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	§	

MOTION TO DISMISS COUNTS 14-22, 24, AND 27 (MONEY LAUNDERING) BASED ON AN "AS APPLIED" CHALLENGE TO THE STATUTES AND FOR OTHERWISE UNCONSTITUTIONALLY FAILING TO SAFEGUARD PROTECTED SPEECH FROM CRIMINAL LIABILITY

COMES NOW STEPHEN STOCKMAN, DEFENDANT, through counsel Sean Buckley and Gary Tabakman, and files this his Motion to Dismiss Counts 14-22, 24, and 27 (Money Laundering) Based on an "As Applied" Challenge to the Statutes and for Otherwise Unconstitutionally Failing to Safeguard Protected Speech from Criminal Liability, for cause showing the Honorable Court as follows:

1. The Indictment—Counts 14-22 and 24.

Counts 14 through 22 and 24 charge violations of 18 U.S.C. §1957 (Money Laundering). The Indictment alleges that Stockman:

> did knowingly cause and engage in, and attempt to cause and engage in, monetary transactions affecting interstate commerce in criminally derived property of a value greater than $10,000, such funds having been derived from specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341. [¶ 68]

Count 27 charges a violation of 18 U.S.C. §1956(a)(1)(B)(i) (Money Laundering). The Indictment alleges that Stockman:

> did knowingly conduct and attempt to conduct the financial transactions . . . which involved the proceeds of a specified unlawful activity, that is, mail fraud, a violation of Title 18 United States Code, Section 1341, knowing that the transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said unlawful activity, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction, represented the proceeds of some form of unlawful activity.
> [¶ 70].

Neither 18 U.S.C. §§1956 or 1957 nor the Indictment contain limiting language to prevent a conviction for Money Laundering under the following circumstances:

(a) The jury issues a conviction for Mail Fraud based on a finding of some fraudulent component of the alleged transaction, thus establishing a predicate for Counts 14-22, 24, and 27;

(b) The jury also finds that some or all of the transactions alleged as Money Laundering in Counts 14-22, 24, and 27 bore a rational nexus to furthering the donor's intended charitable goals, notwithstanding finding some aspect of fraud in the solicitation of the funds.

In fact, under the plain language of §§1956 and 1957 and the Indictment, a conviction for money laundering could seemingly be mandated under these circumstances even if the funds alleged in Counts 14-22, 24, and 27 were applied in furtherance of the donor's intentions and wishes. The unguarded possibility of such a result unconstitutionally infringes on protected First Amendment interests. The Court should therefore dismiss these Counts because application of §§1956 and 1957 to the facts of this case is unconstitutional as applied. *See Serafine v. Branaman,* 810 F.3d 354 at 363-364 (5th Cir. 2016)(holding Texas Psychologists' Licensing Act unconstitutional "as applied" for

infringing on First Amendment rights of political candidate publicly describing herself as "a psychologist" in violation of the Act). Furthermore, the Indictment fails to safeguard protected speech from criminal liability.

2. The First Amendment equates the expenditures of charitable organizations with protected free speech.

The Supreme Court has acknowledged the government's interest in prosecuting fraud relating to charitable solicitations, donations, and expenditures. *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003). However, it has never given the government a blank check to pursue such claims in ways that would punish or even chill the non-criminal exercise of free speech. To the contrary, the Supreme Court has made clear that "charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984); *see also Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 631-32 (1980). Furthermore, the First Amendment does not permit the government to sacrifice the protection of speech for efficiency in the prevention of fraud. *See Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988).

The Supreme Court has repeatedly cautioned government agencies against imposing subjective value judgments upon the wide range of expenditures made by charitable organizations. For example, that Court has declared that "there is no necessary connection between fraud and high solicitation . . . costs," *Munson*, 467 U.S. at 961, and that high costs may themselves be "a part of the charity's goal or . . . simply attributable to

the fact that the charity's cause proves to be unpopular."[1] *Id.* at 967. The Supreme Court was even more direct in *Riley*, unequivocally stating that "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." *Id.* at 793.

In addition to rejecting governmental value judgments upon expenditures by charitable organizations, the Supreme Court has also stated that such organizations are in the best position to decide for themselves the most effective way to exercise their First Amendment rights (including through expenditures). *See Tashijan v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987) (criticizing State's asserted interest in protecting "the Republican Party from undertaking a course of conduct destructive of its own interests," and reiterating "that government 'may not interfere [with expressions of First Amendment freedoms] on the ground that [it] view[s] a particular expression as unwise or irrational'" (quoting *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981); *see also Riley* at 791 ("To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners . . ."). Indeed, charitable organizations would have the First Amendment right to make decisions that "sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits." *See Riley* at 791-92. As just one illustration,

[1] The Supreme Court has observed that fundraising costs for small or unpopular charities may be so high as to appear excessive (or even fraudulent) due to the difficulty of attracting donors—but in such cases the First Amendment does not allow a policy that places the burden of rebutting a presumption of unreasonableness upon the charity. *See Riley* at 792-95.

valid fundraising expenditures could include, among innumerable other things, the costs of introducing the charity's officers to members of the philanthropic community during a special event. *See Id.* at 792.

While the concept of "protected speech" may most commonly be understood as the freedom to speak, it also equally encompasses the freedom not to speak. To this end, the Supreme Court has also disavowed requirements that fundraisers affirmatively disclose to potential donors past percentages of funds actually received by the charity, characterizing such requirements as "compelled speech" that is equally subject to First Amendment protection. *See Riley* at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech"). Thus, the *Riley* Court would not "immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget." *Id.* at 798. To this end, the Supreme Court has observed that "[d]onors are also undoubtedly aware that solicitations incur costs, to which part of their donation might apply." *Id.* at 799.

Given this backdrop, the *Telemarketing Associates* Court found that "there are differences critical to First Amendment concerns between fraud actions trained on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high." *Telemarketing Associates* at 617. Nevertheless, even an individualized fraud action targeting specific conduct in a specific case does not provide the government with a special vehicle to mow down protected speech:

> For example, had the complaint against Telemarketers charged fraud based solely on the percentage of donations the fundraisers would retain, or their failure to alert potential donors to their fee arrangements at the start of each telephone call, *Riley* would support swift dismissal. A State's Attorney General surely cannot gain case-by-case ground this Court has declared off limits to legislators. [*Id.* (emphasis added).]

3. Absent additional protections not present in the Statute or Indictment, applying 18 U.S.C. §§ 1956 and 1957 to the particular facts of this case unconstitutionally exposes protected speech to criminal liability.

Considering the foundation of First Amendment precedent applicable to charitable solicitations and expenditures, and in light of the potential problem elucidated in Paragraph 2 (a) and (b) of this Motion, *supra*, 18 U.S.C. §§ 1956 and 1957 violate the First Amendment as applied, and the Indictment likewise unconstitutionally fails to protect against convictions for protected speech in Counts 14-22, 24, and 27.

The problem with 18 U.S.C. §§ 1956 and 1957 as applied to this case and as alleged in the Indictment is that these statutes indiscriminately target all economic outflow from a transaction (in this case a charitable donation) found by a jury to meet the elements of 18 U.S.C. 1341, without regard to the whether the economic outflow may itself constitute protected speech. While this use of §§ 1956 and 1957 might fit perfectly well within the Health Care Fraud paradigm (under the regulation-based premise that any fraud underlying a billing infects the integrity of the entire reimbursement), these statutory schemes do not likewise fit in the present context — where under certain circumstances a legitimate charitable expenditure protected by the First Amendment can still flow from funds obtained through a solicitation that contained some fraudulent component.

4. Conclusion and request for relief.

Based on the foregoing, the Court should DISMISS Counts 14-22, 24, and 27 based on the Stockman's "as applied" challenge to 18 U.S.C. §§ 1956 and 1957, and otherwise for the failure of the Indictment to safeguard protected speech against criminal liability. Furthermore, Defendant respectfully requests a hearing on this Motion.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that on October 26, 2017 I discussed this Motion with Mr. Ryan Ellersick, counsel for the United States, and the Government is OPPOSED.

/s/ Sean Buckley
Sean Buckley

CERTIFICATE OF SERVICE

I certify that on October 26, 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

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ORDER ON DEFENDANT STOCKMAN'S MOTION TO DISMISS COUNTS 14-22, 24, AND 27 (MONEY LAUNDERING)

ON THIS DATE THE COURT came to consider Defendant Stephen Stockman's Motion to Dismiss Counts 14-22, 24, and 27 (Money Laundering) Based on an "As Applied" Challenge to the Statutes and for Otherwise Unconstitutionally Failing to Safeguard Protected Speech from Criminal Liability. Upon consideration, the Motion is:

_____ GRANTED.

_____ DENIED.

SIGNED ON THIS THE _____ DAY OF _____, 201___.

_____
UNITED STATES DISTRICT JUDGE