IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:11-CR-161
	)	
JOHNNY REID EDWARDS	)	

JOHN EDWARDS' OPPOSITION TO THE GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

INTRODUCTION

The government's proposed instructions allow (perhaps even direct) the jury to convict Mr. Edwards based on an interpretation of election law that was not intended by Congress or the FEC, that has not been upheld as constitutional by the Supreme Court or Fourth Circuit, and that neither Mr. Edwards nor any other federal candidate was put on notice that he would need to follow. Indeed, the government's proposed instructions provide the jury with so much discretion to decide what the law requires for this specific case, that they are really no instructions at all. The government simply presents words and phrases from the Federal Election Campaign Act ("FECA") to the jury – like "contribution," "expenditure" and "for the purpose of influencing any election" – and then, by rewriting phrases like "the purpose," leaves it to the jury to define these terms and phrases for itself.

Then, the government tells the Court the jury should give these terms and phrases their "ordinary meaning" (Dkt. 280 at 35) and that this language is "simple and unremarkable" (Dkt. 281 at 4). But nothing could be further from the truth, as the

Supreme Court and other courts have highlighted that these terms are "ambiguous." Orloski v. FEC, 795 F.2d 156, 163 (D.C. Cir. 1986) (citing Buckley v. Valeo, 424 U.S. 1 (1976)). If this language were so simple, there would be no need for the FEC to create thousands of pages of regulations implementing it, and the routinely sharp divisions between FEC Commissioners in applying the law to the facts of cases that come before it would not occur.

Part of the problem with the government's approach of letting the jury ascribe the "ordinary meaning" to these terms and phrases is that these terms and phrases have not been given their "ordinary meaning" by Congress, the FEC, or the courts. Among other reasons, this is because the area is imbued with general free speech and political free speech First Amendment protections. They are defined terms, made specific to the election context – a context that will largely be foreign to the jury. Absent the Court staying precise to the words of the law itself and the Fourth Circuit case that is closest to any other decision on the subject, there is a very real danger and a substantial likelihood that the jury would interpret the law differently than it was intended by Congress and the FEC or would have been understood by Mr. Edwards or other federal candidates. Consequently, a jury instructed with the government's proposed instructions would be encouraged to convict Mr. Edwards of a crime, even though he did not engage in conduct that Congress or the FEC defined as a crime or that he could have understood to have been prohibited.

OBJECTIONS TO INSTRUCTIONS

Objection to Request No. 3: Direct and Circumstantial Evidence

The government's proposed instruction fails to clarify the concerns that inherently exist in relying upon circumstantial evidence rather than direct evidence. The problematic language is the following:

> Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. For example, if someone came into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial evidence that it was raining outside.

(Dkt. 280 at 6.) The preceding sentence and the example emphasize only the strength of the circumstantial evidence, without acknowledging its limitations. Mr. Edwards proposes replacing that language with the following:

> Unlike direct evidence that a fact exists, circumstantial evidence is proof of a chain of facts and circumstances that merely indicate the existence of a fact. For example, if you go outside to check your mailbox and there is no mail, that is circumstantial evidence that the mailman has not yet come. Although it is circumstantial evidence that the mailman has not come, the truth may be that he did come and you just did not receive any mail that day.

Because the circumstantial evidence is so strong in the government's example, it would be difficult for the jury to distinguish the strength of direct and circumstantial evidence. Mr. Edwards' proposed language conveys that concept more clearly.

Objection to Request No. 4: Presumption of Innocence, Burden of Proof and Reasonable Doubt

Mr. Edwards requests his Proposed Instruction No. 1 be given instead for two reasons. (Dkt. 279 at 4.) First, Mr. Edwards' instruction distinguishes the beyond a

reasonable doubt standard from the preponderance of the evidence standard that applies in civil cases, as the model Federal Judicial Center ("FJC") instruction recommends. As Judge King explains: "It is this feature, the juxtaposition of the requisite standard of proof in civil cases with the more stringent criminal trial standard of proof beyond a reasonable doubt, that is the FJC instruction's greatest asset." United States v. Walton, 207 F.3d 694, 706 (4th Cir. 2000) (en banc) (King, J., dissenting). Likewise, the Fifth Circuit pointed out, "[s]uch a contrast is a useful way to frame the issue for the jury." United States v. Williams, 20 F.3d 125, 132 n.5 (5th Cir. 1994). Several Fourth Circuit judges agree. Walton, 207 F.3d at 706 (King, J., dissenting) ("As the Fifth Circuit in Williams pointed out, contrasting the civil and the criminal standards of proof is an effective means of framing the issue for the jury."). This is especially important when there are jurors who have sat as civil jurors, as have two of the jurors in this case.

