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, NO. 4:17-CR-00116-2, HON. LEE H ROSENTHAL

AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF REHEARING *EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The case number is No. 18-20780. The case is styled as *United States v. Stockman*. Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the appellant's list of persons and entities having an interest in the outcome of this case – as supplemented with respect to *amici curiae* by the list provided by *amicus* American Target Advertising, Inc., *et al.* – is complete, to the best of the undersigned counsel's knowledge. The undersigned counsel also certifies that *amicus curiae* Eagle Forum Education & Legal Defense Fund is a nonprofit corporation with no parent corporation, and that no publicly held corporation owns ten percent or more of its stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: January 31, 2020

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion.[1] Founded in 1981, EFELDF has consistently defended adherence to the Constitution as written, including robust protection of speech under the First Amendment. For these reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Former U.S. Rep. Stephen E. Stockman challenges his federal conviction on two aspects of the charges against him: (1) one count of accepting a "coordinated expenditure" under the Federal Election Campaign Act, 52 U.S.C. §§ 30101-31046 ("FECA"), in excess of the FECA's annual cap on contributions, *see* 52 U.S.C. § 30116(a)(1)(A); and (2) eight counts of mail and wire fraud predicated on the allegedly fraudulent intent to collect money for a charity without the intent to implement the projects pitched to the donors contemporaneously with the donations. *See* 18 U.S.C. §§ 1341, 1343. A merits panel affirmed conviction on these counts, and Stockman has petitioned for rehearing *en banc*.

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[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), (b)(4), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Constitutional Background

The First Amendment protects speech, association, and petition rights from governmental restriction, U.S. CONST. amend. I, which the Supreme Court has held to require heightened protections for political speech and association. *Buckley v. Valeo*, 424 U.S. 1, 75 (1976). Moreover, the Supreme has established an overbreadth doctrine for First Amendment cases that allows challenging not only injury but also a chill on protected First Amendment activity, *Virginia v. Hicks*, 539 U.S. 113, 124 (2003); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), and extends review to not only those whose speech rights are impacted by a governmental restriction but also those whose speech might lawfully be proscribed if "there [is] a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (emphasis added). Finally, while the Supreme Court's precedents are extra protective of First Amendment rights, the entire enterprise of constitutional litigation includes an avoidance doctrine, under which courts "are *obligated* to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (interior quotation marks omitted, emphasis added); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013).

Statutory Background

The election statutes at issue here are FECA and the Bipartisan Campaign

Reform Act, PUB. L. NO. 107-155, 116 Stat. 81 (2002) ("BCRA" or the "McCain-Feingold Act").[2] As indicated, in pertinent part, FECA sets an annual cap on contribution limits. 52 U.S.C. § 30116(a)(1)(A). The statutory issue under FECA is whether to count the money collected from two donors by Life Without Limits – a non-profit under § 501(c)(3) of the Internal Revenue Code – and its Congressional Freedom Foundation project as FECA contributions to Stockman's campaign. That analysis requires parsing FECA definitions for contributions, expenditures, and coordinated expenditures.

In addition, this appeal also concerns the mail and wire fraud statutes, both of which include as an element a "scheme or artifice to defraud" a third party. *See* 18 U.S.C. §§ 1341, 1343. For both statutes, the elements are "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira v. U.S.*, 347 U.S. 1, 8 (1954).

Factual Background

EFELDF adopts Stockman's statement of the facts. Pet. at 4-9.

SUMMARY OF ARGUMENT

Under *In re Cao*, 619 F.3d 410, 418 (2010) (*en banc*), this Court recognized

[2] As Stockman explains, however, BCRA is not truly at issue because, as relevant here, BCRA added only campaign-finance restrictions with respect to "electioneering communications," Pet. 14-15, and it is undisputed that the charges against Stockman do not involve electioneering communications.

that FECA does not apply to non-campaign funding, consistent with *Buckley* and the need to cabin the FECA to the federal interest in ensuring elections free from corruptions or the appearance of corruption. Either *Cao* held that the funds here are exempt from FECA or this Court should revisit the issues left undecided in *Cao* (Section I). With respect to jury instructions that misstate or confuse a statutory element of a crime, the defendant is entitled to de novo review of the jury instruction (Section II). Finally, this Court should consider all amicus *arguments* made in support of the *issues* that Stockman raises because Stockman could rely on those arguments in the Supreme Court – even if no one raised them here – and this Court should not reflexively exclude arguments that the Supreme Court would consider (Section III).

ARGUMENT

I. THE *EN BANC* SHOULD REVIEW THE CIRCUMSTANCES IN WHICH COORDINATED EXPENDITURES TRIGGER FECA.

In *Cao*, the *en banc* Court previously addressed coordinated expenditures under FECA, *Cao*, 619 F.3d at 418, which provides a starting point for the *en banc* Court to assess the need to revisit these issues. As explained below, Stockman's case provides a good vehicle for this Court to revisit an important First Amendment issue.

