UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff	§	
	§	
v.	§	Crim. No. A:19-CR-013 RP
	§	
KYLE GERALD PRALL	§	
	§	
Defendant	§	

Motion to Dismiss the Indictment

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Motion to Dismiss the Indictment

The Court should dismiss the Indictment. The government utilizes broad, amorphous criminal statutes—such as wire and mail fraud—to avoid the FECA[1] criminal statutes that specifically target the precise alleged misconduct: "receiving, or reporting of any contribution, donation, or expenditure," 52 U.S.C. § 30109, and the "fraudulent solicitation of [political] funds," 52 U.S.C. § 30124. The FECA statutes could hardly be more applicable to the Government's allegations; yet they are not charged. And the Government's circumvention of FECA carries serious First Amendment implications.

The FECA is a comprehensive and carefully-tailored bipartisan framework that governs political committee reports and political solicitations. The government's charges, however, are designed to avoid FECA; specifically, FECA's heightened requirement of a "knowing and willful" violation[2] and a "fraudulent" misrepresentation. They are an attempt to lower the *mens rea* necessary to convict where the charges are, in substance, for alleged conduct squarely governed by FECA and

[1] The Federal Election Campaign Act ("FECA").
[2] Indeed, the Department of Justice candidly recognizes that this heightened *mens rea*—this Congressional requirement—can be "a difficult element to satisfy." Donsanto, Craig, U.*S. Department of Justice Manual on Federal Prosecution of Election Offenses*, at 5, 14–15 (7th ed. 2007). The government has chosen to avoid that difficulty completely.

that is, on its face, an exercise of core First Amendment rights.[3] At the same time, charges chosen by the government *quadruple* the potential period of incarceration—all where Congress specifically provided under FECA that a person "shall be . . . imprisoned *for not more than 5 years*" for the very conduct that is alleged.

A law delegating authority to the Department of Justice, in its sole discretion, to determine whether the maximum penalty for a certain offense shall be five years or twenty years, or whether the Government shall be required to prove the defendant acted willfully, would likely violate the nondelegation doctrine and the separation of powers. Yet that has effectively occurred here. But there is a straightforward solution; Congress intended FECA to preempt the use of catch-all criminal statutes in the context of core political speech and political solicitations, as well as the statutorily-required reporting of such activities.

The justifications for preemption run deep—as deep as our most fundamental constitutional rights. The FECA balances First Amendment interests against the government's interest in preventing criminal acts in the context of the exercise of political rights of association and free speech; it represents a narrowly-tailored statute designed to vindicate a compelling governmental interest without unnecessarily chilling core political speech. The use of blunt criminal law instruments like wire and mail fraud—statutes that were not crafted with an eye toward the uniquely sensitive concerns of political speech and disclosures—does not comport with First Amendment standards and values. Their use here, in a setting that arises squarely in the context of core political speech and political solicitations, is unconstitutional on an as-applied basis.

[3] "On its face," because those activities only become criminal *if* the government proves that they were made in conjunction with a particular *mens rea*.

I. The Charged Statutes are Preempted and Unconstitutional As Applied Here

A. The First Amendment Requires that the Government Combat Alleged Violations In this Context Through Narrowly-Tailored Charges and in a Manner that Does Not Risk Chilling Core Political Speech

The First Amendment enshrines rights that are fundamental and necessary to a functioning democracy. *See United States v. Robel*, 389 U.S. 258, 264 (1967). The Supreme Court has long considered political and ideological speech to be at the core of the First Amendment, including speech concerning "politics . . . or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). And "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

The FEC has recognized that conduct governed by the FECA implicates core First Amendment activity—requiring that enforcement actions be undertaken in a manner that avoids chilling political solicitations and other protected rights. As the FEC has explained:

> [B]ecause an individual's or group's solicitation of contributions constitutes core First Amendment protected activity, the Commission must implement the Act's prohibition against "fraudulent misrepresentation" with clarity and precision. . . . The public must have objective [and clear] standards . . . in order to avoid chilling political solicitations at the core of the First Amendment protection.

Federal Election Commission, Policy Statement of Commissioner Lee E. Goodman, p. 1-2 (Feb. 16, 2018). The FEC's determination in this respect, while obviously consistent with First Amendment jurisprudence and values, is entitled to deference and should extend to these proceedings. The FEC "is precisely the type of agency to which deference should presumptively be afforded," given that "Congress has vested the Commission with 'primary and substantial responsibility for administering

and enforcing the Act [FECA].'" *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).[4]

Criminal statutes that potentially inhibit the exercise of First Amendment rights "must be scrutinized with particular care." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)); *see also Reed Enters. v. Corcoran*, 354 F.2d 519, 521 (D.C. Cir. 1965) ("[P]rosecutions involving possible collision with First Amendment rights are not subject to the routine consideration given prosecutions under ordinary criminal statutes."). Such statutes must be construed narrowly in such a context to avoid conflicts with the First Amendment. *See United States v. CIO*, 335 U.S. 106, 112, 121 (1948); *Schwartz v. Romnes*, 495 F.2d 844, 852 (2d Cir. 1974) ("It is difficult to imagine a setting where a narrow interpretation would be more appropriate than when a criminal statute might otherwise impinge on First Amendment rights.").

Criminal statutes that do not raise a First Amendment concern on their face may nonetheless be improper in a setting where their application would chill the exercise of First Amendment rights. *See Smith v. People of the State of California*, 361 U.S. 147, 150–51 (1959) ("Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it."). In such areas, more precise statutes with appropriate safeguards are necessary. *See United States v. Robel*, 389 U.S. 258, 265, 267-68 (1967) ("It has become axiomatic that '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'"; "when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must

[4] Indeed, the FEC is "[u]nique among federal administrative agencies," having "as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *AFLCIO v. FEC,* 333 F.3d 168, 170 (D.C.Cir.2003). Thus, more than other agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights. *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 499 (D.C. Cir. 2016).

achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less.").