Second, the second paragraph of Mr. Edwards' proposed instruction describing the beyond a reasonable doubt standard has been upheld verbatim by the Fourth Circuit. United States v. Carrier, 344 F.2d 42, 46 (4th Cir. 1965). Although the Fourth Circuit has discouraged defining reasonable doubt for the jury because of the concern that trial courts could give an erroneous instruction, it is not error to give an instruction – like the one upheld in Carrier – that is accurate. The government also takes two different positions in asking the Court not to define reasonable doubt, but then asking the Court to define reasonable doubt in part as not "beyond all doubt." (Dkt. 280 at 7.) (It is unclear whether

the government would object to likewise telling the jury that beyond a reasonable doubt is not the same as a preponderance of the evidence.)

Rather than telling the jury what reasonable doubt is not, as the government would have it, the better course is to tell the jury what reasonable doubt is. As Justice Ginsburg cogently explained:

> Whether or not the Constitution so requires, however, the argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining for jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt" when that term is left undefined. Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative-refusing to define the concept at all-is not obviously preferable.

Victor v. Nebraska, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring). Judge King agrees:

> The potential for confusion among jurors is poignantly illustrated by the acknowledged reality that trial judges, despite their extensive legal training and professional experience, themselves often have difficulty articulating the meaning of reasonable doubt. Simply put, if "judges and legal scholars struggle to define reasonable doubt, it is unrealistic to expect a lay jury to properly grasp and apply the stark words."

Walton, 207 F.3d at 701 (King, J., dissenting) (citation omitted). Because the Due Process Clause precludes conviction based on evidence that falls short of the beyond a reasonable doubt standard, Mr. Edwards points out those circuits that hold it is a violation of due process not to define that phrase for the jury. See, e.g., Blatt v. United States, 60 F.2d 481, 481 (3d Cir. 1932); Friedman v. United States, 381 F.2d 155, 160-61 (8th Cir. 1967); United States v. Pepe, 501 F.2d 1142, 1143-44 (10th Cir. 1974); Mundy v. United States, 176 F.2d 32, 32-33 (D.C. Cir. 1949). To avoid constitutional error or, at the very

least, ensure that the jury accurately understands its task, it is better to define the phrase and it cannot be error to do so correctly.

Objection to Request No. 7: Cooperating Witnesses

Mr. Edwards requests his proposed cooperating witness instruction. (Dkt. 279 at 15.) The government has taken Judge Sand's model instruction and significantly changed it. See 1 L. Sand, *et al.*, Modern Federal Jury Instructions Criminal, Instruction Nos. 7-9 (2009). Instead of telling the jury that this Court did not provide immunity to the witnesses and that immunity was arranged between the witness and the government, as Judge Sand's instruction says, the government adds new language asking this Court to vouch for the prosecutor's decision to grant immunity. The government asks the Court to instruct the jury this "is entirely lawful" and not consider whether the jury would "approve or disapprove," which is misleading. The jury may justifiably "disapprove" of the government's decision to grant immunity to someone like Mr. Young, who basically admitted to defrauding Mr. Baron and Mrs. Mellon (e.g. "billing" them each for the same expenses) of hundreds of thousands of dollars and whose story was often inconsistent (to be generous), because the government gave him immunity to testify to things the government should have known are too incredible to be true. Similarly, the government asks this Court to vouch for the reliability of cooperating witnesses by telling the jury that the technique is "frequently" used and crime prevention "would be extremely difficult" without it. But it would be inappropriate for the Court to vouch for the government's evidence in this case, and Judge Sand does not suggest that this Court do so.

