IN THE SUPREME COURT OF WISCONSIN

Case No. 2013AP2504-2508-W
Case No. 2014AP296-OA
Case No. 2014AP417-421-W

Case No. 2013AP2504-2508-W

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

v.

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

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

Brief of Former Members of the Federal Election Commission Lee Ann Elliott, David Mason, Hans von Spakovsky, and Darryl Wold as *Amici Curiae* in Support of Petitioners

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March 18, 2014

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STATE OF WISCONSIN ex rel. FRANCIS D. SCHMITZ, Special Prosecutor,
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THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
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EIGHT UNNAMED MOVANTS,
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To regulate issue advocacy based on speakers' *intent* without regard to the *content* of their advocacy "would chill core political speech by opening the door to a trial on every ad." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.) (hereinafter *WRTL*).[1] Federal law accordingly regulates "coordinated communications" only when the *content* of a communication satisfies a bright-line standard designed to protect issue advocacy, 11 C.F.R. § 109.21(c), thus preventing "broad and intrusive investigations to determine the speaker's *intent*." 75 Fed. Reg. 55947, 55956 (Sept. 15, 2010) (emphasis added).

Issue advocacy, even when "coordinated," is entitled to utmost protection under the U.S. Constitution. And it deserves even greater protection under the Wisconsin Constitution, for "it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United

[1] In this brief, all citations to *WRTL* are to Chief Justice Roberts's lead opinion.

States Supreme Court . . . This court has never hesitated to do so." *State v. Doe*, 78 Wis.2d 161, 171 (1977).

I. Politically Salient Issue Advocacy Is at the Core of the First Amendment's Rights.

This Court, like the Supreme Court, draws a bright line between issue advocacy and express advocacy—"communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley v. Valeo*, 424 U.S. 1, 44 (1976); *Elections Bd. of Wisc. v. Wisc. Mfrs. & Commerce*, 227 Wis.2d 650, 669 (1999) (applying *Buckley*). "Issue ads . . . are by no means equivalent to contributions and the *quid-pro-quo* corruption interest cannot justify regulating them." *WRTL*, 551 U.S. at 478-79.

Accordingly, the Supreme Court "decline[d] to adopt a test for as-applied challenges turning on the speaker's intent to affect an election," *id.* at 467, and recognized that an objective test was necessary to avoid vagueness that "would chill core political speech by opening the door to a trial on every ad," *id.* at 468. It rejected "the notion that a ban on campaign speech could also embrace issue advocacy." *Id.* at 480.

Mere "coordination" of such issue advocacy with elected officials does not make it any less constitutionally valuable. "In a representative democracy," elected officials "act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

II. Prohibiting Coordinated Issue Advocacy Violates the First Amendment, Chilling Protected Speech.

This Court rightly "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." *Elections Bd. of Wisc.*, 227 Wis.2d at 676-77. That is precisely the principle that animates federal regulation of campaign-related speech.

A. The Anti-Corruption Interest Does Not Apply to Issue Advocacy, Even When It Is Coordinated with a Political Candidate.

Because political speech "is central to the meaning and purpose of the First Amendment," *Citizens United v. FEC*, 558 U.S. 310, 329 (2010), laws "that burden political speech are 'subject to strict scrutiny,' which requires the Government to

prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 340.

Only one governmental interest is "sufficiently important" to justify limits on political speech—the government's interest in "prevent[ing] corruption or its appearance." *Id.* at 356. And even in the case of speech expressly advocating a candidate's election or defeat, the Court has found the anti-corruption interest inadequate to justify regulation of independent expenditures. *Id.* at 356-57 ("[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

Because campaign finance laws must be narrowly tailored to achieve the anti-corruption interest, *both* coordination and a close nexus between the speech and an election are required for a communication to be regulated as a campaign contribution. The fact that a speaker expressly advocates for the election of a candidate does not, without more, justify burdensome regulation. The "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates

the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id* at 357.

