IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Eric O'Keefe and Wisconsin Club for Growth, Incorporated, Plaintiffs-Appellees, v. John Chisholm, et al., Defendants-Appellants.	No. 14-1822 (consolidated with Nos. 14-1888; 14-1899; 14-2006; 14-2012; 14-2023; 14-2585)

MOTION OF WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD FOR LEAVE TO FILE AMICUS BRIEF

The Wisconsin Government Accountability Board ("GAB" or "Board"), by its undersigned counsel, pursuant to Fed. R. App. P. 29(b) and this court's order entered July 24, 2014 (ECF Doc 67), respectfully moves the court for leave to file the amicus brief filed with this motion in support of defendants-appellants, John Chisholm, et al. ("Defendants"). In support of its motion, the GAB states as follows:

1. The GAB is the agency which has been delegated responsibility for administration and enforcement of the election and campaign finance laws of the state of Wisconsin, pursuant to Wisconsin Stat. § 5.05(1).

2. For reasons stated in its motion for leave to intervene and alternative motion for leave to file an amicus brief in this matter, ECF Doc 63, the GAB seeks to assist the court in determining whether the "coordinated issue advocacy" legal theory underpinning Defendants' investigation of Plaintiffs-Respondents conduct

is a valid legal theory under applicable Wisconsin law and whether "coordinated issue advocacy" can be subject to regulation under the First Amendment to the United States Constitution.

A copy of the Board's brief is filed with this motion in accordance with Fed. R. App. P. 29(b).

Respectfully submitted on August 8, 2014.

LEE, KILKELLY, PAULSON & YOUNGER, S.C.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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No. 14-1822

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ERIC O'KEEFE and WISCONSIN CLUB FOR GROWTH, INCORPORATED,

Plaintiffs-Appellees,

v.

JOHN T. CHISHOLM, et al.,

Defendants-Appellants.

Consolidated with Appeal Nos. 14-1888; 14-1899; 14-2006; 14-2012; 14-2023; 14-2585

Appeal from The United States District Court
for the Eastern District of Wisconsin,
Case No. 2:14-cv-00139-RTR
Rudolph T. Randa, District Court Judge,

BRIEF OF AMICUS CURIAE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 DISCLOSURE STATEMENT

The full name of every party that the attorney represents in this case:

Wisconsin Government Accountability Board

The names of all law firms whose partners or associates have appeared for the parties in this case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Lee, Kilkelly, Paulson & Younger, S.C.

If the party or amicus is a corporation: N/A

(i) Identify all its parent corporations, if any; and

(ii) List any publicly held company that owns 10% or more of the party's or amicus stock: N/A

Attorney's Signature: /s/ Paul W. Schwarzenbart

Date: August 8, 2014

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Wisconsin Government Accountability Board ("GAB") is responsible for the administration and enforcement of the election and campaign finance laws of the state of Wisconsin. Wis. Stat. § 5.05(1). The GAB's role is not to advocate what the law should be, but rather, as a non-partisan executive branch agency, to faithfully administer and enforce what it believes the law requires. The GAB's interest in this matter is to assist the court in determining whether "coordinated issue advocacy" can be subject to regulation under the Wisconsin campaign finance law and, if so, whether the First Amendment to the United States Constitution bars enforcement of such regulations.

FED. R. APP. P. 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), the GAB affirms that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the GAB or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Plaintiffs-Respondents Eric O'Keefe and Wisconsin Club for

Growth (collectively, "WCFG") asserted claims under 42 U.S.C. § 1983. They alleged that Defendant-Appellant John Chisholm and others (collectively, "Defendants") violated WCFG's First Amendment rights by undertaking a "John Doe" investigation relative to their conduct during Wisconsin election campaigns in 2011 and 2012. WCFG's complaint alleges that:

> Defendants are basing their current phase of the investigation on a theory of campaign coordination that would make nearly all political advocacy in Wisconsin subject to government scrutiny and regulation. In particular, their theory is that Wis. Stat. § 11.01(16), which defines "political purposes" for purpose of Wisconsin campaign-finance law, *reaches communications other than those that are express advocacy or its functional equivalent*. On that basis, Defendants assert that *speech and speech expenditures coordinated with a campaign or campaign committee are subject to Wisconsin laws limiting contributions to campaigns and mandating disclosure.*

See Complaint, ¶ 95; Defendants' Separate Appendix ("Sep. App.") 29-30 (emphasis added). WCFG alleged this "theory of campaign coordination" was flawed because WCFG only engaged in issue advocacy. *Id.*, ¶ 99; Sep. App. 30-31.

In entering a preliminary injunction which bars Defendants from continuing the investigation, the District Court agreed with WCFG and

concluded that:

> The defendants are pursuing criminal charges through a secret John Doe investigation against the plaintiffs for exercising issue advocacy speech rights that on their face are not subject to the regulations or statutes the defendants seek to enforce. This legitimate exercise of O'Keefe's rights as an individual, and WCFG's rights as a 501(c)(4) corporation, to speak on the issues has been characterized by the defendants as political activity covered by Chapter 11 of the Wisconsin Statutes, rendering the plaintiffs a subcommittee of the Friends of Scott Walker ("FOSW") and requiring that money spent on such speech be reported as an in-kind campaign contribution. This interpretation is simply wrong.

R. 181:12-13.[1] GAB supports Defendants' appeals from the District Court's orders denying their motions to dismiss and granting the preliminary injunction because it believes the District Court erroneously construed Wisconsin law and erroneously extended absolute First Amendment protection to coordinated issue advocacy.

SUMMARY OF ARGUMENT

Since *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), superseded by statute as stated in *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the United States Supreme Court

[1] Scott Walker was, at all times material, the Governor of the state of Wisconsin. In 2012, Governor Walker was involved in a heated recall election campaign. At all times material, FOSW was Governor Walker's official campaign committee.

has recognized that the First Amendment limits the ability to regulate expenditures for political purposes by "independent" speakers. *Buckley* held that expenditure limits did not apply unless an independent speaker engaged in what came to be known as "express advocacy." *Id*., 424 U.S. at 45. However, the *Buckley* Court also noted that expenditures "controlled or coordinated" with candidates were "treated as contributions rather than expenditures" under the Federal Election Campaign Act of 1971 ("FECA") and that such treatment "prevent[ed] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id*. at 46-47, citing FECA sec. 608(b).

In denying Defendants' motion to dismiss and entering the preliminary injunction, the District Court disregarded the distinction between independent expenditures and coordinated expenditures recognized in *Buckley* and its progeny. For that reason, GAB recommends that the court reverse the District Court's Decisions and Orders and in doing so clarify that purported independent groups have no absolute First Amendment right to engage in "coordinated issue advocacy" with a candidate, because in doing so such groups have made contributions to the candidate, making them no longer "independent."

ARGUMENT

Because the District Court first concluded that WCFG's conduct was not subject to the regulations or statutes Defendants sought to enforce, this brief initially addresses the Wisconsin statutes and regulations before turning to the First Amendment issues which bear upon Defendants' potential liability to WCFG under 42 U.S.C. § 1983.

I. EXPENDITURES FOR PURPOSES OTHER THAN EXPRESS ADVOCACY CAN BE SUBJECT TO REGULATION UNDER WISCONSIN LAW IF COORDINATED WITH A CANDIDATE.

The District Court did not explain the basis for its conclusion that WCFG's conduct was "not subject to the regulations or statutes the defendants seek to enforce." R. 181:12-13. In reaching that conclusion, the District Court did not acknowledge contrary and indistinguishable Wisconsin case law. Nor did it acknowledge the opinions of the GAB and its predecessor, the Wisconsin State Elections Board ("SEB"),[2] to the contrary.

[2] As this Court noted in *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 809 (7th Cir. 2014), citing 2007 Wis. Act 1 § 1, the GAB "was created in 2007 to replace the State Elections Board as the agency responsible for administering Wisconsin's campaign-finance and election laws."

A. The Wisconsin Court of Appeals Concluded That Coordinated Conduct Not Involving Express Advocacy Can Be Treated As "Contributions" Under Wisconsin Law.

In *Wisconsin Coal. for Voter Participation, Inc. v. State Elections Bd. ("Wisconsin Coalition")*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct.App. 1999), the Wisconsin Court of Appeals concluded that conduct indistinguishable from that at issue here could be a proper subject of investigation under Wisconsin's campaign finance law. That matter involved the plaintiff Coalition raising and expending funds for purposes of printing and mailing a postcard to Wisconsin residents encouraging them to vote in an upcoming Wisconsin Supreme Court election. The Coalition's postcard stated:

> Your choices for the Supreme Court are:
> • Jon Wilcox: 5 years experience on the Wisconsin Supreme Court; 17 years as a judge.
> • Walt Kelly: 25 years as a trial lawyer; ACLU special recognition award recipient.
> Let your voice be heard! These issues are too important to ignore. Your vote is critical. Please remember to vote next Tuesday, April 1st.

605 N.W.2d at 657. Like WCFG here, the Coalition and other plaintiffs sued the GAB's predecessor, the SEB, seeking to enjoin the SEB from investigating connections between the Coalition and the campaign committee for Justice Wilcox with respect to the postcard mailing. *Id.* at

656. Relying on *Buckley*, the Coalition argued, as WCFG does here, that its "speech" was protected by the First Amendment and could not be regulated unless it constituted "express advocacy" on behalf of a particular candidate. *Id*. at 657-58.

The circuit court rejected the plaintiffs' First Amendment argument, and the court of appeals affirmed. While agreeing that under *Buckley* "independent expenditures that do not constitute express advocacy of a candidate are not subject to regulation, and [Wis. Stat.] § 11.04 … says pretty much the same thing," the court of appeals hastened to add that "neither *Buckley* nor § 11.04 limit the state's authority to regulate or restrict campaign contributions." 605 N.W.2d at 658-59. The court noted that while disbursements made by independent organizations which do not constitute a contribution to any candidate are required to be reported "only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate," citing Wis. Stat. § 11.06(2), by contrast, Wis. Stat. § 11.06(1) provides that "*contributions to a candidate's campaign must be reported whether or not they constitute express advocacy*." *Id.* at 659 (emphasis added). Thus, whether the plaintiffs' conduct was a proper subject of the SEB's investigation turned on whether the expenditures for the cost of

printing and mailing the postcards could constitute a "contribution" under the Wisconsin campaign finance law. *Id*. ("The result is that if the mailing was a contribution – which is what the Board is seeking to determine – it was illegal regardless of how one might interpret the postcards' language.")

In concluding the investigation could go forward, the court of appeals relied on the statutes and regulations defining "contributions" and "in kind" contributions. 605 N.W.2d at 659, citing Wis. Stat. § 11.01(6)(a) and Wis.Adm.Code § ElBd 1.20(1)(e).[3] The court also noted that under Wis.Adm.Code § ElBd 1.42(2),[4] a committee such as the plaintiff Coalition was prohibited from making expenditures in support of, or in opposition to, a candidate if those expenditures are made "in cooperation or consultation with any candidate or … committee of a candidate … and in concert with, or at the request or suggestion of, any candidate or … committee" and are not reported as a contribution to the candidate. The court noted that these

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[3] Wisconsin Adm.Code § ElBd 1.20(1)(e) defined an in-kind contribution as a "disbursement by a contributor to procure a thing of value or service for the benefit of a [candidate or committee] who authorized the disbursement." This regulation remains the law of Wisconsin, although renumbered as § GAB 1.20(1)(e), in connection with GAB assuming the powers, duties and responsibilities of the SEB. *See* http://docs.legis.wisconsin.gov/code/admin_code/gab/1.

[4] Like § ElBd 1.20, Wis.Adm.Code § ElBd 1.42(2) was renumbered as part of the GAB regulations in connection with the GAB assuming the roles of the SEB.

provisions "are consistent with the federal campaign finance laws approved by the Supreme Court in *Buckley* – laws which, like our own, treat expenditures that are 'coordinated' with, or made 'in cooperation with or with the consent of a candidate … or an authorized committee' as campaign contributions." *Id*. at 659-60, citing *Buckley*, 424 U.S. at 46-47, 78. The court added that "we think the Board was correct in observing (in one of its briefs to the circuit court) that '[i]f the mailing and the message were done in consultation with or coordinated with the Justice Wilcox campaign, the [content of the message] is immaterial'." *Id*. at 660. And lastly, the court rejected the plaintiff Coalition's claims that the investigation invaded its members' First Amendment rights and that the statutes and regulations were too vague and indefinite to be applied to the postcard preparation and mailing. *Id*. at 660-62.

B. The GAB Has Reaffirmed That Coordinated Conduct Not Involving Express Advocacy Can Be Regulated.

The SEB, like the GAB, was authorized to issue advisory opinions regarding the election and campaign finance laws which it administers and enforces. *See* Wis. Stat. § 5.05(6a) ("The board shall review a request for an advisory opinion and may issue a formal written or electronic advisory opinion to the person making the request."). Persons requesting such

opinions may rely on them. *Id*. ("No person acting in good faith upon an advisory opinion issued by the board is subject to criminal or civil prosecution for so acting, if the material facts are as stated in the opinion request.") The opinions may have the force and effect of law. *Id*. ("To have legal force and effect, each advisory opinion issued by the board must be supported by specific legal authority under a statute or other law, or by specific case or common law authority.")

In the wake of the court of appeals' decision in *Wisconsin Coalition*, the SEB issued Opinion El Bd 00-2. This opinion was reaffirmed by the GAB on March 26, 2008, acting pursuant to 2007 Wisconsin Act 1. Sep. App. 120.[5]

Opinion El Bd 00-2 speaks directly to the coordination issue central to this case. The summary of the opinion states that "expenditures which are 'coordinated' with a candidate or candidate's agent will be treated as a contribution to that candidate." Sep. App. 120. At page 8 of the opinion, the SEB set out its analysis of "Coordination of Expenditures vs. Independent

[5] A link to the text of Opinion El Bd 00-2, and the fact of its adoption by the GAB, is found on the GAB's official website at: http://gab.wi.gov/about/opinions/campaign-finance. Defendants have included a copy of Opinion El Bd 00-2 in their separate appendix. *See* Sep. App. 120-35.

Expenditures" under *Buckley*. *Id*. at 127. The opinion notes that "the *Buckley* court did not distinguish coordinated express advocacy from coordinated issue advocacy or even speak to the question whether one is distinguishable from the other with respect to government's authority to regulate." *Id*. The opinion directly quotes *Buckley* as authority for the proposition that:

> … controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than s.608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.

Id., quoting *Buckley*, 424 U.S. at 46-47. Acknowledging that an outright ban on any "consultation, cooperation or action in concert" between candidates and committees that make expenditures might be unenforceable, the opinion turns to the standard developed in *Federal Election Commission v. The Christian Coalition*, 52 F.Supp.2d 45 (D.D.C. 1999), which addressed the issue of coordinated expenditures generally and coordinated issue advocacy particularly. Sep. App. at 129. After first discussing the court of appeals' decision in *Wisconsin Coalition* and then "putting together" the standard established in *Christian Coalition* with

Wisconsin's statutory language, the SEB derived the following standard for determining if "coordination is sufficient to treat a communication (or the expenditure for it) as a contribution" under Wisconsin law:

> The communication is made at the request or suggestion of the campaign (i.e., the candidate or agents of the candidate); or, in the absence of a request or suggestion from the campaign, if the cooperation, consultation or coordination between the two is such that the candidate or his/her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Id. at 131.[6] Under this standard, the SEB acknowledged that the "protection of a candidate's right to meet and discuss, with any person (including corporate persons), his or her philosophy, views and interests, and positions on issues (including voting record), is absolute," but noted that "[a]" candidate's (or campaign's) right to discuss campaign strategy, however, is

[6] *See Christian Coalition*, 52 F.Supp.2d at 92.

not so absolute." *Id*. at 132.[7]

This standard articulated in Op. El Bd 00-2 remains the GAB's view of Wisconsin law under which expenditures for communications coordinated with a candidate can be treated and regulated as contributions to the candidate, subjecting the expenditures to all applicable contribution limitations and reporting requirements. Although there are fact specific elements to the *Christian Coalition* standard adopted in Op. El Bd 00-2, the "communications" need not constitute "express advocacy" in order for the expenditures for such communications to be treated as contributions.

C. The Scope of the John Doe Investigation Embraced Conduct Subject to Regulation Under Wisconsin Law, As Reaffirmed in Op. El B. 00-2.

Defendants described the following factors as "the legal predicate for the John Doe investigation":

- The Supreme Court's holding in *Buckley* that the First Amendment

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[7] In support of this distinction, the SEB cited *Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997), a case cited by the District Court in granting the preliminary injunction. Of note, the SEB opinion explains: "The First Circuit was not saying that issue advocacy could be coordinated and it was not even saying that the FEC could not promulgate a rule prohibiting coordination of issue advocacy. What the court was saying was that the FEC could not attempt to prevent coordination with a prophylactic rule against all oral contact between candidates and committees who make expenditures after that contact. In other words, the FEC may promulgate a rule proscribing *illicit* coordination, but the rule before the court was not that rule." Sep. App. 129 (emphasis added).

does not invalidate campaign finance laws requiring identification of contributors and contributions;

- The court of appeals' holding in *Wisconsin Coalition* that under the Wisconsin campaign finance law expenditures coordinated with a candidate can be treated as "in kind contributions" whether or not the expenditures involve express advocacy; and
- The language of Wis. Stat. § 11.10(4) providing that if a third party "acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate, [it] is deemed a subcommittee of the candidate's personal campaign committee."

MTD Brief at 16-18; ECF Doc 76.[8]

In the John Doe investigation, the Defendants were seeking, among

[8] These predicates are set out in Defendants' joint brief in support of their appeals from the order denying their motions to dismiss (the "MTD Brief") and are based on defendant Schmitz's Brief filed with the John Doe judge in opposition to a motion to quash the subpoenas. Sep. App. 73-101.

other things,[9] evidence of coordinated communications similar to that at issue in *Wisconsin Coalition, supra*. They were guided by the standard governing when coordinated communications could be treated as contributions, the type of conduct at issue in *Wisconsin Coalition*, clarified by the SEB in Op. El Bd 00-2, adopting the *Christian Coalition* standard. When the GAB reaffirmed Op. El Bd 00-2 on March 26, 2008, it adopted that standard. Pursuant to Wis. Stat. § 5.05(6a), that standard had the force and effect of law. In addition, as Defendants note, Wis. Stat. § 11.10(4) provided an additional valid predicate under state law for seeking evidence whether the parties under investigation had acted "with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or ... in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate." In such event, parties such as WCFG would be "deemed a subcommittee of the candidate's personal campaign committee," which would trigger contribution and disbursement reporting requirements by the candidates.

These provisions of state law supported Defendants' conduct in

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[9] The brief filed by Defendant Schmitz with the John Doe Judge in opposition to a motion to quash the subpoenas details the evidence relied upon by Defendants in initiating the John Doe proceeding. Sep. App. 79-82.

petitioning to open the John Doe investigation and seeking the issuance of subpoenas and search warrants, all of which WCFG alleged were done in violation of its First Amendment rights. Whether Defendants ultimately would have been able to muster sufficient evidence to support criminal charges against WCFG is not the relevant standard for purposes of determining whether Defendants were entitled to qualified immunity and whether the court should have entered a preliminary injunction. The issue for purposes of Defendants' potential liability under 42 U.S.C. § 1983 is whether by investigating WCFG's conduct Defendants violated "clearly established" constitutional rights. *See* MTD Brief at 33-43.

Under state law, as construed by the GAB acting within the scope of its authority, there is no clearly established right to engage in coordinated issue advocacy free of regulation under the campaign finance law. Defendants' conduct in opening the John Doe investigation was not merely "not violative" of clearly established law, it was consistent with prevailing law as construed by the GAB, the agency responsible for its administration and enforcement. Accordingly, even if this Court was to conclude that Op. El Bd 00-2 as reaffirmed by the GAB is constitutionally infirm, that conclusion does not strip Defendants of the cloak of qualified immunity.

D. This Court's Recent Decision in *Barland II* Has No Impact On Issues Related To Coordinated Expenditures.

More than a month after the District Court entered its Decision and Order denying Defendants' motions to dismiss (R. 83), and approximately one week after the District Court entered its Decision and Order granting a preliminary injunction (R. 181), this court issued its decision in *Wisconsin Right To Life, Inc. v. Barland ("Barland II")*, 751 F.3d 804 (7th Cir. 2014).[10] *Barland II* addressed a variety of issues under Wisconsin's campaign finance law, but the resolution of those issues has no bearing on those presented here, because the *Barland II* issues involved independent and not coordinated expenditures that become contributions.

In describing the plaintiffs in *Barland II*, a social welfare organization under IRS Code § 501(c)(4) and its related political action committee (collectively, "WRTL"), this Court stated that:

> Neither the organization nor its state PAC contributes to candidates or other political committees, nor are they connected with candidates, their campaign committees, or political parties. That is to say, they operate independently of candidates and their campaign committees.

Barland II, 751 F.3d at 809. Because the issues in *Barland II* involved an

[10] Because *Barland II* was decided after the District Court entered the orders at issue, it could not have factored into the District Court's reasoning.

assumed predicate that any expenditures were "independent" of candidates and their committees, *Barland II* simply does not address the issue in this case, whether WCFG's expenditures for issue advocacy can be treated as contributions to a candidate if those expenditures were coordinated with the candidate or, more specifically, whether the coordination between FOSW and WCFG was so pervasive that WCFG is treated as a subcommittee of FOSW.

Nor does the narrow construction given to the definitions of "political purposes" in Wis. Stat. § 11.01(16) and "political committee" in GAB § 1.28(1)(a), that is, as limited to express advocacy or its functional equivalent, have any bearing here. The limiting construction applies only to independent "political speakers other than candidates, their committees, and political parties …." *Barland II*, 751 F.3d at 834. The limiting construction does not apply to regulation of contributions or conduct of candidates or their personal campaign committees. In *Wis. Right to Life State Political Action Comm. v. Barland ("Barland I")*, 664 F.3d 139, 152 (7th Cir. 2011), this Court emphasized that "ever since *Buckley* ... the Supreme Court has drawn a distinction between restrictions on *expenditures* for political speech and restrictions on *contributions* to candidates." (Emphasis in

original.) The *Barland I* Court specifically stated: "The First Amendment permits the government to regulate coordinated expenditures." *Id.* at 155. The *Barland II* Court also notes that the Supreme Court's recent decision in *McCutcheon v. Fed. Election Commn*, ___ U.S. ___, 134 S. Ct. 1434, 1464, 188 L. Ed. 2d 468 (2014) does not disturb the *Buckley* distinction between contributions and independent expenditures. 751 F.3d at 811-12.

Even after *Barland II*, expenditures for coordinated communications are constitutionally treated as "in kind contributions" under Wisconsin law. This triggers reporting obligations applicable to the candidates and registration and reporting requirements as to WCFG. In addition, since the limiting construction of Wisconsin statutes by *Barland II* does not apply to the conduct of a candidate or a candidate's personal campaign committee, if (under the second theory underlying the investigation) the communications of WCFG amounted to "acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or [done] in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate," within Wis. Stat. § 11.10(4), then WCFG is deemed a subcommittee of the candidate's personal campaign committee, triggering reporting requirements of the candidate's personal

campaign committee for all contributions and disbursements received or made by WCFG under Wisconsin law. Additionally, as a subcommittee of the candidate's personal campaign committee, WCFG also is subject to contribution limits and source prohibitions under Wisconsin law.

Simply put, if WCFG engaged in coordinated issue advocacy with a candidate, it is not an independent group under *Barland II*. Under such circumstances, it is treated as having made regulated contributions to a candidate with whom it coordinated, or it is treated as a candidate's sub-committee. Accordingly, neither the court's holdings of *Barland II*, nor its analytic framework, have any bearing on WCFG's conduct which was under investigation.

II. COORDINATED ISSUE ADVOCACY IS NOT PROTECTED BY THE FIRST AMENDMENT.

The distinction between independent expenditures and coordinated expenditures for purposes of the First Amendment dates back to *Buckley*, decided in 1976. This distinction has been at the heart of Wisconsin's campaign finance law, as administered by the SEB and later by the GAB, since *Buckley* established the distinction between independent expenditures and coordinated expenditures.

Although post-*Buckley* decisions have eroded other margins of

campaign finance laws on First Amendment grounds, that erosion has not changed the landscape relative to the issue presented in this case. No court, certainly not the United States Supreme Court, has taken the constitutional leap urged by WCFG here, a departure from existing law which obliterates *Buckley's* distinction between independent and coordinated expenditures.

A. The Supreme Court Continues to Recognize That Coordinated Expenditures Can Be Treated As Contributions to a Candidate.

Notwithstanding WCFG's claim of a constitutional right to engage in coordinated issue advocacy, no authority explicitly recognizes such a right. This is not surprising. As Bradley Smith, a former Commissioner and Chair of the Federal Elections Commission ("FEC"), recently noted:

> In fact, more than 35 years after *Buckley* was decided, there has still been remarkably little analysis of the theory of coordination and independent expenditures, by courts or commentators. *Buckley's* attention to the issue is limited to noting, in passing, that "controlled or coordinated expenditures are treated as contributions, rather than expenditures under the Act."

B.A. Smith,[11] *"Super Pacs" and the Role of "Coordination" in Campaign Finance Law (herein, "Smith")*, 49 Willamette L. Rev. 603, 606 (2013),

[11] Smith served as a Commissioner, and later the Chair, of the FEC from 2000 to 2005.

quoting *Buckley*, 424 U.S. at 46. Supreme Court case law bears out this observation. Since *Buckley*, the Court has continued, with almost clocklike regularity, to cite with approval and thus essentially reaffirm *Buckley's* distinction between independent and coordinated expenditures.

In *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985), although invalidating sec. 9012(f) of FECA, which limited expenditures by independent committees, the Court quoted *Buckley's* language stating that "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Five years later, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 702, 110 S. Ct. 1391, 1420, 108 L. Ed. 2d 652 (1990) *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), the Court again cited with approval *Buckley's* language stating that the absence of prearrangement and coordination alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Five years later, in *McIntyre v. Ohio Elections Comm'n*, 514

U.S. 334, 353 n. 14, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), the Court did so again.

In 1996, the Court rejected the FEC's assertion that all party expenditures should be *ipso facto* treated as coordinated, but the Court did not question that party expenditures could be regulated if coordinated. *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n (Colorado Republican I")*, 518 U.S. 604, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996).[12] Five years later, in *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm. (Colorado Republican II")*, 533 U.S. 431, 121 S. Ct. 2351, 150 L. Ed. 2d 461 (2001), the Court declined to constitutionalize the opposite proposition, rejecting the Party's assertion that it should be *ipso facto* free to coordinate expenditures with candidates. In doing so, the Court stated that a party "is in the same position as some individuals and PACs, as to whom *coordinated spending limits have already been held valid*." 533 U.S. at 455, citing *Buckley*, 424 U.S. at 46–47 (emphasis added). Two years later, in rejecting a constitutional

[12] Discussing that decision four years later, the Court referred to "the 'constitutionally significant fact' that there was no 'coordination between the candidate and the source of the expenditure'," stating that "*Colorado Republican* thus goes hand in hand with *Buckley*, not toe to toe." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392-93, 120 S. Ct. 897, 907, 145 L. Ed. 2d 886 (2000), quoting *Colorado Republican I*, 518 U.S. at 617-18.

challenge to section 202 of Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Court stated "there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." *McConnell v. FEC*, 540 U.S. 93 (2003) *overruled on other grounds by Citizens United*, 558 U.S. 310. The Court did not suggest that the First Amendment limited regulation to a subset of communications constituting "express advocacy."

Subsequent to *McConnell*, federal courts considered the validity of proposed FEC rules defining circumstances under which expenditures for coordinated communications could be treated as contributions under BCRA. Describing the proposed rules as "lax," the United States Court of Appeals for the District of Columbia held that because the "express advocacy" standard adopted by the FEC did not adequately separate election-related advocacy from other activity falling outside FECA's expenditure definition, the proposed regulation "runs counter" to BCRA's purpose and therefore failed. *Shays v. Fed. Election Comm'n ("Shays III")*,

528 F.3d 914, 925-26 (D.C.Cir. 2008).[13] Although not a Supreme Court decision, *Shays III* does not signal a constitutionally-mandated retreat limiting the right to regulate communications coordinated with a candidate to the subset of express advocacy; it signals the opposite.

In subsequently overruling *Austin* and *McConnell* and determining that the ban on independent corporate expenditures for "electioneering communications" under sec. 203 of BCRA violated the First Amendment, the Court again quoted with approval the language of *Buckley* recognizing the distinction of constitutional import between independent and coordinated expenditures. *See Citizens United*, 558 U.S. at 357-58 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to

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[13] The rules at issue in *Shays III* provided a safe harbor whereby candidates were free to coordinate with outside groups so long as ads funded by those groups did not include the "magic words" which clearly constitute "express advocacy" or did not recycle campaign materials if those ads aired outside a 90 day window prior to a federal election. Earlier draft rules previously struck down had a 120 day window. The *Shays III* court noted that:

> Under the present rules, any lawyer worth her salt, if asked by an organization how to influence a federal candidate's election, would undoubtedly point to the possibility of coordinating pre-window expenditures. The FEC's claim that no one will take advantage of the enormous loophole it has created ignores both history and human nature.

528 F.3d at 928.

the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.") (quoting *Buckley*, 424 U.S. at 47).

In 34 years of Supreme Court jurisprudence, from *Buckley* through *Citizens United*, the Court has adhered to *Buckley's* distinction regarding the scope of First Amendment protection afforded to independent as opposed to coordinated expenditures. The Court has done so even as other facets of campaign finance law have fallen under First Amendment challenges. The continued vitality of the *Buckley* distinction has been recognized by this Court subsequent to *Citizens United*. *See Ctr. for Individual Freedom v. Madigan ("CIF")*, 697 F.3d 464, 495-96 (7th Cir. 2012) (rejecting argument that definition of coordination under Illinois law was unconstitutionally vague, noting that it was "no less clear than the federal definition, which has long passed muster in the Supreme Court"); *Barland I*, 664 F.3d at 152-54 (emphasizing continued validity of *Buckley's* distinction between restrictions on expenditures for political speech and restrictions on contributions to candidates).

B. The *McCutcheon* Decision Has No Bearing On The Law As It Impacts Coordinated Expenditures.

Despite the Supreme Court's continued adherence to *Buckley's*

distinction between independent and coordinated expenditures, the District Court stated, "*Buckley's* distinction between contributions and expenditures appears tenuous." R. 181:25, citing *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring). Although the District Court relied heavily on *McCutcheon*,[14] its holding has no bearing on *Buckley's* distinction between independent and coordinated expenditures. The issue in *McCutcheon* involved the constitutionality of "aggregate" contribution limits – aggregate meaning the total sum of contributions an individual could lawfully make to candidates (plural) as opposed to a candidate (singular). The *McCutcheon* Court specifically stated that "this case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption." 134 S. Ct. at 1442.

Notably, in reaching its decision on the aggregate limits issue, the *McCutcheon* Court stated that:

> The parties and amici curiae spend significant energy debating whether the line that *Buckley* drew between contributions and expenditures should

[14] That the District Court relied on a case articulating new law decided after the commencement of this action is inconsistent with the law having been "clearly established." *See* Defendants' MTD Brief at 40, citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("Qualified immunity must be analyzed 'in light of clearly established law,' that is, the law at the time the constitutional violation is alleged to have occurred.")

> remain the law. Notwithstanding the robust debate, *we 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*. *Buckley* held that the Government's interest in preventing quid pro quo corruption or its appearance was "sufficiently important," id., at 26–27, 96 S.Ct. 612; we have elsewhere stated that the same interest may properly be labeled "compelling," *see National Conservative Political Action Comm.*, 470 U.S., at 496–497, 105 S.Ct. 1459, so that the interest would satisfy even strict scrutiny.

Id. at 1445-46 (emphasis added). Accordingly, *McCutcheon* does not signal a constitutional retreat from the *Buckley* distinction, one recognized and applied by courts and regulatory agencies for nearly 40 years.

McCutcheon contains no verbiage suggesting an implied, much less an explicit, disavowal of the *Buckley* concept that coordinated expenditures are treated as contributions. Instead, the *McCutcheon* Court quoted with approval *Buckley's* key verbiage supporting the distinction. 134 S. Ct. at 1454, quoting *Citizens United*, 558 U.S. at 357, in turn quoting *Buckley*, 424 U.S. at 47 ("[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent ... undermines the value of the expenditure to the candidate."). Thus, *McCutcheon* can only be read as a continued reaffirmation of *Buckley's* constitutional distinction between independent and coordinated expenditures.

C. Sound Reasons Exist for the Continued Distinction Between Independent and Coordinated Expenditures.

Despite the District Court's concerns as to the impact of regulations affecting coordinated communications, sound reasons exist for the rule. Former FEC Chair and Commissioner Smith made the case succinctly:

> Some type of "anti-coordination rule" is generally presumed to be necessary for any system of campaign finance regulation that relies on limitations and prohibitions on spending and contributing funds, and that hopes to remain effective. The typical approach is to treat coordinated spending as a contribution to the candidate's campaign, subject to both the limits on campaign giving and, if applicable, campaign spending. *Absent such a rule, limitations on financial contributions to candidate campaigns, or on spending by those campaigns, are circumvented with relative ease through the simple expedient of the candidate (or his campaign manager or other agent) directing a would-be donor on precisely how to spend money to benefit the campaign*. Limits on coordinated activity are, therefore, a means of preventing circumvention of the core limits on contributions to candidates and candidate spending.

Smith at 607-08 (emphasis added). In rejecting a challenge to the Illinois campaign finance law's disclosure requirements, alleging the law was vague and overbroad because it regulated as political committees groups that do not have as their "major purpose" the election of a candidate, this Court observed that "limiting disclosure requirements to groups with the major purpose of influencing elections would allow even those very groups

to circumvent the law with ease." *CIF*, 697 F.3d at 489. The *CIF* Court added that the "Supreme Court has frequently warned of the 'hard lesson of circumvention' in campaign finance regulation." *Id.*, quoting *McConnell*, 540 U.S. at 165. Accordingly, disclosure provisions which attempted "to reduce this risk of circumvention by defining 'political committee' to include groups that *either coordinate expenditures with campaigns and parties or that run ads that are unambiguous appeals to vote a particular way*" were consistent with the *Buckley* distinction between independent and coordinated expenditures and were not constitutionally overbroad. *Id.*, 697 F.3d at 489-90.

In focusing on what it described as "defendant's efforts to regulate the plaintiffs' issue advocacy speech," the District Court disregarded the potential subterfuge of using coordinated communications to circumvent constitutionally valid requirements as to contribution limits and disclosures. To the extent the District Court had legitimate concerns about the potential for a chilling effect on speech, the First Amendment does not mandate "green lighting" all coordinated communications other than the subset of communications constituting express advocacy. *See Christian Coalition*, 52 F. Supp. 2d at 88 ("importing the 'express advocacy' standard into [the]

contribution prohibition [of § 441(b) of FECA] would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions").

Speech coordinated with a candidate is reasonably construed as a "thing of value" to and "authorized" by the candidate, amounting to an "in-kind contribution" under Wis.Adm.Code § GAB 1.20(1)(e), whether or not it constitutes express advocacy. The reasonable and constitutional answer to the District Court's concerns is a fact specific standard, such as the GAB's *Christian Coalition* standard. Applying this standard, factors such as the content, timing, and mode of communication, the intended audience and the "volume" of the communications are material to determining whether the communications were made in such a way that "the candidate and the spender emerge as partners or joint venturers in the expressive expenditure …." Sep. App. at 129. To be brought into the regulatory net under this standard requires far more than merely brushing a candidate's sleeve, or

discussing shared philosophies or beliefs with a candidate at a fundraiser.[15]

Defendants opened a John Doe investigation after showing a neutral magistrate, the John Doe Judge, prima facie evidence of expenditures coordinated with a candidate. Erroneously concluding that the expenditures under investigation could not be subject to regulation under state or federal law unless the expenditures involved express advocacy, the District Court prematurely shut down the investigation. The District Court should not have shut down a valid investigation before Defendants could determine if the evidence could support criminal charges under the applicable *Christian Coalition* standard; the District Court should have dismissed this lawsuit.

CONCLUSION

The GAB respectfully recommends that the court reverse the District Court's Orders denying Defendants' motions to dismiss and granting WCFG's motion for a preliminary injunction.

[15] The District Court suggested that a charitable fundraiser coordinated with the Boy Scouts could result in the Scouts becoming a campaign subcommittee subject to the requirements and limitations of Wisconsin campaign-finance laws, exposing them to civil and criminal penalties. R. 181:20 n.8.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) for a brief by an amicus curiae because this brief contains 6,720 words, excluding the parts of the brief exempted by Fed. R. Ap. P. 32(a)(7)(B)(iii).

2. 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 Word 2013 in 13 point Times New Roman font, with footnotes in 11 point Times New Roman font.

Dated August 8, 2014.

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