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

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**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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Eric O'Keefe, et al.,
*Plaintiffs-Appellees*

v.

John T. Chisholm, et al.,
*Defendants-Appellants*

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Appeal From The United States District Court
For the Eastern District of Wisconsin
Case No. 14-C-139
The Honorable Judge Rudolph T. Randa

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# BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for *Amicus Curiae*, the Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center"), hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit. Counsel of record, who is appearing in his individual capacity in this matter, is senior counsel at Davis Polk & Wardwell LLP.* The Brennan Center is a non-profit entity, has no corporate parent and otherwise has nothing to disclose pursuant to these Rules.

* Associates at Davis Polk & Wardwell LLP also assisted in the preparation of this brief.

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy.

## SUMMARY OF ARGUMENT

The court below would limit the State of Wisconsin's authority to regulate campaign expenditures coordinated between candidates and third parties to the narrow category of "express advocacy," leaving the vast majority of coordinated spending completely unrestricted. This Court should reject that reasoning, which is at odds with nearly forty years of Supreme Court precedent and, if implemented, would eviscerate contribution limits that are a key bulwark against *quid pro quo* corruption.[2] This brief only addresses the legal and policy underpinnings of the

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund its preparation or submission. No one other than *amicus*, its members, and its counsel made a monetary contribution that was intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

[2] The Brennan Center does not endorse a narrow reading of the government's interest in preventing corruption or the appearance of corruption. For this brief's purpose of stating the law, however, we confine this discussion to the legal standard recognized by the Supreme Court's governing jurisprudence.

Supreme Court's view that coordinated spending may be regulated as a contribution and the Court's rejection of the "express advocacy" standard as a limit on such regulation. This brief does not address the particular facts upon which this case is based, nor does it take any position regarding whether those facts evidence coordination under Wisconsin law. This brief also takes no position on whether the investigation at issue in this case should have been commenced or should continue.

The Supreme Court has repeatedly rejected the notion advanced by the District Court that coordination of otherwise permissible expenditures between spender and candidate "does not add the threat of *quid pro quo* corruption." *See O'Keefe v. Schmitz*, No. 14-C-139, 2014 WL 1795139, at *9 (E.D. Wis. May 6, 2014). For decades, the Supreme Court has instead held that third-party expenditures that are coordinated with candidates are equivalent to campaign contributions because "[t]he ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the [expense]." *Buckley v. Valeo*, 424 U.S. 1, 36-37 (1976). Such contributions, the Court has held, present a heightened risk of *quid pro quo* corruption because spending "made after a 'wink or nod' often will be 'as useful to the candidate as cash.'" *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (quoting *Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado II*), 533 U.S. 431, 442, 446 (2001)). Because the government has a compelling interest in protecting against the danger of *quid pro quo* corruption, and the appearance or perception of such corruption, the Court has

consistently upheld regulation of campaign contributions – including coordinated expenditures – as limited and justified restraints on First Amendment activities.

The court below also erred in its assertion that only coordinated spending amounting to "express advocacy" – defined by *Buckley* as "explicit words of advocacy of election or defeat of a candidate," 424 U.S. at 43 – may be constitutionally limited by Wisconsin. On the contrary, the Supreme Court has made clear that the "express advocacy" limitation, articulated for a limited purpose in *Buckley*, is not a constitutional limit on all campaign regulation and has no application in the context of contributions, including outside spending coordinated with candidates.

Instead of endorsing the wholly unsupported express advocacy limitation on regulation adopted by the District Court, this Court should affirm Wisconsin's approach, which, consistent with Supreme Court precedent, defines coordination based primarily on the conduct of the spender and the candidate. The act of coordination is compelling evidence of the value of particular spending to a candidate, whether that spending is for "express" or other election advocacy.

Adhering to Supreme Court precedent, there is no basis for the lower court's unsupported assertion that coordinated issue advertisements falling outside the narrow confines of express advocacy "carry no risk of corruption" so long as the candidate and spender share the same viewpoint. *O'Keefe*, 2014 WL 1795139, at *10. The vast majority of spending by candidates and outside groups does not contain express advocacy, and, as the Supreme Court has clearly stated, a candidate will likely very much appreciate such spending when it is coordinated. Because

most election-related communications do not contain express advocacy, the lower court's standard, if adopted, would have the effect of gutting contribution limits and disclosure requirements, thereby exposing our institutions of government to the perils of actual or perceived *quid pro quo* corruption.

## ARGUMENT

### I. Since *Buckley*, the Supreme Court Has Treated Coordinated Expenditures as Contributions in Order to Guard Against the Danger of *Quid Pro Quo* Corruption.

The court below asserted, without citing precedent or evidence, that coordination of expenditures "does not add the threat of *quid pro quo* corruption" to spending that would be protected by the First Amendment absent coordination. *O'Keefe*, 2014 WL 1795139, at *9. That claim is contrary to the central distinction in *Buckley* and its progeny: that contributions – expressly including coordinated expenditures[3] – present a heightened risk of corruption and thus may constitutionally be subject to more limitations than truly independent expenditures. Instead of applying the *Buckley* standard, the District Court dismissed it as "tenuous" and "mere 'word games.'" *O'Keefe*, 2014 WL 1795139, at *12 (quoting *McCutcheon v. FEC*, 134 S. Ct. 1464 (2014) (Thomas, J., concurring)).

[3] Under Wisconsin law, expenditures are called "disbursements," *see* WIS. STAT. § 11.01(7), but this difference in statutory terminology has no constitutional significance.

A. *Buckley* distinguished between contributions and independent expenditures under the First Amendment.

Far from being "tenuous," *Buckley* has been the cornerstone of the Supreme Court's analysis of campaign finance laws over the last four decades. The Supreme Court's decision in 1976 drew a clear line between laws regulating independent expenditures and those regulating contributions. *Buckley*, 424 U.S. at 13-23. The Court intended to strike a balance between legitimate government concerns about the corruptive and anti-republican effect of money in politics – as feared by the Founding Fathers, *see The Federalist No. 46*, at 324 and *The Federalist No. 57*, at 389-90 (James Madison) (Tudor Publishing Co., 1937), and consistently recognized by the Court – and the strong interest of citizens in independently exercising their First Amendment rights to express political views and participate in American democracy.

In *Buckley*, the Supreme Court explained its distinction between independent expenditures and contributions as being focused upon the governmental interests with respect to each form of spending and the corresponding burden imposed upon First Amendment rights. *Buckley* identified the following compelling government interest as sufficient to justify a restraint on First Amendment rights: protecting the "integrity of our system of representative democracy" from "the danger of actual *quid pro quo* arrangements" and "the impact of the appearance of corruption." 424 U.S. at 26-27. The Court was especially concerned about the danger inherent in the association between contributors and politicians, particularly when candidates "lacking immense personal or family wealth must depend on financial

contributions." *Id.* at 26. The Court concluded that while contribution limits "entail[] only a marginal restriction" on the contributor's freedom of association, "independent" expenditure limits impose a far greater burden on First Amendment rights. *Id.* at 20, 23. Accordingly, the Court subjected independent expenditure limits to strict constitutional scrutiny and struck down such limits in the Federal Election Campaign Act of 1974 ("FECA"), while subjecting the Act's contribution limits to less-burdensome "closely drawn" scrutiny and upholding them. *Id.* at 25-28. This result, the Court reasoned, appropriately targeted "the narrow aspect of political association where the actuality and potential for corruption have been identified[,] while leaving persons free to engage in independent political expression [and] to associate actively." *Id.* at 28.

B. *Buckley* defined "contributions" to include "coordinated expenditures" because such expenditures present a heightened risk of *quid pro quo* corruption compared to independent expenditures.

The *Buckley* Court understood the term "contribution" under FECA to extend to "anything of value . . . made for the purpose of influencing" an election, expressly including "coordinated" spending. *Id.* at 23-24, 46-47. Indeed, the classification of coordinated spending as a contribution was integral to the *Buckley* framework. The Court explained that expenses "coordinated" with the candidate "are treated as contributions rather than expenditures," because "[t]he ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the [expense]." *Id.* at 46, 36-37. It expressly distinguished coordinated spending from the category it referred to as "independent expenditures," which are not "coordinated" and which *Buckley* held to

be subject to the highest level of constitutional protection. *See id.* at 46 ("[S]uch controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act"). The Court made this distinction because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47.

C. Since *Buckley*, the Supreme Court has consistently held that coordinated expenditures may be limited just as direct contributions.

The line drawn by *Buckley* between laws limiting independent expenditures and those limiting contributions, including coordinated expenditures, has been repeatedly reaffirmed. The Supreme Court has consistently recognized the legitimate interest in limiting contributions – and coordinated expenditures – given the risk of *quid pro quo* corruption or its appearance arising therefrom.

In 2001, the Supreme Court rejected a facial challenge to FECA's limitations on political party expenditures made in coordination with a candidate. *Colorado II*, 533 U.S. 431.[4] The Court in *Colorado II* embraced *Buckley*'s functional analysis, recognizing that "[t]here is no significant functional difference between a party's

[4] The Supreme Court's decision in *Colorado II* followed its decision five years earlier finding FECA's provisions limiting political party expenditures unconstitutional as applied to independent advertising expenditures of a political party. *See Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604 (1996). The plurality opinion placed particular emphasis on the fact that the expenditure at issue in *Colorado I* constituted an "'independent' expenditure, not a 'coordinated' expenditure that other provisions of FECA treat as a kind of campaign 'contribution.'" *Id.* at 613-14 ("[W]e therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution."). The plurality emphasized that "the constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617.

coordinated expenditure and a direct party contribution to the candidate." 533 U.S. at 464. Reaffirming that such coordinated expenditures have the same "power to corrupt" as direct contributions, the Court held FECA's restrictions on coordinated expenditures constitutional. *Id* at 465.

