RECEIVED
04-06-2015
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT
Case No. 2013AP2504-2508-W

STATE OF WISCONSIN *ex rel.* THREE UNNAMED PETITIONERS,

Defendants-Petitioner,

v.

GREGORY A. PETERSON, John Doe Judge,
GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor

Plaintiffs-Respondents.

[Consolidated with Case Nos. 2014AP296-OA, 2014AP417-421-W]

REVISED BRIEF OF THE WYOMING LIBERTY GROUP AS *AMICUS CURIAE*

CRAMER, MULTHAUF
& HAMMES, LLP
Matthew M. Fernholz
(SBN #1065765)
1601 East Racine Ave, Ste. 200
P.O. Box 558
Waukesha, WI 53187
(262) 542-4278 Tel.
mmf@cmhlaw.com

Attorney of Record

Benjamin T. Barr
Stephen R. Klein
1902 Thomes Ave., ste. 201
Cheyenne, WY 82001
(307) 632-7020 Tel.
benjamin.barr@gmail.com
stephen.klein@wyliberty.org

Attorneys for Amicus

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Coordination Laws may not Eradicate Innocent Political Association 2

A. Wisconsin Statute Section 11.06(7) and GAB Section 1.42 are Overbroad Because They Ban any Coordination 6

B. *Christian Coalition* Offers This Court a Workable Standard for Coordination that Wisconsin's System Fails to Meet 9

II. The First Amendment Does Not Permit a Walk-on-Eggshells Approach to Campaign Finance Reform 16

A. Fifteen Years of Inconsistent Standards 17

B. The Current Law Threatens All Associations in Wisconsin That Express a Political Opinion 19

1. Silencing the Press with Expansive "Coordination" Theories 21

2. Leaving no Stone Unturned: Even the Boy Scouts Would be Muzzled 24

3. Far-Reaching Coordination Rules Damage American Politics 25

CONCLUSION 28

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(b), (c) 31

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)(f) 32

TABLE OF AUTHORITIES

Cases

Abrams v. U.S., 250 U.S. 616 (1919) 1

Bruno v. Milwaukee Cnty., 2003 WI 28, 260 Wis.2d 633, 660 N.W.2d 656 8

Buckley v. Valeo, 424 U.S. 1 (1976) 2, 3, 28

Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310 (2010) ..... *Passim*

Clifton v. Fed. Elec. Comm'n, 114 F.3d 1309 (1st Cir. 1997) 3, 7, 25

Connally v. General Constr. Co., 269 U.S. 385 (1926) 16

DeLay v. State, 443 S.W.3d 909 (Tex. Crim. App 2014) 6

FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999) ..... *Passim*

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) 3, 9

Grayned v. City of Rockford, 408 U.S. 104 (1972) 19

McCutcheon v. Fed. Elec. Comm'n, 134 S.Ct. 1434 (2014) 2

New York Times Co. v. U.S., 403 U.S. 713 (1971) 5

O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014). 19

O'Keefe v. Schmitz, 19 F. Supp. 3d 861 (E.D. Wis. 2014) 25

Showers Appraisals, LLC v. Musson Bros., 2013 WI 79, 350 Wis. 2d 509, 835 N.W.2d 226 8

U.S. v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943) 1

Watchtower Bible & Tract Soc'y of NY v. Village of Stratton, 536 U.S. 150 (2002) 5

Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804, 834–35 (7th Cir. 2014) (*Barland II*) 6, 7, 20

Statutes

52 U.S.C. § 30101(9)(B)(i) (2015) 21

WIS. STAT. § 11.01(16) 19

WIS. STAT. § 11.06(7) 6-8

WIS. STAT. § 11.10(4) 25

WIS. STAT. § 11.26 9

WIS. STAT. § 11.30(3) (2015) 21

WIS. STAT. § 11.30(4m) (2015) 21

WIS. STAT. § 11.38 (2015) 21

Other Authorities

GAB Advisory Opinion 2000-02 12

Bob Bauer, *The Coordination of Issue Advocacy Part I: Coordination and the Press*, MORE SOFT MONEY HARD LAW, June 27, 2014 23

Brian Stelter, *Abortion and Akin Were Off Limits During Romney Interview, Reporter Says*, THE CAUCUS, Aug. 23, 2012 23
Editorial, *Chisholm makes tough decision in difficult and tragic case*, MILWAUKEE J. SENTINEL, Dec. 22, 2014 22
Emma Roller & Stephanie Stamm, *How to Win Friends and Influence Elections*, NAT'L JOURNAL, Feb. 10, 2015 17
Wisconsin Voter Turnout Statistics, GOV'T ACCOUNTABILITY BD. 26

