IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	4:17-cr-116 (2)
	§	(Hon. Lee H. Rosenthal)
STEPHEN STOCKMAN	§	

DEFENDANT STOCKMAN'S MOTION TO DISMISS COUNT 12 (MAKING EXCESSIVE CONTRIBUTIONS) FOR FAILING TO ALLEGE A CRIME AND FOR UNCONSTITUTIONAL STATUTORY AND REGULATORY VAGUENESS

COMES NOW STEPHEN STOCKMAN, DEFENDANT, through counsel Sean Buckley and Gary Tabakman, and pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, files this his Motion to Dismiss Count 12 (Making Excessive Contributions) for Failing to Allege a Crime and for Unconstitutional Statutory and Regulatory Vagueness, for cause showing the Honorable Court as follows:

1. The Indictment—Count 12

Count 12 alleges the aiding and abetting of excessive "coordinated expenditure contributions by Center for the American Future" to Stockman's Senate campaign. ¶ 62. This charge is based on "specific advertising advocating for STOCKMAN's election and attacking STOCKMAN's opponent." *Id.* This Count should be dismissed as a matter of law, as it fails to allege facts or conduct that, even if true, would constitute "express advocacy" as is required in this context to demonstrate an excessive contribution under the Federal Election Campaign Act ("FECA"). Moreover, under controlling Fifth Circuit precedent, the "specific advertising" in question did not contain "express advocacy," and

any effort to restrict or subsequently punish its dissemination is unconstitutional based on the First, Fifth, and Fourteenth Amendments for violation of protected speech and press rights, vagueness, and lack of notice.

2. Count 12 fails to allege either the legal elements of a violation under the Federal Election Campaign Act and Regulations, or their factual underpinning.

Count 12 is predicated on the statutory limitations on "contributions" to candidates provided for in 52 U.S.C. §30116(a)(1)(A)(for the 2014 federal elections, this limit was $2,500 per person, per candidate, per election). 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).

For an advertisement to constitute a "coordinated expenditure" — as Count 12 alleges — a communication must meet all three elements of a three-prong test: (i) payment prong — the ad must be paid for by a person other than the candidate, candidate's committee, or political party; (ii) content prong — the ad must have certain content; and (iii) conduct prong — the people involved must engage in certain conduct. *See* 11 C.F.R. §109.21(a). The Indictment seeks to demonstrate that the payment prong is met by alleging that the newspaper at issue was paid for by the Center for the American Future ("CAF"). To meet the conduct requirement, the Indictment alleges activity that the government believes would constitute coordination. However, the Court need not reach either of those two prongs because the advertisement in question fails with respect to the content prong.

The Indictment states that a newspaper-style mailing by the Center for the American Future contained "specific advertising advocating for STOCKMAN's election and attacking STOCKMAN's opponent." ¶ 62. This allegation purports to satisfy the "content prong" set out in 11 C.F.R. § 109.21(c)(3)[1] that requires there be a "public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office." (Emphasis added). The Government's factual allegations fall far short of meeting this test of the FEC regulation.

A. 11 C.F.R. §100.22(a)

Completely absent from Count 12 is any language that measures up to "express advocacy" as defined by the FEC. There is simply no allegation that the CAF-funded newspaper made any statement that remotely resembles any of the following:

> "phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in 94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote for Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" [11 C.F.R. § 100.22(a).[2]]

[1] Although FEC regulations establish other ways in which to meet the content standard, the Indictment is limited to the issue addressed herein.

[2] This definition is in line with the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which "narrowly and explicitly construed" the Federal Election Campaign Act to apply only "to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 43-44.

Instead, the allegation related to this CAF newspaper is a mere generalization that it "advocat[ed] for STOCKMAN's election and attacked STOCKMAN's opponent." The Indictment provides no quotations or other pinpointed election campaign rhetoric using phrases identical to or substantially the same as those set out in the FEC regulation. Indeed, the newspaper whose content is incorporated into the Indictment's allegations nowhere contains the "explicit words of advocacy or defeat of a candidate" that would bring it under the purview of the FEC's first definition of "express advocacy." Under the definition set out in the FECA statute, 52 U.S.C. §30101, tracked in 11 C.F.R. §100.22(a), there can be no "independent expenditure" unless the expenditure "expressly advocat[es] the election or defeat of a clearly identified candidate . . ."

B. 11 C.F.R. §100.22(b)

In the alternative, the FEC regulation sets out a highly controversial test for "express advocacy" based on how a reader might understand the advertisement, rather than what was stated. That test requires that the language "taken as a whole" is "unmistakable, unambiguous, and suggestive of only one meaning" — that is "advocacy of the election or defeat" of a particular candidate. *See* 11 C.F.R. §100.22(b)(1). Since the CAF newspaper does not contain any explicit words of advocacy, the Government must rely on this alternative test. However, as discussed *infra*, this alternate test (i) has been deemed unconstitutional by multiple federal courts, and (ii) has fallen into disuse by the FEC. Nevertheless, the Government has grounded Count 12 exclusively in this deeply flawed and unconstitutionally vague test.

Even as a matter of pleading, Count 12 falls short of the mark, failing to allege why the CAF newspaper, "taken as a whole," is the same as "express advocacy."[3] The reason that the Indictment fails to make this required allegation is that the subject of Count 12, the CAF newspaper entitled "The Conservative News," taken as a whole, is just that — political news from a conservative point of view, not express advocacy.

Indeed, the CAF newspaper discusses issues related to the legislative record and public policy positions of two Texas officeholders, Senator John Cornyn (R-TX) and Congressman Stockman (R-TX), including their voting records on various topics — information that would be of interest to most Texans, such as the issues of abortion, gun control, and "Obamacare," among others. The Conservative News never urged the reader to vote for or against either candidate. There is only one reference to the date of the primary election for U.S. Senate buried in the middle of the issue, in an article on page seven. Instead, there are repeated references to legislative matters then being debated in the nation's Capitol.

The mailing only barely mentions the Republican primary election, and then only provides news reporting about third-party endorsements in the election: (1) "Amnesty backers invade primary to back Cornyn" (p. 3); (2) "Common Core Champs Praise Cornyn" (p. 6); and (3) two articles mention endorsements of Congressman Stockman by two pro-gun organizations (pp. 5, 7). Two boxes, one on page 11 and the other on page

[3] The FEC Regulation also requires that "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. §100.22(b)(2). Again, there was no allegation in Count 12 to meet this test.

16, compare positions taken by Cornyn and Stockman on several policy issues, but neither discusses the election.

3. The CAF newspaper does not meet the Fifth Circuit's requirement of explicit words to constitute express advocacy.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court considered the constitutionality of the provisions of the FECA governing independent expenditures. It held that FECA language, which purported to restrict expenditures "relative to a clearly identified candidate," was impermissibly vague, and narrowed the interpretation of the statute to apply only to "communications that in express terms advocate the election or defeat" of a candidate.[4] *Id.* at 41-44. In distinguishing between types of speech, the Court noted that:

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. [*Id.* at 42.]

To be sure, the FEC expanded the definition of express advocacy in 1995 when it promulgated 11 C.F.R. §100.22(b) in part based on the Ninth Circuit's decision in *Fed. Election Comm'n v. Furgatch,* 807 F.2d 857 (9th Cir. 1987). In *Furgatch*, the Ninth Circuit allowed the FEC to regulate speech using a standard based on the eye of the beholder, not

[4] The *Buckley* court identified the precise type of terms that would constitute express advocacy — often called "magic words." "This construction would restrict the application of §608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44, n.52.

the text of the ad. However, even there, the Ninth Circuit made clear that "speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act." *Id.* at 864. There being no "clear plea for action" with respect to an election in the CAF newspaper, there is no "express advocacy" even under the test articulated in *Furgatch*.[5]

Indeed, in a case involving the State of Mississippi's regulation of independent expenditures in state elections, the Fifth Circuit expressly rejected the *Furgatch* test for this Circuit. *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002). In that case, the Chamber of Commerce ran four television advertisements "extolling the virtues of" candidates for the Mississippi Supreme Court. The ads "identified the candidate and described in general terms the candidate's judicial philosophy, background, qualifications, and other positive qualities." *Id.* at 190. The ads did not, however, "expressly advocate the election or defeat of a candidate." *Id.* The Fifth Circuit 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. In the end, the Fifth Circuit found "the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment as interpreted in *Buckley* . . ." *Id.* at 194.

> 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.]

[5] The only statement in the CAF newspaper that resembles a call to action was "Ask Cornyn" with respect to his position on a Social Security issue (p.4) — which relates to issue advocacy, not candidate advocacy.

The Fifth Circuit concluded that "the result is 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.

The CAF newspaper at issue in Count 12 is similar to the televised ads at issue in *Moore.* Both discussed candidates and their qualities, but neither advertisement included explicit words encouraging the reader or viewer to vote for or against a candidate.

As of this writing, the *Moore* decision has never been overruled or questioned in the Fifth Circuit and continues to be controlling law in this Circuit. Indeed, its central holding was cited and followed in a later decision in this Circuit — *Center for Individual Freedom v. Carmouche,* 449 F.3d 655 (2006). In that case, the Fifth Circuit ruled that the Louisiana Campaign Finance Disclosure Act ("CFDA") regulation of an "expenditure" made with respect to a judicial election could only be sustained under the First Amendment "by imposing the same limiting construction on the CFDA that the Court employed in *Buckley*." *Id.* at 663. When that same "limiting construction" is applied to this case, the Motion to Dismiss Count 12 must be granted.[6]

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[6] Other federal couts have declared §100.22(b) to be unconstitutional. *See Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996) and *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001)("*VSHL*"). In both Circuit court decisions, the courts applied *Buckley* to determine that the FEC's new regulation (and reliance on *Furgatch*) violated the FECA and *Buckley*, "which limit the meaning of 'express advocacy' to clear words that 'directly fit the term . . .'" *VSHL* at 392. *See also Right to Life of Dutchess County, Inc. v. FEC*, 6 F.Supp 2d 248 (S.D.N.Y. 1998)(holding §100.22(b) violated the First Amendment; not appealed by the FEC to the Second Circuit). *But see Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), and *Free Speech v. FEC,* 720 F.3d 788 (10th Cir. 2013), where these circuits erroneously applied the *McConnell* and *Wisconsin Right to Life* electioneering communications rulings to cases involving independent expenditures, an error not made by the Fifth Circuit in *Center for Individual Freedom v. Carmouche, infra.*

4. The Supreme Court has not undermined the Fifth Circuit's decisions in *Moore* and *Center for Individual Freedom*, and these cases remain controlling precedent in this Circuit.

The Fifth Circuit decided *Center for Individual Freedom* after the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003). *McConnell*, *inter alia*, considered amendments made to FECA by the Bipartisan Campaign Reform Act ("BCRA"), 116 Stat. 81, including the constitutionality of restrictions on so-called "electioneering communications."[7] The *Center for Individual Freedom* decision demonstrated that nothing in the *McConnell* decision undermined the principle set out in *Moore.* The Court rejected the argument that "*McConnell* . . . provides a more holistic, 'practical' approach to determining whether expenditures have been made for the purpose of influencing an election . . ." *Id.* at 665. On the contrary, the Court concluded that "*McConnell* does not obviate the applicability of *Buckley*'s line-drawing exercise where, as in this case, we are confronted with a vague statute." *Id.* (citation omitted).

Moreover, the *Moore* and *Center for Individual Freedom* cases have not been overtaken by any other Supreme Court cases since then addressing election law. For example, *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007)("*WRTL II*"), was an "as applied" challenge to the restrictions imposed by BCRA on electioneering communications. In considering that "as applied" challenge, the Court stated that:

> the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in

[7] BCRA created a new category of regulated speech called "electioneering communications," which are communications mentioning the name of a candidate in the period prior to a primary or an election, and meet certain other requirements, including broadcast requirements. The CAF newspaper is not an electioneering communication.

> this as-applied challenge is not the "functional equivalent" of express campaign speech. We further hold that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly, we hold that BCRA §203 is unconstitutional as applied to the advertisements at issue in these cases. [*WRTL II* at 457 (emphasis added).]

Even though leaving undisturbed the notion that some "functional equivalent" speech could be restricted with regard to electioneering communications, the Court's analysis rejected considerations of the intent, effect, and contextual factors that had previously been cited to urge that political speech considered the "functional equivalent" of express advocacy could no longer be employed in other contexts. *WRTL II* at 467-474.

Far from being a settled legal matter, application of the Government's alternative definition of "express advocacy" is in, at best, a state of disarray, and could be near abandonment, and certainly is so vague that it fails to provide constitutionally required notice of what conduct is prohibited.

5. The FEC has declined to assert violations based on the alternative test.

In recent years, the FEC, charged by Congress with administering federal election laws, has been unable to gather a majority of its Commissioners willing to enforce the second definition of "express advocacy" apparently due to its vagueness and the uncertain and arbitrary results it brings, the constitutional challenges that have been raised, and the decisions of federal courts. For example, two FEC Advisory Opinions issued in 2012, prior to the printing of the CAF newspaper, gave reason to believe that the alternative test had been, as a matter of practice, rejected by the Commission, by failing to garner a majority of the Commissioners willing to enforce it. In those AOs, the FEC analyzed several

proposed advertisements to determine whether they contained express advocacy which would trigger the various regulatory requirements, but was unable to reach a consensus that they did. *See* Appendix A.

Reflecting the almost impenetrable confusion underlying this issue, in issuing one of these two Advisory Opinions, A.O. 2012-11, three of the FEC Commissioners issued a remarkable Statement on the Advisory Opinion intended to provide:

> the public with a rare glimpse into how Commissioners determine whether or not speech is an "independent expenditure" under the Act, particularly whether a communication contains "express advocacy." Ordinarily, this determination is done behind the closed doors of the FEC's confidential enforcement process, long after the speech occurs, and long after any attendant report is due. [Statement at 1.]

These Commissioners explained "differences in application" of those tests which "cause confusion among the public as to how the test will be applied to them." *Id.* at 2. The Commissioners admitted that "[a] review of closed FEC enforcement matters shows that determining whether an ad constitutes express advocacy is difficult to ascertain prospectively . . ." *Id.* at 3. It is impossible to read this 29-page Statement without being convinced of the vast confusion permeating this issue. The Statement concluded with a call to adhere to an admonition from the Supreme Court:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." [*Id* at 24, *citing Citizens United v. FEC*, 558 U.S. 310 (2010).]

The FEC cannot reach consensus on the application of its non-statutory definition, yet the government's case for Count 12 turns on that definition. A criminal prosecution is not the place to iron out such differences, and this dispute alone provides reason for dismissing Count 12 on the grounds that the law is vague and did not provide adequate notice of the conduct prohibited by the statutory and regulatory scheme under which Stockman is now being prosecuted.

6. Having failed to include all the essential facts and elements of the offense charged, Count 12 of the Indictment is defective and must be dismissed.

The Indictment fails to demonstrate that the Grand Jury understood that it could not find that the CAF newsletter constituted a "coordinated contribution" unless that newspaper consisted of "express advocacy" — a highly technical term with a highly technical definition, as demonstrated, *supra.* Indeed, the words "express advocacy" do not even appear in the Indictment, and there is no reason to believe that this element of a "coordinated contribution" was even considered by the Grand Jury. All that exists is the general charge that the CAF newspaper "advocated for STOCKMAN and against his opponent . . ." (Indictment at ¶ 40) and "advocating for STOCKMAN's election and attacking STOCKMAN's opponent . . ." (Indictment at ¶ 62). For the reasons discussed in sections 2 and 3, *supra*, such general statements do not meet the test of "express

advocacy" in this Circuit.[8]

The Government must not be allowed to proceed in this manner. The U.S. Attorney Manual published by the U.S. Department of Justice makes clear that an indictment must "contain those facts and elements of the alleged offense necessary to inform the accused of the charge . . ." USAM, Title 9, Criminal Resource Manual Section 222.[9] *See also* Federal Grand Jury Practice, U.S. Department of Justice, October 2008 at 514-60; and Fed. R. of Crim. Pro. Rule 7(c). This specificity is necessary to "inform defendants of the nature and cause of the accusation to permit preparation of a defense and must equip defendants with sufficient facts to plead former jeopardy in a subsequent prosecution." *United States v. Diecidue*, 603 F.2d 535, 546 (5th Cir. 1979)(emphasis added). Additionally, an indictment must "specifically state[] all elements of the offense [to] ensure[] that the grand jury charged such an offense and that critical parts of the charged offense were not subsequently contributed by the prosecutor alone." *Id.* at 546-57 (emphasis added).

This salutary rule is rooted in the Fifth Amendment, which this Circuit has determined requires that "no person shall be held to answer for a capital, or infamous crime, unless on a presentment or indictment of a Grand Jury . . ." *See also Val Liew v. United States*, 321 F.2d 664, 669 (5th Cir. 1963). As the Court of Appeals for this circuit explained,

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[8] Particularly in a situation where even three FEC Commissioners have gone on record to recognize both the ambiguity of "express advocacy" and the need of specifics like "vote for," "elect," and the like, not just the generic statement "Advocating for STOCKMAN's election," AND "vote against," "reject," or "defeat," not just "attack STOCKMAN's oppoinent," one cannot assume that the Grand Jury made a choice based on applicable law. See Commissioner Statement on AO 2012-11 (Free Speech) at 2-3.

[9] http://www.justince.gov/usao/eousa/foia_reading_room/usam/title9/crm00222.htm (emphasis added)

"[l]ittle may be left open to construction or interpretation of an indictment. If the offense is not plainly stated and is made so only by a process of interpretation, there is no assurance that the Grand Jury would have charged such an offense." *Id.* Indeed, the Supreme Court has precluded such speculation:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. [*Russell v. United States*, 369 U.S. 749, 770 (1962).]

The Indictment failed to explain what "express advocacy" means in the context of "coordinated communications." This understanding would have been critically necessary to the Grand Jury, since Congress has chosen to employ a specific term with a technical meaning trimmed by the Courts to guard against violations of the First Amendment Freedoms of Speech and Press. Without explaining that "coordinated communications" could not exist in the absence of "express advocacy," and carefully defining that term for the Grand Jury, the Grand Jury could have used a meaning which is not permissible to use. This is a fatal flaw in Count 12 of the Indictment, and for this additional reason, Count 12 must be dismissed.

7. Conclusion and Request for Relief.

For the reasons set forth above, the Honorable Court should DISMISS Count 12 of the Indictment against Defendant Stephen Stockman. Stockman furthermore requests a hearing on this Motion.

