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SUPREME COURT OF WISCONSIN
Case No. 2013AP2504- 2508-W
Case No. 2014AP296-0A
Case No. 2014AP417- 421-W

THREE UNNAMED PETITIONERS,

Petitioners,

v.

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

Respondents.

Case Nos. 2013AP2504-2508-W

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

[CAPTIONS CONTINUED ON FOLLOWING PAGE]

BRIEF OF CAMPAIGN LEGAL CENTER, DEMOCRACY 21, COMMON CAUSE IN WISCONSIN AND LEAGUE OF WOMEN VOTERS OF WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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TWO UNNAMED PETITIONERS,

Petitioners,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge, and FRANCIS D. SCHMITZ, Special Prosecutor,

Respondents.

Case No. 2014AP296-0A

L.C. Nos. 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

FRANCIS D. SCHMITZ, Special Prosecutor,

Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,

Respondent,

Case Nos. 2014AP41- 42-W

and

EIGHT UNNAMED MOVANTS,

Interested Parties.

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

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STATEMENT OF INTEREST

Amici curiae Campaign Legal Center, Democracy 21, Common Cause in Wisconsin and the League of Women Voters of Wisconsin are nonprofit organizations that work to strengthen the laws governing campaign finance and political disclosure.

SUMMARY OF ARGUMENT

Under Wisconsin law, money spent in coordination with a candidate for the purpose of influencing an election is deemed a contribution subject to limits and source restrictions, as well as disclosure obligations. *See, e.g.*, Wis. Stat. §§ 11.01(6)(a)1, (16); § 11.06(1); Wis. Admin. Code § GAB 1.42. The goal of this law—and many similar laws at the federal and state levels—is to block attempts by big donors to purchase influence over candidates "through prearranged or coordinated expenditures amounting to disguised contributions," and thereby to prevent political corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

Among the many issues raised by these consolidated cases is the overarching question of whether this regime is constitutional. Specifically, this court asks whether Wis. Stat. ch. 11 violates the U.S. Constitution or Wisconsin Constitution if it "prohibits a candidate or a candidate's campaign committee from engaging in 'coordination' with an independent advocacy organization that engages solely in issue advocacy." Order of December 16, 2014. It further asks whether the phrase "for political purposes" in Wis. Stat. § 11.01(16) is unconstitutionally vague if it is not limited to express advocacy to elect or defeat a clearly identified candidate. *Id.*

Both of these questions must be answered in the negative.

First, the U.S. Supreme Court has made clear that the regulation of coordinated spending can extend beyond express advocacy communications. It unambiguously held that "there is no reason why Congress may not treat coordinated disbursements for electioneering communications," i.e., communications about candidates that do not include express advocacy, "in the same way it treats all other coordinated expenditures." *McConnell v. FEC*, 540 U.S. 93, 202-03 (2003).

Second, the definition of "political purposes in Wis. Stat. § 11.01(16), which relies upon the phrase "for the purpose of influencing the election," is not vague as applied to the regulation of coordinated spending. The U.S. Supreme Court formulated the express advocacy test in *Buckley* to narrow the federal definition of "expenditure," which similarly relied on the phrase "for the purpose of influencing" an election. 424 U.S. at 79. But this ruling was in the context of independent expenditures. By contrast, the *Buckley* Court was not troubled by the same language in the federal definition of "contribution." *Id.* at 78. Instead, it found that within the "general understanding" of a contribution—an understanding that included "all expenditures placed in cooperation with or with the consent of a candidate"—the definition of "contribution" was sufficiently precise. *Id.*; *see also id*. at 46-47 & n.53. Thus, Wisconsin need not employ an express advocacy standard in regulating coordinated spending, i.e., "expenditures placed in cooperation with or with the consent of a candidate."

Finally, the evolution of federal law underscores that the regulation of coordinated spending is not restricted by the express advocacy test. For over three decades, the Federal Election Campaign Act ("FECA") and related regulations, have swept far more broadly

than express advocacy in the regulation of "coordinated expenditures," and the courts have consistently upheld this broader approach.

For these reasons, Questions 11 and 13 of this Court's December 16, 2014 Order should be answered in the negative, and the constitutionality of Wisconsin's law affirmed.