Regulations

11 C.F.R. § 109.21(h) 27
GAB 1.42 ..... *Passim*

INTRODUCTION

This Court must afford due skepticism to the State's claims that campaign finance laws can survive constitutional review when they damage the very premise of the First Amendment, which "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *U.S. v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.). It welcomes citizen participation in government affairs—including citizens talking to officeholders. It celebrates a free people holding those in power accountable. And it recognizes that only when all ideas, all confluences of ideologies, and all exchanges of ideas are permitted, that truth prevails. *Abrams v. U.S.*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

Wisconsin's patchwork of anti-coordination provisions destroys these principles. The law is far-reaching, invasive, and haphazard. It injects itself into innocent conduct, like the affairs of Boy Scouts, that the State has no interest in limiting. In being invasive and haphazard, it instills a chill against grassroots speakers and damages civic participation and cooperation. Because of this,

Wisconsin's hodge-podge of campaign finance restrictions cannot survive review.

ARGUMENT

I. COORDINATION LAWS MAY NOT ERADICATE INNOCENT POLITICAL ASSOCIATION

The First Amendment contemplates that citizen participation in government affairs is not conduct to be eradicated but cherished. *See Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 339 (2010). And there is "no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Elec. Comm'n*, 134 S.Ct. 1434, 1441 (2014).

Of the many categories of regulated conduct found in election law jurisprudence, coordinated expenditures are one of the densest. On one end of regulated spectrum are independent expenditures—money spent for speech that is relatively separate from candidate or officeholder influence. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). On the other end of the spectrum are fully coordinated expenditures—money spent for speech that is extensively synchronized with a candidate or officeholder. Election law precedent instructs that speech is still independent even if a third-party group and a candidate or officeholder share information. *See, e.g., Clifton v. Fed.*

Elec. Comm'n, 114 F.3d 1309, 1314 (1st Cir. 1997); *Fed. Elec. Comm'n v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

As for other notable categories of speech, election law has long divided "issue advocacy" from "express advocacy," or its functional equivalent. The Supreme Court established these boundaries in *Buckley* and *Wisconsin Right to Life* to ensure that while government might pursue the eradication of corruption it must respect a wide variety of political speech not related to this anti-corruption interest. "Express advocacy" constitutes communications that in "express terms advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 44. Independent expenditures are simply another name for express advocacy communications. Issue advocacy is speech about most anything else—politics and candidates—outside of express advocacy. *Fed. Elec. Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 456–57 (2007). Significantly, both express advocacy and issue advocacy receive heightened constitutional protection over contributions because they contain more expressive elements. *Id.* at 478–79 ("Issue ads like WRTL's are by no means equivalent to

contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them.")

The difference between independent expenditures and coordinated expenditures is significant. Independent expenditures are high-value speech and government has no valid interest in limiting them. *Citizens United*, 558 U.S. at 339. But Wisconsin law blatantly ignores these crucial differences and presumes most any non-regulable expenditure is a highly-regulated contribution unless certain oaths are taken and paperwork filled out. *See, e.g.*, WIS. ADM. CODE § GAB (hereinafter "GAB") 1.42(1), (6).

How a given state's election law considers speech to be independent or coordinated is consequential for would-be speakers. A local gun club would be free to spend as much money as it likes promoting gun safety issues or related candidate stances through independent expenditures or issue advocacy. However, the same club would be severely limited in the amount of money it spends making coordinated expenditures since these would be treated like contributions. Under Wisconsin law, for example, if a gun club's spending is deemed coordinated with an Assembly candidate it may only spend up to $500 for that speech. WIS. STAT. § 11.26(1)(c).

Wisconsin's far-reaching system stands and falls on the unconstitutional presumption it builds into the law. Realizing it is not free to widely regulate independent expenditures and issue advocacy, the State attempts to reclassify this speech as coordinated expenditures. Comparatively, this regulatory three-card Monte is like treating press speech as the functional equivalent of obscene speech or reinterpreting religious handbills to be unprotected speech. *See, e.g.*, *New York Times Co. v. U.S.*, 403 U.S. 713 (1971); *Watchtower Bible & Tract Soc'y of NY v. Village of Stratton*, 536 U.S. 150 (2002). Attention to the categorical speech definition is vital here, for Wisconsin's sleight of hand must be exposed for what it is—an unjust attempt to evade constitutional safeguards necessary to protect political speech.