But by the same token, coordination with public officials does not merit heavy regulatory burdens when the resulting communications are *issue* advocacy, for the absence of express advocacy (or its functional equivalent) reduces the value to the candidate of any coordinated communication and alleviates the risk of corruption. *See id.* at 360 ("Ingratiation and access . . . are not corruption.").

It is no answer for prosecutors or regulators to assert that affording such protection for issue advocacy might carry with it some residual risk of secret *quid pro quo* corruption. For under the First Amendment, campaign finance laws "must give the benefit of the doubt to protecting rather than stifling speech." *Id.* at 327. Thus, the Supreme Court struck down a ban on corporate "electioneering communications" despite the residual risk that some "issue advocacy [might] circumvent the rule against express advocacy[.]" *WRTL*, 551 U.S. at 479.

Even in affirming the government's power to regulate speech that is the "functional equivalent" of express advocacy though lacking "magic words" calling for the election or defeat of

a candidate, *McConnell v. FEC*, 540 U.S. 93, 206 (2003), the Supreme Court took care to define this category as narrowly as possible: a communication is "the functional equivalent of express advocacy *only* if [it] is susceptible of *no reasonable interpretation other than as an appeal to vote for or against a specific candidate*." *WRTL*, 551 U.S. at 469-70 (emphasis added), *quoted in Citizens United*, 558 U.S. at 325. This is an "objective . . . test" based on the *content* of the communication. *Citizens United*, 558 U.S. at 335. And the "functional equivalence" inquiry has "*no* application to *issue* advocacy[.]" *WRTL*, 551 U.S. at 481 (emphasis added).

B. Regulation of Coordinated Issue Advocacy Chills Speech.

"First Amendment freedoms need breathing space to survive," because "vague laws . . . inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41 n.48 (quotation marks and alteration omitted).

That chilling effect of vague campaign finance laws, which led the Supreme Court to allow regulation of express advocacy,

Id. at 80, and to reject an "expansive definition of [its] 'functional equivalent'" in the context of electioneering, *WRTL*, 551 U.S. at 479, is even more problematic in the context of restrictions on coordinated speech. When prosecutors can initiate criminal investigations based only on speculation about the intent underlying coordinated speech, and without regard to the content of the speech, the threat of prosecution "will unquestionably chill a substantial amount of political speech." *Id.* at 469.

The risk of chilling protected speech is particularly great in the coordination context, because individuals and organizations with an interest in speaking on matters of public policy naturally tend to interact with the political representatives responsible for making and enforcing public policy. *See In re: The Coalition, Nat'l Repub. Cong. Comm.*, MUR 4624 (Nov. 6, 2001) (statement of Comm'r Bradley A. Smith), at 25 ("Given that groups frequently have contacts with officeholder/candidates, credible allegations of coordination will be easy to make.").[2] If prosecutors can punish issue advocacy simply because it is "coordinated," then public interest groups "will be unable both to work with elected

[2] http://eqs.fec.gov/eqsdocsMUR/0000018E.pdf.

representatives and to run ads attempting to influence public opinion on issues of mutual interest." *Id.* at 11. Ultimately, such groups "will be asked to surrender either their rights of free speech and association or their rights of speech and to petition for redress." *Id*. And the chilling effect would extend beyond the groups and individuals actually prosecuted to third parties aware of the prosecution. *See id.* at 12.

Political opponents inevitably would leverage the possibility of prosecution against their rivals, alleging coordination in order to trigger intrusive investigations and lengthy litigation. *See Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986) ("[D]isgruntled opponents . . . could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters."); *In re: The Coalition*, MUR 4624 (statement of Comm'r Bradley A. Smith), at 2 ("These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing 'corruption or the appearance of corruption.'"). As one Commissioner stressed, "[e]veryone at this Commission is well aware of a favorite saying of the practicing campaign finance

law bar: '*The process is the punishment*.'" *Id.* at 12 n.18 (emphasis added).

III. The FEC Respects the Right to Engage in Issue Advocacy, Even Coordinated Issue Advocacy, Precisely to Avoid Chilling Political Speech.