Supreme Court precedent, in holding a criminal statute to be in conflict with the First Amendment, supports the view that amorphous criminal statutes with ill-defined outer limits (like those being used here) and that are effectively only limited by prosecutorial discretion are not appropriate vehicles when their use may impact and collaterally chill the exercise of First Amendment rights:

> Not to worry, the Government says: The executive branch construes § 48 to reach only "extreme cruelty," . . . and it "neither has brought nor will bring a prosecution for anything less." . . . But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. . . . <u>This prosecution is itself evidence of the danger in putting faith in Government representations of prosecutorial restraint</u>.

United States v. Stephens, 559 U.S. 460, 480 (2010) (citations omitted), *superseded by statute*, 18 U.S.C. 48 (2010), *as recognized in United States v. Richards*, 13-20265, 2014 WL 2694225 (5th Cir. 2014) (underlining added).

The Supreme Court's First Amendment jurisprudence cautions that vague or general laws can improperly chill political speech, and that precise guidance is necessary to ensure that laws—when applied in the context of political speech—do not chill such speech. *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) ("[V]ague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) ("[L]aws . . . must give fair notice of conduct that is forbidden or required . . . [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); *Buckley*

v. Valeo, 424 U.S. 1, 41 (1976) (requiring "precision . . . in an area so closely touching our most precious freedoms.").

The Supreme Court has made clear that even generally applicable laws are subject to strict scrutiny when they apply to speech because of the harm purportedly caused by its content. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 988 (2016). This protection is not, however, about protecting fraudulent speech; it is about preventing the chilling of non-fraudulent speech. *See, e.g. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

B. The FECA is Designed to Balance First Amendment Rights and to Provide the Standard for Criminal Prosecutions in this Context

With this in mind, the government should not be able to avoid constitutional scrutiny by sidestepping the FECA statutes when the effect is to use broad, catchall criminal statutes to police compliance with reporting requirements that are governed by First Amendment standards. *See Buckley v. Valeo,* 424 U.S. 1, 75 (1976) (per curiam) (recognizing expenditure reporting requirements trigger a "strict standard of scrutiny" because they impinge "the right of associational privacy").

The FECA is a carefully-tailored, bipartisan system that governs the constitutionally sensitive area of political speech and disclosures. Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), as amended by the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002). Originally enacted in 1972, the FECA has been substantively amended several times. Most notably, it was amended in 2002 in several important respects described below.

The legislative history provides indications that Congress intended for FECA to govern criminal prosecutions in this context. The 1974 Conference Report to certain amendments, for

example, indicates that "[t]he provisions of the conference substitute make it clear that *the* Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses . . . ." Report of the Committee on Conference on the Federal Election Campaign Act Amendments of 1974 (Report No. 93-1433, 93 Cong., 2d Sess., 69, 1974) (emphasis added). Elsewhere, the Conference Committee stated that "It is clear that *the* Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees. . . ." S. Conf. Rep. 93-1237, 1974 U.S.C.C.A.N. 5618, 5668 (emphasis added).

While these legislative statements admittedly appeared under a section referencing the Effect on State Law and were followed by references to state law, the statements are susceptible to a broader interpretation that would evidence an intent that the FECA criminal provisions govern such activities *vis. a vis.* other federal law as well as state law. Indeed, the committee's use of the modifier "the" before Federal law indicates a reference to *the* statutory act, FECA (*the* Federal law), rather than "federal law" more generally as a concept in itself. The modifier "the" would have been entirely unnecessary if Congress merely meant to refer to federal law in general (compare "Federal law" generally to "*the* Federal law"). Its use of the specifying modifier "the" evidences that FECA was intended to occupy the field with respect to federal criminal sanctions in this context.

The 2002 amendments are particularly important, as they evidence an intent to utilize FECA's criminal standards to create a uniform criminal standard and sentencing regime. The 2002 amendments specifically increased the criminal penalties for FECA violations, providing for a five-year period of incarceration and declaring such violations a felony. *See* Bipartisan Campaign Reform Act of 2001, 147 Cong Rec S 3084, 3127. The 2002 amendments also increased the statute of limitations applicable to such violations. *See id.* In the process, Congress specifically instructed the

U.S. Sentencing Commission to issue guidelines for "penalties for violations of the Federal Election Campaign Act of 1971 and related election laws," further evidencing a Congressional intent that the FECA would be used as a uniform standard governing criminal conduct in that context. Sec. 314 ("Sentencing Guidelines"), Bipartisan Campaign Reform Act of 2002, PL 107–155, March 27, 2002, 116 Stat 81.

Prior to the 2002 amendments, there was no sentencing guideline that applied to FECA offenses, and FECA crimes were therefore sentenced pursuant to U.S.S.G. § 2X5.1. In response to Congress's 2002 mandate, the Sentencing Commission promulgated a new sentencing guideline, U.S.S.G. § 2C1.8, which was accepted by Congress. *See* 28 U.S.C. § 994(p). Congress thus intended to create a uniform criminal framework to govern FECA violations. This further implies that Congress did not intend general, catchall criminal provisions, which are also subject to a different sentencing guideline, to govern such conduct.

