

No. 18-20780

**In the United States Court of Appeals
For the Fifth Circuit**

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

STEPHEN E. STOCKMAN,
Defendant - Appellant.

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

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

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July 30, 2019

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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 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.

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; Pastor Chuck Baldwin, Kila, Montana; Bob Barr, Atlanta, GA; L. Brent Bozell, III, Reston, VA; Floyd Brown, Washington State; Ken Campbell, Lincoln, CA; Sandy Campbell, Lincoln, CA; James N. Clymer, Esq., Lancaster, PA; Chad Connelly, Prosperity, SC; The Honorable Donald J. Devine; William J. Federer, Ft. Meyers, FL; Ellen Grigsby, Dallas, TX; Rebecca Hagelin, Placida, FL; Colin Hanna, West Chester, PA; Charles Daniel

Key, Former Oklahoma state representative; James L. Martin, Arlington, VA; Jenny Beth Martin, Woodstock, GA; Colby May, Esq., Washington, D.C.; The Honorable Bob McEwen, Washington, D.C.; Barry Meguiar, Irvine, CA; Joseph Miller, Esq., Fairbanks, AK; Malcolm Morris, Houston, TX; Pat Nolan, Alexandria, VA; Richard Norman, Leesburg, VA; Reverend Rick Scarborough, D. Min., Lufkin, TX; Richard A. Viguerie, Manassas, VA.

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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
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SUMMARY OF THE ARGUMENT

The Answering Brief for the United States relies heavily on a U.S. Supreme Court opinion about the Bipartisan Campaign Reform Act for its argument that Appellant unlawfully coordinated third-party expenditures by a tax-exempt organization resulting in illegal campaign contributions. That opinion, however, addressed “electioneering communications” only, which are certain broadcast ads within 30 or 60 days of an election, and has no bearing on this case since those types of communications were not used. The Answering Brief also objects to an argument in the Brief of *Amici Curiae* American Target Advertising, Inc. et al. (“*Amici* Brief”) that the Appellant was improperly barred at trial from mentioning Lois Lerner, the once-head of the Tax-Exempt Division of the Internal Revenue Service. But the Lois Lerner scandal had bearing on the campaign finance and tax-exempt laws at issue in this case that were addressed by Appellant in his principal Brief. That scandal involved the targeting of conservatives for unlawful enforcement of tax-exempt laws, including the specter of prosecution, where lawful political speech was involved. Therefore, the issue raised in the *Amici* Brief properly supplements the arguments of Appellant, which is the proper role of an *amicus curiae* brief.

ARGUMENT

I. *McCONNELL* DOES NOT APPLY

Among the important issues for the correct disposition of this case that *Amici* wish to address in this reply brief is that the Answering Brief's reliance on *McConnell v. FEC*¹ for purposes of the Government's case that Appellant Steve Stockman unlawfully coordinated with a third party, thus allegedly creating an illegal contribution. The Government incorrectly states the scope of that decision and the underlying statutory law. *McConnell* simply did not do what the Government argues.

Appellant was convicted for allegedly engaging in a conspiracy to fraudulently raise money for what the Government argued at trial was an "independent expenditure" on behalf of his senate campaign committee, which the Government further argued was unlawfully coordinated with a tax-exempt Internal Revenue Code § 501(c)(4) organization, which therefore allegedly resulted in an illegal campaign contribution to Appellant Steve Stockman. Your *Amici* argued in their brief that a printed and mailed publication called *The Texas Conservative*

¹ 540 U.S. 93 (2003).

News, which the Government referenced repeatedly at trial by calling it an “independent expenditure” triggering the unlawful coordination rules (and thus allegedly making it an illegal campaign contribution), did not contain the “magic words” expressly advocating election or defeat of a candidate under the test in *Buckley v. Valeo*, 424 U.S. 424 (1976). *Buckley*’s “magic words” test remains the standard for independent expenditures even as recognized by the Fifth Circuit. Am. Cur. Br. 16-23. Because there was no “express advocacy,” thus no “independent expenditure,” as a matter of law there was no unlawful coordination, thus no illegal campaign contribution.

In its Answering Brief, the Government seeks to make new law via prosecution not supported by statute or case law. *McConnell*, on which the Government relies for its argument, deals with express advocacy as applied only to provisions 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 by adding and defining the term “electioneering communications,” which are certain broadcast ads made within 30 or 60 days of a federal election.² The discussion of “express advocacy” and “coordinated communications” in *McConnell* to which the

² See *McConnell*, 540 U.S. at 191-193.

