, your *amici* collectively know that taking outspoken, principled positions on matters of political, social, moral, religious, ideological, or other causes, campaigns, and controversies can create opponents or enemies, even in high places within the government.

A. The Panel’s Opinion erred about unlawful coordination between nonprofits and political campaigns.

The Panel’s entire legal analysis on the issue of unlawful coordination between Stockman and an Internal Revenue Code §501(c)(4) organization is found at Panel Op. 10 – 12. The proposed *amicus* brief explains that the Panel’s Opinion erred by selectively excerpting a passage from *McConnell v. FEC*<sup>3</sup> to conclude there was an “expenditure” under FECA resulting in an unlawfully excessive contribution to Stockman’s campaign for U.S. Senate. Reading the entire passage from *McConnell*, however, shows conclusively that the U.S. Supreme Court addressed a narrow issue about only § 202 of the Bipartisan Campaign Reform Act (“BCRA,” also known as the “McCain–Feingold Act,” Pub.L. 107–155, 116 Stat. 81, enacted March 27, 2002, H.R. 2356). BCRA amended the Federal Election Campaign Act to modify the term “expenditure” for purposes of unlawful

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<sup>3</sup> 540 U.S. 93 (2003).

coordination to include certain types of broadcast communications called “electioneering communications.” *McConnell* simply decided that Congress may redefine “expenditure” to include “electioneering communications,” and a reading of the full passage and the statutory provision it addressed conclusively shows *McConnell* does not apply to this case.

The excerpted passage from *McConnell* used in the Panel’s decision not only corrupts that narrow point from *McConnell*, but exceeds the judiciary’s authority by legislating to make acts that had been innocent and protected by the First Amendment through January 9, 2020 now criminal as of January 10, 2020. The Panel’s Opinion openly disregarded the controlling test from *Buckley v. Valeo*, 424 U.S. 424 (1976) about what constitutes an “expenditure” for purposes of FECA’s decades-old precedent applying to print publications like *The Conservative News* on which the Panel ruled. See, Panel Op. 10 - 11. The “magic words” test from *Buckley* and addressed in the Petition for Rehearing *En Banc* is also the standard recognized by the Fifth Circuit in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), which acknowledged the “magic words” test that “[w]ords of express advocacy include terms such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.*, 449 F.3d at 664. The Petition for Rehearing *En Banc* is well-founded because the print publication *The Conservative News* contained no express advocacy, and

therefore cannot as a matter of law be subject to the unlawful coordination rules, and therefore there could be no excessive contribution for which Stockman was convicted.

B. The Panel’s Opinion neglected the test for fraudulent intent and costs of fundraising applicable to review of charitable solicitations, consistent with important First Amendment rights involved.

The proposed *amicus* brief would also help explain why a rehearing *en banc* is needed to cure the Panel Opinion’s complete disregard of the First Amendment’s application to, and protection of, charitable solicitations, and what constitutes fraud in this arena. The First Amendment protects the right to engage in charitable solicitation.

Prior authorities . . . clearly establish that charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment . . . [and] that without solicitation the flow of such information and advocacy would likely cease.

*Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988).

Also in the context of charitable solicitations, “[i]t is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” *Id.* at 801. In declaring unconstitutional a North Carolina statutory requirement that compensated fundraisers disclose certain information about costs of fundraising to donors before

soliciting donations -- for reasons argued by the government that the law was needed to protect donors from fraud due to unseen high costs of fundraising -- the U.S. Supreme Court tells us, “the State may [instead] vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.” *Id.* at 800.

The proposed *amicus* brief explains that the Panel’s Opinion, in its blurred analysis of compensation that flowed to those who solicited donations from two sophisticated donors, does not acknowledge the most recent pronouncement by the U.S. Supreme Court regarding fraud and charitable solicitations, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003). It is clear that “the First Amendment does not shield fraud.” *Id.* at 611-12. But as to costs of fundraising, specifically the compensation paid to solicitors acting on behalf of nonprofit organizations, *Telemarketing Associates* tells us, “[w]hile bare failure to disclose that information directly to potential donors does not suffice to establish fraud, when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.” *Id.* at 606. And, “in a properly tailored fraud action *the State bears the full burden of proof*. False statement alone does not subject a fundraiser to fraud liability,” (*id.* at 620, emphasis added) and “the gravamen of the fraud action in this case is not high costs or fees, *it is particular representations made with intent*

to mislead.” *Id.* at 621 (emphasis added). A cause of action for fraud will survive when those soliciting “attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, *knowing full well that was not the case . . . .* Such representations remain false or misleading, however legitimate the other purposes for which the funds are in fact used.” *Id.* at 622 (emphasis added). Lastly, the “mere failure to volunteer the fundraiser's fee when contacting a potential donee, without more, is insufficient to state a claim for fraud.” *Id.* at 624.