The Department of Justice's own Manual recognizes this background:

> In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA). One of . . . BCRA's goals was to provide **enhanced criminal penalties for knowing and willful** FECA violations. Yet another goal was to put in place a strong sentencing guideline for FECA crimes. The following year the United States Sentencing Commission obliged, promulgating a sentencing guideline, U.S.S.G. § 2C1.8, that recommends imprisonment for most campaign financing offenses.
>
> . . .
>
> As amended by BCRA, FECA applies to virtually all financial transactions that impact upon, directly or indirectly, the election of candidates for federal office . . . .
>
> FECA contains its own criminal sanctions, which in turn provide that, to be a crime, a FECA violation must have been committed **knowingly and willfully** . . . . Prior to BCRA, all FECA crimes were one-year misdemeanors. However, for FECA crimes that occur on or after November 6, 2002 (when BCRA took effect), those aggregating $25,000 or more are five-year felonies, and those that involve illegal conduit contributions and aggregate over $10,000 are two-year felonies. 2 U.S.C. §§ 437g(d)(1)(A), (D). Moreover, all criminal violations of FECA that occur after January 25, 2003, are subject to a new sentencing guideline, U.S. Sentencing Guideline § 2C1.8, that the United States Sentencing Commission promulgated in response to a specific BCRA directive.

Donsanto, Craig, U.*S. Department of Justice Manual on Federal Prosecution of Election Offenses*, at xiii, 4 (7th ed. 2007) (emphasis added). The Bill that introduced the 2002 amendments stated that it was intended "[t]o amend the Federal Election Campaign Act of 1972 to *enhance* criminal penalties for election law violations . . . ." Bipartisan Campaign Reform Act of 2001, 147 Cong Rec S 3084, 3127 (emphasis added). And the legislative history indicates that Congress amended the FECA in 2002 in order to provide a specific prosecutorial tool to combat egregious violations of the FECA's solicitation and reporting requirements. Hearing # HRG-2001-HJH-0036, "Hearing before the Subcom on the Constitution to consider S. 27 and similar H.R. 380, both the Bipartisan Campaign Finance Reform Act of 2001, to amend the Federal Election Campaign Act (FECA) of 1971 to revise financing of Federal election campaigns." Indeed, the bill's sponsor, Senator Thompson, stated that the bill was intended to "provide prosecutors in really egregious type situations—not your run-of-the-mill instances but in really concentrated, egregious type situations-with the tools to do something about those kinds of situations [that violate the FECA]." Hearing # HRG-2000-RAS-0002, "Hearing before the Committee on Rules and Administration United States Senate to consider S. 1991 and similar H.R. 417, both the Bipartisan Campaign Finance Reform Act of 2001, to examine the constitutionality of limits on political contributions and campaign finance spending in light of first amendment freedom of speech and association rights" at 184. In other words, the 2002 amendments reflect Congress's intention that the FECA's statutes would serve as the vehicle to govern and prosecute criminal conduct that falls under the FECA.

The legislative hearings on the FECA's 2002 amendments also demonstrated a strong Congressional concern with balancing First Amendment rights and ensuring that the effort to combat violations of the FECA in the context of political solicitations and reporting did not come at the price of chilling political speech. Hearing # HRG-2001-HJH-0036, "Hearing before the Subcom on the Constitution to consider S. 27 and similar H.R. 380, both the Bipartisan Campaign Finance Reform

Act of 2001, to amend the Federal Election Campaign Act (FECA) of 1971 to revise financing of Federal election campaigns" ("Several of the recent proposals to amend FECA . . . violate the First Amendment. Although it is true that some, but not all, of the provisions may be prophylactic measures that arguably combat political corruption, they come at the price of constraining too much political speech in too great an extent."; "A threshold problem . . . is the sheer complexity of these bills, and the regulatory schemes they would create. With the possibility of increased criminal sanctions awaiting violators, those engaging in political expression have a right to know what is and is not an illegal activity. A statute cannot be written so broadly so as to force possible violators to 'guess' at its meaning."; "[t]he threat of criminal sanctions, when weighed against incremental increases in political expression, could deter even the most seasoned political veteran from exercising his or her First Amendment freedoms.").

Importantly, the 2002 amendments to the FECA criminalize "knowing and willful" violations. Because of this "knowingly and willfully" language, prosecutions under FECA's criminal provisions require proof that the defendant was aware of the substantive FECA requirement he or she violated, and that he or she violated that statute notwithstanding this active awareness of wrongdoing. *National Right to Work Committee v. Federal Election Commission*, 716 F.2d 1401 (D.C. Cir. 1983); *AFL-CIO v. Federal Election Commission*, 628 F. 2d 97 (D.C. Cir. 1980).

Historical context reinforces this point. The 2002 FECA amendments were implemented shortly after several important Supreme Court decisions construing the word "willful" in the context of comprehensive statutory regimes like the FECA. *See e.g. Ratzlaf v. United States*, 510 U.S. 135 (1994). Those cases provide that willfulness, in such a context, requires a heightened *mens rea*. Congress, which is presumed to have knowledge of such interpretations, *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978), deliberately required a "willful" violation of the precise alleged activities at issue here—acts governed by FECA—in order to balance the risk of chilling First Amendment speech.

The amendments, or re-enactments, of this specific element in light of such recent Supreme Court case law underscored a Congressional intent to apply a specific level of *mens rea* in the constitutionally sensitive area of political speech. And that intent itself is evidence that Congress intended *that standard*—and thus *the FECA*—to actually be applied to such conduct. It does *not* evidence an invitation to selectively prefer catchall statutes with lesser *mens rea* requirements.

As background, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Supreme Court held that willfulness required that the government must prove that the defendant acted with knowledge that his conduct violated the statute at issue. *Id.* at 137. *Ratzlaf* arose in the context of the Currency and Foreign Transactions Reporting Act ("Bank Secrecy Act"). The Bank Secrecy Act requires financial institutions to file a Cash Transaction Report ("CTR") when a customer deposits cash in a certain amount. *Id.* at 139–47. It also criminalizes a "willful" attempt to structure one's deposits in a manner designed to avoid causing the financial institution to issue a CTR. *Id.* at 140–41. This, the court held, required that the government prove a heightened *mens rea*—that is, that the defendant knew his conduct violated the statute. *Id.* at 146-147.