Objection to Request Nos. 10 & 11: Defining "Knowingly" and "Willfully"

Mr. Edwards requests his proposed combined instruction for "knowingly" and "willfully." (Dkt. 279 at 18.) The government's proposed separate instructions are generic, addressing circumstances when a statute uses "knowingly" or "willfully," rather than the statutes in this case that require both be found. Accordingly, it makes sense to define the terms relative to one another so that the jury can better appreciate their distinctions. Mr. Edwards' examples illustrating the distinctions also would be helpful in putting the concepts to the jury in a manner that is stripped of legalese and is better understandable. The government's Proposed Instruction No. 11 also is problematic for defining the term "willfully" in terms of a "bad purpose," which can be confusing to jurors as they may conclude that Mr. Edwards did something for a "bad purpose" (e.g., having an affair or concealing it) even though it was not to break the law.

Objection to Request No. 12: Conscious Avoidance

The government's request for a conscious avoidance instruction invites reversible error. The Fourth Circuit has emphasized such an instruction "is only proper in rare circumstances," United States v. Ruhe, 191 F.3d 376, 385 (4th Cir. 1999), and "should be given sparingly," United States v. Nicholson, 176 Fed. App'x 386, 393 (4th Cir. 2006). "A willful blindness instruction should be given only in 'rare circumstances,' because the jury instruction presents the danger of allowing the jury to convict based on an *ex post facto* theory (he should have been more careful) or to convict on a negligence theory (the defendant should have known his conduct was illegal)." United States v. Lightly, 616

F.3d 321, 378 (4th Cir. 2010) (finding error in giving the instruction without a "legitimate basis"). Mr. Edwards has found no case involving alleged violations of FECA in which the jury was instructed on conscious avoidance.[1]

Such an instruction is warranted only when "the evidence supports an inference of deliberate ignorance." Ruhe, 191 F.3d at 384. Evidence must exist from which "the jury could reasonably infer" the defendant sought to remain "deliberately ignorant of the illegal nature" of what transpired. Nicholson, 176 Fed. App'x at 394. "This requires more than mere negligence in not obtaining knowledge." United States v. Diaz-Calderon, 216 Fed. App'x 331, 342 (4th Cir. 2007) (Michael, J., concurring and dissenting in part). "[M]ere suspicion … is insufficient to establish knowledge." United States v. Hussein, 1993 WL 33816, at * 2 (7th Cir. 1993).

The instruction is erroneous for two reasons. First, no evidentiary predicate for giving the instruction exists. There has been no evidence at trial warranting such an ostrich instruction because there has been no evidence that Mr. Edwards was aware of a "high probability" that what was occurring violated the federal election laws and that he consciously chose to remain ignorant of the applicability of the election laws. There is no evidence whatsoever to suggest that he was trying to avoid knowing what was occurring

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[1] The one FECA case in which the jury was instructed on willful blindness was reversed on other grounds. Therefore, there was no appellate review of the willful blindness charge. United States v. Curran, No. 92-558, 1993 U.S. Dist. LEXIS 7756 (E.D. Pa. Apr. 28, 1993) rev'd on other grounds, 20 F.3d 560 (3d Cir. 1994).

because he believed it would be illegal. In the filter of using such an instruction "sparingly" is the evidence of his actions being directed to not lying to Mrs. Edwards and not wanting to cause any more confrontations with her. The only evidence of any conversations about the facts and law that matter – whether soliciting funds could violate the law – is not that he avoided it but that he actually consulted with people about it. A jury might be able to conclude he made that up, but, even then, he is not "avoiding" the issue, he would have been lying about it.

The government asking the jury to conclude the opposite by the Court giving this instruction in this context is doing so by twisting what Mr. Edwards was "avoiding" and positing the rest on speculation. Speculation is insufficient to warrant a conviction that requires factual findings be made beyond a reasonable doubt. See, e.g., United States v. Hickman, 626 F.3d 756, 769 (4th Cir. 2010) ("Unbridled speculation is an impermissible basis for conviction beyond a reasonable doubt."); United States v. Morillo, 158 F.3d 18, 22 (1st Cir. 1998) (convictions must be reversed when theories of guilt or innocence are "equal or nearly equal").

Second, the proposed instruction itself is incomplete. Although the instruction explains that conscious avoidance is a substitute for knowledge and that "willfulness cannot be satisfied in this manner," the jury is unlikely to appreciate the distinction between using conscious avoidance to find knowledge but not willfulness based on these six words alone. In a setting where the conscious avoidance instruction is proper, courts add the following sentence after that language: "'Willfulness' requires the government to

prove beyond a reasonable doubt not only that Mr. Edwards knew the conduct was unlawful, but also that he purposefully intended to commit an act that would violate the election laws." See United States v. Ferrarani, 219 F.3d 145, 156 (2d Cir. 2000) (finding such clarifying language helpful).