The Panel’s Opinion failed to adequately address the issue of whether the Government proved donations were solicited with intent to defraud, and instead relied on after-the-fact results that individual programs failed or under-achieved, examples of which are “Stockman appears to have promised” one mailing (Panel Op. at 3), and “Stockman failed to mail any ‘voter education material’ as promised.” *Id.* Another example is that the quantity of the direct mail publication *The Conservative News* mailed was less than what was originally intended (Panel Op. at 6), even though the Panel’s Opinion provides no explanation of any fraudulent intent during the solicitations, and fails to recognize the honest, everyday types of decisions about why quantities of direct mail are scaled back. As an unwarranted substitute for the test in *Telemarketing Associates*, the Panel’s Opinion instead focuses in indirect, blurred fashion on compensation to those who

solicited the donations, and ordinary expenditures such as for “airline tickets, fast food, and gasoline.” Panel Op. at 4. Such artificial look-back determinations of intent -- based on success or failure of the projects for which funds were raised -- are contrary to the standards required by the First Amendment for charitable solicitations. The Government must prove “money [was obtained] on false pretenses or by making false statements,” (*National Federation of Blind*, 487 U. S. at 800) and “particular representations made with intent to mislead.” *Telemarketing Associates*, 538 U.S. at 621. Indeed, as the headline of the *Townhall.com* article about this opinion cited above at note 2 states, all nonprofits should be terrified of this opinion.

### **CONCLUSION**

For the foregoing reasons, your *amici* respectfully request that the Court grant this Motion of American Target Advertising, Inc. *et al.* for Leave to File *Amicus* Brief in Support of Appellant’s Petition for Rehearing *En Banc*, and deem the accompanying *amicus* brief, Attached as Exhibit A, filed.

Dated: January 31, 2020

Respectfully submitted,

/s/ Mark J. Fitzgibbons

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## 5<sup>TH</sup> CIR. RULE 27.4 CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for *Amici Curiae* American Target Advertising, Inc. et al. certifies that the following persons and entities as described in Fifth Circuit Rule 27.4 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.

**Appellee:** United States of America; Counsel for Appellee: Carmen Mitchell of the U.S. Attorney's Office, Houston, TX and Robert Heberle of the U.S. Department of Justice, Washington, D.C.

**Appellant:** Stephen E. Stockman; Counsel for Appellant: David Warrington of Kutak Rock, LLP, Washington, D.C.

**Amici:** American Target Advertising, Inc., Manassas, VA; Arthur D. Ally Maitland, FL; Jim Babka, Akron, OH; Ted Baehr, Camarillo, CA; The Honorable Bob Barr, Atlanta, GA; L. Brent Bozell, III, Reston, VA; The Honorable Paul C. Broun, Gainesville, GA; Floyd Brown, Washington State; Tammy Cali, McLean, VA; Kenneth Clark, Galveston County, TX; James N. Clymer, Esq., Lancaster, PA; Chad Connelly, Prosperity, SC; Christopher Craig, Esq., Fairfax, VA; The Honorable Donald J. Devine; Alan P. Dye, Esq., Washington, DC; Bruce Eberle, McLean, VA; Joshua B. Farmer, Esq., Spindale, NC; William J. Federer, Ft. Meyers, FL; Nancy Fullen, Spokane, WA; Rick Green, J.D., Dripping Springs,