A. The FEC's "Coordination" Rules Are Limited By Bright-Line Content Standards to Avoid Chilling Issue Advocacy.

The FEC's restrictions on "coordinated" communications are triggered only by communication that meets *both* "conduct" standards *and* "content" standards. 11 C.F.R. § 109.21(a) (setting both requirements); *id.* § 109.21(c) (listing content standards).

As to content, a communication coordinated with a candidate will meet the content standard only if it is express advocacy or its functional equivalent; or if it is an "electioneering communication" (defined in turn by 11 C.F.R. § 100.29 and limited to a 30- or 60-day window preceding elections); or if it refers to a "clearly identified" federal candidate or his party and is published in his jurisdiction within a 90- or 120-day timeframe preceding the election. *Id.* § 109.21(c).[3]

[3] In recounting these content standards, the signed *amici* do not necessarily endorse their merits in every respect. For present purposes, *amici* merely note that the standards are bright-line content standards intended by

(*footnote continued on next page*)

Indeed, because the content standards regarding "electioneering" and "clearly identified" candidates are bound by time and place restrictions (that is, they apply only within certain time periods before elections, and only to communications targeted at relevant voters),[4] the only "coordinated" communications regulated by the FEC without time and place limits are the well-established categories of "express advocacy" and its "functional equivalent," and the outright republication of the candidate's own political materials; not issue advocacy—coordinated or otherwise. The FEC established these content requirements to minimize the risk of burdening or chilling political advocacy. 68 Fed. Reg. 421, 427-28 (Jan. 3, 2003).

The last of these content standards to be promulgated was the "functional equivalent of express advocacy" standard. And its promulgation, in 2010, exemplifies the FEC's approach to ensuring that the "coordinated communications" provision not be allowed to unduly burden issue advocacy. Before 2010, express advocacy and outright republication of candidate materials were

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the FEC to limit the "coordinated communications" regulation to objectively discernible election advocacy.

[4] *See id*. §§ 109.21(c)(1), (c)(4); *id.* § 100.29.

"the only content standard[s] outside the 90-day and 120-day windows" before elections. *See* 75 Fed. Reg. at 55951 & n.10. But the D.C. Circuit held that "express advocacy" alone was too narrow under the statute, since speakers could evade that standard by simply eschewing "magic words" endorsing or opposing a candidate. *Shays v. FEC*, 528 F.3d 914, 926 (D.C. Cir. 2008). So the FEC added the familiar "functional equivalent of express advocacy" standard that the Supreme Court had established in *Wisconsin Right to Life* and *Citizens United*. *See* 75 Fed. Reg. at 55952 (discussing both cases). The FEC stressed that this newly adopted standard shared precisely the same definition offered by the Supreme Court: a communication is "the functional equivalent of express advocacy" *if and only if* "it is susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." *Id.* (emphasis added). This standard respects the right to coordinate with candidates on "genuine issue ad[s]"—such as ads that "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter"—while still leaving room for regulation of coordinated communications that has actual

"indicia of express advocacy." *See id.* at 55953 (quoting *WRTL*, 551 U.S. at 470).

Indeed, the FEC rejected a proposal to blur the content/conduct distinction by allowing "[e]xplicit [a]greement" between the speaker and a candidate to satisfy the content standard as well as the conduct standard. A "'fact specific' determination of whether a communication or agreement was made for the purpose of influencing a Federal election would require *broad and intrusive investigations to determine the speaker's intent*." *Id.* at 55956 (emphasis added). Such investigations "would chill core political speech by opening the door to a trial on every ad." *Id.* at 55957.

These are precisely the kinds of objective, bright lines that Wisconsin law should draw. *Cf. Elections Bd. of Wisc.*, 227 Wis.2d at 676-77. Absent the protection of clear content standards limited strictly to matters of genuine election-focused advocacy, state regulation of "coordination" would enable prosecutors and regulators to inquire into any collaboration between members of the public and their elected leaders, thus chilling the public's engagement in constitutionally protected issue advocacy.

B. Before Adopting Narrower, Bright-Line Content Standards for its Regulations, the FEC Experienced Firsthand the Dangers of Broad Inquiry Into Allegedly "Coordinated" Communications.