Likewise, in *Cheek v. United States*, 498 U.S. 192 (1991), the Supreme Court held that the word "willfully" in sections 7201 and 7203 of the U.S. tax code indicated that the government must prove a heightened *mens rea*—that the defendant knew of a duty and voluntarily and intentionally violated that duty. *Id.* at 200. That is, "willfulness," as interpreted by the Supreme Court in *Cheek*, requires a specific intent to violate the statutory duty at issue. The court noted that such an interpretation is particularly appropriate where the statutory regime is "complex" and comprehensive. *Id.* at 200. *See also Bryan v. United States*, 524 U.S. 184, 191 (1998) (noting that "willfulness" requires specific intent, that is, knowledge that the particular act violates a particular law, when used in the context of highly technical and complex statutes; and holding that "willfulness" in other contexts requires at least knowledge that the conduct is unlawful.).

Particularly against this backdrop, the 2002 legislative amendments to the FECA, re-enacting a "willfulness" requirement, demonstrate a Congressional intent that this heightened *mens rea* level govern conduct in this constitutionally sensitive area. *See Lorillard, Div. of Loew's Theatres, Inc.*, 434 U.S. at 580. Much like the *Ratzlaf* and *Cheek* cases, the heightened *mens rea* connoted by willfulness is particularly apt here in the context of a comprehensive and complex statutory regime that balances First Amendment rights. *See In re Sealed Case*, 254 F.3d 233, 236 (D.C. Cir. 2001) ("federal election law 'involves a complex statutory and regulatory framework.'")

Indeed, the Department of Justice's own Manual recognizes that Congress specifically required this heightened *mens rea* and that conduct that violates FECA only becomes a potential crime where it is committed "knowingly and willfully":

> FECA violations that either: (1) do not present knowing and willful violations, e.g., those resulting from negligence or mistake on the part of the offender as to what the law required or forbade, or (2) involve sums below the statutory minimums for criminal prosecution, are handled noncriminally by the Federal Election Commission (FEC) under the statute's civil enforcement provisions. 2 U.S.C. § 437g(a).
>
> . . .
>
> The Department interprets the significant enhancements to FECA's criminal penalties enacted in 2002 through BCRA as reflecting a clear congressional intent that all **knowing and willful** violations involving sums that aggregate above the statutory minimums for FECA crimes be considered for prosecution.[5]
>
> . . .
>
> FECA violations become potential crimes when they are committed **knowingly and willfully**, that is, by an offender who knew what the law forbade and violated it notwithstanding that knowledge. While this is at times a difficult element to satisfy, examples of evidence supporting the element include: (a) an attempt to disguise or conceal financial activity regulated by FECA; (b) status or experience as a campaign official, professional fundraiser, or lawyer; and (c) efforts by campaigns to notify donors of applicable campaign finance law (e.g., donor card warnings).

[5] It is a very odd construction indeed for the Department of Justice to infer that Congress—by enacting "significant enhancements to FECA's criminal penalties"—intended the DOJ to prosecute "all **knowing and willful** violations" under *other* statutes—particularly statutes that do not even require a "knowing and willful" violation.

Donsanto, Craig, U.*S. Department of Justice Manual on Federal Prosecution of Election Offenses*, at 5, 14–15 (7th ed. 2007) (emphasis added). As this reflects, the Department of Justice recognizes that this heightened *mens rea* can be "a difficult element to satisfy." *Id.* Indeed, it is—and for good and constitutionally-motivated reasons. Prosecutors should not be able to sidestep this difficulty by charging broad, amorphous, catchall statutes that lower the *mens rea* for alleged conduct that is precisely described by FECA.

C. The FECA Provides a Narrowly-Tailored Statutory Framework that Governs the Precise Alleged Conduct.

The Indictment alleges that Mr. Prall registered three political committees that were subject to the FEC's jurisdiction and that "were required to report to the FEC all contributions and expenditures." (Indict. ¶¶ 6; 7-9). The Indictment alleges that "specifically, PRALL solicited contributions . . . for multiple political committees . . . based on misrepresentations . . . that the money . . . would be used to support candidates." (Indict. ¶ 12). The Indictment alleges that he posted political content on his political committee websites and advertised the existence of the political committees online. (Indict. ¶ 19). Indeed, these websites contained extensive political commentary and educational and advocacy information about political issues. The Indictment alleges that Mr. Prall attempted to conceal these activities from the FEC. (Indict. ¶¶ 14, 15, 21).

The FECA statutes provide a specific and narrowly-tailored statutory framework. 52 U.S.C. § 30109 sets forth a criminal statute specifically governing the "making, receiving, or reporting of any contribution, donation, or expenditure" in violation of the federal election laws (FECA). That provision states as follows:

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who **knowingly and willfully** commits a violation of any provision of this Act which involves the making, receiving, or **reporting of any** contribution, donation, or **expenditure**—

(i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or **imprisoned for not more than 5 years**, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 30118(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 30118(b)(3) of this title may incorporate a violation of section 30119(b), 30122, or 30123 of this title.

(C) In the case of a **knowing and willful** violation of **section 30124** of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 30122 of this title involving an amount aggregating more than $10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

> **(A)** the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);
>
> **(B)** the conciliation agreement is in effect; and
>
> **(C)** the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

52 U.S.C. § 30109. Subsection (d)(1)(A)(i) specifically provides that a person who **knowingly and willfully** commits a violation under this statute aggregating to $25,000 or more "shall be fined . . . or imprisoned *for not more than 5 years*, or both."