TX; Ellen Grigsby, Dallas, TX; Rebecca Hagelin, Placida, FL; Colin Hanna, West Chester, PA; Donna Hearne, St. Louis, MO; Donna Rice Hughes, Great Falls, VA; Sheriff Richard Mack (Ret.), Higley, AZ; James L. Martin, Arlington, VA; Colby May, Esq., Washington, D.C.; The Honorable Bob McEwen, Washington, D.C.; Joseph Miller, Esq., Fairbanks, AK; Malcolm Morris, Houston, TX; Charles Nave, Esq., Roanoke, VA; Pat Nolan, Alexandria, VA; Tom Pauken, Dallas, TX; Larry Pratt, Springfield, VA; Cynthia Ridgeway, Diana, TX; Ron Robinson, Santa Barbara, CA; Reverend Rick Scarborough, D. Min., Lufkin, TX; The Honorable Andrea Seastrand, Grover Beach, CA; The Honorable Rebecca Skinner, Gilmer, TX; Bill Stenger, Big Sandy, TX; The Honorable Charles Taylor, Brevard, NC; Richard A. Viguerie, Manassas, VA; Tim Wildmon, Tupelo, MS.

Counsel for Amici Curiae: Mark J. Fitzgibbons, Manassas, VA.

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

/s/ Mark J. Fitzgibbons  
Mark J. Fitzgibbons  
Counsel for movant *Amici Curiae*  
American Target Advertising, Inc. *et al.*

## CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2020, I electronically filed the foregoing MOTION FOR COURT'S PERMISSION FOR AMICI CURIAE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC* with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Mark J. Fitzgibbons

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## **CERTIFICATE OF COMPLIANCE WITH RULE 27**

In accordance with Federal Rule of Appellate Procedure 27, I certify that the foregoing motion is proportionately spaced using Times New Roman 14-point font and contains 2,247 words, under the limit set by Fed. R. App. P. 29(b).

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# **EXHIBIT A**

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,*

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STEPHEN E. STOCKMAN,  
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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 *Amicus Curiae* of American Target Advertising, Inc. *et al.*\*  
In Support of Appellant’s Petition for Rehearing *En Banc***

---

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*Attorney for Amici Curiae*

January 31, 2020

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The Honorable Bob Barr  
Former Congressman, Georgia  
Founder and President, Liberty Guard

L. Brent Bozell, III  
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Former Chairman, Texas Republican Party  
Former White House legal counsel's staff, Reagan Administration

Larry Pratt  
Executive Director Emeritus  
Gun Owners of America

Cynthia Ridgeway  
Republican Party Upshur County Chairman  
Founder/Former President of Upshur County Conservative Coalition

Ron Robinson  
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Rick Scarborough Ministries

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The Honorable Rebecca Skinner  
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Bill Stenger  
Big Sandy Housing Authority & Big Sandy Ministerial Alliance

The Honorable Charles H Taylor  
U.S. House of Representatives  
Former Member, North Carolina

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

Tim Wildmon  
President, American Family Association

## **CORPORATE DISCLOSURE STATEMENT**

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

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## TABLE OF AUTHORITIES

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be-terrified-of-this-new-court-decision-n2559769](https://townhall.com/columnists/rachelalexander/2020/01/20/all-nonprofits-should-be-terrified-of-this-new-court-decision-n2559769),  
last visited January 22, 2020.....4, 13

## STATEMENT OF INTEREST<sup>4</sup>

American Target Advertising, Inc. (“ATA”) is a direct mail agency that provides services to nonprofit organizations communicating with members of the general public and soliciting contributions nationally. Its chairman, Richard A. Viguerie, pioneered political direct mail in the 1960s and 70s. Its clients include Internal Revenue Code §§ 501(c)(3) and 501(c)(4) nonprofit organizations. 43 *co-amici* are individuals (1) formally associated with nonprofit organizations (other than as just donors), (2) providing services to nonprofits (including legal representation or fundraising), and/or (3) are former elected officials or candidates for elected office. They join this brief because they are concerned for the rights of nonprofit organizations and political committees to communicate, fundraise, build files of supporters, and associate with prospective donors and voters.

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<sup>4</sup> Appellant and Appellee have consented to the filing of this brief. No party’s counsel or other person authored this brief, in whole or in part, or contributed money to fund its preparation or submission.