The language also invites error on the conspiracy count. It is "well established … that a conscious avoidance theory may not be used to support a finding that the defendant intended to join or participate in the conspiracy." United States v. Tropeano, 252 F.3d 653, 660 (2d Cir. 2001); see United States v. Hale, 1992 WL 163600, at *4 (4th Cir. 1992) ("[C]onscious avoidance may not be used to establish knowing participation in the conspiracy."). Nothing in the government's proposed instruction makes that clear, so the point would have to be added.

If the Court were to find evidence in the trial record from which the jury could find conscious avoidance, the Court also should predicate the instruction by explaining the government's theory and tying it to that evidence in particular. It cannot just be that the Court instructs on willful blindness. It would have to narrow that away from the facts of the affair to willful blindness about the law or the campaign rules that the government is seeking to use this charge to show "knowledge." In other words, in the context of this specific case, where there is clearly "avoidance" about some things (e.g., affair related facts), it risks substantial error to allow that confusion to occur. Accordingly, in any such instruction, additional language would be required:

> The government argues that Mr. Edwards deliberately closed his eyes to what would otherwise by obvious to him based on the testimony of [Person

> A] that [X, Y & Z occurred]. Remember, the issue is not whether he was avoiding facts or circumstances concerning how to deal with Mrs. Edwards or the non-campaign aspects of his extra-marital affair. The government must prove beyond reasonable doubt that he was avoiding knowledge of how his conduct would violate the law. In addition, even then, you must find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth and not because he was merely negligent, foolish, or mistaken then the element that the defendant acted "knowingly" may be satisfied.

Objection to Request No. 14: Agent

Mr. Edwards requests that the Court give his Proposed Jury Instruction Nos. 16 & 17. (Dkt. 279 at 21, 23.) The government's instruction is generic, unlike Mr. Edwards' instructions, which focuses on the actual alleged agent in this case, Andrew Young. That specificity helps avoid juror confusion. The government's instruction is also erroneous because it fails to clarify that Mr. Edwards may have "ordered, directed, commanded" that something be done at a level of generality that would be legal, but that would not make him responsible if his agent implemented that order in an illegal manner. That point is clarified by Mr. Edwards' example in Proposed Instruction No. 17 that it would be legal for Mr. Edwards to instruct his agent to go to the store to get office supplies, if he believed the agent would buy them, and that he could not be held liable if the agent implemented Mr. Edwards' order by stealing the supplies.[2]

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[2] If there are others who the government alleges are an "agent," the Court can give Mr. Edwards' proposed instructions and replace the references to Andrew Young with a more generic term, like "someone."

Objection to Request Nos. 15-20: Conspiracy

Mr. Edwards requests the Court give his Proposed Jury Instruction Nos. 34-39 concerning conspiracy. (Dkt. 279 at 51-60.) Understanding the conspiracy charge is particularly difficult, as the jury must understand the law regarding both the alleged conspiracy and the substantive legal violations that are the alleged violations of the conspiracy. To avoid confusion, it makes more sense to instruct the jury on the substantive legal violations first, so that the jury will already have that understanding by the time the Court explains the law of conspiracy. This was something that the parties had thought best in pre-trial hearings.

Mr. Edwards' instructions are more jury-friendly because they describe the actual alleged offense, rather than the government's instructions which merely cross-reference the Indictment. (Dkt. 280 No. 16 at 22 ("agreement charged in the Indictment"); No. 17 at 23 (same).)

Parts of the government's instructions also would be erroneous on the facts of this case. Proposed Instruction No. 18, for example, includes generic language about "proof of a personal or financial interest in the outcome of the scheme is not essential," which may be the case ordinarily but not here. (Dkt. 280 at 25.) How can the government charge Mr. Edwards with conspiring to accept and receive money as a campaign contribution, and even allege the object of the conspiracy was for this money to satisfy his personal expenses, while telling the jury it does not need to find that the object of the scheme was that he would obtain a personal or financial interest? This instruction is

tantamount to telling the jury it can convict without finding the object of the conspiracy charged in the Indictment.