In *Cao*, the Court rejected as frivolous the argument that Congress lacked the constitutional power to cap coordinated expenditures for matters "*other than* (a) communications containing express advocacy, (b) targeted federal election

activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature[.]" *Cao*, 619 F.3d at 417 (emphasis added). The quoted text represents the fifth question certified to this Court in *Cao*. *Id.* Significantly, the *en banc* Court rejected that argument under FECA's judicial review provision, now codified at 52 U.S.C. § 30110. *See id.* The argument was frivolous not because Congress *had* the constitutional authority but because FECA did not purport to regulate coordinated expenditures outside the four carve-outs of the fifth certified *Cao* question: "*Buckley* does not permit non-campaign-related speech to be regulated." *Cao*, 619 F.3d at 418 (*citing Buckley*, 424 U.S. at 43-44 & n.52; *Shays v. FEC*, 528 F.3d 914, 917 (D.C. Cir. 2008)). In other words, the *Cao* majority did not think that FECA applied in the circumstances challenged in *Cao*.[3]

The panel and Stockman appear to agree that the coordinated expenditures at issue do not count as "communications containing express advocacy" (*i.e.*, the first of the four categories excluded by the fifth certified *Cao* question). *Compare* Pet. at 10-13 *with* Slip Op. at 11 ("clear and uncontested that *The Conservative News* does not contain direct instructions to 'vote for' or 'defeat' any candidate"). Instead, what divides the panel and Stockman appears to be the panel's insistence that coordinated

[3] This narrow interpretation results from FECA's reliance on the appearance of corruption *in elections* to justify intruding upon protected speech under strict scrutiny, which produced the narrow interpretation limiting FECA to campaign-related speech.

expenditures can qualify as contributions, rather than as expenditures. *See* Slip Op. at 11-12 (citing *McConnell v. FEC*, 540 U.S. 93, 202 (2003)); *Buckley*, 424 U.S. at 46 ("such controlled or coordinated expenditures are treated as contributions rather than expenditures under [FECA]"). For the panel to be correct under *Cao*, however, the donations in question not only must be campaign related, *Cao*, 619 F.3d at 418 (FECA does not apply to non-campaign-related speech), but also must fall into one or more of the three remaining categories excluded by the fifth certified *Cao* question (namely, targeted federal election activity, disbursements equivalent to paying a candidate's bills, or distributing a candidate's campaign literature). *Cao*, 619 F.3d at 417-18. On the facts of this case, however, the donations in question are neither campaign-related funds nor so directly tied to Stockman's campaign (*e.g.*, paying his bills or distributing his campaign literature) as to trigger FECA.

As then-Chief Judge Jones recognized in her partial dissent in *Cao*, the issue of how FECA constitutionally applies to coordinated expenditures is more nuanced than the panel's treatment of the issue:

> The Supreme Court, the district court, the plaintiffs and the FEC all recognize that "coordinated expenditures" range on a spectrum from those that are more independently communicative of a supporter's views to those more like money contributions, which *Buckley v. Valeo* characterizes as mere symbolic expression. The majority employs a meat cleaver instead of a scalpel in the most sensitive constitutional area of political speech.

Cao, 619 F.3d at 440-41 (Jones, C.J., concurring in part and dissenting in part).

(footnotes omitted). Amicus EFELDF respectfully submits that the en banc Court should revisit the issue of FECA's application to the types of coordination at issue here, this time with the scalpel and sensitive to the issues of protected First Amendment activity. In addition, Judge Clement wrote a partial dissent, indicating that she "would go further than the Chief Judge in fashioning a standard that protects political speech that is not the functional equivalent of a campaign contribution." *Cao*, 619 F.3d at 451. *Amicus* EFELDF respectfully submits that – assuming arguendo that *Cao* did not already decide this case in Stockman's favor – the paths shown by the two partial dissents in *Cao* should guide this Court, now that the issues are squarely presented.

Indeed, Judge Jolly – who authored the panel opinion in *Stockman* – did not disagree with Chief Jones and Judge Clement in *Cao*:

> There is much to admire in Chief Judge Jones's dissent, and if I agreed that the argument she addresses was the question that plaintiffs were actually presenting for decision, I would concur in her opinion. Judge Clement has written clearly but broadly. In my view, she does not merely challenge the statute's express provisions that effectively bar a Party from coordinating its efforts with the campaign of a candidate, but also the Supreme Court's ruling that essentially upholds this provision. *Both she and Chief Judge Jones ultimately may be correct. But, in my opinion, not today.*

Cao, 619 F.3d at 435 (Jolly, J., concurring) (emphasis added). Instead, he indicated that the questions that their partial dissents addressed were not presented in *Cao*.

Amicus EFELDF respectfully submits that the questions are presented here.

Finally, because the First Amendment context implicates not only the canon of constitutional avoidance but also overbreadth doctrine, the argument for *en banc* review is even stronger:

> Because the … advertisements do not contain explicit words exhorting viewers to take specific electoral action for or against the featured candidates, we hold that the advertisements do not constitute "express advocacy" under the bright line approach adopted above. As a consequence, the district erred in holding that the advertisements are subject to mandatory disclosure[.]