Moreover, 52 USC § 30124 specifically governs fraudulent misrepresentations and solicitations of funds, providing:

> **(a) In general**
>
> No person who is a candidate for Federal office or an employee or agent of such a candidate shall—
>
> **(1)** fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or
>
> **(2)** willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).
>
> **(b) Fraudulent solicitation of funds**
>
> No person shall—
>
> **(1) fraudulently misrepresent** the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or
>
> **(2) willfully and knowingly** participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

52 U.S.C. § 30124. The FECA's criminal statutes thus provide a narrowly-tailored statutory framework that balances First Amendment rights in this constitutionally sensitive area and that governs very specific conduct. The thrust of the allegations set forth in the Indictment is violations of the FECA.

D. The Statutes Charged in the Indictment are Preempted and Unconstitutional *As Applied* Here

While the general rule is that "[w]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants," *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979), there is an exception to this general rule where there is a "positive repugnancy"—that is, a significant inconsistency—between the statutes at issue. *Id.* at 122; *United States v. Richardson*, 8 F.3d 15 (9th Cir. 1993). There is, in fact, a significant inconsistency between the statutes charged and the FECA statutes.

In *United States v. Richardson*, 8 F.3d 15 (9th Cir. 1993), the Ninth Circuit found that statutory inconsistencies between a specific false statement statute and the catchall false statement statute (§ 1001) demonstrated a Congressional intent to preempt a § 1001 charge:

> Section 1001 was "inconsistent" with section 1920 to the extent that the former made false statements relating to the federal employees' compensation context felonies, while the latter made all such false statements misdemeanors. Section 1920 expressly provides that acts of the type here involved shall be punished by "*no more*" than $2,000 and a one-year prison term. Accordingly, section 1001 is partially inconsistent with section 1920 and is preempted to the extent that it applies to false statements regarding federal employees' compensation affidavits, reports, or claims.

United States v. Richardson, 8 F.3d 15, 17 (9th Cir. 1993).

The *Richardson* court's analysis is consistent with longstanding Supreme Court precedent holding that specific statutes take precedence over—and implicitly limit—more general statutory provisions. For example, the Supreme Court, in *Simpson v. United States*, 435 U.S. 6 (1978) invoked

"the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later." (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973); Sands, Sutherland, Statutory Construction § 51.05 (4th ed. 1973). The *Simpson* court continued:

> This guide to statutory construction has special cogency where a court is called upon to determine the extent of the punishment to which a criminal defendant is subject for his transgressions. In this context, the principle is a corollary of the rule of lenity, an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive.

Simpson v. United States, 435 U.S. 6, 15–16 (1978). This rule is commonsensical: where Congress enacts a statute specifically prohibiting certain conduct, courts should presume that it intended for them to apply *that* provision to such circumstances rather than other, unrelated statutes. Indeed, this rule expressed by the Supreme Court in *Simpson* is even more compelling where, as here, the more specific statute was enacted *after* the general statute.

The *Richardson* court's analysis is particularly on point here. Much like the § 1920 provision at issue in *Richardson* that applied to false statements specifically related to "federal employees' compensation affidavits, reports, or claims," § 30109 applies to the precise type of misstatements alleged to exist here: those relating to the "receiving, or reporting of any contribution, donation, or expenditure" and to the "fraudulent solicitation of funds."

Moreover, much like the statute at issue in *Richardson*, the FECA specifically provides that a defendant who violates the conduct encompassed by 52 U.S.C. § 30109 "**shall be** fined under Title 18, or imprisoned **for not more than** 5 years, or both." The use of the word "shall" demonstrates a Congressional intent that the statute's penalties are mandatory where the conduct falls under the statute. *United States v. Hartford*, 489 F.2d 652, 655 (5th Cir. 1974). The phrase "for not more than" places a cap on the penalty for a violation of conduct described by the statute. Charging a defendant in a manner that exposes him to a sentence of *more than* 5 years for an act that falls under § 30109

overrides the clear congressional directive that a defendant "shall be . . . imprisoned *for not more than* 5 years."

In addition to placing a five-year cap on a defendant's exposure to incarceration, the FECA criminal statutes also provide another safeguard: a heightened *mens rea* requirement. The FECA specifically requires a "knowing[] and willful[]" violation in order to impose criminal sanctions for a false statement in a report filed with the FEC. 52 USC § 30109(d). This "knowingly and willfully" language requires proof that the defendant was aware of the substantive FECA requirement he or she violated, and that he or she violated that statute notwithstanding this active awareness of wrongdoing. *National Right to Work Committee v. Federal Election Commission*, 716 F.2d 1401 (D.C. Cir. 1983); *AFL-CIO v. Federal Election Commission*, 628 F. 2d 97 (D.C. Cir. 1980); *see also Ratzlaf v. U.S.,* 510 U.S. 135 (1994) ("knowing and willful" violation of a regulatory law concerning reporting of currency transactions required proof that offender knew of legal duty and violated that legal duty notwithstanding that knowledge). In other words, it requires a specific intent to commit the violation.

Moreover, where the alleged criminal act is the "fraudulent solicitation of funds," § 30124(b), the FECA also requires a "fraudulent misrepresentation." The FEC has specifically advised that:

> A violation of Section [30124] requires *fraudulent* misrepresentation. Key elements of fraud are the maker's intent that the misrepresentation be relied on by the person and in a manner reasonably contemplated, the person's ignorance of the falsity of the representation, and the person's rightful or justified reliance. More significantly, a fraudulent misrepresentation requires intent to deceive.

F&LA at 3-4, MUR 3690 (National Republican Congressional Committee (emphasis in original); Federal Election Commission, Policy Statement of Commissioner Lee E. Goodman, p. 6 (Feb. 16, 2018). The heart of the government's Indictment centers on allegations of fraudulent solicitations of funds.

These heightened *mens rea* requirements are appropriate given that the FECA is a complex and comprehensive statutory framework governing election law and the solicitation of political donations.