Before Congress enacted the Bipartisan Campaign Reform Act of 2002, the FEC's regulations on coordinated communications were much less clear than the lines drawn by the current regulations: a private party's expenditure "for general public political communication" would nevertheless be deemed an in-kind contribution if the communication merely "include[d] a clearly identified candidate and is coordinated with that candidate, an opposing candidate or a party committee." 65 Fed. Reg. 76138, 76146 (Dec. 6, 2000).[5] And "coordination," in turn, was defined broadly to include communications produced after "substantial discussion" with the candidate regarding the communications that resulted in "collaboration or agreement." *Id.*

That vaguer, subjective standard proved woefully problematic in practice: general allegations of collaboration sufficed to trigger "high-profile" investigations involving

[5] The Bipartisan Campaign Reform Act of 2002 specifically repealed these standards, which had been codified at 11 C.F.R. § 100.23. Pub. L. 107-155, 116 Stat. 81, § 214 (Mar. 27, 2002).

"extensive rifling through the respondents' files, public revelations of internal plans and strategies, depositions of group leaders, and the like." *In re: The Coalition*, MUR 4624 (statement of Comm'r Bradley A. Smith), at 4. Commissioner Smith cited two prominent examples of this trend. First was the set of complaints filed by the Democratic National Committee alleging coordination by "various Republican Party affiliated committees, and a large number of business and trade associations." *Id.* at 2. The FEC ultimately closed the case without taking action against the respondents, after "a four-year investigation of more than 60 committees and organizations plus several individual respondents," in which FEC attorneys "took nine depositions, collected thousands of pages of documents, and interviewed numerous other witnesses[.]" *Id.* Second, Commissioner Smith cited an investigation into alleged coordination by the AFL-CIO, "another recent high-profile matter eventually resulting in no finding of a violation." *Id.* at 4.

He stressed that a "content test" was necessary to provide "a bright line" for would-be speakers to know what communications could give rise to FEC regulation and investigation. *Id.* "Absent a content standard, however, no such

immediate defense is available if the Commission launches an investigation into the alleged coordination with candidates"; instead, such "allegations and investigations may be avoided only by completely avoiding all contact with candidates, because even minimal conduct could trigger a credible allegation" of coordination, sparking an investigation. *Id.* "Groups and individuals who petition the government [or] contact their elected representatives," he wrote, "need guidance on what conduct falls short of coordination without concluding that the only clear way to avoid liability is to refrain from making independent expenditures." *Id.* at 3. Absent a bright-line content standard, the coordination regulation "treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office[.]" *Id.* at 4 (quoting *Clifton v. FEC*, 114 F.3d 1309, 1314 (1st Cir. 1997)).

Likewise, the ACLU has urged that "coordination rules should draw clear lines between issue and express advocacy to prevent the chilling of legitimate issue advocacy," ACLU, Letter to Sens. Sheldon Whitehouse & Lindsey Graham 3-4 (Apr. 9,

2013).[6] *See also* ACLU, "Letter to the Senate in Opposition to the McCain-Feingold Bipartisan Campaign Finance Reform Act of 2001" (Mar. 20, 2001) ("The First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, not to drive a wedge between the people and their elected representatives." (citation omitted)).[7]

Similarly, the AFL-CIO urged that, "in the absence of a clear and narrow definition of coordination, an organization's ideological opponents need only assert that it is engaged in such activity to initiate a crippling litigation process that could prevent the organization from participating, legally, in lobbying or speech activities." Br. of AFL-CIO, *AFL-CIO v. FEC*, No. 02-1755, 2003 WL 22002431 at 34-35 (July 8, 2003).

CONCLUSION

Under the U.S. Constitution and the still greater protections of the Wisconsin Constitution, this Court must reject attempts to punish, regulate, or otherwise burden and chill issue

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[6] https://www.aclu.org/files/assets/4-9-13_--_campaign_finance_hearing_final.pdf.