Courts generally employ a coordination standard that is purposefully restrictive, which limits the number of cases triggering a finding of coordination, and prevents "chilling protected contact between candidates and corporations or unions." *Christian Coalition*, 52 F. Supp. 2d at 89. But Wisconsin's system eschews this judicial wisdom in favor of the state's coordination standard—one that is far-reaching, invasive, and haphazard in its operation.

When constitutional standards deteriorate, prosecutions that closely resemble political persecutions become the norm. *See*, *e.g.*, *DeLay v. State*, 443 S.W.3d 909 (Tex. Crim. App 2014).

A. WISCONSIN STATUTE SECTION 11.06(7) AND GAB SECTION 1.42 ARE OVERBROAD BECAUSE THEY BAN ANY COORDINATION

Wisconsin imposes the odd requirement that any individual or group wishing to speak out about political candidates, or even political issues, must file an oath affirming they do not act in cooperation or consultation with certain candidates and committees. WIS. STAT. § 11.06(7). Related administrative rules, `GAB § 1.42(1) and (6), work a deeper injury by creating a presumption that expenditures not preceded by an oath will be treated as contributions under Wisconsin law.[1] Adding insult to injury, any group that acts in consultation or cooperation with a candidate or his committee may be deemed *part* of the candidate's committee, subject to a wide universe of campaign finance restrictions and penalties. WIS. STAT. §11.10(4).

[1] The Seventh Circuit predicted the deeply problematic constitutional concerns connected with GAB § 1.42(1) and (6). *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 843 n.26 (7th Cir. 2014) (*Barland II*). However, because the appellant in that matter did not challenge the rules, they were not in controversy. *Id.*

Because clear standards are not delineated in Wisconsin's law, prudent actors would look to national precedent defining these standards. *See Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 834–35 (7th Cir. 2014) (*Barland II*) (comparing Wisconsin's broad definitions of "communication" and "political purpose" to federal law and case law). The First Circuit, for example, has explained that the Supreme Court stated that coordination "implied some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue." *Clifton*, 114 F.3d at 1311 (citations omitted). Likewise, the D.C. District Court has explained that properly constructed coordination regulations must avoid "chilling protected contact between candidates and corporations and unions." *Christian Coalition*, 52 F. Supp. 2d at 89.

Wisconsin Stat. § 11.06(7) and its implementing regulations GAB § 1.42(1) and (6) reach broadly and consider any expenditure for speech coordinated if it is made with any "cooperation or consultation" with candidates or committees. Thus, the law and rules in question reach far beyond their permissible scope, treating the smallest indicia of shared information, planning, or just talking with an elected officeholder as being fully coordinated.

Starting with the plain language of the statute, WIS. STAT. § 11.06(7) is invalid on its face due to its breadth. The problematic section provides that the only form of "disbursement" that shall be considered "independent" is one where an individual or committee does not act in "cooperation," "consultation," "in concert with," "or at the request or suggestion" of a candidate.

It is only natural to imagine there is a limiting construction readily available to trim the reach of Wisconsin election law. However, the plain language of a statute is presumed to "most directly convey what the legislature means." *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶35, 350 Wis. 2d 509, 835 N.W.2d 226. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶20, 260 Wis.2d 633, 660 N.W.2d 656. The terms "cooperation," "consultation," and "in concert with" are not ambiguous or puzzling terms. Rather, they are abundantly clear in their ordinary usage. Their chief constitutional malady is that they overreach and transform otherwise unregulated, independent

speech into coordinated speech with monetary caps. *See* WIS. STAT. § 11.26.

On its face, the operation of Wisconsin election law is easy to understand. It mutates all speech—big or small—by any speaker—the mighty or the meek—into a coordinated expenditure when even the most negligible cooperation occurs. *See* GAB 1.42(1) ("No expenditure may be made or obligation incurred over $25" where no oath is filed). But the First Amendment and settled precedent render this sweeping approach invalid. This Court should examine the guiding wisdom of *Christian Coalition*—a case that mirrors the FEC's coordination approach—to better understand constitutionally appropriate standards.