ARGUMENT

I. The Regulation of Contributions and Coordinated Expenditures Is Not Limited to Express Advocacy.

A. The Express Advocacy Test Was Devised to Modify Laws Regulating Independent Spending.

The Supreme Court created the express advocacy test to narrow the broadly-worded definition of "expenditure" in two federal statutory provisions regulating independent spending, but never required this test in the regulation of contributions and coordinated expenditures. *Buckley*, 424 U.S. at 44 (formulating express advocacy test to narrow expenditure limit); *id*. at 79-80 (applying test to narrow disclosure of independent expenditures).

Buckley addressed concerns that the federal definitions of "expenditure" and "contribution" were unconstitutionally vague and overbroad because both definitions relied on the broad operative phrase "for the purpose of influencing any election for Federal office." *Id*. at 79; *see also* 52 U.S.C. § 30101(8)(A)(i) (defining "contribution"); *id.* § 30101(9)(A)(i) (defining "expenditure"). The *Buckley* Court concluded, in the context of independent expenditures, that this phrase was vague because it potentially "encompass[ed] both issue discussion and advocacy of a political result." 424 U.S. at 79. Consequently, where the actor was "an individual other than a candidate or a group other

than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80.

But this was in the context of independent expenditures. By contrast, the Court found that the "for the purpose of influencing" language "presents fewer problems in connection with the *definition of a contribution* because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). Instead of imposing an "express advocacy" construction on the definition of "contribution," the Court merely clarified that a contribution includes: (1) "contributions made directly or indirectly to a candidate, political party, or campaign committee," (2) "contributions made to other organizations or individuals but earmarked for political purposes," and (3) "*all expenditures placed in cooperation with or with the consent of a candidate*, his agents, or an authorized committee of the candidate." *Id*. at 78 (emphasis added).

Thus, *Buckley* recognized that within the bounds of the "general understanding" of what constitutes a political contribution—an understanding that included coordinated expenditures (i.e., expenditures "placed in cooperation with or with the consent of a candidate")—the limiting gloss of express advocacy was not necessary. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 77 n.50 (D.D.C. 1999) (noting *Buckley* found that "the First Amendment did not require a narrowing understanding of 'expenditure'" in the context of coordinated expenditures). Otherwise put, *Buckley* concluded that the "purpose

of influencing" language in a statutory provision defining contributions, and by extension, coordinated expenditures, was neither vague nor overbroad.

The Supreme Court in *McConnell* went further and affirmatively recognized that a coordination rule could extend beyond "express advocacy" to reach "electioneering communications," a category of non-express advocacy that was only first regulated by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81; *see* 52 U.S.C. § 30104(f). "Electioneering communications" were defined as broadcast advertisements that "refer[] to a clearly identified candidate for Federal office," are "targeted to the relevant electorate," and air 30 days before a primary or 60 days before a general election. 52 U.S.C. § 30104(f)(3). *McConnell* held that disbursements for "electioneering communications" that are coordinated with a candidate or party could be deemed "coordinated expenditures," and treated as contributions to that candidate or party. 540 U.S. at 202. In so holding, the Court noted that "*Buckley*'s narrow interpretation of the term 'expenditure' was not a constitutional limitation on Congress' power to regulate federal elections," and consequently concluded that "there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." *Id.* at 202-03.

No subsequent case has questioned this holding in *McConnell*. In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), the Supreme Court considered the constitutionality of the federal ban on the use of corporate treasury funds to finance electioneering communications. But that case concerned the regulation of *independent* spending, not *coordinated* spending. The spending at issue—three advertisements

criticizing the involvement of both Wisconsin Senators in the filibuster of certain judicial nominees—were not coordinated with candidates or officeholders. The *WRTL* plurality determined that the federal ban on *independent* corporate spending was only permissible insofar as it applied to express advocacy or the "functional equivalent of express advocacy," and it defined the latter narrowly to cover only those ads that were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70. At no point, however, did the Court suggest that these tests were relevant to the regulation of contributions and coordinated spending.

Nor does *Citizens United v. FEC*, 558 U.S. 310 (2010), support the use of an express advocacy standard in regulating coordinated spending. There, the Supreme Court invalidated the federal ban on corporate independent expenditures in its entirety, even insofar as it applied to express advocacy or its functional equivalent. *Id*. at 365-66. But at the same time, the Court also upheld the challenged "electioneering communications" disclosure requirements, *id.* at 367, and expressly "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 369. Thus, if anything, *Citizens United* cast doubt on the continued relevance of the test for express advocacy (and its "functional equivalent") to campaign finance regulation.