The instruction also is inaccurate in other respects. It tells the jury Mr. Edwards must join the conspiracy "with an awareness of at least some of the basic aims and purposes of the unlawful agreement" (id.), but that is not quite right. Where an agreement has lawful and unlawful ends, Mr. Edwards must be shown to be aware that at least some of the aims and purposes of the agreement were unlawful. This instruction would seem to allow the jury to convict Mr. Edwards if it found that he joined an agreement that happened to be illegal, even if he was only aware of the legal objects of the conspiracy (for example, that he joined the agreement to help Ms. Hunter receive proper medical care for his unborn child, rather than being aware that this assistance would be provided in a manner that violated the election laws). This ambiguity does not exist in Mr. Edwards' proposed instructions.

Objection to Request Nos. 21-25: Election Law

The government's proposed instructions are inadequate, as they merely provide the jury with the deceptively simple language of the statute without any of the Supreme Court's and the Fourth Circuit's interpretation harmonizing that language with the First Amendment, or the additional clarity provided by the FEC. It also gets basic elements of the offense wrong, and fails to explain critical aspects of the law. Here, it is more than a mere request by Mr. Edwards to use his proposed election law instructions, Proposed Instruction Nos. 18-29. (Dkt. 279 at 24-29.) Allowing the government's version unfairly

directs the outcome. This is the ground where adhering to the actual words of the law and the Fourth Circuit case is the safest to prevent error.

The government's instruction is wrong even on the most basic elements of the offense. The government's Proposed Instruction No. 21 tells the jury it is a crime to "knowingly" accept campaign contributions, but the statute makes it a crime to "knowingly and willfully" accept and receive the illegal campaign contributions. 2 U.S.C. § 437g(d)(1)(A)(i) (emphasis added). The government leaves "willfully" out altogether from that instruction. In addition, the government's Proposed Instruction No. 22 tells the jury that Mr. Edwards committed a felony if he accepted more than $2,300 for either a primary or general election from either Mr. Baron or Ms. Mellon, but that is plainly erroneous. (Dkt. 280 at 32.) Although that would be a civil violation of the act, the felony provision requires that the candidate accept and receive more than $25,000 from a single person in a calendar year. 2 U.S.C. § 437g(d)(1)(A)(i). The government may want to lower the bar between finding a civil or criminal violation but that is what is on trial in this case.

Similarly, element four to Proposed Instruction No. 22 throws in at the end that the jury must find that Mr. Edwards "acted knowingly and willfully," but does not explain what he must have done knowingly and willfully. (Dkt. 280 at 32.) It is unclear whether that refers to element one, becoming a candidate; element two, accepting and receiving a contribution; or both. It also does not clarify what he had to do knowingly and willfully. For example, it is unclear from this instruction whether he merely accepted and received

a contribution knowingly and willfully that happened to exceed $2,300, or whether he willfully accepted and received the contribution while knowing that it exceeded $2,300.

Proposed Instruction No. 23 also inadequately explains that a "candidate for federal office" includes a person seeking the Presidency. The problem is that it fails to clarify what is not included, such as an appointment to the position of Attorney General or selection by a political party to be the party's Vice President nominee. Mr. Edwards' Proposed Instruction No. 24 would make that clear. (Dkt. 279 at 34.)

Objection to Request No. 24: Contribution

As explained at the outset, the flaw in this instruction is that it does not explain anything. It simply throws out very complicated legal terms, which may appear deceptively simple, without any meaningful explanation. The end result is that the jury is given open-ended discretion to make sense of the law on its own, and arrive at an understanding of the law that runs contrary to the intent of Congress, that no Court or the FEC would share, and that neither Mr. Edwards nor any other candidate could anticipate. In effect, it allows the jury to fashion the law according to its own understanding and then hold Mr. Edwards criminally liable based upon its own *ex post facto* understanding of the law that it fashions in the jury room. Were it not in a heavily-protected First Amendment area, this type of charge unmoored from the actual words of the law and one principal case would be a due process violation. In the free speech arena, it is even worse.

The government does not explain that direct contributions, coordinated expenditures, and personal use expenses are mutually exclusive categories, and does not

clarify for the jury how to distinguish what would qualify under those categories from what would not. Such issues have been litigated exhaustively before the FEC and the courts, and reasonable minds often differ on the application of the law to facts. Without any further guidance, the jury's ability to apply any settled understanding of the law to the facts in this case is impossible.