B. *CHRISTIAN COALITION* OFFERS THIS COURT A WORKABLE STANDARD FOR COORDINATION THAT WISCONSIN'S SYSTEM FAILS TO MEET

Correctly designed campaign finance laws begin with a presumption in favor of the exercise of free speech and association. *Wisconsin Right to Life*, 551 U.S. at 473. Thus, citizen participation in governmental affairs, associating with candidates and officeholders to advance public policy, and resulting speech occupy a special place in First Amendment jurisprudence. Compelling

government interests may infrequently dislodge these presumptions and allow for narrow categories of conduct and speech to be regulated to prevent corruption.

When confronted with a politically controversial case examining this very issue, the D.C. District Court established the foundation of coordination standards known in election law today. Before the *Christian Coalition* court were two very different starting theories to decide the question of what speech should be deemed independent or coordinated. The FEC argued in favor of a prophylactic rule where "any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election 'coordinated.'" *Christian Coalition*, 52 F.Supp.2d at 89. The court ultimately embraced a modified version of plaintiff's proposed, narrow coordination standard.

In rejecting the FEC's prophylactic approach to determining coordinated expenditures, the *Christian Coalition* court reasoned that "discussion of campaign strategy and discussion of policy issues are hardly two easily distinguished subjects." *Id.* at 90. Far-reaching

rules would certainly achieve the government's interest in rooting out *quid pro quo* corruption, but at too high a cost. Instead of being narrowly tailored to that interest, the rules would penalize all sorts of ordinary and healthy contact between factions, citizens, and candidates for office, or "the common, probably necessary, communications between candidates and constituencies during an election campaign." *Id.*

The *Christian Coalition* court then signaled its mindfulness of instruction from *Buckley* and reasoned that "considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate." *Id.* at 91. The *Christian Coalition* formulation, then, is one that carefully weighs the need to safeguard citizen participation in governmental affairs against the government's need to protect against corruption in the electoral process. Where speech is predominately created by a third party organization or individual and substantial negotiation does not occur and changes are not made by the candidate to the communication, it retains its heightened

protection as expressive speech of the third party. But where a candidate alters the third party's speech such that it resembles more of his own views or where substantial negotiation occurs between a candidate and an individual or group, it loses its heightened First Amendment protection and is treated more like a contribution under the law.

These concerns and subsequent balancing gave way to the court's formulation of its understanding of coordination, now replicated as a starting point in federal election law to define the standard:

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated;" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure. . . .[2]

[2] The GAB attempted to fashion, absent rulemaking, a *Christian Coalition* plus standard in Advisory Opinion 2000-02 (*available at* http://gab.wi.gov/node/659). There, while favorably highlighting the limiting standards of *Christian Coalition* (which included the right to discuss committee strategy with candidates), the advisory opinion suggests committees should not discuss strategy with candidates or campaigns. Of course, AO 2000-02 carries almost no legal significance here, given that the Board went out of its way to explain that it is "so fact intensive that the Board's opinion is virtually limited to the facts upon which the opinion is predicated."

Id. at 92. The FEC relied on the *Christian Coalition* test to help formulate its own coordination standard. This test involves three prongs (payment, content, and conduct) and the conduct prong heavily tracks the *Christian Coalition* formulation. *See* 11 C.F.R. § 109.21. In this way, it provides bright lines about the boundaries between independent and coordinated speech and allows a safe harbor for third parties to engage in some discussion and cooperation with candidates with resulting speech still qualifying as independent.

The particular facts of *Christian Coalition* are even more interesting when considering where the boundary between coordinated and independent expenditures exists. It is clear from the case that "[Christian Coalition Executive Director Ralph] Reed and [Coalition Board Chairman Pat] Robertson . . . had special access to the Bush campaign's strategy. In fact, Reed frequently offered the campaign advice, much of which was either followed or implemented independently." 52 F.Supp.2d at 93. Likewise, the Coalition shared extensive information with the Bush campaign about its voter guides. The evidence undisputedly showed that "Robertson and Reed clearly had special access to Bush–Quayle '92.

Reed had extensive discussions concerning the campaign's thinking on a number of strategic issues." *Id.* at 94. Ultimately, a great deal of inner strategy was shared between the Coalition and the Bush campaign but no real negotiation or partnership formed out of it.