## SUMMARY OF THE ARGUMENT

The Panel Opinion filed January 10, 2020 upheld the conviction of Appellant Stephen Stockman on multiple counts. Appellant filed a Petition for Rehearing *En Banc* on January 20, 2020. Despite the fact that communications involving campaign finance and charitable solicitation formed predicate bases for Stockman’s convictions, the Panel’s Opinion failed to mention *even once* the First Amendment to the United States Constitution, which protects rights of speech, press, and association in this case. Your *amici* respectfully ask this Court to grant Appellant’s Petition for Rehearing *En Banc* because the Panel’s Opinion (1) erred in deciding a print publication central to Stockman’s conviction was an “expenditure” under the Federal Election Act (“FECA”) governing unlawful coordination, (2) failed to apply the correct standard consistent with the First Amendment in determining fraud in the context of charitable solicitations, and (3) failed to account for the costs of fundraising, including compensation for those who solicit charitable contributions, in its analysis of fraud. The Panel’s Opinion is at odds with United States Supreme Court and Fifth Circuit precedent, and this proceeding involves questions of exceptional importance about criminalizing and therefore chilling innocent First Amendment rights of speech, press, and association.

## ARGUMENT

Your *amici* support Appellant Stephen Stockman's Petition for Rehearing *En Banc* with great respect for the precious donors who associate with nonprofit causes. The Panel's Opinion conflicts with (1) United States Supreme Court and Fifth Circuit precedent about what is an "expenditure" for purposes of the Federal Election Campaign Act ("FECA"), about which the Panel's Opinion erred in determining unlawful coordination between Stockman, as a candidate for federal elected office, and an Internal Revenue Code § 501(c)(4) organization, (2) United States Supreme Court precedent about the Government's requirement to prove fraudulent intent in charitable solicitation communications, which are protected by the First Amendment,<sup>5</sup> and (3) United States Supreme Court precedent that payments of costs of fundraising, including compensation to those who solicit contributions -- even when not disclosed at the point of solicitation -- is not fraud.

That the Petition seeks rehearing on matters of exceptional importance, such as the chilling effect on First Amendment rights, may be adequately summarized

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<sup>5</sup> U.S. Constitution, Amendment I.

by the headline of a January 20, 2020 *Townhall.com* article about the Panel’s Opinion, “All Nonprofits Should be Terrified of This New Court Decision.”<sup>6</sup>

The blistering Panel Opinion found room to mock Mr. Stockman, but failed to mention the First Amendment *even once* despite its being a fundamental and paramount law governing regulation of charitable solicitations and campaign finance.

#### I. INDEED *McCONNELL* DOES NOT APPLY HERE.

Stockman was convicted for an excessive campaign contribution based on unlawfully coordinating expenditures by a § 501(c)(4) nonprofit organization. The nonprofit issued via direct mail a print publication called *The Conservative News* critical of Stockman’s opponent. Stockman was involved in the arrangement of financing for that publication. The Panel Opinion’s deeply flawed analysis of a coordinated expenditure under the FECA, 52 U.S.C. § 30101 *et seq.*, starts at page 10 and ends at page 12 of the Opinion. The Opinion said that Stockman “caus[ed] an excessive campaign contribution in the form of a coordinated expenditure, an

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<sup>6</sup> Rachel Alexander, “All Nonprofits Should be Terrified of This New Court Decision,” *Townhall.com*, January 20, 2020, <https://townhall.com/columnists/rachelalexander/2020/01/20/all-nonprofits-should-be-terrified-of-this-new-court-decision-n2559769>, last visited January 22, 2020.

offense covered by Count 12 of the indictment,” and governed by the FECA. Panel Op. at 10. The Opinion’s Note 7 at page 12 abandons this Court’s precedents in the area of campaign finance law, and instead creates new law by selectively and misleadingly editing a passage from *McConnell v. FEC*, 540 U.S. 93 (2003).

From the seminal opinion *Buckley v. Valeo*, 424 U.S. 1 (1976), “expenditures” for purposes of FECA are only those communications that *expressly advocate* for the election or defeat of a named candidate. As the Petition for Rehearing *En Banc* explains at pages 11 - 12, *Buckley* limited the “express advocacy” test to “expenditures” on communications that use the “magic words,” such as “vote for,” “vote against,” “elect,” “defeat,” and certain other terms,<sup>7</sup> which the Panel’s Opinion acknowledged at page 11 were entirely absent from *The Conservative News* for which Stockman was charged with the crime of excessive contributions via “coordinated” expenditure, a term codified at 52 U.S.C. § 30116(a)(7)(B)(ii).

Since enactment of the Bipartisan Campaign Reform Act of 2002, (McCain–Feingold Act, Pub.L. 107–155, “BCRA”), a second type of expenditures for “electioneering communications” are subject to FECA’s unlawful coordination

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<sup>7</sup> See also, *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006).

rule. The Panel Opinion’s Note 6 accurately describes “electioneering communications” as “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.” Panel Op. at 12.