In addition, even the government's short form definitions are wrong. The government defines the personal use expense regulation in terms of what would "ordinarily be a personal expense," but that is not the test and the jury has no way of knowing what sort of expense a candidate incurs during an election season would "ordinarily" be a personal expense or "ordinarily" be a campaign expense. (Dkt. 280 at 34.) FEC regulations do not define personal use expenses in a circular manner by what is "ordinarily" a personal use expense. The FEC defines them in terms of whether funds are used to fulfill "a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 C.F.R. § 113.1(g). In addition, even if the type of expense is covered by the rule, the payment of the expense by a third party is not necessarily a campaign contribution. It is a campaign contribution, "unless the payment would have been made irrespective of the candidacy." 11 C.F.R. § 113.1(g)(6). Mr. Edwards' Proposed Instruction No. 20 clearly delineates what types of expenses qualify from those that do not. (Dkt. 279 at 28-29.) The government would leave the jury free to make that decision for itself based on what it

concludes "ordinarily" takes place during elections, even though it has no basis to know what is "ordinarily" the case, and that is not the test.

Among the most problematic parts of this instruction is the government's new, never previously proposed instruction, which it filed a nine-page memo to support. (Dkt. 281.) The instruction would transmogrify the statutory language "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i) (emphasis added), into something other that what it plainly states. The government asks this Court to ignore the significance the Supreme Court and Fourth Circuit place on this statutory language, and instead tell the jury:

> Because people rarely act with a single purpose in mind, it is not necessary that you find that a gift, purchase, or payment was made solely for the purpose of influencing a federal election. It is sufficient under the law if you find that the gift, purchase, or payment was made for, among other purposes, the purpose of influencing any election for federal office.

(Dkt. 280 at 35.)

Again, the government's arguments in support of this instruction demonstrate that it is asking the Court to legislate and do it after the fact and in the midst of an actual criminal case. There is no citation in the government's memorandum in support for this instruction to any case dealing with election law. Instead, the government tells the Court the phrase "the purpose of influencing" has been given its "ordinary meaning" in other contexts. (Dkt. 280 at 35.) It even claims the phrase is "simple and unremarkable." (Dkt. 281 at 4.)

The Supreme Court, in the context of election law cases (which is what this is), certainly does not agree with the concept that this is "simple and unremarkable." In Buckley v. Valeo, 424 U.S. 1, 77-78 (1976), the Supreme Court addressed the ambiguity of the phrase at length:

> There is no legislative history to guide us in determining the scope of the critical phrase 'for the purpose of … influencing." It appears to have been adopted without comment from earlier disclosure Acts. Congress "has voiced its wishes in (most) muted strains," leaving us to draw upon "those common-sense assumptions that must be made in determining direction without a compass." Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness.

The Court then went on to address the various "line-drawing problems" created by this phrase. Id. at 78-79. It resolved those problems by construing the language narrowly, to reach only "spending that is unambiguously related to the campaign of a particular federal candidate." Id. at 80.

A decade later, the D.C. Circuit struggled with the same phrase, explaining: "The Act itself does not define the key phrases 'for the purposes of influencing any election' or 'in connection with any election.'" Orloski, 795 F.2d at 163. It explained "the phrases 'for the purposes of influencing any election' and 'relative to any clearly-identified candidate' are ambiguous." Id. Indeed, interpreting and applying this language has been a fertile source of litigation and is one of the reasons election law is so complicated.

Given that the Supreme Court and courts like the D.C. Circuit find the phrase "ambiguous" – as opposed to "simple and unremarkable" – it is difficult to imagine this

lay jury will do better. Moreover, because the Supreme Court imposed its "unambiguously related" test on the statute to save it, the jury would have no way of divining this limitation without an instruction from the Court or the Court providing it with a copy of Buckley or its progeny.

The government's reliance upon interpreting words in a statute in accordance with their "ordinary meaning," applies only when Congress has left a term undefined. It does not apply to defined terms, like "contribution" and "expenditure," because "Congress remains free, as always, to give the word a broader or different meaning." Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1707 (2012). And it has even less force here, when the Supreme Court imposed a limiting instruction to save the statute.