Mere cooperation, sharing of insider knowledge, and even extensive discussions about undisclosed strategy simply could not constitute coordination for the *Christian Coalition* court. The court also considered the Coalition's deep involvement in several congressional campaigns where no finding of coordination could be upheld, either. The FEC alleged that the Coalition engaged in coordinated expenditures with the Helms campaign for the Senate race in North Carolina in 1990. It based its theory on evidence that Reed had special access to Helms's private opinion polls, which allowed the Coalition to target North Carolina as a focus state for its efforts. In another instance, Beverly Russell went so far as to serve as a Coalition official and volunteer for a congressional campaign and was able to provide secret campaign strategy information to the Coalition. The Court rejected each of these theories, realizing that volunteers, campaigns, advocacy groups, and candidates will often share information in with perfect protection of the First Amendment.

Since none of the reviewed conduct involved a sort of partnership or co-venture operation between the Coalition and the campaigns, no improper coordination could be found.[3]

Free speech jurisprudence and election law precedent inform this Court that no matter the government interest in regulation, careful boundaries must remain between coordinated and independent expenditures to ensure breathing room for the latter. Two existing limiting constructions help provide these exact boundaries. The first is found in the traditional express advocacy, or its functional equivalent, standard delineated in *Buckley* and *Wisconsin Right to Life*. This test provides that before a state may regulate expenditures or other forms of electoral communication they must, in express terms, advocate the election or defeat of candidates. Anything else remains unregulable. The second is found in *Christian Coalition*, which ensures that ordinary interaction with candidates is protected and only regulates coordinated speech where both the third-party group and the speaker emerge as joint venturers. 52 F.Supp.2d at 95. Because Wisconsin elected to ignore leading guidance in these areas and ran roughshod over constitutional

[3] Where the Christian Coalition appeared to be more of a partner with candidates, civil penalties were found valid for improper coordination. *Christian Coalition*, 52 F.Supp.2d at 49.

concerns, this Court should find its coordination provisions facially invalid and halt the entirety of this political prosecution. *Citizens United*, 558 U.S. at 331 (noting the "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.")

II. THE FIRST AMENDMENT DOES NOT PERMIT A WALK-ON-EGGSHELLS APPROACH TO CAMPAIGN FINANCE REFORM

The Supreme Court's ruling in *Citizens United* included a reminder that in order for constitutional rights to have meaning, laws that abut them—particularly free speech— must be understandable:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."

558 U.S. at 324 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Unfortunately, even speakers who can afford experienced legal counsel to help them navigate campaign finance law end up on the wrong end of law enforcement. *See* Emma Roller & Stephanie Stamm, *How to Win Friends and Influence Elections*, NAT'L JOURNAL, Feb. 10, 2015,

http://www.nationaljournal.com/twenty-sixteen/how-to-win-friends-and-influence-elections-20150210 ("Even campaign finance lawyers we spoke with for this story—people who deal with these regulations every day—have disagreements about how exactly to interpret, well, anything.") Although the State is confident that the political engagement in this case was illegal, Wisconsin's recent campaign finance history reveals prolix, ever-evolving standards that neither a campaign finance attorney, much less person of ordinary intelligence, could reasonably comply with. Instead of learning the larger lessons of *Citizens United* and the Seventh Circuit's recent ruling in *Barland II*, the State returns with an all-encompassing definition of "coordination." Its overbreadth renders the law unconstitutional.

A. FIFTEEN YEARS OF INCONSISTENT STANDARDS

In *Barland II*, the Seventh Circuit put great effort into laying out the recent history of Wisconsin campaign finance law. *See generally* 751 F.3d at 809–30. The law's myriad faults stem from ignorance or evasion of important First Amendment precedent:

> Part of the problem is that the state's basic campaign finance law . . . has not been updated to keep pace with the evolution in Supreme Court doctrine marking the boundaries on the government's authority to regulate election-related speech. In addition, key administrative rules do not cohere well with the statutes, introducing a patchwork of new and different

> terms, definitions, and burdens on independent political speakers, the intent and cumulative effect of which is to enlarge the reach of the regulatory scheme.

Id. at 808. Particularly noteworthy is the Wisconsin Legislature's effort in 2001 to require any organization merely mentioning a candidate in an advertisement within 60 days of an election to become a political committee. This law was complete with "a nonseverability clause and a fairly obvious poison pill" that entirely eliminated the bill when part of it was struck down. *Id.* at 818. Since then, like so many campaign finance "reform" efforts at the state and federal level, action to expand the reach of the law has originated entirely from executive officeholders or agencies. The GAB tried its own hand at repeating the 2001 legislative effort in 2008:

> [U]nder the new version of [GAB § 1.28], almost anything a person might publicly say about a candidate within 30 days of a primary and 60 days of a general election trigger the entire panoply of proscriptions and prescriptions in Chapter 11 once the minimal spending threshold is crossed (then a mere $25; now $300).