Two years after *Colorado II*, in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), seven justices reaffirmed the premise that coordinated expenditures may be constitutionally regulated as contributions given the increased risk that such spending will serve as a *quid* in exchange for a *quo*. *See id.* at 219 ("Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign' may be treated as indirect contributions."); *see also id.* at 317-19 (Kennedy, J., concurring in the judgment in part and dissenting in part). Affirming *Buckley*'s distinction between contributions and independent expenditures, the Court in *McConnell* struck down one provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA") as "an unconstitutional burden on the parties' right to make unlimited independent expenditures," *id.* at 213-14, while at the same time upholding two provisions of BCRA treating coordinated expenditures for "electioneering communications" as indirect contributions subject to the source and amount limitations imposed by FECA, *id.* at 202-03, 219-23.[5]

[5] Electioneering communications are broadcast, cable, or satellite communications that "clearly reference" a candidate, target that candidate's electorate, and are made within thirty days of a primary, caucus, or nominating convention, or sixty days of a general election. *See* 2 U.S.C. § 434(f).

In their opinion for the Court in *McConnell*, Justices Stevens and O'Connor reiterated the increased risk of corruption posed by coordinated expenditures compared to independent expenditures. The justices explained that while independent expenditures are "poor sources of leverage for a spender," coordinated expenditures "made after a 'wink or nod' often will be 'as useful to the candidate as cash.'" *Id.* at 221 (quoting *Colorado II*, 533 U.S. at 446, 442); *see also id.* at 222 ("A supporter easily could comply with a candidate's request or suggestion . . . and the resulting expenditure would be 'virtually indistinguishable from [a] simple contributio[n].'" (quoting *Colorado II*, 533 U.S. at 444-45)) (alteration in original). Although they dissented from the Court's decision with respect to the majority of the BCRA provisions at issue, Chief Justice Rehnquist and Justice Kennedy joined in finding the limitations imposed on certain coordinated expenditures constitutional because they are the functional equivalent of indirect contributions. *See id.* at 318-19 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy's opinion, joined by the Chief Justice, recognized that the coordinated expenditure regulation at issue advanced the government's legitimate interest in preventing corruption or the appearance thereof:

> Section 202 does satisfy *Buckley*'s anticorruption rationale in one respect: It treats electioneering communications expenditures made by a person in coordination with a candidate as hard-money contributions to that candidate. . . . § 202, in this single way, is valid: It regulates conduct that poses a *quid pro quo* danger—satisfaction of a candidate's request.

*Id.* at 319.

D. Recent Supreme Court cases further support the distinction between independent and coordinated expenditures set forth in *Buckley*, *Colorado I*, *Colorado II*, and *McConnell*.

Although the District Court places reliance on the Supreme Court's recent decisions in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), *see, e.g.*, *O'Keefe*, 2014 WL 1795139, at *7, 10-11, those opinions in fact reaffirm the distinction first made in *Buckley* between impermissible limitations on independent expenditures and permissible limitations on contributions made in the form of coordinated expenditures.

Central to the Court's decision in *Citizens United* was the fact that the corporate expenditures at issue were made *independently* and not coordinated with any candidate. *See* 558 U.S. at 360. The Court stated expressly that "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Id.* Indeed, the Court explicitly quoted *Buckley*'s statement of the rationale underlying its distinction between contributions and expenditures: "[The] absence of prearrangement and coordination . . . undermines the value of the expenditure to the candidate" and "alleviates the danger" of *quid pro quo* corruption. *Id.* at 357 (quoting 424 U.S. at 47). It is no coincidence that, having thus reaffirmed *Buckley*'s animating rationale, the Court's opinion repeatedly and consistently refers to the provision struck down in *Citizens United* as a "prohibition on corporate *independent* expenditures." *Id.* at 339 (emphasis added); *see also, e.g.*, *id.* at 357 ("[W]e now conclude that *independent* expenditures,

including those made by corporations, do not give rise to corruption or the appearance of corruption.") (emphasis added).