The Fourth Circuit has emphasized that, "after Buckley, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular … candidate.'" North Carolina Right to Life, Inc. v. Leake ("NCRL"), 525 F.3d 274, 281 (4th Cir. 2008) (quoting Buckley, 424 U.S. at 80). The reason such regulations can survive at all "is because only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable." Id. The government wants to distinguish NCRL by saying it was decided in a different election law context. But that is splitting hairs. It is the only election law case on this issue in the Fourth Circuit (and one of only a few in the country) and ought to be embraced as the safest ground on which the Court can stand in instructing the jury.

While it may be less significant in other contexts, the word "the" in the phrase "the purpose of influencing an election" is of critical importance in election law. That is because it strikes an important balance, as certain payments are regulated if they are made for "the purpose of influencing an election" and other payments are regulated when they are not. In this case, the government focuses on regulating what can legitimately be made for "the purpose of influencing an election," such that the payments qualify as a campaign contribution. But there is a flip-side to election law that is just as important and that requires the Court to be careful not to construe this phrase so broadly.

2 U.S.C. § 439a(b) provides that campaign contributions "shall not be converted by any person to personal use." The reason is fairly obvious: contributions to a campaign that are made for "the purpose of influencing an election" should be spent as they were intended, and not for a candidate's personal use. As the Court may recall, this is the crime that was initially being investigated in this case. The government was concerned that Mr. Edwards may have converted campaign contributions to cover a personal expense, expenses that are not incurred to influence the election, by diverting campaign funds to assist his girlfriend. That would have been a serious crime, but it did not happen. None of the money at issue in this case came from the campaign's coffers.

The government then turned its theory completely around to charge not that actual campaign funds were illegally spent, but that outside funds became campaign contributions because they were made for "the purpose of influencing an election," such that they were campaign contributions. But if that is true, there would be absolutely

nothing wrong with the campaign spending as much money as it wanted on Ms. Hunter (the $2,300 limit applies to contributions to the campaign, not spending by the campaign). Ms. Hunter's personal expenses cannot become campaign-related when paid by Ms. Mellon or Mr. Baron, but be non-campaign related if paid by the campaign. Under the government's logic, if spending money to conceal an affair is campaign related because it is spent for "the purpose of influencing an election," then presumably a candidate could spend campaign money (including federal taxpayer matching funds) to pay, for example, for his mistress to have an abortion to conceal the affair.

This is where the government's instruction leads when it blurs the line between what is for "the purpose of influencing an election" and what is for a personal purpose. The line becomes all the more impossible by the government's proposed instruction that spending is for "the purpose of influencing an election" even if it was not made "solely" for that purpose. (Dkt. 280 at 35.) As stated in the Rule 29 hearing, this really is an invitation for the Court to direct the verdict through this instruction – any person in the case can have one thought at some time that the funds could assist the campaign and Mr. Edwards is guilty. That is not the law; it is not the cases decided under the law; and it is an attempt to end up with a conviction and let the circuit court deal with it later.

The same logic can be pushed to the other extreme. A candidate could use the same logic in taking $50,000 from the campaign fund to give his wife jewelry for her birthday if the thought crossed his mind that it would help his campaign for his wife to

look so pretty by his side wearing that jewelry. That is what happens when "the purpose" is turned into "a purpose."

Fortunately, the Supreme Court and Fourth Circuit have made it easy for this Court to avoid opening such a Pandora's Box. The use of the definite article "the" was highlighted in both Buckley and NCRL as a limiting phrase. In addition to regulating campaigns and expenditures by individuals, FECA regulates "political committees." Buckley held that only organizations "under the control of a candidate or the major purpose of which is the nomination or election of a candidate" can be regulated as "political committees." 424 U.S. at 79 (emphasis added). This language is in parity with the requirement that only those "contributions" or "expenditures" "made for the purpose of influencing an election" can be subjected to federal regulation. NCRL invalidated a North Carolina statute regulating political committees that strayed beyond organizations with "the major purpose" of electing candidates to reach organizations with merely "a major purpose" of electing candidates. NCRL, 525 F.3d 287-89 (emphasis added). Given "Buckley's goals, it is clear that the importance the plaintiffs [organizations] attach to the definite article is correct." Id. at 287. Buckley's "the major purpose" test was designed to ensure that regulation "fell on election-related speech, rather than on protected political speech." Id. A more open-ended "a major purpose" test was invalid because it could cover political speech and "contravene both the spirit and letter of Buckley's 'unambiguously campaign related' test." Id. at 287-88. "Permitting the regulation of organizations as political committees when the goal of influencing elections

is merely one of multiple 'major purposes' threatens the regulation of too much ordinary political speech to be constitutional." Id. at 288-89.