Id. at 822. This rule was finalized in 2010, and subsequently curtailed by the Seventh Circuit last year. Specifically, communications by "political speakers other than candidates, their campaign committees, and political parties" must contain express advocacy or its functional equivalent to be regulated as acts

undertaken for "political purposes." *Id.* at 843–44; *see* WIS. STAT. § 11.01(16).

Continuing this tradition of avoiding broad First Amendment rulings in favor of broad regulation, since the reach of regulation to communications by independent groups is confined to express advocacy or its functional equivalent, the State now endeavors to turn as many *communications* as possible into *contributions*. This adds to a sordid history of misunderstanding free speech.[4] The court below, however, understood, and reinforced the Seventh Circuit's *Barland II* ruling by quashing the subpoenas against the plaintiffs. Coordination restrictions cannot reasonably capture all cooperation and all speech, like issue advocacy, for it will outlaw most meaningful political association in Wisconsin.

B. THE CURRENT LAW THREATENS ALL ASSOCIATIONS IN WISCONSIN THAT EXPRESS A POLITICAL OPINION

The Supreme Court considers voiding vague laws "a basic principle of due process." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Where a vague statute "abut(s) upon sensitive

[4] The GAB was so bold as to recently take the position that until the U.S. Supreme Court explicitly approves certain political activity, it is properly subject to regulation. *See* Brief of Wisconsin Government Accountability Board in Support of Defendants-Appellants as Amicus Curiae, at 20–26, *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014), No. 14-1822, 2014 WL 4402299. Nothing could be further from the truth. *See Citizens United*, 558 U.S. at 324.

areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id*. The doctrine of overbreadth is distinct, but relates closely to vagueness: "[O]verbroad laws, like vague ones, deter privileged activity . . . . The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Id.* at 114–15.

The Seventh Circuit recently reiterated the importance of both doctrines: "[B]ecause political speech is at the core of the First Amendment right, overbreadth and vagueness concerns loom large in this area, *especially when the regulatory scheme reaches beyond candidates, their campaign committees, and political parties.*" *Barland II*, 751 F.3d at 811 (emphasis added). Wisconsin election law, and its implementing regulations, are so sweeping they reach out, regulate and penalize all sorts of innocent cooperation between third party groups and candidates. It also permits Wisconsin prosecutors to selectively decide which speech to suppress and which to leave untouched.

1. Silencing the Press with Expansive "Coordination" Theories

Newspapers and other media corporations have usually enjoyed the unbridled ability to discuss politics and endorse candidates, spending considerable funds unaffected by campaign finance regulation. The Federal Election Campaign Act provides a broad regulation exemption for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, or candidate." 52 U.S.C. § 30101(9)(B)(i) (2015). Wisconsin law contains a similar exemption, "unless the communication is made by a candidate, personal campaign committee, support committee of a candidate . . . or a political party." WIS. STAT. § 11.30(4m) (2015); *see also* WIS. STAT. § 11.30(3) (2015) (reporting for "persons who own any financial interest in a newspaper or periodical . . . or in any radio or television station. . . . ."). The State's theory could work around this and provide that any input from a campaign could make issue advocacy by the press an illegal corporate contribution to the campaign. *See* WIS. STAT. § 11.38 (2015).

When engaging in issue advocacy, editorials can provide valuable support for elected officials and their campaigns. Following the State's scheme, nothing indicates a stronger case for coordination than when a media outlet disseminates and endorses "certain speech" that is "valuable to the candidate." Consider a recent editorial in the *Milwaukee Journal-Sentinel*:

> [P]eople need to go through [a statement from District Attorney John Chisholm] so they can better understand Chisholm's decision and reach their own conclusions. In the meantime, it should trust that the county's elected representative — Chisholm — has done his job and made the best decision under the circumstances.

Editorial, *Chisholm makes tough decision in difficult and tragic case*, MILWAUKEE J. SENTINEL, Dec. 22, 2014, *available at* http://www.jsonline.com/news/opinion/chisholm-makes-tough-decision-in-difficult-and-tragic-case-b99413483z1-286575251.html. This editorial quotes and endorses the message of an elected official on a particularly controversial topic before a large audience, undoubtedly benefitting Chisholm. This is only legal under the State's theory because the State has not prosecuted.