As with *Citizens United*, the Supreme Court's recent decision striking down federal aggregate contribution limits in *McCutcheon* supports *Buckley*'s treatment of coordinated expenditures as contributions subject to limitation. The plurality's opinion in *McCutcheon* specifically disclaimed any need to "revisit *Buckley*'s distinction between contributions and independent expenditures and the corollary distinction in the applicable standards of review." 134 S. Ct. at 1445. It also reaffirmed *Buckley*'s reasoning that independent expenditures are less likely to corrupt or give the appearance of corruption given the "absence of prearrangement and coordination." *Id.* at 1454 (quoting *Citizens United*, 558 U.S. at 357). The plurality's recognition that "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through *independent* actors, as when a donor contributes to a candidate directly," is an express reiteration of the reasoning underlying the Court's longstanding differential treatment of independent and coordinated expenditures. *See id.* at 1452 (emphasis added).

Rather than moving away from the central tenets set forth in *Buckley* with respect to regulation of contributions, the *McCutcheon* Court reaffirmed the legitimate interest the government has in limiting campaign contributions – understood to include coordinated campaign-related expenditures, *id.* at 1455, 1457 – to prevent corruption or the appearance thereof. *See id.* at 1450-52.

## II. The Supreme Court Has Never Applied *Buckley*'s "Express Advocacy" Limitation to Coordinated Expenditures.

Citing no authority, the District Court erroneously inflated *Buckley*'s "express advocacy" standard – which narrowed FECA's independent expenditure limits to apply only to "communications that include explicit words of advocacy of election or defeat of a candidate," 424 U.S. at 43 – into an all-encompassing limit on the regulation of all political spending. Misapplying *Buckley* and its progeny, the District Court's opinion broadly asserted that "limited intrusions into the First Amendment are permitted to advance the government's narrow interest in preventing *quid pro quo* corruption . . . only as it relates to express advocacy speech." *O'Keefe*, 2014 WL 1795139, at *7. In fact, the Supreme Court's adoption of "express advocacy" or its equivalent as a limiting principle with respect to campaign finance legislation has always been confined to independent rather than coordinated expenditures.[6]

### A. *Buckley* construed FECA's expenditure limits to cover only "express advocacy" in order to overcome constitutional vagueness and overbreadth concerns specific to limitations on independent expenditures.

In introducing the "express advocacy" standard, *Buckley* did not announce a new constitutional principle. Instead, when evaluating FECA's regulation of independent expenditures, *Buckley* narrowly construed FECA to apply to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44, 80. That construction was

[6] The phrase "independent expenditure" has both a general meaning, denoting any type of independent election spending, and meaning as a specific term of art under FECA. *See* 2 U.S.C. § 431(17). This brief uses the term in its broader, general sense.

only utilized to overcome vagueness and overbreadth concerns arising in the context of restrictions on independent spending, and the Court has recognized that *Buckley* did not intend to announce a new generally applicable constitutional principal based upon an "express advocacy" limitation. *McConnell*, 540 U.S. at 192 ("In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."); *see also FEC v. Wis. Right to Life, Inc.* (*WRTL*), 551 U.S. 449, 474 n.7 (2007) ("*Buckley*'s intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test.") (Roberts, C.J., controlling opinion).[7]

B. The Supreme Court and other federal courts have not applied an "express advocacy" limit to coordinated expenditures.

Contrary to the District Court's holding, the Supreme Court's decisions have only applied an "express advocacy" limitation to FECA's restrictions on independent expenditures and not to FECA's restrictions on contributions – which under the applicable statute and the Court's decisions include coordinated expenditures. *Buckley*, 424 U.S. at 23; *see also WRTL*, 551 U.S. 449. Consistent with that

[7] Despite recognizing that *Buckley*'s "express advocacy" standard was not a constitutionally mandated rule, the two controlling justices in *WRTL* adopted a test distinguishing between "express advocacy or its functional equivalent" and non-express advocacy for purposes of evaluating the constitutionality of FECA's provision restricting independent corporate expenditures for electioneering communications. *Id.* at 465. Three concurring justices refused to adopt the plurality's test, *id.* at 495-96 (Scalia, J., concurring in the judgment), and *WRTL* has been entirely displaced by the Court's later decision in *Citizens United*, finding these same restrictions facially unconstitutional. As previously discussed, the Court's analysis in *Citizens United* was keyed to the independent nature of the communications limited by FECA. *See supra* pp. 9-10.

distinction, in *McConnell*, seven justices upheld against First Amendment challenge limitations imposed by BCRA on coordinated expenditures made for "electioneering communications" – a category of communications the Court recognized was broader than "express advocacy" communications. 540 U.S. at 189, 202-03. Additionally, in both *McConnell* and *Citizens United*, the Supreme Court recognized that relying upon a distinction between express advocacy and other campaign-related communications, such as issue advocacy, is often impracticable. *See Citizens United*, 558 U.S. at 358 (citing *Buckley*, 424 U.S. at 42) ("[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."); *McConnell*, 540 U.S. at 193-94 (finding that the "express advocacy" distinction is "functionally meaningless" and "has not aided the legislative effort to combat real or apparent corruption.").

Consistent with *Buckley* and *McConnell,* the Tenth Circuit held in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* that the express advocacy limitation in *Buckley* applied only to independent expenditures – not to coordinated expenditures, which "are treated as 'contributions rather than expenditures' under the FECA." 59 F.3d 1015, 1020 (10th Cir. 1995) (quoting *Buckley*, 424 U.S. at 46-47, n.53), *rev'd on other grounds,* 518 U.S. 604 (1996). The Supreme Court reversed that decision on other grounds, with the plurality holding that the conduct in question was not, in fact, coordinated, *Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado I*)*,* 518 U.S. 604 (1996), but none of the justices

disputed the Tenth Circuit's position that the "express advocacy" limitation did not apply to coordinated expenditures.

Similarly, in an influential D.C. District Court decision in *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45, 87 (D.D.C. 1999), the court rejected the notion that *Buckley*'s express advocacy standard applies to coordinated expenditures, finding such an argument "untenable." As in *McConnell*, the court reasoned that the First Amendment does not require that regulation of coordinated communications be limited to express advocacy because of the grave risk of corruption inherent in unregulated coordinated expenditures. Restricting the regulation of such expenditures to the "narrow class of communications" covered by "express advocacy," the court found, would severely undercut the government's ability to prevent corruption:

> [I]mporting the "express advocacy" standard into § 441b's contribution prohibition 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. Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat.

*Id.* at 88.

The court explained that coordinated expenditures that do not rise to the level of express advocacy could nevertheless be "every bit as beneficial to the candidate as a cash contribution of equal magnitude and would equally raise the potential for corruption." *Id.*; *cf. McConnell*, 540 U.S. at 221 (quoting *Colorado II*, 533 U.S. at 442, 446) ("[Expenditures] made after a 'wink or nod' often will be 'as useful to the

candidate as cash.'"). The court further found that in cases where a candidate benefits from anonymity, such as in launching an attack advertisement against an opponent, such coordinated expenditures "would be substantially *more* valuable than dollar-equivalent contributions because they come with an 'anonymity premium' of great value to a candidate running a positive campaign." 52 F. Supp. 2d at 88 (emphasis added).

Ignoring numerous decisions to the contrary, the court below asserted without support that "coordinated ads" in favor of particular policies "carry no risk of corruption" where the spender's "interests are already aligned with" the candidate. *O'Keefe*, 2014 WL 1795139, at *10. Additionally, the District Court reasoned that with respect to "issue advocacy speech, . . . [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." *Id.* at 19. As set out above, such an idea is entirely at odds with nearly forty years of Supreme Court decisions in which the Court has recognized that it is the fact of coordination itself and the corresponding benefit received by the candidate that presents the danger of *quid pro quo* corruption. *See supra* Part I. The alignment of views between the spender and the candidate does nothing to reduce the value of coordinated spending to a candidate or the resulting danger of *quid pro quo* corruption.

C. Consistent with Supreme Court precedent, the Seventh Circuit's decision in *Barland II* does not require an "express advocacy" limitation on Wisconsin's laws governing coordinated spending.

The Seventh Circuit's recent decision in *Wisconsin Right to Life, Inc. v. Barland* (*Barland II*), 751 F.3d. 804 (7th Cir. 2014), does not require this Court to import the

"express advocacy" limitation into Wisconsin's law governing coordinated expenditures. *Barland II* held that a Wisconsin statute defining activities undertaken for "political purposes" is vague and overbroad and must be narrowly construed to cover only "express advocacy and its functional equivalent" for certain purposes. *See id.* at 838.[8] The statutory language at issue forms part of the definition of a number of terms under Wisconsin law, including both "disbursement" (Wisconsin's term for expenditure) and "contribution." *Id.* at 812-13. However, the analysis in *Barland II* was confined to the context of independent "disbursements." Plaintiffs, the court found, "operate independently of candidates," "spend money for political speech independently of candidates and parties," and do not make contributions to candidates. *Id.* at 808-09. Plaintiffs thereby challenged Wisconsin's statutory definitions only "to the extent that these definitions trigger . . . restrictions and requirements for independent groups." *Id.* at 829.

The court held that its limiting construction of the term "political purposes" did not apply where the term did not present vagueness and overbreadth concerns. In particular, communications by "candidates, their committees, and political parties" are not subject to the narrower construction because such communications are "unambiguously related to the campaign." *Id.* at 833-34 & n.21 (quoting *Buckley*, 424 U.S. at 80). The same logic applies here: the act of coordination is evidence that an expenditure is unambiguously campaign-related.

[8] *Amicus* does not endorse the reasoning in *Barland II*, but accepts it as binding Seventh Circuit precedent here.

*Barland II*'s reliance on *Buckley* further clarifies that its limiting construction should not be applied to coordinated spending. *Barland II* adopted the "express advocacy and its functional equivalent" standard "as those terms were explained in *Buckley* and [*WRTL*]." *Id.* at 834. *Buckley*, like *Barland II*, addressed a statutory provision that related to both "contributions" and "expenditures," – FECA § 434(e) – and *Buckley* expressly narrowed the provision only in the context of independent expenditures – not contributions, including coordinated spending. *Buckley*, 424 U.S. at 76-80; *see also WRTL*, 551 U.S. at 465 (applying an "express advocacy or its functional equivalent" limitation to a FECA provision governing independent corporate expenditures for electioneering communications). *Barland II*'s use of the "express advocacy" standard must similarly be understood to apply only to independent spending.

Indeed, just three years ago the same panel that decided *Barland II* fully embraced the *Buckley* framework, holding that "there is a fundamental constitutional difference between money *spent* . . . independently of the candidate's campaign and money *contributed* to the candidate." *Wis. Right to Life State Political Action Comm. v. Barland* (*Barland I*), 664 F.3d 139, 153 (2011) (quoting *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985)). Given *Barland I*'s support for limits on contributions, understood by the court to include coordinated expenditures under *Buckley* and its progeny, there is no reason to imagine the same panel was seeking to invalidate those limits – without any discussion whatsoever – in *Barland II*.

III. Whether a Restriction on Coordination of Expenditures Is Constitutional Depends Primarily on the Conduct of the Spender and the Candidate, Not the Content of the Resulting Communications.

A. *Christian Coalition* defined coordination based primarily on conduct because the act of coordination is a strong indicator of the potential for *quid pro quo* corruption.

In *Christian Coalition*, the D.C. District Court put forth a standard for coordination that is consistent with *Buckley* and its progeny and is narrowly tailored to encompass those expenditures that present a heightened danger of *quid pro quo* corruption. This test has been widely adopted across the country, including in Wisconsin.

*Christian Coalition* adopted a definition of coordination that focuses on the conduct of the spender and the candidate. While content is relevant to ensuring that the subject of regulation concerns material related to an election, it is the conduct – the coordination itself – that is most important. The court held that coordinated expenditures may be treated as contributions when they are made "at the request or the suggestion of the candidate," when the candidate can "exercise control" over the expenditure, or when there has been "substantial discussion or negotiation between the campaign and the spender" over the expenditure. 52 F. Supp. 2d at 91-92.

*Christian Coalition*'s conduct test is "narrowly tailored" and "restrictive" in order to "limit[] the universe of cases triggering potential enforcement actions" to those in which the potential for *quid pro quo* corruption is "palpable." *Id.* at 88-91. The court's test captures only those situations in which a candidate has "taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants." *Id.* at 92. Such "valuable" coordinated

expenditures "circumvent the contribution limits" and are particularly likely to lead to corruption. *Id.* at 91.

Even those who generally oppose campaign finance restrictions have extolled *Christian Coalition*'s conduct-focused approach and found it consistent with *Buckley* and its progeny. *See, e.g.*, Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 625 (2013) (arguing that "the approach taken in *Christian Coalition* fits quite comfortably into the *Buckley* paradigm" and is tailored to conduct that creates a "very heightened appearance" of *quid pro quo* corruption).[9]

B. Wisconsin's standard for coordination closely tracks *Christian Coalition* and is similar to standards adopted by the FEC and other states.

Wisconsin law, which tracks *Christian Coalition*, is well within the mainstream. In 1999, the Wisconsin Court of Appeals expressly rejected the notion that *Buckley*'s "express advocacy" test limited "the state's authority to regulate or restrict campaign contributions." *See Wis. Coalition for Voter Participation, Inc. v. State Elections Bd.*, 231 Wis. 2d 670, 679 (Ct. App. 1999). In 2000, the Elections Board essentially adopted the *Christian Coalition* test, holding that expenditures "made for the purpose of influencing voting at a specific candidate's election" could be treated as contributions if they were based on the candidate's request or suggestion, were under the candidate's control, or were the subject of substantial discussion or

[9] *Amicus* does not believe that the *Christian Coalition* test represents the outer limit of what conduct can constitute coordination.

negotiation between the candidate and the spender. Wis. El. Bd. Op. 00-2 at 12 (2000) (Reaffirmed 3/26/2008) (Advisory Opinion).

The FEC's definition of "coordinated communications" also incorporates the test from *Christian Coalition*. Coordinated expenditures cover, *inter alia,* expenditures made at the "[r]equest or suggestion" of the candidate, with the "[m]aterial involvement" of the candidate or after "[s]ubstantial discussion" between the candidate and the spender. 11 C.F.R. § 109.21(d).

The FEC also includes a content prong, though it is not nearly as restrictive as the "express advocacy" test adopted by the court below. The FEC instead includes a wide swath of election-related advocacy within its definition of coordinated communications. Moreover, no court has held that the FEC's content prong represents an outer limit on the types of coordinated advocacy the government may regulate consistent with the First Amendment.[10] To the contrary, the Commission's rules were initially invalidated for being too *narrow*.[11]

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[10] In fact, half the Commission has opined that coordinated expressive communications not meeting its content prong can still be contributions under FECA. *See* Statement on Advisory Opinion Request 2011-23 (American Crossroads), Chair Cynthia L. Bauerly & Commissioner Ellen L. Weintraub, Dec. 1, 2011, http://www.fec.gov/members/weintraub/statements/AO_2011-23_American_Crossroads_CLB_ELW_ Statement.pdf; Statement of Commissioner Steven T. Walther for Advisory Opinion 2011-23 (American Crossroads), Dec. 1, 2011, http://www.fec.gov/members/walther/statements/Walther_Statement_AO_2011-23_American_Crossroads.pdf.

[11] In *Shays v. Federal Election Commission*, the D.C. Circuit invalidated a previous version of the FEC's rule that employed, in part, the "functionally meaningless" express advocacy standard. 414 F.3d 76, 100 (D.C. Cir. 2005) (quoting *McConnell*, 540 U.S. at 193). The court found that the FEC lacked any "persuasive justification" for the incorporation of this standard, and that its use would allow a "coordinated communication free-for all." *Id.*

Many other states also define coordination primarily based on the conduct of the spender and the candidate. *See, e.g.*, OHIO REV. CODE ANN. § 3517.01(C)(17) (defining independent expenditure as an expenditure "that is not made with the consent of, in coordination, cooperation, or consultation with, or at the request or suggestion of any candidate"); MONT. ADMIN. R. 44.10.323(4) ("'Coordinated expenditure' means an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate or political committee or an agent of a candidate or political committee."); 94-270-1 ME. CODE R. § 6(9) (providing that if an "expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate, the expenditure is considered to be a contribution from the spender to the candidate"); *see also Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003) (following *Christian Coalition* to preserve an otherwise overbroad statute).

## IV. Limiting Regulation of Coordinated Spending to "Express Advocacy" Would Eviscerate Contribution Limits and Disclosure, Leaving Governments Vulnerable to *Quid Pro Quo* Corruption.

Affirmation of the District Court's novel view of the First Amendment's limitations upon a legislature's ability to regulate coordinated expenditures to prevent *quid pro quo* corruption or its appearance would make contribution limits meaningless. If legislatures could constitutionally limit only coordinated expenditures for express advocacy, individuals and parties could provide unlimited funds for other coordinated election-related advertising supporting a candidate over and above their direct contributions to such candidate under the base limitations. As discussed above, the Supreme Court has expressly recognized that such indirect

contributions pose a serious risk of *quid pro quo* corruption or its appearance, and may therefore be limited consistent with the Constitution. The Court has also recognized the importance of effective disclosure with respect to such contributions, which the District Court's decision would eviscerate.

Key to the District Court's holding that coordinated issue advertisements carry "no risk of corruption" is the court's idea that "[s]uch ads are meant to educate the electorate, not curry favor with corruptible candidates." *O'Keefe*, 2014 WL 1795139, at *10. That underlying premise is belied by evidence that candidates themselves recognize such advertising is more effective than express advocacy in campaign advertising. *McConnell*, 540 U.S. at 127 ("[C]ampaign professionals testified that the most effective campaign ads . . . should, and did, avoid the use of the magic words [of express advocacy.]); *id.* at 127 n.18 (finding use of express advocacy in 5% or less of candidate advertisements in the 1998 and 2000 elections); *see also* Michael Franz, Joel Rivlin & Kenneth Goldstein, *Much More of the Same: Television Advertising Pre and Post-BCRA*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 141, 144 (Michael J. Malbin ed., 2006) (finding candidates only used magic words in 11.4% of their advertisements in the 2000 election).

In *McConnell*, the Supreme Court recognized that issue advertisements supported by soft money funds not subject to FECA's limitations were used by candidates and donors to circumvent contribution limitations. *See McConnell*, 540 U.S. at 128 ("[Issue] ads were attractive to organizations and candidates precisely

because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money."); *id.* at 129 ("[C]andidates and officials knew who their friends were" and sought to "circumvent FECA's limitations, [by] asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on 'issue' advocacy."). It should come as no surprise then, that only a tiny proportion of ads run by party and outside groups in the last presidential election before the Court's decision contained express advocacy. *See* CRAIG B. HOLMAN & LUKE MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 13 (2001) (analyzing 940,755 television advertising spots and finding only 2% of party and outside group advertisements used "magic words" of express advocacy).

In more recent cycles, ads lacking express advocacy have continued to constitute the vast majority of election-related communications by outside interest groups. *See* Erika Fowler, *A Brief Word on Magic Words*, WESLEYAN MEDIA PROJECT, Oct. 18, 2010, http://mediaproject.wesleyan.edu/2010/10/18/magic-word-update/ (finding that, with respect to independent group advertisements in 2010, only approximately one in ten advertisements in U.S. Senate races and one in three advertisements in U.S. House races used "magic words" of express advocacy); Michael M. Franz, *The Citizens United Election? Or Same As It Ever Was?*, THE FORUM, Dec. 2010, at 7, 8, *available at* http://www.cerium.ca/IMG/pdf/2012_07_13_SEANCE_2.pdf (finding interest group advertisements in the 2008 House and Senate races used express

advocacy phrases only 7% and 1% of the time, respectively, and in the 2010 House and Senate races only 30% and 10%).

Such outside spending is rising exponentially in U.S. elections. In the wake of *Citizens United*, outside spending in federal elections tripled between the 2008 and 2012 presidential elections, and quadrupled between the 2006 and 2010 midterm elections. *See* Center for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, http://www.opensecrets.org/outsidespending/cycle_tots.php. If anything, Wisconsin elections have experienced an even more pronounced increase. *See, e.g.*, *A Record Amount of Money Spent on Wisconsin Recall*, CBS NEWS ONLINE, June 7, 2012, http://www.cbsnews.com/news/a-record-amount-of-money-spent-on-wisconsin-recall/ (noting that outside spending increased by six times between the 2010 gubernatorial and 2012 recall elections).

Moreover, outside spending increasingly comes from groups devoted to electing a single candidate – often staffed by the candidate's own family, friends or former staffers. *See* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 89-92 (2013); PUBLIC CITIZEN, SUPER CONNECTED 10 (2013), *available at* http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf (estimating that 45% of super PAC spending in 2012 was by groups devoted to electing a single candidate). These single-candidate groups allow maxed-out contributors to target particular races in exactly the same way as they are able to do with direct contributions.

The District Court itself essentially conceded that allowing unlimited coordination between such groups and candidates would render all contribution limits meaningless. The court proclaimed that "plaintiffs have found a way to circumvent campaign finance laws, and that circumvention . . . cannot be condemned or restricted." *O'Keefe*, 2014 WL 1795139, at *11. Contrary to that misstatement of the law, allowing candidates and their donors to coordinate regarding third-party election-related issue advertising presents a danger of *quid pro quo* corruption or its appearance that legislation may seek to prevent. *See supra* Part I.

The District Court's novel view of coordination would also undermine disclosure laws that aim to provide transparency in the spending of money for political campaigns. In most jurisdictions, groups that expend "dark money" without disclosing their donors must maintain independence from candidates with respect to most of their political activities. If the District Court's reasoning were to stand, such groups would be allowed to coordinate an unlimited amount of spending directly with candidates without public disclosure. Such a situation would undermine transparency and further increase the risk that the coordinated spending in question would lead to *quid pro quo* corruption. *See Buckley*, 424 U.S. at 67 (disclosure requirements "provide the electorate with information" and "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity").

Dark money is already increasing exponentially as part of current political spending. *See* Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 384 (2013) (noting "dark money" currently accounts for almost sixty percent of all outside spending at the federal level); Robert Maguire, *How 2014 Is Shaping Up To Be the Darkest Money Election To-Date*, OPENSECRETS.ORG, Apr. 30, 2014, http://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/ (finding the current cycle's dark money total is on pace to exceed that of 2012 three-fold, notwithstanding the absence of a presidential race). The District Court's decision would further exacerbate this trend. Such a result would be wholly at odds with the Supreme Court's recent jurisprudence, which has reaffirmed that disclosure laws are an essential tool for voters to make informed decisions in the political marketplace and also assist in preventing *quid pro quo* corruption. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1460-61; *see also Ctr. for Indiv. Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012) (observing that, after *Citizens United*, there is a pressing need for "an effective and comprehensive disclosure system").

## CONCLUSION

The reasoning articulated by the District Court is at odds with nearly forty years of Supreme Court precedent, and, if allowed to stand, would eviscerate state and federal contribution limitations that are an important bulwark against *quid pro quo* corruption in the electoral process. This Court should reject the District Court's

reasoning, and instead hold that Wisconsin's treatment of coordinated expenditures as contributions subject to regulation is consistent with the longstanding recognition by the Supreme Court that such regulation is consistent with the First Amendment.

Respectfully submitted,

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

I, Daniel Kolb, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that 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 it has been prepared in a 12-point, proportionally spaced typeface, Century Schoolbook, with footnotes in 11-point type using Microsoft Word 2010.

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