Bryan v. United States, 524 U.S. 184, 191 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994); *Cheek v. United States*, 498 U.S. 192 (1991); *see also In re Sealed Case*, 254 F.3d 233, 236 (D.C. Cir. 2001) ("federal election law 'involves a complex statutory and regulatory framework.'"). They are all the more appropriate in light of the fundamental First Amendment rights that hang in the balance.

The charges under the Indictment, however, are cleverly crafted to avoid these safeguards. They require a substantially lower *mens rea* standard. Of the statutes charged, only § 1001 requires a "knowing and willful" violation. None of the other statutes require this particularly appropriate level and type of *mens rea*. And, importantly, that phrase has been given a much different—and *much* less stringent—interpretation in the context of § 1001. *United States v. Lichenstein*, 610 F.2d 1272, 1276-77 (5th Cir.) In this circuit, § 1001's "knowingly and willfully" requirement does not require proof that the defendant knew that making the statement was illegal or violated a particular statute. *See United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990).[6]

Thus, the alleged violations require the government to prove a lower level of *mens rea* than required under FECA in order to obtain a higher level of punishment. While this may ordinarily not be enough to dismiss and force the government back to the drawing board, there are other compelling reasons to do so here: the *mens rea* standard that the government seeks to avoid is a standard that has been drawn to protect First Amendment rights; the government's approach emasculates FECA's protections and, in the process, threatens to chill core political speech.[7]

In presenting these arguments, counsel is compelled to acknowledge Fifth Circuit precedent in *United States v. Hopkins*, 916 F.2d 207, 218-19 (5th Cir. 1990), which rejected a defendant's

[6] In recent years, however, the government has appeared to back away from this view. *Ajoku v. United States of America*, 2014 WL 1571930 (U.S.), 11 Brief for the United States in Opposition ("Upon further consideration, however, the government has concluded that the "willfully" element of these provisions [section 1001 should] require[] proof that the defendant knew his conduct was unlawful."); *id.* at 15 ("in the context of Sections 1001 and 1035, it should be interpreted to require proof that the defendant knew his conduct was unlawful."). That, however, is not the law in the Fifth Circuit.

[7] These First Amendment implications alone distinguish this case from other Fifth Circuit precedent, such as *United States v. Anderez*, 661 F.2d 404 (1981), as they demonstrate "constitutional infirmities" with the government's charging approach. As set forth herein, the additional FECA-specific factors also distinguish this case.

contention that his "convictions under Title 18 for fraud, concealment, and misapplication of funds (which are felonies) [were] improper because the defendant[] should have been prosecuted only under the federal election laws (which create only misdemeanors)."[8] That case, however, involved a complex web of false records by principals of a federally insured savings and loan entity that was prohibited by federal law from making political contributions. *Id.* at 210-11. It did not implicate core First Amendment rights—nor the prospect of chilling political speech—in the manner that the current case presents. Indeed, the First Amendment implications do not appear to have even been briefed or raised in that case.

Moreover, *Hopkins*, which was not decided by a three-judge panel but by a two-judge quorum, was decided prior to the 2002 Bipartisan Campaign Reform Act. The 2002 act substantially enhanced the criminal penalties under the FECA. Indeed, the *Hopkins* court took note of the fact that the criminal provisions under FECA at that time only provided for a misdemeanor. The Bill that introduced the 2002 amendments, however, was specifically intended "[t]o amend the Federal Election Campaign Act of 1972 to enhance criminal penalties for election law violations . . . ." Bipartisan Campaign Reform Act of 2001, 147 Cong Rec S 3084, 3127, and its sponsor testified that the amendments were intended to provide prosecutors with "tools" to specifically combat violations. Hearing # HRG-2000-RAS-0002, "Hearing before the Committee on Rules and Administration United States Senate to consider S. 1991 and similar H.R. 417, both the Bipartisan Campaign Finance Reform Act of 2001, to examine the constitutionality of limits on political contributions and campaign finance spending in light of first amendment freedom of speech and association rights" at 184.

Importantly, in 2002 Congress also directed the promulgation of a sentencing Guideline that would specifically govern and dictate sentences for violations in the context of federal election laws,

[8] At the time *Hopkins* was decided, FECA only provided for misdemeanors.

such as the solicitation of funds and political committee reporting.[9] *See* Bipartisan Campaign Reform Act of 2002, 107 P.L. 155, 116 Stat. 81, 107. Prior to the 2002 amendments, there was no sentencing guideline that applied to FECA offenses, and FECA crimes were therefore sentenced pursuant to U.S.S.G. § 2X5.1. In response to Congress's 2002 mandate, the Sentencing Commission promulgated a new sentencing guideline, U.S.S.G. § 2C1.8, which was accepted by Congress. *See* 28 U.S.C. § 994(p). Congress thus intended to create a uniform criminal framework to govern FECA violations, implying that it did not intend general, catchall criminal provisions, which are also subject to a different sentencing guideline, to govern such conduct.[10] Notably, at the time of Congress's 2002 directive and its later acceptance of the guideline, the sentencing guidelines were mandatory, further indicating that Congress intended the FECA to govern violations in this context. *See* United States Sentencing Commission, *Increased Penalties for Campaign Finance Offenses and Legislative Recommendations*, at 2, available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/campaign-finance/200305_RtC_Increased_Penalties_Campaign_Finance_Offenses.pdf (2003). These factors distinguish the *Hopkins* court's finding that the defendants there had pointed to "no indication in the federal election laws that Congress intended them to supplant the general criminal statutes found in Title 18." *Hopkins*, 916 F.2d at 218.