Coordination of issue advocacy with the press could just as easily become a crime of omission. Sometimes campaigns encourage reporters to explore specific issues in candidate interviews. *See, e.g.*,

Brian Stelter, *Abortion and Akin Were Off Limits During Romney Interview, Reporter Says*, THE CAUCUS, Aug. 23, 2012, http://thecaucus.blogs.nytimes.com/2012/08/23/abortion-and-akin-were-off-limits-during-romney-interview-reporter-says/?_r=0. When a press outlet only asks certain questions of a candidate by request in order to get a story, or when it avoids covering certain stories under assurance that it will lead to more access down the road, it can be of great value to the political campaign. Under the State's theory, positive coverage at the suggestion of a campaign or candidate may be illegal coordination.

Regulating either coordinated commission or omission of free speech in these instances is an absurd result. Campaigns do everything in their power to circulate their message, both expressly for the election of their candidate and for their candidate's position on certain issues. This is not merely through editorials, but all forms of news coverage. "Candidates often plan or budget for 'earned' media" and include a "considerable amount of media work backstage." Bob Bauer, *The Coordination of Issue Advocacy Part I: Coordination and the Press*, MORE SOFT MONEY HARD LAW, June 27, 2014,

http://www.moresoftmoneyhardlaw.com/2014/06/coordination-issue-advocacy-part-coordination-press/. This Court should not allow long-standing respect for the free press to be circumvented by all-encompassing investigations by the State.

2. Leaving no Stone Unturned: Even the Boy Scouts Would be Muzzled

Problematically, Wisconsin law does not require more overt acts of coordination to trigger a finding of coordination. Imagine that the Boy Scouts wish to launch a fundraiser and synchronize it with a candidate running for office.[5] Suppose Glacier's Edge Boy Scouts Troop 16 found itself on the low end of fundraising one year. Suppose further that concerned troop parents are helping to champion a legislative bill designed to reduce childhood poverty in Wisconsin. They also happen to want to speak publicly about it. To help raise funds for the Troop, and to thank its legislative sponsor, it invites its sponsor, now a candidate for re-election, to the big fundraiser. Including the candidate accomplishes several goals for the Troop. It allows a small organization to benefit from better fundraising due to the public recognition of the officeholder; it allows thankful parents to acknowledge the officeholder's good

[5] *See O'Keefe v. Schmitz*, 19 F.Supp.3d 861, 872 n.8 (E.D. Wis. 2014), *rev'd* 769 F.3d 936 (7th Cir. 2014).

work; and it allows for a free exchange of ideas and cooperation between the officeholder and the Troop about how best to solve childhood poverty.

Imposing Wisconsin's coordination scheme on these facts would turn Glacier's Edge Boy Scouts Troop 16 into a full-fledged political subcommittee of the candidate. WIS. STAT. § 11.10(4). It would also impose contribution limits and restrictions on the Troop as well as subject it to campaign finance reporting requirements. All this because it wanted to raise funds, end childhood poverty, and thank a Wisconsin Assemblyman. Of course, the vice of this approach is easily understood. It is "beyond reasonable belief" that the "government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues." *Clifton*, 114 F.3d at 1314. In the State's chase-your-tail approach to rooting out all supposed corruption, it would criminalize even Boy Scouts hoping to improve civil society.

3. Far-Reaching Coordination Rules Damage American Politics

The State has emphasized that the activities of the Unnamed Petitioners are indicative of coordination and cause for investigation. The practical effect of this is to severely curtail the association of

anyone who decides to work on a campaign and simultaneously supports one or more causes. The State's theory would require an impenetrable wall of separation between campaigns and issue groups, abridging the speech and association of candidates and engaged citizens alike. This would be particularly harmful to grassroots candidates challenging incumbents.

In every state, in both state and federal elections there are politically engaged citizens and for each one dozens (if not hundreds or thousands) who are passive or apathetic. Even in Wisconsin's tumultuous 2012 election, voter turnout barely passed 70%. *See Wisconsin Voter Turnout Statistics*, GOV'T ACCOUNTABILITY BD., http://gab.wi.gov/elections-voting/statistics/turnout (last visited Mar. 4, 2015). The law must not serve to separate the already small number of engaged citizens into exclusive groups simply because one decides to run for office and others decide to support the candidate.