The print publication that formed the basis for which Stockman was convicted for unlawful coordination, *The Conservative News*, was clearly not an “electioneering communication,” and lacked *Buckley*’s magic words that would otherwise qualify it as an “expenditure.” Therefore, it could not be subject to FECA’s unlawful coordination rules, which should have precluded Count 12 as a matter of law.

The Panel’s Opinion (at 12) reached its errant conclusion only by selectively editing a passage from *McConnell*. That passage read in its entirety, however, provides a distinctly different result than what the Panel’s Opinion reached. As shown below, that passage applied solely to BCRA § 202, which reads:

SEC. 202. COORDINATED COMMUNICATIONS AS CONTRIBUTIONS.

Section 315(a)(7) of the Federal Election Campaign Act of 1971 (2

U.S.C. 441a(a)(7)) is amended--

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(1) by redesignating subparagraph (C) as subparagraph (D);

and

(2) by inserting after subparagraph (B) the following:

“(C) if--

“(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 304(f)(3)); and

“(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering

communication or that candidate's party and as an expenditure by

that candidate or that candidate's party; and”.<sup>8</sup>

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<sup>8</sup> Source: <https://www.congress.gov/107/plaws/publ155/PLAW-107publ155.htm>, last visited January 27, 2020.

The *full* passage from *McConnell*, however, is clearly and inescapably anchored in a congressional decision that “electioneering communications” too may be “expenditures” for purposes of FECA and unlawful coordination:

6. The District Court’s judgment is affirmed insofar as it held that plaintiffs advanced no basis for finding unconstitutional BCRA §202, which amends FECA §315(a)(7)(C) to provide that disbursements for electioneering communications that are coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party, 2 U. S. C. A. §441a(a)(7)(C). That provision clarifies the scope of §315(a)(7)(B), which provides that expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of a candidate or party constitute contributions. BCRA pre-empts a possible claim that the term “expenditure” in §315(a)(7)(B) is limited to spending for express advocacy. Because Buckley’s narrow interpretation of that term was only a statutory limitation on Congress’ power to regulate federal elections, *there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats other coordinated expenditures.*

*McConnell*, 540 U.S. at 202-03 (emphasis added). The Panel Opinion’s selectively editing that passage is unmoored judicial abandon. It invades the legislative function, making new law. Appellant is right: “*McConnell* does not apply here.”

Petition for Rehearing *En Banc* at 13.

II. THE PANEL’S OPINION IGNORES FIRST AMENDMENT PRECEDENT ABOUT FRAUD IN THE COMMUNICATION OF CHARITABLE SOLICITATIONS, AND COSTS OF FUNDRAISING.

The Panel’s Opinion states that “Stockman is alleged to have orchestrated a criminal scheme to obtain charitable donations under false pretenses and to then enrich himself with the proceeds.” Panel Op. at 2. Witnesses Jason Posey and Thomas Dodd “worked with Stockman to raise money for various ‘nonprofit’ entities between 2010 and 2014.” *Id.* The Panel’s Opinion, however, neglected the tests for fraudulent intent and costs of fundraising required for review of charitable solicitations consistent with important First Amendment rights involved. As a starting point, the First Amendment protects the right to engage in charitable solicitation.

Prior authorities . . . clearly establish that charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment . . . [and] that without solicitation the flow of such information and advocacy would likely cease.

*Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988).

Also in the context of charitable solicitations, “[i]t is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” *Id.* at 801. In declaring unconstitutional a North Carolina statutory requirement that compensated fundraisers disclose certain information about costs of fundraising to donors before

soliciting donations -- for reasons argued by the government that the law was needed to protect donors from fraud due to unseen high costs of fundraising -- the U.S. Supreme Court tells us, “the State may [instead] vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.” *Id.* at 800.