[7] https://www.aclu.org/free-speech/letter-senate-opposition-mccain-feingold-bipartisan-campaign-finance-reform-act-2001.

advocacy. The law "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U.S. at 469.

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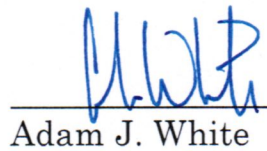
CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of the brief is 2,935 words.

Dated at Washington, D.C. this 18th day of March, 2015.

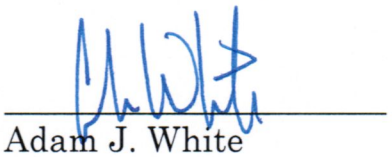


Adam J. White
Pro Hac Vice (pending)

CERTIFICATE OF SERVICE

I hereby certify that I have served three paper copies of this brief on each person named below, pursuant to Wis. Stat. § 809.19.(8)(a).

Dated at Washington, D.C. this 18th day of March, 2015.



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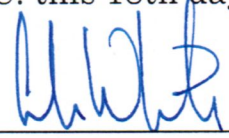
CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Washington, D.C. this 18th day of March, 2015.



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Motion of Former Federal Election Commission Members Lee Ann Elliott, David Mason, Hans von Spakovsky, and Darryl Wold to File Non-Party *Amicus* Brief in Support of Respondent

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Now come James R. Troupis and Adam J. White (*pro hac vice* pending), and respectfully move that former Federal Election Commission members Lee Ann Elliott, David Mason, Hans von Spakovsky, and Darryl Wold be granted leave to file a non-party *amicus* brief in this Court, in the above-referenced case. In support of this Motion, and pursuant to Wis. Stat. § 809.19(7), we state as follows:

1. This case raises fundamental questions of the extent to which the U.S. Constitution and Wisconsin Constitution protect "issue advocacy" as free speech, and whether such speech is entitled to less constitutional protection when it is allegedly "coordinated" with elected officials.

2. Because the Wisconsin Constitution's free-speech protections, set forth at Art. I, § 3, are at least as strong as those of the U.S. Constitution's First Amendment, this Court necessarily must apprise itself of the protections afforded by the First Amendment.

3. And, in turn, the protections afforded by the U.S. Constitution are not just found in U.S. Supreme Court case law arising under the First Amendment, but are also highlighted by the experience of the Federal Election Commission ("FEC") in adminstering the federal election laws under the First Amendment.

4. *Amici* are deeply familiar with the First Amendment and the federal election laws, because they are former members of the FEC with many years of experience in interpreting the Federal Election Campaign Act, implementing regulations, devising enforcement policy, and investigating violations:

5. Lee Ann Elliott was a member of the FEC from 1982 to 2000, and she was its chairman in 1984, 1990, and 1996.

6. David Mason was a member of the FEC from 1998 to 2008, and he was its chairman in 2002 and 2008.

7. Hans von Spakovsky was a member of the FEC from 2006 to 2007.

8. Darryl Wold was a member of the FEC from 1998 to 2002, and he was its chairman in 2000.

9. They move for leave to file their non-party *amicus* brief in order to apprise the Court of the complexities and difficulties of applying campaign finance laws in a manner consistent with the First Amendment. And they urge the Court to ensure that the public's right to engage in issue advocacy, including coordinated issue advocacy, is protected at the state level no less than at the federal level, in light of the FEC's experience on the subject.

WHEREFORE, undersigned counsel respectfully requests that this Court grant the motion for leave to file the *amicus* brief of former FEC

Commissioners Elliott, Mason, von Spakovsky, and Wold, and accept the enclosed brief for filing.

Dated this 18th day of March, 2015.

Respectfully submitted

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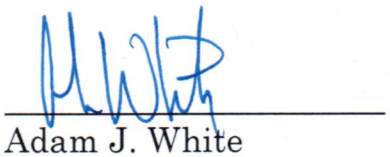
March 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have served three paper copies of this brief on each person named below, pursuant to Wis. Stat. § 809.19.(8)(a).

Dated at Washington, D.C. this 18th day of March, 2015.



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