The Fourth Circuit found this error was "compounded by the statute's vagueness." Id. at 289. While "the major purpose" test is open to some interpretation, the narrowness of the phrase "the major purpose" provides sufficient "fair warning" of its scope. Id. By contrast, there is no way to determine whether some lesser consideration would be "a major purpose," which the court compared to "handing out speeding tickets without telling anyone … the speed limit." Id. at 290 (internal quotation omitted). Foreshadowing a case like this one, the Fourth Circuit noted that such a vague test is "open to the risk of partisan and ideological abuse. This is nowhere so dangerous as when protected speech is involved. … Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject." Id.

Telling the jury that third-party spending can be a campaign contribution, even if the spending was made predominantly for some purpose other than influencing the election, invites the same problems and uncertainty. There is no way for the jury to determine whether influencing the election may have been 1% of the reason a third-party expenditure is made, and it is all too easy for a jury to assume that any help offered to a candidate during an election would be intended to help the campaign, at least in some small part. Consequently, the proposed instruction directs the jury toward conviction in

all cases when money is spent to help a person who happens to be a candidate, even though that plainly was not the intent of Congress or the FEC.

In addition, the proposed instruction is erroneous because it focuses on the wrong person's intent. Mr. Edwards is the person who is on trial here and the jury should be focused on his intent, but the proposed instruction focuses on the intent of the third party who made "a gift, purchase, or payment." (Dkt. 280 at 35.) That is deeply flawed because that imposes a form of strict liability on the candidate. If a close friend of the candidate were to loan the candidate's daughter $10,000 to pay for college tuition, assuring the candidate that he thinks of the candidate's daughter as his own daughter, that he loves her, or that it is just a loan, and the candidate believes him, he should not be held liable if the donor actually assisted the candidate's daughter to free up the candidate's money for the campaign or to protect the image of the candidate's family by keeping his daughter from dropping out of school. A candidate cannot be forced to risk criminal liability upon his inability to accurately read the mind of a donor, but that is the sort of liability this instruction imposes. The law is to the contrary; it creates an objective bright-line test for identifying contributions, and it makes the improper receipt of such contributions a felony only when the defendant accepts them "knowingly and willfully." Orloski, 795 F.2d at 162; see also Shays v. FEC, 414 F.3d 76, 99 (D.C. Cir. 2005) (noting adoption of an "objective, bright-line test … for 'contribution' in Orloski").

Objection to Request No. 27-30: False Statements

Mr. Edwards requests the Court give his Proposed Instruction No. 31 instead. (Dkt. 279 at 46.) The government's proposed instruction erroneously uses the phrase "knowingly concealed" in element 1 and "knew it" in element 2 (Dkt. 280 at 38), when the statute uses the phrase "knowingly and willfully … conceals." 18 U.S.C. § 1001. In elements 2 and 3, the words "knowingly" and "willfully" are omitted altogether. This instruction also fails to specify the fact that is alleged to have been concealed, cross-referencing instead the Indictment. Mr. Edwards' proposed instruction is clearer by addressing the allegations directly; the government's proposal leaves the terms undefined.

The government's Proposed Instruction No. 28 also is erroneous for bringing the concept of intent back into the definition of "conceals," but then defining the intent as "knowing" rather than "knowingly and willfully."

Objection to Request No. 32: Venue

Rather than provide a single instruction on venue for all counts, Mr. Edwards believes the better course is to explain the venue requirement as it relates to each count separately. That makes sense because the definition of what conduct is criminal defines the relevant points when venue exists, and the crimes in this case are different (conspiracy, contributions, false statements). It also is unclear from the government's proposed instruction whether it applies only to Count 6, or Counts 1-5 as well.

Objection to Request Nos. 35-36: Punishment and Sympathy

These instructions are unnecessary because the Court already has instructed the jury to follow the law and decide the case based solely on the evidence. To the extent that the Court instructs the jury not to consider punishment or allow sympathy for the defendant to influence the verdict, it should provide balance within the instruction and instruct the jury as to the opposite – that the jury should not convict Mr. Edwards because it dislikes him or would like to see him punished for something. The only thing that matters is whether the jury finds beyond a reasonable doubt that the government has proven the charges in this case.

This the 13th day of May, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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