In short, *Buckley* devised the "express advocacy" test for a specific purpose: to limit FECA's regulation of *independent* spending. The Court specifically declined to apply this test to the regulation of political contributions, finding instead that the "general understanding" of a contribution—which included "all expenditures placed in cooperation

with or with the consent of a candidate"—was sufficiently precise. Nothing in *WRTL* or *Citizens United* undermines this holding.

B. Wisconsin Law Is Consistent with the Supreme Court's First Amendment Jurisprudence.

Under Wisconsin law, like federal law, coordinated spending constitutes an in-kind contribution from the spender to the candidate, subject to contribution limits and source restrictions, as well as disclosure requirements. Wis. Stat. §§ 11.01(6)(a)1, (16); 11.06(1); Wis. Admin. Code § GAB 1.42(2), (6); *see also* Wis. Stat. §§ 11.26(1)(a)1; 11.38.

Wisconsin law does not limit the regulation of coordinated spending to express advocacy. *See, e.g*. Op. El. Bd. 00-2 (2000), at 12-13 (reaffirmed Mar. 26, 2008). Instead, "speech which does not expressly advocate the election or defeat of a clearly identified candidate may, nevertheless, be subject to campaign finance regulation" if (1) "the speech is made *for the purpose of influencing voting* at a specific candidate's election"; and (2) "the speech is made at the request or suggestion of the campaign" or where "there has been substantial discussion or negotiation" between the spender and candidate about the communication. *Id.* at 12 (emphasis added); *see also* Wis. Stat. § 11.01(6)(a)1, (7)(a), (16).

Wisconsin's content standard for coordinated spending is thus consistent with *Buckley*'s holding and closely tracks the "for the purpose of influencing" language in the federal definitions of "contribution" and "expenditure."

Furthermore, Wisconsin's approach was upheld in *Wisconsin Coalition for Voter Participation, Inc. (WCVP) v. State Elections Board*, 231 Wis.2d 670, 605 N.W. 2d 654 (Wis. Ct. App. 1999). There, the Court of Appeals considered the exact legal questions

that are at issue here, reviewing a lawsuit brought to enjoin an investigation of alleged coordination between WCVP and a judicial campaign. WCVP maintained that the investigation was unfounded because its mailings did not contain express advocacy, but the court held that the communications were regulable "*whether or not* they constitute express advocacy." *Id*. at 659. The Court reasoned that although *Buckley* held that "independent expenditures that do not constitute express advocacy of a candidate are not subject to regulation," *Buckley* did not "limit the state's authority to regulate or restrict *campaign contributions*." *Id*. at 658-59 (emphasis added).

Wisconsin's regulation of coordinated spending is also consistent with *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). The Seventh Circuit panel there applied an "express advocacy" construction to the definition of "political purposes" because it relied on "for the purpose of influencing" language. *Id.* at 832-33. But the panel did so as applied to the plaintiff group and its political committee, both of which engaged only in independent spending and "operate[d] independently of candidates and their campaign committees." *Id*. at 809. This narrowing construction was not needed, in the court's opinion, for communications by "candidates, their committees, and political parties" because such communications are "unambiguously related to the campaign." *Id.* at 833-34 & n.21 (quoting *Buckley*, 424 U.S. at 80). Here, the act of coordinating an expenditure with a candidate makes it functionally an expenditure by the candidate, and as such, unambiguously campaign-related. *Barland* is thus consistent with *Buckley* and the principle expressed therein: the express advocacy test applies to the regulation of independent spending, not the regulation of contributions and coordinated spending.

II. The Evolution of Federal Law Demonstrates that an "Express Advocacy" Limitation on the Regulation of Coordinated Spending Is Not Constitutionally Required.

Federal campaign finance law defines coordinated spending as an "expenditure" made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 52 U.S.C. § 30116(a)(7)(B)(i). The Federal Election Commission (FEC) regulations applying this definition set forth two standards that must be met before a communication is regulable as a coordinated expenditure: (1) a standard for the "*content*" that a communication must contain; and (2) a "*conduct*" standard for the cooperation, consultation or discussion that must occur between a spender and a candidate. 11 C.F.R. § 109.21.

For more than 25 years, the statute had no "content standard" for the regulation of coordinated expenditures beyond the statutory definition of "expenditure"—i.e., any payment "made by any person *for the purpose of influencing* any election for Federal office." 52 U.S.C. § 30101(9)(A)(i) (emphasis added). The FEC's 1980 regulation likewise contained no content standard beyond the statutory definition of expenditure. 11 C.F.R. § 109.1(b) (1980). Thus for over two decades, the "for the purpose of influencing" language was the only content standard governing coordinated spending.