The Panel’s Opinion ignored the proper analysis of (1) the requirement that the Government prove fraudulent intent in the solicitation communications, and (2) how fundraising costs and compensation of those who solicited donations from two sophisticated donors (Mr. Rothschild, see, Panel Op. at 2 – 4, and Mr. Uihlein, see, Panel Op. at 4 – 6) are part of these protected rights. Instead of reviewing whether the Government proved fraudulent intent in the solicitation communications, the Panel’s Opinion relies on the failure or underachievement of programs for which donations were solicited, thereby creating a substitute for evidence of fraud and intent at the time of solicitation. Your *amici* respectfully argue that the Panel Opinion’s errors on these issues would have far-reaching and dangerous effects on First Amendment rights of nonprofit organizations, and are subject to *de novo* review.<sup>9</sup>

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<sup>9</sup> Appellant couches his claim about the need for *de novo* review about jury instructions relating to §§ 501(c)(3) and 501(c)(4) organizations (“The Government used these instructions as

The Panel’s Opinion failed to acknowledge the most recent pronouncement by the U.S. Supreme Court regarding fraud and charitable solicitations, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003). It is clear that “the First Amendment does not shield fraud.” *Id.* at 611-12. But as to costs of fundraising, including compensation paid to solicitors acting on behalf of nonprofit organizations, *Telemarketing Associates* tells us, “[w]hile bare failure to disclose that information directly to potential donors does not suffice to establish fraud, when nondisclosure is accompanied by *intentionally misleading statements designed to deceive the listener*, the First Amendment leaves room for a fraud claim.” *Id.* at 606 (emphasis added). And, “in a properly tailored fraud action *the State bears the full burden of proof*. False statement alone does not subject a fundraiser to fraud liability,” (*id.* at 620, emphasis added) and “the gravamen of the fraud action in this case is not high costs or fees, it is particular representations *made with intent to mislead.*” *Id.* at 621 (emphasis added). A cause of action for fraud will survive when those soliciting “attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, *knowing full well that was not the case* . . . . Such representations remain false or misleading, however legitimate the other

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a substitute for the specific intent to defraud . . . .” Petition for Rehearing *En Banc* at 16), and your *amici* respectfully supplement that claim with these First Amendment concerns.

purposes for which the funds are in fact used.” *Id.* at 622 (emphasis added).

Lastly, the “mere failure to volunteer the fundraiser's fee when contacting a potential donee, without more, is insufficient to state a claim for fraud.” *Id.* at 624.

The Panel’s Opinion failed to adequately address the issue of whether the Government proved donations were solicited with intent to defraud, and instead relied on after-the-fact results that individual programs failed or under-achieved, examples of which are “Stockman appears to have promised” one mailing (Panel Op. at 3), and “Stockman failed to mail any ‘voter education material’ as promised.” *Id.* Another example is that the quantity of the direct mail publication *The Conservative News* mailed was less than what was originally intended (see, Panel Op. at 6), even though the Panel’s Opinion provides no explanation of any fraudulent intent. The Opinion failed to recognize the honest, everyday types of decisions nonprofits make about why quantities of direct mail are scaled back, including (1) costs of direct mail exceed what can be financed, (2) over-booked print vendors, (3) the unavailability of lists of names to receive the mailing, and (4) decisions that the direct mail copy is less effective than desired.

Also as a substitute for the test in *Telemarketing Associates*, the Panel’s Opinion instead focuses in indirect fashion on compensation to those who solicited the donations, and ordinary expenditures such as for “airline tickets, fast food, and

gasoline.” Panel Op. at 4. Such artificial look-back determinations of fraud -- based on success or failure of the projects for which funds were raised -- are contrary to the standards required by the First Amendment for charitable solicitations and direct mail realities. The Government must prove “money [was obtained] on false pretenses or by making false statements,” (*National Federation of Blind*, 487 U. S. at 800) and “particular representations made with intent to mislead.” *Telemarketing Associates*, 538 U.S. at 621. Indeed, as the headline of the *Townhall.com* article cited above (see note 3) warns, all nonprofits should be terrified of the Panel’s Opinion.

## CONCLUSION

First Amendment rights of speech, press, and association have been harmed by the Panel's Opinion. The severity of context of a criminal conviction will chill First Amendment rights of others, and your *amici* respectfully urge this Court to grant the Petition for Rehearing *En Banc* for the reasons stated herein.

Dated: January 31, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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**CERTIFICATE OF COMPLIANCE WITH RULES 29 AND 32(A)**

In accordance with Federal Rule of Appellate Procedure 29, 32(a)(5), (a)(6), (a)(7)(B), and (a)(7)(C), I certify that the foregoing brief is proportionately spaced using Times New Roman 14-point font and contains 2,594 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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