Reasons for running for elected office vary, but candidates are often driven by specific principles and issues. Whether through public activism, legislative lobbying or other activity, politicians achieve their first political successes before actually running for

office. It is during this formative time that a future candidate will find allies. When the time comes, some of these allies will serve important full-time roles in the candidate's campaign. Others, however—particularly those who are committed to positions in issue organizations—will not. There is wide ground between these options; many engaged citizens wear different hats and participate in *both* issue advocacy and electoral campaigns. To comply with the State's coordination rules, a candidate would have to cut ties with any engaged citizen who is not part of the campaign, and severely curtail (and certainly monitor) the activities of part-time staff or volunteers. Of course a candidate and campaign should not have to do this, for the practical effect of this is to cut off a campaign from engaging the citizens who are in a position to help advance both the election and the issues that matter most to the campaign.[6]

A segment from then-United States Solicitor General Robert Bork's *amicus* in *Buckley* aptly illustrates the end result of the State's dangerous theory that all political speech is subject to

[6] The FEC recognizes the dual roles citizens often play between campaigns and third party groups. In its coordination rules, the FEC provides for an explicit firewall safe harbor where common vendors between a campaign committee and a third party group may work in both organizations provided certain conditions are met. 11 C.F.R. § 109.21(h).

coordination oversight. A portion of the brief distinguished the justifications for the federal Hatch Act from those for the FECA:

> While a desire to "take civil servants out of politics" is readily understandable, there could be no parallel desire, at least under democratic government as we know it, to "take politicians out of politics." Members of Congress, and the President, make the policy civil servants must apply, and the policy-makers legitimately can be sensitive to "political" considerations including the needs and desires of "pressure groups."

Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, at 43, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 412237. Whether it is a newspaper, a small group, or an influential operation, associations that seek to effectively speak out must not be hindered from communicating and associating with officeholders and candidates who respect and reflect their values. Likewise, candidates must not be prohibited from associating with organizations that agree with them. The result would be, quite simply, to "take politicians out of politics." *Id.* Unless a candidate exhibits substantial control of a third-party message, speech and association must be immune from coordination investigations and charges.

CONCLUSION

This Court is not tasked with eliminating all prohibitions on coordination, and though an ideal campaign finance system would

make issue advocacy entirely immune from coordination inquisitions, this Court need not go so far.[7] Instead, this Court need only affirm the careful formulations of *Clifton* and *Christian Coalition*—which followed principles first enunciated in *Buckley*—and end the baseless inquisition in this case and prevent future attempts to criminalize free speech and association.

[7] Given the State's continued recalcitrance to First Amendment principles, however, *Amicus* hopes the Court will consider it. *See supra* part II(A).

For the aforementioned reasons, this Court should affirm the motion to quash and dismiss this case entirely.

Respectfully submitted,

Dated this 2nd day of April, 2015.

/s/ Matthew M. Fernholz
CRAMER, MULTHAUF & HAMMES, LLP
Matthew M. Fernholz (SBN #1065765)
1601 East Racine Ave, Ste. 200
P.O. Box 558
Waukesha, WI 53187
(262) 542-4278 Tel.
mmf@cmhlaw.com
Attorney of Record

Benjamin T. Barr
Stephen R. Klein
1902 Thomes Ave., Suite 201
Cheyenne, WY 82001
(307) 632-7020 Tel.
benjamin.barr@gmail.com
stephen.klein@wyliberty.org
Attorneys for Amicus

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(b), (c)

I hereby certify that this *amicus curiae* brief conforms to the form requirements of Rule 809.19(8)(b) for an *amicus* brief produced with a proportional serif font.

I further certify that *amicus* has filed a motion with this brief requesting extension of the length requirement in Rule 809.19(8)(c) to not exceed 6,000 words. The length of this brief is 5,621 words.

Dated this 2nd day of April, 2015.

/s/ Matthew M. Fernholz
Matthew M. Fernholz
State Bar No. 1065765

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this *amicus curiae* brief in compliance with Rule 809.19(12)(f). I further certify that the text of this electronic copy is identical to the text of the paper copy of this brief filed with the Court.

Dated this 2nd day of April, 2015.

/s/ Matthew M. Fernholz
Matthew M. Fernholz, Esq.
State Bar No. 1065765