In 2002, Congress explicitly addressed coordination in BCRA, and mandated a more specific content standard for the FEC's coordination rule, directing that disbursements for "*electioneering communications* that are coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party." *McConnell*, 540 U.S. at 202 (citing 52 U.S.C. § 30116(a)(7)(C (emphasis added). This mandate was

challenged in *McConnell*, but the Supreme Court specifically upheld this section, concluding that Congress could constitutionally regulate non-express advocacy communications, i.e., "electioneering communications," as coordinated expenditures. *See* Section I.A. *supra*.

Following *McConnell*, the FEC promulgated a new content standard for its coordination rule that took into account the BCRA mandate. The rule provided that the following content could trigger the coordination rule: (1) the republication of campaign materials; (2) express advocacy; (3) "electioneering communications"; and (4) "public communications" that "refer[] to a political party or to a clearly identified candidate for Federal office," are distributed 120 days before a primary election or a general election, and are targeted to the relevant electorate. 11 C.F.R. § 109.21(c)(1)-(4)(2003); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 427-31, 453-54 (Jan. 3, 2003). The new regulation thus provided that a finding of coordination could be predicated on *any public communication mentioning a federal candidate within a 120-day pre-election window*.

Although the FEC's coordination rule swept far more broadly than express advocacy, it was challenged not as overbroad, but instead, as too narrow. Two of BCRA's congressional sponsors, Representatives Martin Meehan and Christopher Shays, contended that outside the regulated 120-day pre-election periods, the rule's reliance on an express advocacy standard would "permit a candidate to engage in massive, unregulated coordination with corporations, unions, wealthy individuals, and interest groups"—"free

from any contribution limitations, source restrictions, or even disclosure requirements." Amended Compl. ¶ 95, *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (No. 02-1984).

The D.C. Circuit Court of Appeals agreed with the plaintiffs' objection. It twice invalidated the rule, both in its 2003 form and as it was later revised to change the pre-election window for covered public communications from 120 days to 90 days with respect to congressional primary elections. Coordinated Communications, 71 Fed. Reg. 33,190, 33,193 (June 8, 2006); 11 C.F.R. § 109.21(c)(4) (2006). The Court of Appeals held that the rule's "fatal defect" was that it regulated only express advocacy outside of the 120-day pre-election window—and that the FEC had provided no "persuasive justification" for such "weak restraints" on potentially corruptive coordinated activity. *Shays v. FEC*, 414 F.3d 76, 100 (D.C. Cir. 2005) ("*Shays I*"). *See also Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) ("*Shays III*") (finding that the revised rule "still permits exactly what we worried about in *Shays* [*I*], i.e., more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words").

Following these decisions, the FEC again revised its coordination rule, this time providing that outside the pre-election windows, both express advocacy *and* its "functional equivalent" would meet the content standard. Coordinated Communications, 75 Fed. Reg. 55,947, 55,952-54 (Sept. 15, 2010). This rule was not challenged and is in effect today.

Thus, at no point has either FECA or its implementing regulations limited the "content" of regulable "coordinated expenditures" to express advocacy. After BCRA explicitly directed the FEC to regulate "electioneering communications" as coordinated

spending, the FEC settled on a coordination regulation that covered all public communications that simply mentioned a candidate within expansive 90- or 120-day periods before an election, even if the communications did not contain express advocacy or its equivalent. This rule was not deemed overbroad, but rather invalided twice as too narrow. The claim that the regulation of coordinated spending can extend no further than "express advocacy" or its functional equivalent simply cannot be squared with federal law or the judicial authority reviewing its evolution.

CONCLUSION

For all these reasons, this Court should answer Questions 11 and 13 of its Order in the negative, and affirm the constitutionality of the challenged laws.

RESPECTFULLY SUBMITTED this 17th day of March 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)

I hereby certify that this *amicus curiae* brief conforms to the form and length requirements of Rule 809.19(8)(b) and (c) for an *amici curiae* brief produced with a proportional serif font. The length of this brief is 2971 words.

Dated this 17th day of March 2015.

/s/*Susan M. Crawford*
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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 809.19(12)

I hereby certify that on March 17, 2015, 22 copies of the foregoing brief were filed with the clerk's office, and that three copies were served on all counsel of record for the parties by U.S. Post, Priority Mail. I further certify that I will file the foregoing brief electronically upon notice by the clerk that the brief has been accepted by the Court, and that the electronic brief will be identical in content and format to the printed brief filed with the Court today.

Dated this 17th day of March 2015.

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