Government incorrectly alludes generally in its Answering Brief, and specifically at pages 49-51, arose solely in the context of “plaintiff’s challenge to BCRA’s use of the term ‘electioneering communication.’” *McConnell*, 540 U.S. at 190. In other words, BCRA made one test of express advocacy for broadcast ads called “electioneering communications,” but did not amend the law as to “independent expenditures,” thus the *Buckley* test for “independent expenditures,” with its “magic words” of “express advocacy,” remains wholly intact. Since *McConnell* did nothing to change the law with respect to “express advocacy” in the context of “independent expenditures,” it does not govern or apply to the printed direct mail newspaper called *The Texas Conservative News* at issue in this appeal, which lacked the magic words under the *Buckley* test (see Am. Cur. Br. at 17). That direct mail publication also was clearly not an “electioneering communication” to which *McConnell* exclusively applies for purposes of the unlawful coordination rules.

To reiterate the point -- because campaign finance law has many terms and can be confusing – the references to “express advocacy” addressed in the *McConnell* opinion apply to only to “electioneering communications,” which communications were never at issue in this case. The Government quotes *McConnell* that “the express advocacy restriction was an endpoint of statutory

interpretation,” (Answering Brief at 50, citing *McConnell*, 540 U.S. at 190) but that reference in *McConnell* was made in the face of a constitutional challenge limited expressly to electioneering communications, and was for purposes of upholding the new rules created by BCRA *solely for electioneering communications*. As the *McConnell* opinion makes clear five pages later in discussing “BCRA § 202’s Treatment of ‘Coordinated Communications’ as Contributions,” “*Buckley*’s narrow interpretation of the term ‘expenditure’ was not a constitutional limitation on Congress’ power to regulate federal regulations. Accordingly there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats other coordinated expenditures,” i.e., independent expenditures with the magic words. *McConnell*, 540 U.S. at 195. *McConnell* did not change the extant rules for independent expenditures, and the Government cites no statutory or case law that it did. None appears to exist.

The clarity and importance of this issue for Appellant, your *Amici*, and hopefully the Court necessarily depend on understanding that BCRA created a new test for “electioneering communications,” which are broadcast ads only, but left entirely intact the old test for “independent expenditures,” which would encompass printed materials were they to contain the magic words. (“Section 202 of BCRA amends FECA § 315(a)(7)(C) to provide that disbursements for ‘electioneering

communication[s]’ that are coordinated with a candidate or party will be treated as contributions to . . . that candidate or party.” *McConnell*, 540 U.S. at 202.³)

Neither BCRA nor *McConnell* changed the express advocacy magic words test for other expenditures, and *The Texas Conservative News* did not contain “magic words” expressly advocating election or defeat.

Since *McConnell*, the statutory coordination rules apply only to (1) independent expenditures, which require the “magic words” from *Buckley*, and (2) electioneering communications. Neither type of communication was present in this case. The Government and certain regulators of campaign finance or nonprofit communications may not like this chasm for coordinated communications created

³ Indeed, n.15 in *Amici*’s Brief (Am. Cur. Br. at 23) was a visible enough road sign that should have lead the government to the right answer:

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

by Congress, but they certainly may not fill it in using the criminal prosecution system.

Both the Appellant and your *Amici* have argued that tax-exempt law and campaign finance law are complex (see Brief of Appellant at 27-28, *Amici*'s Brief at 2), so much so that these areas of law are specialty practices (see *Amici*'s Brief at 5). Indeed, the fine lawyers for the Government, as prosecutorial generalists, were confused about its terms and applications, which made it easier for the jury to be confused in application of facts and testimony, and indeed the Government's misunderstanding of the law helped create that confusion. It remains, however, that the Government's case against Appellant Stockman as to the issues of "express advocacy," "independent expenditures," and unlawful coordination were incorrectly argued by the Government, resulting in grounds for reversal.

The Government's reliance on *McConnell* entirely lacks merit. Such plain error about the law by the Government -- especially in the context of a criminal prosecution on which it achieved a severe conviction -- is worthy of full and exacting attention by the Court in considering reversal. Additionally, the solicitation of donations from Mr. Uhlein for this project not only were for legal expenditures contrary to what the Government has argued, but the Government's Answering Brief failed to address why its case can survive the test for fraudulent

solicitations articulated under *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), which your *Amici* have already argued the Government failed to do. See Am. Cur. Br. at 7, 8, and 14.

II. AMICI'S REFERENCE TO ISSUES FORECLOSED AT TRIAL SUPPLEMENTS APPELLANT'S PRINCIPAL BRIEF

Another issue your *Amici* wish to dispute via a reply brief is the argument made at 33-34, n.10 of the Answering Brief that “Stockman did not make [an] argument in his opening brief” and therefore waived it for purposes of the issue argued by your *Amici*. This applies to *Amici*'s argument that a Motion in Limine restricted Appellant's “full Sixth Amendment defense rights at trial to refer to Lois Lerner” (Am. Cur. Br. at 16), the controversial former head of the Tax-Exempt unit at the Internal Revenue Service. For its objection, the Government cites Am. Cur. Br. at 15-16 & n.7 -- but not n.8 nor n.9 at Am. Cur. Br. 16, which supplemented *Amici*'s argument on this issue by relating it to the animus of the once-powerful, now-disgraced Ms. Lerner and her colleagues toward the confluence of conservative nonprofits, money, and politics. These issues argued by your *Amici* are entirely related to the legal arguments in Appellant's Brief because Ms. Lerner was a central figure in a national scandal involving the misapplication of tax-exempt and campaign finance laws -- not at all unlike certain arguments advanced

by the Government in this case -- especially with regard to small-government conservative critics of government such as Appellant Stockman. For example:

Lerner knocks the “whacko wing” of the Republican Party and conservative radio shows. [House Ways and Means Chairman Dave] Camp said in a statement that he hopes the released emails urge the Justice Department to “aggressively pursue this case” and appoint a special counsel. In May 2013, Lerner acknowledged that the IRS chose groups with “tea party” in their name for additional review in determining their tax-exempt status as social welfare groups.⁴

Amici’s argument supplements central arguments made by Appellant as to the misguided prosecution where the Government was wrong about matters involving tax-exempt and campaign finance law.⁵ Especially given the errors of

⁴ Alex Rogers, *Emails: Former IRS Official Lois Lerner Called Republicans 'Crazies' and '—holes'*, Time.com, July 30, 2014, <https://time.com/3059918/lois-lerner-republicans/> (Last visited July 26, 2019). The various investigations of Ms. Lerner even found emails by her in which she refers to Republicans as “crazies” and “assholes.” Id.

⁵ It is “appropriate to use an amicus curiae brief to amplify or supplement the main legal and factual arguments presented in a party’s brief.” Sarah F. Corbally and Donald C. Bross, *A Practical Guide For Filing Amicus Briefs In State Appellate Courts* (2001), https://cdn.ymaws.com/naccchildlaw.site-ym.com/resource/resmgr/amicus_curiae/amicuspracticalguide.pdf (last visited July 25, 2019); “An amicus brief should supplement, not duplicate, a party’s brief.” Justice Craig T. Enoch (Ret.) and Robert J. Witte, *A Business Perspective on Amicus Briefing* (2019), citing Mary-Christine Sungaila, *Effective Amicus Practice Before the United States Supreme Court: A Case Study*, SOUTHERN CALIFORNIA REVIEW OF LAW AND WOMEN'S STUDIES, Spring 1999, Pg. 188,

tax-exempt and campaign finance law by the Government in its prosecution, which issues were argued in Appellant’s Brief, the order granting the Government’s motion in limine foreclosed the presentation and development of potentially game-changing facts and arguments about issues that Appellant did indeed expressly argue in his Brief,⁶ but for which the record was hampered by the suppression of Appellant’s defense. While the trial court is accorded broad discretion about admission of evidence, Stockman was unjustly limited in defending himself in the criminal trial where the issues were tied to those advanced by Ms. Lerner and a national scandal involving her abuse of power involving tax-exempt law, campaign finance law, and unlawful politically-motivated targeting of conservatives.

<http://apps.americanbar.org/buslaw/newsletter/0029/materials/pub/51.pdf> (last visited July 25, 2019); “The classic role of the amicus curiae is to assist in a case of general public interest, supplement the efforts of counsel, and draw the court’s attention to law that may otherwise escape consideration.” *Plaintiff’s Response to Microsoft’s Objection to Participation by Professor Lawrence Lessig as an Amicus Curiae* (December 20, 1999), citing *Miller-Wohl Co., Inc. v. Commissioner of Labor and Indus.*, 694 F.2d 203, 204 (9 Cir. 1982); see also *New England Patriots Football Club, Inc., v. University of Colorado*, 592 F.2d 1196, 1198 n. 3, <https://www.justice.gov/atr/file/690021/download> (last visited July 25, 2019).

⁶ “Improper and Unnecessary Instructions on 501(c)(3) and (c)(4) Organizations Prejudiced Stockman ...” Brief of Appellant at 29. “Most of Stockman’s activity in this case occurred in the context of 501(c)(3) and (c)(4) organizations. These [disputed jury] instructions served as backdrop for the entire trial.” *Id.* at 30 (emphasis added). “In closing argument, the Government repeatedly referred to ‘sham non-profits.’” *Id.* at 34.

The facts and arguments that Appellant was foreclosed from developing and using in his criminal defense are or may have been consequential. For example, when he was a Member of Congress, Appellant had “filed a motion directing congressional police to arrest Lois Lerner . . . for contempt of Congress.” Rachael Bade, *Stockman pushes for Lerner arrest*, Politico (July 10, 2014).⁷ Conversely as reported in 2014, Lerner’s emails showed she “was in contact with the Department of Justice in May 2013 about whether tax exempt groups could be criminally prosecuted for ‘lying’ about political activity.”⁸ Lerner’s emails are reported as her saying, “there are several groups of folks from the FEC world that are pushing tax fraud prosecution for c4s who report they are not conducting political activity when they are (or these folks think they are).” *Id.* The emails indicate a broader network of participants in the scandal including the Elections Crimes Branch at the Department of Justice (which by jurisdiction would have been involved in the indictment of Stockman) and with Democrat Members of Congress:

⁷ <https://www.politico.com/story/2014/07/steve-stockman-lois-lerner-irs-108783> (last visited July 23, 2019).

⁸ Katie Pavlich, *BREAKING: New Emails Show Lois Lerner Was in Contact With DOJ About Prosecuting Tax Exempt Groups*, Townhall (April 16, 2014), https://townhall.com/tipsheet/katiepavlich/2014/04/16/breaking-new-emails-show-lois-lerner-contacted-doj-about-prosecuting-tax-exempt-groups-n1825292?utm_source=TopBreakingNewsCarousel&utm_medium=story&utm_campaign=BreakingNewsCarousel (last visited July 23, 2019).

I got a call today from Richard Pilger Director Elections Crimes Branch at DOJ ... He wanted to know who at IRS the DOJ folks [sic] could talk to about Sen. Whitehouse idea at the hearing that DOJ could piece together false statement cases about applicants who "lied" on their 1024s -- saying they weren't planning on doing political activity, and then turning around and making large visible political expenditures. DOJ is feeling like it needs to respond, but want to talk to the right folks at IRS to see whether there are impediments from our side and what, if any damage this might do to IRS programs. I told him that sounded like we might need several folks from IRS.

Id. Issues about political speech, election law, and tax-exempt entities within the Lois Lerner scandal are of course prominent in Appellant's brief. Indeed, as reported this year, some "100 right-of-center groups wrongfully targeted for their political beliefs under the Obama administration's Internal Revenue Service" received settlement checks in a class-action lawsuit. M.D. Kittle, *Conservative Groups Targeted in Lois Lerner's IRS Scandal Receive Settlement Checks*, The Daily Signal (January 11, 2019), <https://www.dailysignal.com/2019/01/11/conservative-groups-targeted-in-lois-lerners-irs-scandal-receive-settlement-checks/> (last visited July 25, 2019).

Another example is that Appellant was prohibited from using the name "Lois Lerner" to address denial by the Internal Revenue Service of his application for status as an Internal Revenue Code § 501(c)(3) tax-exempt organization. ROA 2201.

Appellant argued major elements of the Government’s case were based in erroneous arguments about use of tax-exempt entities for “political” communications, what constituted “political” for purposes of tax-exempt law, and the interplay between tax-exempt organizations and political expenditures. It was Ms. Lerner who both sparked and attempted preemptive damage control for congressional hearings about IRS abuse of conservative nonprofit organizations under her watch when she was quoted as stating at an American Bar Association meeting:

The problem in the (c)(4) area is that the kind of activity the organizations were doing is okay for (c)(4)s but it can’t be their primary activity. So that weighing and balancing is a little different than when we have a (c)(3) that says you can’t do any political activity. That’s a pretty easy question. So I guess my bottom line here is that we at the IRS should apologize for that, it was not intentional, and as soon as we found out what was going on, we took steps to make it better and I don’t expect that to reoccur.⁹

And as reported in *The Weekly Standard*, “[p]erhaps no other IRS official is more intimately associated with the tax agency’s growing scandal than Lois Lerner, director of the IRS’s Exempt Organizations Division.”¹⁰ There even was known

⁹ Rick Hasen, *Transcript of Lois Lerner’s Remarks at Tax Meeting Sparking IRS Controversy*, electionlawblog.org (May 11, 2013), <https://www.electionlawblog.org/?p=50160> (last visited July 23, 2019).

¹⁰ Mark Hemingway, *IRS’s Lerner Had History of Harassment, Inappropriate Religious Inquiries at FEC*, *The Weekly Standard* (May 20, 2013),

prosecutorial interaction between the Justice Department and Lerner regarding “nonprofit groups conducting political activity.”¹¹

Indeed, Appellant was foreclosed from arguing that the Government’s entire case -- rife with errors about the law governing campaign finance and political advocacy by tax-exempt organizations -- may have been an extension of scandalous positions advanced by once-powerful Lerner. Or, perhaps the case was even retributinal towards the Appellant for his legislative and legal aggression towards Lerner and those around her. And, whether by correlation or causation, Lerner’s acting in conjunction with some officials within the Department of Justice about these issues were certainly relevant to the case. Appellant was prohibited from mentioning Lerner’s name in ways that would or could have aided a fairer trial about issues raised in Appellant’s Brief -- issues indeed tied at the hip to the core arguments raised in Appellant’s Brief. The Government’s objection is

<https://www.weeklystandard.com/mark-hemingway/irss-lerner-had-history-of-harassment-inappropriate-religious-inquiries-at-fec> (last visited July 23, 2019).

¹¹ “Republicans on a House oversight panel say the Justice Department asked former Internal Revenue Service official Lois Lerner in 2010 to help them build criminal cases against nonprofit groups conducting political activity.” Susan Ferrechio, *GOP: Justice Department pushed Lois Lerner to help build criminal case against nonprofits*, WashingtonExaminer.com, May 22, 2014, <https://www.washingtonexaminer.com/gop-justice-department-pushed-lois-lerner-to-help-build-criminal-case-against-nonprofits> (last visited July 26, 2019).

therefore misplaced since this issue argued by your *Amici* is certainly consistent with, supplemental to, and even integral to Appellant's arguments for reversal.

As argued by *Amici* in their primary Brief, the Government used "innocent, exculpatory, and even wise scenarios" employed by Appellant and his colleagues (Am. Cur. Br. at 23), including the unrestricted donation by Mr. Uihlein to the Center for American Futures (Am. Cur. Brief at 8-14) -- which were solicited legally for legal political advocacy protected by the First Amendment. Throughout this case the Government misused innocent acts of Appellant and his colleagues to spin fantastical tales of guilt that confused and misled the jury. The Jury Instructions reflected failures of the Government to properly articulate the law, prejudicing consideration of facts that on their face were innocent acts. Yet the Appellant was prohibited at trial from raising the credible specter that there were improprieties of a cabal or joint menace among Lois Lerner and some within the Department of Justice to target conservatives for exactly the type of legal, tax-exempt expenditures in the political sphere at issue in this case.

Additionally, the public interest and *Amici*'s interests are served when the courts do not act to chill First Amendment rights to criticize government officials, or identify government officials associated with particular policies or legal scandals. The Government's Motion in Limine certainly gives at least the

appearance that it sought to limit testimony that would place a justifiably dark cloud of greater reasonable doubt over its case. That this happened in the context of a criminal trial focused on nonprofit political speech and fundraising, where First Amendment rights are highly in play, is even more disturbing to your *Amici*.

CONCLUSION

The Government misled the jury by creating confusion about complex law, and by contorting innocent acts to appear suspicious in that poisoned context. The Appellant was also improperly barred from developing facts and arguments about campaign finance and tax-exempt law -- and scandalous, unlawful targeting of outspoken, politically active conservatives like him -- that could have provided the reasonable doubt for the jury to acquit. Steve Stockman's conviction should be reversed.

Dated: July 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 30, 2019, I electronically filed the foregoing 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 RULE 32(A)

In accordance with Federal Rule of Appellate Procedure 32(a)(5), (a)(6), (a)(7)(B), and (a)(7)(C), I certify that the foregoing brief is proportionately spaced using Times New Roman 14-point font and contains 3,547 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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