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IN THE SUPREME COURT OF WISCONSIN

Case Nos. 2013AP2504-2508
Case Nos. 2014AP296
Case Nos. 2014AP417-421

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,

Consolidated Proceeding on Petitions for Review,
a Petition for Bypass and a Petition to Commence an Original Action
relating to five John Does proceedings,
Case Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23.

BRIEF OF AMICI CURIAE, THE HON. BRADLEY A. SMITH, CENTER FOR COMPETITIVE POLITICS, AND WISCONSIN FAMILY ACTION SUPPORTING THE POSITION OF THE PETITIONERS

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Case Nos. 2014AP296

STATE OF WISCONSIN ex rel. TWO UNNAMED PETITIONERS,

Petitioner,

v.

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

Respondents,

Circuit Court Case #s 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

Case Nos. 2014AP417 - 421

STATE OF WISCONSIN ex rel. FRANCIS D. SCHMITZ, Special Prosecutor,

Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,

Respondent,

And

EIGHT UNNAMED MOVANTS,

Interested Parties.

Circuit Court Case #s 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

Table of Contents

Table of Authorities

CASES

STATUTES/CODES

OTHER AUTHORITIES

INTRODUCTION

Amici are the Hon. Bradley A. Smith, the Center for Competitive Politics ("CCP"), and Wisconsin Family Action ("WFA"). Professor Smith is one of the nation's leading authorities on campaign finance law. He has been a member of the Federal Election Commission and served as its Chairman in 2004.

CCP is a 501(c)(3) organization and is the nation's largest organization dedicated solely to protecting First Amendment political rights. Professor Smith is the Chair of CCP.

WFA is a 501(c)(4) social welfare organization. WFA is engaged in education, grassroots organization, and advocacy on issues of importance to traditional families. WFA also works with officeholders and candidates who share its concerns about Wisconsin families. WFA justifiably fears that based on the John Doe prosecutors' theory of this case, if it speaks during an election, its exercise of its constitutional associational and expressive rights will be investigated, and possibly challenged, by prosecutors as criminal conduct.[1]

This Court requested briefing from the parties in this case on a number of issues. *Amici* submit this brief on numbers 7 and 11, asking whether Wisconsin's campaign finance law can be interpreted to treat "coordinated" expenditures for

[1] WFA has been identified in media reports as having received a subpoena as part of this John Doe proceeding.

issue advocacy as "contributions" and, if so, whether it does so in a constitutional manner.

ARGUMENT

I. "ISSUE ADVOCACY" REQUIRES ROBUST CONSTITUTIONAL PROTECTION.

The Petitioners and other 501(c)(4) social welfare organizations like WFA have been threatened with felony charges for speaking during an election. This First Amendment oddity is a product of the Respondents' stated position that, if discussed with a candidate for public office, independent expenditures for issue advocacy – speech afforded robust constitutional protection – might be construed as a political contribution to that candidate. If the amount of the independent expenditure exceeds the contribution limits to a candidate under Wis. Stat. § 11.26, then the speech becomes a felony.

Whether or not the law may ever treat coordinated expenditures for issue advocacy as contributions, Wisconsin has not done so – at least not in a constitutional manner. Under Wisconsin law, spending on political activities – whether they are deemed "contributions" or "expenditures" – may be regulated only if they have been undertaken for a "political purpose." The statute purports to cast a very wide net, defining "political purpose" as anything done for the purpose of "influencing" an election. Wis. Stat. § 11.01(16). In *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014) (*Barland II*), the Seventh Circuit found this definition of "political purposes" to be unconstitutional as

applied to issue advocacy, applying a saving construction similar to that adopted by the Supreme Court in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"), which made clear that standards based on something other than a communication's text, e.g., on its "intent" or "effect," are constitutionally impermissible. Under *Barland II*, speech may constitutionally be considered to have been undertaken for "political purposes" only if it amounts to express advocacy or its functional equivalent as defined in *WRTL II*. If that saving construction applies here, the Petitioners win.

But the Respondents contend that this saving construction should not apply to speech that has been "coordinated" with a candidate. They say that the fact that a candidate had some contact with a speaker – raised money for it, requested or suggested a communication or discussed its content – removes the need for constitutional protection.

A. The U.S. Supreme Court Has Provided Robust Protection for Issue Advocacy Expenditures.

To understand why the Respondents' position is constitutionally suspect, it is necessary to understand the framework for analyzing restrictions on political speech. The U.S. Supreme Court has long recognized that "[a] restriction on the amount of money that a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Restrictions on

"expenditures" (Wisconsin law calls them "disbursements," *i.e.*, what a speaker may spend directly, as opposed to limits on contributions to a candidate) directly restrain speech and, as the Seventh Circuit has noted, "usually flunk" the constitutional test. *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 145 (2011) (*Barland I*).

Such limitations are most problematic in the case of "issue advocacy" – speech that is something other than an appeal to elect or defeat a candidate. Even if done in an attempt to reach alleged "evasion" of contribution limits[2] – they directly limit core political speech. *WRTL II*, 551 U.S. at 469 ("'[T]he Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'"), *quoting First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978). Indeed, the U.S. Supreme Court's historic refusal to subject contribution limits to strict scrutiny depends on the fact that persons who are limited in their ability to contribute to candidates are otherwise free to "discuss candidates and issues," *i.e.*, issue advocacy. *Buckley*, 424 U.S. at 21. As *Amicus* Smith has observed, the unfettered ability to spend money to speak is an important "escape valve" that permits less exacting scrutiny of limitations on contributions. Bradley

[2] The Supreme Court has been increasingly reluctant to uphold limitations on speech as an "anti-circumvention" rule to support some other restriction. *See McCutcheon v. FEC*, 134 S.Ct. 1434, 1458 (2014) (noting that base contribution limits are themselves a prophylactic measure and that "[t]his "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit").

A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLIAMETTE L. REV. 603, 612 (2013).

Because "political speech is at the core of the First Amendment, overbreadth and vagueness concerns loom large in this area" and "campaign-finance regulation must be precise, clear, and may only extend to speech that is 'unambiguously related to the campaign of a particular … candidate.'" *Barland II*, 751 F.3d at 811, *quoting Buckley*, 424 U.S. at 80. First Amendment "breathing space" requires that government regulate issue advocacy with "narrow specificity." *Id.*, *quoting Buckley*, 424 U.S. at 41, n. 48. The rules that distinguish express from issue advocacy and expenditures from contributions must be narrowly and clearly drawn.

B. Any Restriction on Issue Advocacy that Is Alleged to be a "Coordinated Communication" and thus Transformed into Express Advocacy Must Have Narrow and Specific "Content" and "Conduct" Limitations.

The danger with the Respondents' position here is obvious. An overly broad or vague definition of "coordination" will close the "escape valve" that is central to *Buckley*'s framework. Particularly when the penalty for getting it wrong is the threat of criminal prosecution, it is essential that "coordination" be clearly and sharply cabined.

Concerns about vagueness and overbreadth in the area of political speech are amplified by the nature of any prospective coordination investigation. Such an inquiry would, by definition, seek to find something that has been allegedly

hidden. They will often involve nearly unlimited rooting through the activities of political activists – often at the behest of opposing partisans. Because coordination might turn up anywhere, investigators will feel justified looking everywhere.

Given these constitutional concerns, *Amicus* Smith has consistently explained that there is a need to both define the *conduct* and the *content* of communications that may be subject to coordination rules. *See, e.g.*, Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 168 (2002); Matter of The Coalition, MUR 4624, Commissioner Bradley A. Smith Statement for the Record, available at http://www.fec.gov/members/former_members/ smith/smithreason6.htm; *see also* Smith, *supra*, 50 Willamette L. Rev. at 609, n. 19. Clear conduct and content standards allow speakers to know when their speech will be subject to regulation, and prevent intrusive investigations that will otherwise chill protected speech.

II. WISCONSIN HAS NO CONSTITUTIONALLY ADEQUATE DEFINITION AS TO WHAT "CONTENT" OR WHAT "CONDUCT" CONSTITUTES "COORDINATION."

A. There Must Be a Content Limitation on the Type of Speech that May Be Considered "Coordinated."

Without a content standard, speakers who interact with candidates will be at risk, and there will be no safe harbor that immunizes constitutionally-protected speech from partisan prosecutorial harassment. While no legal definition can

completely eliminate ill-founded investigations, a speaker who avoids the type of speech that falls within specifically defined coordination restrictions will ensure that the inquiry will be "short, non-intrusive and inexpensive . . . ." Matter of The Coalition, MUR 4624, *supra*.

This is not because issue advocacy would be of no value to candidates or have no impact on elections. *WRTL II*'s limitation of federal restrictions to express advocacy and its functional equivalent was not contingent on the assumption that the speaker did not intend such a benefit or influence or that issue advocacy would have no such effects. As early as *Buckley*, the Court recognized that the distinction between express and issue advocacy "may often dissolve in practical application," *Buckley*, 424 U.S. at 42, and that speakers are permitted to craft their issue advocacy with an eye to helping a candidate, *id.* at 45.

Yet the Supreme Court has made clear that the lesson to be drawn from this difficulty is precisely the opposite of the Respondents' position. The Supreme Court has maintained robust protection for issue advocacy and rejected the idea that "prophylaxis upon prophylaxis" warrants the suppression of speech. The "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 474.

This need for objective standards is particularly important for a 501(c)(4) organization like WFA. It engages in issue advocacy; it also works with candidates on issues and policies of common interest. As the U.S. Supreme Court

has recognized, the right to engage in such association is not suspended because there is an election or because issue advocacy might have an effect on the outcome of an election. A speaker does not "forfeit its right to speak on issues simply because, in other aspects of its work, it opposes candidates who are involved with the same issues." *Id.* at 472. In rejecting a definition of coordination that would apply to communications with elected officials by an organization preparing a voters' guide, the First Circuit noted that "it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues." *Clifton v. FEC*, 114 F. 3d 1309, 1314 (1st Cir. 1997).

This content standard must be an objective one based on the actual words used in the communication and not a subjective standard based on intent. An "intent" standard is constitutionally insufficient to distinguish between fully-protected expenditures for issue advocacy and less-protected contributions for express advocacy. *WRTL II*, 551 U.S. at 467-69. Wisconsin's regulatory scheme has already been determined to fail this test. *Barland II*, 751 F.3d 804.

The statutes define "political purpose" as having to do with "intent" – anything done for the purpose of "influencing" an election. Wis. Stat. § 11.01(16). As noted above, the Seventh Circuit has found that the subjective test in § 11.06(16) is unconstitutional and that Chapter 11 can only reach communications that are objectively express advocacy within the meaning of *Buckley* and *WRTL II*. *Barland II*, 751 F.3d at 843-44.

The Respondents, in other fora, have argued that *Barland II*'s limiting construction can be ignored here because it applies only to speakers other than candidates, their committees, and political parties. But a limiting construction was not required for these speakers because "[c]ommunications by candidates and their connected committees are 'unambiguously related to the campaign' of a particular candidate. *Id.* at 833, n. 21, *quoting Buckley*, 424 U.S. at 80. On the other hand, application of the definition to "noncandidates and outside groups . . . raises vagueness and overbreadth concerns." *Id.*

The argument that *Barland II* is inapplicable because the Petitioners or others can be "deemed" to have been a subcommittee of a candidate assumes the conclusion. The Wisconsin Club for Growth, for example, is a separate entity and does not purport to be part of the campaign of any candidate. It is a "noncandidate" and an "outside group." If it can be deemed to be otherwise, it is only because the concept of coordination makes it so. But to have engaged in a "coordinated" communication, a "committee" must have made "disbursements" for "political purposes." Use of the term in connection with defining coordination raises the same overbreadth and vagueness concerns as it does in other contexts.

These concerns can be ignored only if some *je ne sais quoi* of coordination – discussion between a speaker and someone who is a candidate – was so pernicious as to obviate the need for any "breathing room" or "safe harbor" otherwise essential for persons engaged in issue advocacy. This could be true only if the fact that a communication about an issue has been discussed with – or, under

Wisconsin law, merely "requested" by – a candidate is so problematic, in and of itself, that it justifies limiting the speaker's expression.

Respondents may rely upon *Wisconsin Coalition for Voter Participation et al. v. State Elections Board*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999) ("*WCVP*"). But *WCVP* was based on the intent-based definition of "political purpose" which has now been declared unconstitutional. *WCVP* was a dead letter after the U.S. Supreme Court's rejection of an intent standard in *WRTL II*. Given *WRTL II and Barland II*, it is not possible to apply the contribution, disbursement and other campaign finance provisions of Chapter 11 to any issue advocacy.

B. There is also No Clear Conduct Standard under Wisconsin Law.

In addition to having a (permissible) content standard for "coordination," Wisconsin must also have a conduct standard that clearly identifies the actions that constitute illegal coordination. If a speaker has discussed issues with a candidate, she still has to be told precisely how that discussion has now limited her subsequent advocacy on those issues. Imagine that WFA had discussed with an elected official a strategy for getting public support for pro-family policies. Must WFA then be silent on those policies unless it can show it was indifferent to the outcome of elections? Once it has engaged with elected officials on its mission, where does WFA look to see what future speech constitutes "coordination" and what does not? The lack of a clear conduct standard forces advocacy organizations like WFA to avoid all contact on issues of common interest with

elected officials – to forfeit their constitutional right to petition the government – in order to avoid a claim of criminal coordination.

The Wisconsin Legislature has passed no statute and the Government Accountability Board ("GAB") has promulgated no rules defining either a content or conduct standard for coordinated communication.[3] Searching for the guidance that cannot be found in the statutes, the Respondents, in other fora, have pointed to an advisory opinion issued by the State Elections Board. But an advisory opinion is not law. Wis. Stat. § 5.05(6a) protects the party requesting such an opinion, but it provides no protection to anyone else and does not bind the GAB – much less prosecutors – to apply the same standard to anyone else. More importantly, the advisory opinion has no content limitation other than the intent-based standard doomed by *WRTL II* and struck down in *Barland II*.

The advisory opinion's conduct limitations are based on a district court decision in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). But that decision makes it clear why a more adequate conduct standard is necessary. It permits a finding of coordination when a communication is made at the "request or suggestion" of a candidate or if there is substantial negotiation or discussion regarding the communication's contents, timing, location, mode, or "volume."

This is unconstitutionally vague. What does it mean to "request" or "suggest" a communication? Would issue advocacy by WFA criticizing an

[3] To promulgate such a rule, the GAB would have had to engage in the open and transparent rule-making process with input from the public and oversight from the Governor and the legislature. The only current GAB rule addressing coordination is limited to express advocacy. *See* Wis. Admin. Code § GAB 1.42.

elected official who opposed tuition tax credits become criminal because it had discussed the importance – and how to persuade the public of the merits – of such credits with the official's opponent? This seems wildly wrong.

Matters are not helped by the advisory opinion's statement that an independent speaker "probably" has a right to discuss philosophy, views, and issues with a candidate, but not campaign strategy. Why is that an appropriate dividing line? Organizations like WFA have all sorts of reasons to communicate with candidates about the ways in which a particular issue is to be advanced that have nothing to do with circumventing contribution limits. Because Wisconsin has no clear conduct standard for defining coordination it cannot seek to punish what is actually First Amendment protected speech.

CONCLUSION

A regulatory regime that permits the threat of criminal sanctions against otherwise independent speakers because they have communicated with elected officials and candidates about the issues of the day based on the intent of the speaker is unconstitutionally vague. To the extent that this regime can be read to require a prophylactic divide between those who wish to speak on issues during an election and those who wish to petition elected officials and make common cause on those issues, it is wildly overbroad. Because Wisconsin lacks an adequate definition of the conduct and the content of communications that could constitute

"coordination," it cannot constitutionally regulate conduct that individual prosecutors from time to time allege to be "coordination."

Dated: March 18, 2015.

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

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 2,987 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: March 18, 2013

/s/ RICHARD M. ESENBERG
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CERTIFICATE OF COMPLIANCE
WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of section 809.19(12). 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: March 18, 2015

/s/ RICHARD M. ESENBERG
RICHARD ESENBERG

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2015, (22) copies of the Motion and Brief of Amicus Curiae The Hon. Bradley A. Smith, Center For Competitive Politics and Wisconsin Family Action were filed in the Wisconsin Supreme Court via hand delivery, three (3) copies of the motion and brief were served upon parties of record via first-class mail.

Dated: March 18, 2015

/s/ RICHARD M. ESENBERG
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