Respectfully submitted,

/s/ Sean Buckley
Sean Buckley
770 S. Post Oak Ln., Ste. 620
Houston, Texas 77056
TEL: 713-380-1220
FAX: 713-552-0746
buckleyfirm@gmail.com
State Bar No. 24006675

/s/ Gary Tabakman
Gary Tabakman
JP Morgan Chase Building
712 Main Street, Suite 2400
Houston, Texas 77002
TEL: 713-228-8500
FAX: 713-228-0034
gary@bdslawfirm.com
State Bar No. 24076065

CERTIFICATE OF CONFERENCE

I certify that on October 24, 2017 I discussed this Motion with Mr. Robert Heberle, counsel for the United States, and the Government is OPPOSED.

/s/ Sean Buckley
Sean Buckley

CERTIFICATE OF SERVICE

I certify that on October 24, 2017 I provided a copy of this Motion to counsel for the United States, and all parties, via the ECF system.

/s/ Sean Buckley
Sean Buckley

Appendix A
Summary of Referenced Federal Election Commission Advisory Opinions

A. FEC Advisory Opinion 2012-11.

In FEC Advisory Opinion 2012-11 (Free Speech May 8, 2012), the FEC considered 11 proposed ads and determined that two were express advocacy, four were not express advocacy, and the FEC could not decide on the remaining ads. The two ads that were determined to be express advocacy contained the explicit words that "identify a candidate . . . with a position on an issue . . . and then state that the viewers should vote against those who take that issue position . . ." AO 2012-11 at 5. The four ads that the FEC determined were not express advocacy addressed specific policy issues and contained no federal electoral references. The five remaining ads referenced a candidate, an issue, and made mention of "this November" or "this fall." However, the FEC simply stated that it "could not approve a response regarding [those five ads] by the required four affirmative votes" without explanation or elaboration. *Id.* at 7-9.

B. FEC Advisory Opinion 2012-27.

The FEC considered the content of more ads in Advisory Opinion 2012-27 (National Defense Committee Aug. 24, 2012). The FEC determined that three of the seven proposed ads were not express advocacy and could not make a determination on the remaining four because it lacked a majority vote to do so. Two of the ads identified a candidate, as well as a policy position of the candidate, and implicitly advised action:

> "Harry Reid: Willing to put America's service men and women at risk through his risky sequestration gamble. Willing to put politics above common senses and protecting the men and women who defend our nation.

> Stop the insanity, stop sequestrations, stop Reid's twisted liberal agenda. This fall, get educated about Harry Reid, get engaged, and get active."
>
> "What kind of leader is Harry Reid? Ineffective. Ultra-liberal. Unrepresentative of Nevada values. Harry Reid voted for increasing Tricare premiums to nickel and dime America's heroes. Veterans and service men and women know better than to trust Harry Reid. This November: support new voices, support your military, support Nevada values."

Despite calls to action in these ads, the FEC determined that the ads do "not contain express advocacy under 11 CFR 100.22." AO 2012-27 at 4.

The four ads that did not receive a majority vote from the FEC contained similar calls to action, such as "Support conservative voices . . ." and "Be heard this fall" and "Take a stand with us . . ." Such calls are not present in the CAF mailing.

In AO 2012-27, the FEC was asked whether it would continue to apply and enforce the second express advocacy definition, 11 C.F.R. §100.22(b). However, the FEC did not address this substantively as it "could not approve a response by the required four affirmative votes about whether this question qualifies as an advisory opinion request." AO 2012-27 at 5. In other words, there were three out of the six Commissioners who were willing to address this question.

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HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
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VS.	§	4:17-cr-116 (2)
	§	(Hon. Lee H. Rosenthal)
STEPHEN STOCKMAN	§	

ORDER ON DEFENDANT STOCKMAN'S MOTION
TO DISMISS COUNT 12 OF THE INDICTMENT

ON THIS DATE THE COURT came to consider Defendant Stephen Stockman's Motion to Dismiss Count 12 of the Indictment. The Motion is:

_____ GRANTED.

_____ DENIED.

SIGNED ON THIS THE _____ DAY OF _____, 20___.

_____
UNITED STATES DISTRICT JUDGE