Chamber of Commerce of the United States v. Moore, 288 F.3d 187, 198 (5th Cir. 2002). A bright-line approach is needed here, and it would exonerate Stockman.

II. THE JURY INSTRUCTIONS WARRANT *DE NOVO* REVIEW.

The second issue that Stockman raises is unrelated to the first but just as important: do Circuit precedent and due process require that appellate courts review jury instructions de novo for confusing instructions that go to the statutory elements of a crime. That question too warrants *en banc* review.

A. The jury instructions were confusing, and the jury was confused.

Before addressing the law, it is worth reviewing the facts. The facts show not only that the jury instructions were confusing but also that the jury was confused.

At the outset, including materials on tax-exempt purposes under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code was likely confusing: what counts as charitable or educational under the Internal Revenue Code likely does not

align with the understandings of those terms in the public mind. *Cf.* FED. R. EVID. 403 ("court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence"). Having the definitions was more likely to cause prejudice, even assuming *arguendo* that they were relevant.

Moreover, the jury clearly *was confused*, as evidenced by the jury question about the 501(c)(3) organization's ability to use the donations. *See* Pet. at 8-9 (reproducing ROA:963); *U.S. v. Kopstein*, 759 F.3d 168, 180 n.6 (2d Cir. 2014) (jury's request for clarification is evidence of confusion); *Frosty Land Foods Int'l, Inc. v. Refrigerated Transp. Co.*, 613 F.2d 1344, 1348 (5th Cir. 1980) ("the charge, considered as a whole, must instruct the jury so that the jurors understand the issues to be tried and are not misled") (*citing Baker and Co., Florida v. Preferred Rich Mutual Insurance Co.*, 569 F.2d 1347, 1350 (5th Cir. 1978)). Insofar as mail and wire fraud require a fraudulent intent at the time of the alleged fraud's execution, *Pereira*, 347 U.S. at 8, the tax-exemption language was irrelevant (and misleading) unless the purported charity was clearly fraudulent from its inception (*e.g.*, raising funds for an *impossible* project where the charity would reallocate the funds when the inevitable technical problems surfaced). Nothing of the sort happened here.

B. This Court should apply de novo review to the jury instructions for fraud.

Given that the jury instructions confused the jury as to a statutory element of the wire and mail fraud offenses, this Court should have reviewed the instructions under *de novo* review:

> Although this court usually reviews a district court's failure to grant a requested jury instruction for abuse of discretion, we review de novo whether the jury instruction misstated an element of the statutory crime.

U.S. v. Morales-Palacios, 369 F.3d 442, 445 (5th Cir. 2004) (*citing U.S. v. Ho*, 311 F.3d 589, 605 (5th Cir. 2002)); *U.S. v. Ho*, 311 F.3d 589, 605 (5th Cir. 2002) (*citing U.S. v. Adam*, 296 F.3d 327, 330 (5th Cir. 2002). Similarly, the question of whether an element of the wire fraud statute "requires the government to plead and prove that [the defendant] 'intended to obtain money or property from deceived investors'" qualifies as a "challenge to the jury instructions" that "presents a question of statutory interpretation that] we review … *de novo*." *U.S. v. Baker*, 923 F.3d 390, 402 (5th Cir. 2019) (*citing U.S. v. Harris*, 740 F.3d 956, 964 (5th Cir. 2014)). Stockman was entitled to *de novo* review on the jury instruction for mail and wire fraud.

III. THE *ARGUMENTS* RAISED HERE ARE AVAILABLE TO SUPPORT THE *ISSUES* THAT STOCKMAN RAISES.

Amicus EFELDF frequently files *amicus* briefs in appellate courts across the country at both the federal and state levels. Because – in EFELDF's experience –

this Court is among the courts more ready to find waiver of arguments or issues, the en banc Court should consider the difference between an *issue* raised by a party and the *arguments* used to support that issue. In the Supreme Court, Stockman could raise any *arguments* to support the issues that raised or passed upon below, *Yee v. Escondido*, 503 U.S. 519, 534-35 (1992), so it would be passing strange if this Court cannot consider arguments raises by amicus briefs to support Stockman's issues. The contrary view – namely, that *amici* should not repeat the parties' arguments but cannot argue what the parties omit – would collapse *amicus* practice to the apocryphal small town with the sign saying "Entering Amicus Practice" on both sides of the sign (*i.e.*, no town exists).

CONCLUSION

The *en banc* Court should grant the petition for rehearing *en banc*.

Dated: January 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 18-20780, *United States v. Stockman*.

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 2,584 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2016, and I have relied on that software's word-count feature to calculate the word count.

Dated: January 31, 2020

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

No. 18-20780, *United States v. Stockman*.

I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper documents, except for this Certificate Regarding Electronic Submission; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: January 31, 2020

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CERTIFICATE OF SERVICE

No. 18-20780, *United States v. Stockman*.

I hereby certify that, on January 31, 2020, I electronically filed the foregoing brief – as an exhibit to the motion for leave to file – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph