Nos. 14-1822, 14-1888, 14-1899,
14-2006, 14-2012, 14-2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ERIC O'KEEFE, and
WISCONSIN CLUB FOR GROWTH, INC.,

Plaintiffs-Appellees,

v.

JOHN T. CHISHOLM, BRUCE J. LANDGRAF,
DAVID ROBLES, FRANCIS D. SCHMITZ and DEAN NICKEL,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
Case No. 2:14-cv-139-RTR

BRIEF *AMICI CURIAE* FOR THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 SUPPORTING APPELLANTS AND URGING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: Nos. 14-1822, 14-1888, 14-1899, 14-2006, 14-2012, 14-2023

Short Caption: O'Keefe, et al. v. Chisholm, et al.

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Attorney's Signature: /s/ Paul M. Smith Date: 8/8/2014
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Attorney's Signature: /s/ J. Gerald Hebert Date: 8/8/2014
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Attorney's Signature: /s/ Tara Malloy Date: 8/8/2014
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Attorney's Signature: /s/ Paul S. Ryan Date: 8/8/2014
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Attorney's Signature: /s/ Lawrence M. Noble Date: 8/8/2014
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STATEMENT OF INTEREST

Amici curiae Campaign Legal Center (CLC) and Democracy 21 are nonprofit, nonpartisan organizations that work to strengthen the laws governing campaign finance and political disclosure. The *amici* have participated in a number of the campaign finance cases underlying the claims brought here, including *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010), and were active in the development of the federal standards for coordination.[1]

SUMMARY OF ARGUMENT

Under Wisconsin law, money spent in coordination with a candidate for the purpose of influencing an election is deemed a contribution to such candidate subject to limits and source restrictions, as well as disclosure obligations. *See, e.g.*, Wis. Stat. §§ 11.01(6)(a)1, 11.01(16); 11.06(1); Wis. Admin. Code § GAB 1.42. The goal of this law—and many similar laws at the federal and state level—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). The constitutional question raised by this appeal is whether the mere avoidance of words of express electoral advocacy in a coordinated communication so reduces its value as a contribution—and its corruptive potential—that it cannot permissibly be subject to limits or public disclosure.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirm that no party's counsel authored the brief in whole or in part, and no person—other than the *amici*—contributed money to fund the brief.

The Supreme Court has specifically addressed this question and answered in the negative. It held that "there is no reason why Congress may not treat coordinated disbursements for electioneering communications," i.e., a form of non-express advocacy, "in the same way it treats all other coordinated expenditures." *McConnell*, 540 U.S. at 202-03.

With complete disregard for this precedent, Judge Randa of the U.S. District Court for the Eastern District of Wisconsin preliminarily enjoined the John Doe investigation at issue here based on the theory that the First Amendment forbids regulation of any coordinated spending beyond express advocacy and its functional equivalent. May 6, 2014 Decision and Order (R.181). *Amici curiae* submit this brief to address the constitutional holding set forth in the district court's opinion granting the preliminary injunction, and take no position on the other claims in this case, nor on the factual allegations made by the parties.

In his holding on the merits of the case, Judge Randa makes at least four errors. First, he improperly analyzes this case as if it concerned independent expenditures, instead of coordinated spending (i.e., "disguised contributions"). This approach flies in the face of the Supreme Court's longstanding methodology for reviewing campaign finance laws wherein the distinctions between expenditure restrictions, contribution restrictions and disclosure requirements determine the level of review and applicable precedent.

Second, Judge Randa fails to recognize that the Supreme Court formulated the express advocacy test in *Buckley* to narrow only the regulation of *independent*

expenditures, and deemed the test unnecessary for the regulation of contributions and *coordinated* expenditures. *Buckley* found that "all expenditures placed in cooperation with or with the consent of a candidate," 424 U.S. at 78, that were "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(9)(A)(i), could be regulated as coordinated expenditures. Wisconsin's law regulating coordinated spending comports with this standard, and consequently is presumptively constitutional.

Third, Judge Randa fails to recognize that the Federal Election Campaign Act ("FECA") and related regulations, for over three decades, have swept far more broadly in the regulation of "coordinated expenditures" than his opinion would allow. Both the Supreme Court and lower courts have upheld this more expansive federal approach.

Finally, by adopting an express advocacy standard for coordinated spending, Judge Randa enables large-scale circumvention of the contribution limits, allowing precisely the type of quid pro quo corruption that the limits were designed to prevent. It defies common sense and experience to assert that a coordinated advertising campaign that meets a candidate's every specification and request is not a valuable "contribution" to his campaign simply because it lacks words of express advocacy.

For these reasons, the district court's decision to grant plaintiffs' motion for a preliminary injunction should be reversed.

ARGUMENT

I. The District Court Mischaracterizes the Regulation of Coordinated Spending as a Restriction on Independent Expenditures.

Although plaintiffs' case concerns an investigation into possible *coordinated* election spending, Judge Randa analyzes this case as if it were a challenge to limits on *independent* issue speech. As a consequence of confusing the nature of the alleged activities and laws under review, he applies the wrong standard of scrutiny, relies on inapposite judicial authority and improperly limits the universe of regulable coordinated spending to express advocacy.

The Supreme Court's longstanding approach to campaign finance laws is to determine the standard of review based on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003); *McConnell*, 540 U.S. at 134-40. Since *Buckley*, the Court has distinguished between three different types of campaign finance regulations for purposes of judicial review: restrictions on expenditures; restrictions on contributions to candidates, party committees and political committees; and public disclosure requirements. 424 U.S. at 19-23, 64-65. Restrictions on independent expenditures are deemed the most onerous campaign finance regulations and are consequently subject to strict scrutiny. *Id.* at 44-45; *see also FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464-65 (2007) ("*WRTL*"). Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136 (quoting

Beaumont, 539 U.S. at 162) (internal quotation marks omitted). Disclosure requirements, the "least restrictive" campaign finance regulations, are subject only to "exacting scrutiny." *Buckley*, 424 U.S. at 64, 68.

Buckley also recognized that "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," i.e., coordinated expenditures, should be treated as contributions. *Id.* at 46 n.53, 46-47; *see also FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) ("*Colorado II*") ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate . . . ."). Laws limiting coordinated spending should be reviewed as contribution restrictions subject to "closely drawn scrutiny." *Colorado II*, 533 U.S. at 446 (noting that *Buckley* "subjected limits on coordinated expenditures by individuals and nonparty groups to the same scrutiny it applied to limits on their cash contributions").

Judge Randa ignores this analysis. Instead of adhering to the standard framework for reviewing campaign finance laws, wherein the nature of the regulation determines the level of review, he invents a new schema of "express advocacy money" and "issue advocacy money" completely unmoored from the Supreme Court's jurisprudence. *See, e.g.*, R.181 at 15-16. "Express advocacy money," according to Judge Randa, may lead to *quid pro quo* corruption, but "issue advocacy money," even if coordinated with and benefiting a candidate's campaign, "does not rise to the level of favors for cash." R.181 at 19. The problem with this approach—

even putting aside its novelty and lack of legal support—is that it confuses the nature of the laws at issue here and thus subverts the standard mode of review that depends on such distinctions.

Restrictions on coordinated spending operate as contribution limits, and as such, warrant only "closely drawn" scrutiny. *Colorado II*, 533 U.S. at 456, 464. But because he characterizes Wisconsin law as a restriction on "issue advocacy money," Judge Randa overlooks that the law functions only as a contribution restriction. As a result, he incorrectly concludes that strict scrutiny applies. R.181 at 12. This is a clear error.

Judge Randa suggests that the Supreme Court's recent decision in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-42 (2014), may have cast doubt on "*Buckley*'s distinction between contributions and expenditures." R.181 at 25. But, in fact, the *McCutcheon* plurality specifically and repeatedly disavowed the contention that it was overruling its past precedents. 134 S. Ct. at 1451 & n.6. Contribution limits remain subject to the "closely drawn" standard of review established by the Supreme Court in *Buckley*. *Id*. at 1445 ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."); *see also Citizens United*, 558 U.S. at 359 (noting that plaintiff had not made contributions and "ha[d] not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny").

Judge Randa's conflation of expenditure limits and contribution limits also causes him to repeatedly rely on the wrong case law, namely, on cases reviewing restrictions on *independent* spending such as *WRTL* and *Citizens United*. These cases did not address contribution limits, and certainly did not suggest that coordinated spending should be treated as independent spending for the purposes of constitutional review. To the contrary, both cases reaffirmed that the difference between independent expenditures and contributions or coordinated expenditures is crucial in analyzing a First Amendment claim.[2]

Finally, Judge Randa's disregard for the nature of the laws at issue here has led to his indiscriminate application of the "express advocacy" test to the entirety of Wisconsin's legal regime for coordinated spending, although its component laws are contribution restrictions and disclosure requirements. But, as argued in Section II, the express advocacy test was formulated for the specific purpose of narrowing FECA's regulation of independent expenditures. It has never been required in the context of coordinated spending.

[2] *See WRTL*, 551 U.S. at 478-79 (noting that Court has "long recognized" that the government's anti-corruption interest is "a reason for upholding contribution limits" but questioning whether that interest also justifies limits on independent "electioneering expenditures"); *Citizens United*, 558 U.S. at 345 (noting that "[t]he *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures").

II. The Tests for Express Advocacy and its Functional Equivalent Are Not Required for the Regulation of Contributions and Coordinated Expenditures.

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"[3] in two federal statutory provisions regulating independent spending, and later characterized the test as a "product of statutory interpretation, not a constitutional command." *McConnell*, 540 U.S. at 191-92.

In *Buckley*, the Supreme Court addressed constitutional concerns that the federal definitions of "expenditure" and "contribution" were vague and overbroad because both definitions relied on the broad operative phrase "for the purpose of influencing any election for Federal office." 424 U.S. at 79; *see also* 2 U.S.C. § 431(8)(A)(i) (defining "contribution"); *id.* § 431(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

[3] Although the *Buckley* Court applied the express advocacy test to limit the definition of "expenditure," it initially formulated the test to narrow a different FECA provision, i.e. an expenditure limit providing that "[n]o person may make any expenditure . . . *relative to a clearly identified candidate* during a calendar year which . . . exceeds $1,000." 424 U.S. at 39 (emphasis added). The *Buckley* Court was troubled by the vagueness of the phrase "relative to a clearly identified candidate," and consequently construed the phrase to "apply only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44 (emphasis added).

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 *Buckley* 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 23 n.24 (emphasis added). Instead of imposing an "express advocacy" construction on the definition of "contribution," the Supreme 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, the *Buckley* Court 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* affirmed that a broad statutory provision governing

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 past "express advocacy" to encompass "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* 2 U.S.C. § 434(f). *McConnell* upheld a section of BCRA providing that disbursements for "electioneering communications" that are coordinated with a candidate or party would be deemed "coordinated expenditures," and treated as contributions to that candidate or party. 540 U.S. at 202.

Plaintiffs attempt to counter the weight of this precedent by invoking the Supreme Court's 2007 decision in *WRTL*. *See* Pls.' Mem. Supp. Prelim. Inj. at 5, 36, 40 (R.7). But *WRTL* is inapplicable here because that case again concerned the regulation of *independent* spending, not *coordinated* spending, and reviewed a federal ban on independent corporate spending, 2 U.S.C. § 441b(b)(2), not a restriction on corporate contributions.

The spending in *WRTL*—three advertisements critical of the involvement of both Wisconsin Senators in the filibuster of certain judicial nominees—entailed no involvement with candidates or officeholders. Thus, the premise of the case was that WRTL's proposed spending was independent—and its independence is what concerned the plurality in their consideration of whether "the governmental interest in preventing corruption and the appearance of corruption" justified the broad

corporate spending ban at issue. 551 U.S. at 478. The "*quid-pro-quo* corruption interest," the *WRTL* plurality determined, would only sustain a ban on independent corporate spending 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 469-71. At no point, however, did the Court suggest that the regulation of contributions and coordinated spending should be similarly limited to express advocacy and its functional equivalent. *See id*. at 478 (noting that the government's anticorruption interest had long "been invoked as a reason for upholding contribution limits").

In short, the *Buckley* Court devised the "express advocacy" test for a specific purpose: to limit FECA's regulation of *independent* spending. *See* 424 U.S. at 44 (applying express advocacy test to narrow expenditure limit); *id*. at 79-80 (applying test to narrow disclosure of independent "expenditures"). The Court specifically declined to apply this test to the regulation of political contributions—finding instead that the "general understanding" of a contribution as including donations "to a candidate, political party, or campaign committee" and "all expenditures placed in cooperation with or with the consent of a candidate" was sufficiently precise. Similarly, the *WRTL* Court devised a test for the "functional equivalent of express advocacy," but only to limit the scope of the federal ban on corporate *independent* spending. There is no justification for Judge Randa's attempt to excise

the express advocacy test from this context and graft it onto Wisconsin's regulation of coordinated spending.

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

Under Wisconsin law, coordinated spending is 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; 11.01(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 is modeled on the coordination standard adopted in *FEC v. Christian Coalition*, *see* Section III.A *infra*, and accordingly, does not limit the regulation of coordinated spending to express advocacy. 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. Op. El. Bd. 00-2 (2000) (reaffirmed Mar. 26, 2008) (emphasis added); *see also* Wis. Stat. § 11.01(6)(a)1, (7)(a), (16) (a "contribution" or "disbursement" is a gift or payment for "political purposes," i.e., "for the purpose of influencing the election or nomination for election").

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

found this standard sufficiently tailored and clear in the context of coordinated spending, and this Court should find likewise here with respect to Wisconsin law.

Furthermore, Wisconsin's approach has already been upheld by the state's courts. 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), the state Court of Appeals considered the exact legal question that is 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 constitute 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 while *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 this Court's recent decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). The three-judge panel there invalidated the definition of "political purposes" on grounds of vagueness and overbreadth due to its reliance on "for the purpose of influencing" language. *Id.* at 832-33. But it did so in connection to the *independent* expenditures of the plaintiff and its political committee, both of which "operate[d] independently of candidates and their campaign committees." *Id*. at 809. *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.

III. 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." 2 U.S.C. § 441a(a)(7)(B)(i). The 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. §§ 109.20, -.21.

While both the "content" and "conduct" aspects of the law have been amended on multiple occasions, at no point has either the FECA or its implementing regulations limited the "content" of regulable "coordinated expenditures" to express advocacy. And in direct contradiction to Judge Randa's holding, both the Supreme Court and lower courts have repeatedly upheld this approach. The claim that the regulation of coordinated spending can extend no further than "express advocacy" or its functional equivalent simply cannot be squared with the history of federal law or the judicial authority reviewing its evolution.

A. Federal Law Has Always Defined Coordinated Expenditures More Broadly than Express Advocacy—and the Courts Have Approved this Approach.

For more than 25 years, federal law had no "content standard" for the regulation of coordinated expenditures beyond the language of the statutory definition of "expenditure"—i.e., any payment "made by any person *for the purpose of influencing* any election for Federal office." 2 U.S.C. § 431(9)(A)(i) (emphasis added). Congress amended FECA in 1976 to provide simply that 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, shall be considered to be a contribution to such candidate." FECA Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475 (codified at 2 U.S.C. § 441a(a)(7)(B)(i)). There was no content standard beyond the statutory definition of "expenditure." Similarly, the FEC's 1980 regulation stated only that an "expenditure" was not considered "independent" if made pursuant to "any arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication." 11 C.F.R. § 109.1(b) (1980).[4] Again, there was no separate "content" standard.

The law remained materially unchanged until 2001, when the FEC promulgated a rule with a narrower "conduct" standard for coordinated spending in response to

[4] *See also* Explanation and Justification for 1977 Amendments to FECA, H.R. Doc. No. 95-44, at 54 (1977), *available at* http://fec.gov/law/cfr/ej_compilation/1977/95-44.pdf. The FEC's interpretation of this regulation for nearly 20 years as *not* requiring "express advocacy" is reflected in numerous FEC advisory opinions employing the statutory "for the purpose of influencing" content test in the context of coordinated spending. *See, e.g.*, FEC Advisory Op. ("AO") 1982-56 (Oct. 29, 1982); AO 1983-12 (June 13, 1983); AO 1988-22 (July 5, 1988); AO 1990-5 (Apr. 27, 1990).

FEC v. Christian Coalition. *See* 65 Fed. Reg. 76138, 76140 (Dec. 6, 2000); *see also* 75 Fed. Reg. 55947, 55948 (Sept. 15, 2010). In *Christian Coalition*, the court found the FEC's regulation of coordinated expenditures unconstitutionally overbroad because a spender could trigger the rule "merely by having engaged in some consultations or coordination with a federal candidate," 52 F. Supp. 2d at 91, but without having reaching any definitive agreement with such candidate. Importantly, however, while the court questioned the "conduct" necessary to support a finding of coordination, it rejected the Coalition's argument that the express advocacy test was applicable as a "content" standard for a finding of coordination. *Id.* at 88; *see also id.* at 77 n.50. Instead, the court affirmed the FEC's longstanding position that if a spender and candidate met the Court's "conduct" standard, "any subsequent expenditures made *for the purpose of influencing* the election" would be rendered coordinated expenditures, "i.e., contributions." *Id.* at 89 (emphasis added). Otherwise put, the court recognized that the only "content" standard for coordinated spending was the broad definition of "expenditure" under federal law.

The FEC's post-*Christian Coalition* rule added a restrictive conduct standard that required an actual "agreement or collaboration" for a finding of coordination, but *still contained no separate content standard*. 11 C.F.R. § 100.23 (2001); 65 Fed. Reg. 76138 (Dec. 6, 2000). Concerned that this new rule unduly narrowed the regulation of coordinated spending, Congress explicitly addressed coordination in BCRA. It repealed the FEC's 2000 coordination rule and instructed the FEC that its new regulation "shall not require agreement or formal collaboration to establish

coordination." BCRA § 214(c), 116 Stat. at 95. Significantly for this case, BCRA also 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." 2 U.S.C. § 441a(a)(7)(C). "Electioneering communications" were defined by BCRA as television and radio advertisements that "refer[] to a clearly identified candidate for Federal office," are "targeted to the relevant electorate," and air 30 days before a primary election or 60 days before a general election. 2 U.S.C. § 434(f)(3). BCRA thus explicitly extended the regulation of coordinated spending to non-express advocacy communications, i.e., "electioneering communications," a category of speech that Judge Randa clearly would characterize as "issue speech."

These sections were challenged in *McConnell*, but the Supreme Court specifically upheld the statutory mandate that the FEC include "electioneering communications" in its coverage of coordinated spending. 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.

Further, *McConnell* did not simply approve of the regulation of electioneering communications in the context of coordinated spending, but also sustained new

spending restrictions and disclosure requirements established by BCRA for such communications, even if undertaken independently of a candidate. *Id*. at 195-99, 203-09. In so holding, the Supreme Court rejected the plaintiffs' assertion that campaign finance laws could regulate only express advocacy and opined broadly that the express advocacy test was "functionally meaningless" in terms of distinguishing regulable election-related speech from issue advocacy. *Id*. at 190; *see also id.* at 193-94 ("*Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption . . . ."). Thus, *McConnell* not only sustained the regulation of non-express advocacy, i.e., "electioneering communications," but questioned the basic functionality of the express advocacy test that Judge Randa endorses.

Following the *McConnell* decision, the FEC promulgated a new coordination rule governing "coordinated communications" that took into account the BCRA mandates. The rule contained a new, more encompassing "conduct" standard and, for the first time, a "content" standard for coordinated communications. 11 C.F.R. § 109.21 (2003). In terms of the latter, the FEC regulation 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"[5] 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. *Id.*

[5] A "public communication" covers all communications to the general public by means of any "broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank." 2 U.S.C. § 431(22).

§ 109.21(c)(1)-(4); *see also* 68 Fed. Reg. 421, 427-31, 453-54 (Jan. 3, 2003). In short, the new regulation provided that a finding of coordination could be predicated on not only express advocacy and electioneering communications, but also *any public communication mentioning a federal candidate within a 120-day pre-election window*.

Although the FEC's 2003 coordination rule clearly swept far more broadly than the express advocacy standard adopted by Judge Randa, it was not criticized as overbroad, but rather immediately attacked as too narrow. Two of BCRA's congressional sponsors, Representatives Martin Meehan and Christopher Shays, filed suit under the Administrative Procedures Act ("APA") to challenge the regulation as contrary to the law it purported to implement, contending 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).[6]

The D.C. Circuit Court of Appeals agreed with the plaintiffs' objections. It ruled that the FEC's 2003 coordination regulation failed to meet APA standards, finding that the regulation'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

[6] Democracy 21 served as co-counsel to the plaintiffs and CLC represented *amici curiae* Senators John McCain and Russ Feingold in the *Shays I* and *Shays III* litigation.

"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*"), *petition for reh'g en banc denied*, No. 04-5352 (D.C. Cir. Oct. 21, 2005). If the FEC was intent on using an express advocacy standard outside of the 120-day window, the Court opined, that decision "requires some cogent explanation, not least because by employing a 'functionally meaningless' standard outside that period, the FEC has in effect allowed a coordinated communication free-for-all for much of each election cycle." *Id.*

Following the *Shays I* litigation, the FEC issued a revised coordination regulation in 2006. 71 Fed. Reg. 33190, 33190 (June 8, 2006). The new regulation regarding congressional elections was materially identical to the one struck down by *Shays I*, except that it *shortened*, from 120 days to 90 days, the pre-election windows in which all public communications were subject to the coordination rule with respect to a primary election for a congressional race. *Id*. at 33193; 11 C.F.R. § 109.21(c)(4) (2006).

Unsurprisingly, this new regulation was challenged once again in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), and once again, the D.C. Circuit Court of Appeals found that the regulation was unduly narrow and lacked the reasoned justification required by the APA. The Court of Appeals noted that the new regulation "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." *Id.* at 925. The Court

of Appeals therefore arrived at the same "inexorable" conclusion: the FEC's "decision to apply a 'functionally meaningless' standard outside [the 120-day] windows" was not reasonable. *Id.* at 924 (citing *McConnell*, 540 U.S. at 193).

Following the *Shays III* decision, the FEC again revised its coordination rule, this time providing that outside the 90- and 120-day pre-election windows, both express advocacy *and* the "functional equivalent of express advocacy" would meet the content standard for coordination. 75 Fed. Reg. 55947, 55952-54 (Sept. 15, 2010). The FEC defined the "functional equivalent of express advocacy" in a manner similar to the *WRTL* decision, as a communication "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." *Id.*; *see also* 11 C.F.R. § 109.21(c)(5). Although *amici curiae* here filed comments in the rulemaking objecting to the use of a "functional equivalent" content standard as overly narrow and underinclusive,[7] Representatives Shays and Meehan did not again sue. The content standard adopted as part of the 2010 rule governs determinations of "coordinated spending" at the federal level today.

B. The Federal Experience Demonstrates that the Express Advocacy Test Is Not Required in Regulating Coordinated Spending.

Judge Randa's adoption of an express advocacy "content" standard cannot be squared with any of the federal statutes, FEC regulations or court decisions on this subject.

First, the "content standard" for coordinated communications under federal law has always swept more broadly than express advocacy. For decades, there was

[7] *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2009-23 (Jan. 19, 2010), *available at* http://fec.gov/pdf/nprm/coord_commun/2009/clcdemocracy21.pdf.

no "content standard" other than the "for the purpose of influencing" language in FECA's definition of "expenditure." In 2003, the Supreme Court in *McConnell* upheld a BCRA provision that explicitly directed the FEC to regulate as coordinated spending a category of non-express advocacy speech, i.e. "electioneering communications," where such communications were made in cooperation, consultation, or in concert with or at the request or suggestion of a candidate or party. The FEC ultimately settled on a coordination regulation that covered all public communications within expansive windows before an election that mentioned a candidate. None of these standards can be reconciled with Judge Randa's adoption of an express advocacy test.

Second, the FEC was repeatedly criticized in its regulation of coordinated spending for adhering only to an express advocacy test outside of its 90- and 120-day pre-election windows. According to the D.C. Circuit, use of an express advocacy test in this context was a "fatal defect," *Shays I*, 414 F.3d at 100, that "provide[d] a clear roadmap" for those who would circumvent the law, *Shays III*, 528 F.3d at 925, and would lead to a "free for all" of coordinated spending, *Shays I*, 414 F.3d at 100. Thus, far from requiring the express advocacy test that Judge Randa adopts, the courts that have previously addressed this subject have adamantly rejected all but the most limited use of the test.

Most fundamentally, in reviewing various federal laws, the Supreme Court has questioned the basic functionality of the express advocacy test. The *McConnell* Court observed that this test was neither effective nor constitutionally required—it

termed it "meaningless." While the Supreme Court in *WRTL* revisited the test—or at least formulated a new test for the "functional equivalent of express advocacy"—it did so in the process of narrowing a restriction on independent spending, not coordinated spending. Finally, the Supreme Court effectively mooted *WRTL* and its "functional equivalent" test in *Citizens United* by striking down the federal ban on corporate independent expenditures in its entirety, regardless whether it applied to express advocacy or the functional equivalent of express advocacy. 558 U.S. at 365-66. *Citizens United* also made clear that these tests were not relevant to the review of a disclosure law. The Court upheld the challenged "electioneering communications" disclosure requirements, *id.* at 366, 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.

In short, Judge Randa's attempt to resurrect the express advocacy test runs counter to decades of federal law and practice, as well as the Supreme Court's recent decisions in *McConnell*, *WRTL* and *Citizens United*.

IV. Adopting an Express Advocacy Standard for "Coordinated Communications" Would Allow Gross Abuse of the Contribution Limits and Create the Potential for Quid Pro Quo Corruption.

Adopting an "express advocacy" standard for coordination—in other words, endorsing a test that the Supreme Court has described as "functionally meaningless" and "easily evade[d]"—would encourage large-scale circumvention of Wisconsin's contribution limits and disclosure laws. *McConnell*, 540 U.S. at 127 n.18, 193. The potential for corruption is manifest.

Since its 1976 decision in *Buckley*, the Supreme Court has upheld limits on coordinated spending to prevent "attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 47; *see also Colorado II*, 533 U.S. at 465 ("[A] party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits.").

Limits on coordinated spending represent just one of the measures the Supreme Court has upheld to reduce circumvention of the contribution limits and thereby safeguard the integrity of the political system. *See, e.g.*, *McConnell*, 540 U.S. at 144 (upholding the party "soft money" restrictions on grounds that "[anti-corruption] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *Cal. Med. Ass'n. v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding limits on contributions to political committees "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*"); *Beaumont*, 539 U.S. at 155 (upholding restriction on corporate contributions because it "hedges" against the use of corporations "as conduits for circumvention of [valid] contribution limits") (alteration in original) (citation and internal quotation marks omitted). As noted in *Colorado II*, "all Members of the Court agree that circumvention is a valid theory of corruption . . . ." 533 U.S. at 456.

These decisions make clear that laws to prevent circumvention of valid contribution limits advance the governmental interest in preventing real and apparent corruption, and that coordinated spending limits in particular serve this

important interest.[8] It is therefore extraordinary that Judge Randa celebrated the fact that "[t]he plaintiffs have found a way to circumvent campaign finance laws" by engaging in coordinated "issue speech," and embraced the express advocacy test as a means to perpetuate evasion of the contribution limits.

Judge Randa's decision to limit the regulation of coordinated spending to express advocacy will both authorize circumvention of the state contribution limits through coordinated non-express advocacy spending, and allow such activity to escape Wisconsin's public disclosure laws. His rationale is that a candidate's "coordination with and approval of issue advocacy speech" "does not rise to the level of favors for cash." R.181 at 19. But he offers no evidence or support for his conclusory statement that "[l]ogic instructs that there is no room for a *quid pro quo* arrangement when the views of the candidate and the issue advocacy organization coincide"—and this assertion contradicts not only Supreme Court precedent, but also real world experience. *Id.*

What Judge Randa's express advocacy construction will do, in practice, is allow wealthy donors to pay for sophisticated, million-dollar ad campaigns "for the

[8] The recent *McCutcheon* decision, which invalidated the federal aggregate limits on contributions to candidates and parties, 2 U.S.C. § 441(a)(3), did nothing to undermine the principle that the government has a compelling interest in anti-circumvention measures. Instead, in the course of determining whether the aggregate limits were justified by an important governmental interest, the Court considered whether the aggregate limits *in fact* were needed to forestall circumvention of the base contribution limits. 134 S. Ct. at 1456. The Court ultimately found that the circumvention scenarios offered by defendants to demonstrate the necessity of the aggregate limits were "highly implausible," *see id.* at 1454, and on these grounds, invalidated the limits. At no point, however, did the *McCutcheon* Court state or imply that preventing circumvention of the contribution limits was not a crucial governmental interest. To the contrary, it noted that circumvention involving "money beyond the base limits funneled in an identifiable way to a candidate—for which the candidate feels obligated" remained a concern, but distinguished this type of scenario from those posited by the government in *McCutcheon*. *Id.* at 1461.

purpose of influencing" an election in coordination with the candidates of their choice. To do so, these donors need merely to avoid magic words such as "vote for" or "vote against" or their functional equivalents. But where a candidate is able to dictate the content, media, audience and timing of an ad, the absence of express advocacy hardly diminishes its value to his campaign. It defies common sense to assert that a coordinated advertising campaign that meets a candidate's every specification and request does not constitute a "contribution" to this candidate's campaign. This type of "issue advocacy speech"—fully coordinated with a candidate, undertaken for the purpose of influencing his election and concealed from the public—is exactly what gives rise to the possibility of "favors for cash."

The D.C. Circuit's decisions in *Shays I* and *Shays III* illustrate this common-sense proposition. In *Shays III*, the Court of Appeals criticized the FEC for regulating only coordinated expenditures for express advocacy outside of 90- and 120-day pre-election windows, reasoning that this approach "would lead to the exact perception and possibility of corruption Congress sought to stamp out in BCRA." 528 F.3d at 925 (D.C. Cir. 2008) (quoting *McConnell*, 540 U.S. at 221) (internal quotation marks omitted). The Court of Appeals had already provided several examples to demonstrate its concerns in *Shays I*:

> Under the new rules, more than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, "Why don't you run some ads about my record on tax cuts?" The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the "magic words" of express advocacy—"vote for," "vote against," "elect," and so forth—the ads won't qualify as contributions subject to FECA. Ads stating "Congressman X voted 85 times to lower

> your taxes" or "tell candidate Y your family can't pay the government more" are just fine.

414 F.3d at 98. The *Shays III* court further highlighted that absent express advocacy, "the FEC would do nothing about such coordination, even if a contract formalizing the coordination and specifying that it was 'for the purpose of influencing a federal election' appeared on the front page of the New York Times." 528 F.3d at 925.

Precisely the same scenarios would be permitted by Judge Randa's ruling below. Judge Randa's conclusory finding that "[c]oordination [of non-express advocacy communications] does not add the threat of *quid pro quo* corruption that accompanies express advocacy speech" because the interests of the candidate and group are "aligned," R.181 at 19, 21, comports with neither law nor logic. His claim that "no one will take advantage of the enormous loophole [he] has created ignores both history and human nature." *Shays III*, 528 F.3d at 928.

CONCLUSION

This Court should reverse the district court's order granting plaintiffs' motion for preliminary injunction.

RESPECTFULLY SUBMITTED this 8th day of August 2014.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Century 12 point font.

/s/ Paul M. Smith
Paul M. Smith

Dated: August 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2014, I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system, which will accomplish electronic notice and service for the following participants in the case:

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