Finally, as described above, the 2002 amendments were made in the direct aftermath of Supreme Court decisions like *Ratzlaf* and *Cheek*, construing the element of "willfulness" as requiring a heightened *mens rea* in the context of comprehensive, complex statutory regimes. Congress's re-adoption of that willfulness element against such a (recent) background—particularly in conjunction

[9] Congress also mandated that the guideline include a number of aggravating factors as enhancements, such as the amount involved in the offense, whether the offense involved foreign funds, and whether it was motivated by a desire to gain a specific advantage from the government. BCRA, § 314(b)(2). This further indicates a specific Congressional intent to create a comprehensive criminal framework under the FECA.

[10] The Court should note that the government contends that another sentencing guideline section applies in this case because it has charged general wire and mail (and other) charges, rather than FECA violations. This underscores the circumvention of FECA—and Congressional intent.

with its serious enhancements to FECA's criminal provisions and creation of a uniform criminal statutory framework—further implies that it intended the FECA provisions to govern violations in this constitutionally sensitive area, especially given that this particular heightened *mens rea* requirement is not typically required by general, catchall federal criminal statutes like those charged here. In light of the unique First Amendment issues presented here, and the intervening legislative activities, *Hopkins* should not be read to foreclose the relief sought herein.

i. The Government's Charging Approach Renders FECA's Criminal Statutes Entirely Superfluous

Other considerations support preemption as well. For instance, under the government's theory, every violation of § 30109 would also constitute a violation of 18 U.S.C. §§ 1001, 1341, 1343, and 1519. The statute would be entirely subsumed by other general statutes. The Supreme Court has rejected similar interpretations that would render a statute (here, § 30109) superfluous. *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("The Government acknowledges that, under its reading, § 1519 and § 1512(c)(1) "significantly overlap." Nowhere does the Government explain what independent function § 1512(c)(1) would serve if the Government is right about the sweeping scope of § 1519. We resist a reading of § 1519 that would render [another statute superfluous . . . .") (internal citations omitted).

The court should not adopt a theory that carries the effective (and unavoidable) implication that Congress engaged in a futile and meaningless act by adopting a statute (§ 30109) that criminalizes conduct that is already completely prohibited, and intended to be prosecuted, under another criminal statute. *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (rejecting such a construction and reasoning that "if "tangible object" in § 1519 is read to include any physical object, § 1519 would prohibit all of the conduct proscribed by § 2232(a), which imposes a maximum penalty of five years in prison for

destroying or removing "property" to prevent its seizure by the Government.").[11] Such a theory should particularly be rejected where, as here, the later-in-time statute carries a lesser penalty and a *mens rea* level that is more difficult to establish—factors that indicate that Congress intended for FECA to play a particular role and function.

ii. The Government's Charging Approach Creates a Separation-of-Powers Problem

The prosecution's approach also creates a separation-of-powers problem. The Supreme Court has held that Article I's grant of legislative power to Congress means that Congress may not confer unlimited discretionary authority to the Executive Branch. *Whitman v. Am. Trucking Ass'n,* 531 U.S. 457, 472 (2001); *Loving v. United States,* 517 U.S. 748, 758 (1996). When Congress allows the Executive Branch to make an essentially legislative-type determination, it must "lay down by legislative act an intelligible principle" to cabin that discretion. *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928); *see also Am. Power & Light Co v. SEC,* 329 U.S. 90, 105 (1946) (explaining Congress must establish "the boundaries of this delegated authority"). When Congress has "declared no policy, has established no standard, [and] has laid down no rule," the delegation of authority to the Executive Branch is unconstitutional. *Panama Refining Co. v. Ryan,* 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 542 (1935).

If Congress enacted a statute specifying that the Attorney General, in his sole discretion, may determine whether the maximum penalty for a certain offense shall be five years or twenty years, or whether the Government shall be required to prove the defendant acted willfully, such a delegation would likely violate the nondelegation doctrine. Yet that is, in effect, exactly what the government's approach has done here. This Court should not permit the evasion of this critical separation-of-powers restriction by granting the Attorney General complete discretion to choose between multiple

[11] In *Yates*, the Supreme Court rejected such a theory that would have allowed the government to charge a statute that would, as here, have quadrupled the period of incarceration.

substantively identical laws with dramatically different penalties and *mens rea* requirements on a case-by-case basis. Instead, it should read the FECA criminal statutes as governing the prosecution of the alleged conduct.

iii. The Government Charging Approach Violates the First Amendment

Finally, the underlying First Amendment implications indicate that FECA preempts the statutes at issue with respect to the particular alleged acts. This case turns on actions and speech that, apparently, test the boundaries of First Amendment-protected activity and criminal fraud. The dividing line is the subjective mental state that gave rise to the speech at issue. On one side, the government characterizes the speech at issue as a means of facilitating a criminal endeavor; on the other side, Mr. Prall, as the exercise of core rights of political solicitation that are constitutionally protected. A key distinction between these two contentions, however, is that only Mr. Prall is entitled to a constitutional presumption in his favor.

Under its theory, the government's case will turn, in part, on the appropriateness of expenditures that were made to further the fund-raising solicitations at issue. But the First Amendment counsels that only narrowly-tailored laws should be used to judge what expenditures are, and are not, appropriate to further activity that is, on its face, an exercise of core First Amendment rights. *See e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 610–12 (1996); *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985).

Laws as broad and amorphous as the wire and mail fraud statutes, the false statement statute, and § 1519 are not sufficiently tailored to avoid chilling political speech. They are, therefore, unconstitutional *as applied* in this context.

This should not be confused with an argument that there is some sort of blanket First Amendment defense. Of course, the First Amendment is not a defense to fraud. But such a "blanket"

defense is conceptually distinct from the proposition that the government must use a narrowly-tailored means—one that is not overbroad—when it targets conduct that is, on its face, an exercise of core First Amendment rights. A precisely-drawn statute, like FECA, may satisfy such a requirement—and was certainly intended to. Broad, amorphous statutes like those charged here, however, do not. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

Indeed, sanctioning the use of amorphous, catchall criminal statutes in this context would invite the government (perhaps, in the form of the political party newly swept into office) to exercise virtually unfettered discretion to pick and choose to prosecute political opponents—or those that disagree with their political views—under wide-ranging criminal theories that could conceivably fit under notoriously amorphous statutes like the wire or mail fraud statutes. The government would merely need to set forth a theory that questioned whether the defendant's efforts to raise political funds were legitimate or whether the expenditures that facilitated that effort were well-intentioned. The mere threat of an indictment would chill speech and threaten the health of our democracy.[12] The slope is too slippery. But a narrowly drawn statute, like FECA, would cabin that discretion and, in doing so, would draw a much nicer balance with our First Amendment values.

Indeed, allegations (like those at issue) that political solicitations (otherwise governed by FECA) are the means through which a fraud is allegedly perpetrated have the grave potential to be utilized to target political messages (and messengers). And where, as here, they are applied selectively, it underscores the potential for politically motivated enforcement. For example, prior to the period at issue, there was not a single criminal case charging the criminal theories set forth by the government. And the FEC had repeatedly refused, as shown herein, to find violations for conduct similar to that

[12] Indeed, even if the government's theory in this case were proven, a contention obviously stringently disputed, two wrongs do not make a right: Its charging approach is far too insensitive to the effect it could have on more fundamental democratic and free speech values.

allegedly engaged in here—a fact that actually has bearing on the heightened "knowing and willful" *mens rea* requirement, and that the prosecution likely wanted to sidestep.

Several FEC decisions are illustrative. The holdings summarized below indicate that the FEC has repeatedly rejected similar theories even under a lower civil standard. In *Republican Majority Campaign PAC*, for example, the FEC held as follows:

> Republican Majority's disclosure reports show that it spent many thousands of dollars to compensate its officers, whether directly via legal fees or other benefits. According to Republican Majority's disclosure reports for the 2011-2012 election cycle, over 58% of Republican Majority's disbursements were for operating expenditures. These disbursements included over $100,000 to Kreep, Republican Majority's Executive Director until February 2012, for "legal services" and "office rent." Republican Majority disbursed over $80,000 in 2011-2012 to Goodwin, Republican Majority's National Director and Treasurer, for "accounting services," "management services," "medical insurance," "salary," and related purposes.

F&LA, MUR 6633 (Republican Majority Campaign PAC, *et al.*), pp. 6-7. Despite these findings, the FEC held that "the Commission finds no reason to believe that Republican Majority violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b)."[13]

Moreover, in *Patriot Super PAC*, the FEC again rejected similar theories:

> The record leaves little doubt that the Respondent sought to use Representative West's likeness to raise funds independently to support his candidacy. Moreover, it appears that the Respondent spent very little of the money it raised to support West. Rather, the funds appear to have been spent primarily on additional fundraising,[14] much apparently to vendors in which Freiling and Elliott [treasurers] may have held personal financial interests. Nonetheless, the Commission cannot agree with Complainant that this conduct constitutes a fraud within the reach of the Act or Commission regulation.

F&A, MUR 6643 (Patriot Super PAC, *et. al.*), p. 1.

> Patriot's disclosure reports show that it spent many thousands of dollars to compensate its officers, whether directly via consulting fees or other benefits, or by funneling business to Freiling's and Elliott's other ventures in fundraising and communications media. Patriot's reports disclose that since its inception on January 13, 2012, Patriot disbursed over $375,000 to Grassroots [a for-profit for which Elliott

[13] 2 U.S.C. § 441h(b) was recodified and moved under 52 U.S.C. § 30124, which is one of the FECA criminal statutes at issue here.

[14] The government's theory is that funds were used on additional fundraising, and that this is both illegal in and of itself, and is also evidence of a fraudulent scheme. That theory, however, is inconsistent with precedent such as this.

> served as president and CEO] for "fundraising," and over $44,000 to Fairfax Technologies LLC [connected to Freiling] for "rent," "generic advertising," "robocalls," and "media buy." Patriot's advisory committee chair, Elliott, is also Grassroots' president and chief executive officer, while Patriot's Treasurer, Freiling, is Fairfax's registered agent. These disbursements were made in addition to over $104,000 disbursed to Freiling as "salary." In total, over 80% of Patriot's disbursements in 2012 were for operating expenditures.

F&A, MUR 6643 (Patriot Super PAC, *et. al.*), pp. 6-7. Despite these findings, the FEC refused to find a violation of 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b). *Id.* at 11.[15] These FEC hearings indicate that the laws are being applied selectively here through the use of generalized, catchall statutes that are designed to avoid FECA. And that further underscores the serious threat posed by the government's charging approach—that it could be used in the future to target political messages without a governing standard that properly accounts for its potential impact on the exercise of First Amendment rights. Only narrowly-tailored standards, like those under FECA, are appropriate in the context of conduct that is, on its face, an exercise of core First Amendments rights.

II. Conclusion

The Court should dismiss the Indictment. Each of the substantive counts is, as demonstrated above, preempted by FECA.[16] The government's charging approach improperly avoids FECA's heightened *mens rea* requirements and incarceration caps. The use of the broad, catchall charges at issue here—in a setting that arises squarely in the context of core political speech and political solicitations—violates the First Amendment.

[15] 2 U.S.C. § 441h(b) was recodified and moved under 52 U.S.C. § 30124, which is one of the FECA criminal statutes at issue here.

[16] The money laundering charges utilize such charges as predicate acts and are, therefore, improper as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2019, I have electronically filed the foregoing document with the Clerk of Court through the CM/ECF document filing system, which sent notification and copies of the filing to all counsel of record.

/s/ Jason B. Freeman
Jason B. Freeman