IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

CITIZENS FOR RESPONSIBLE GOVERNMENT ADVOCATES, INC., Plaintiff, v. THOMAS BARLAND, *et al*. Defendants.	)	No. 2:14-cv-01222

BRIEF *AMICUS CURIAE* OF CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Lester A. Pines*
SBN 1016543
Cullen Weston Pines & Bach LLP
122 West Washington Avenue, Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
pines@cwpb.com

J. Gerald Hebert
Tara Malloy
Paul S. Ryan
Megan P. McAllen
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
(202) 736-2200 (telephone)

Counsel for Amicus Curiae

*Counsel of Record

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STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to strengthen the laws governing campaign finance and political disclosure. CLC has participated in a number of the campaign finance cases underlying the claims brought here, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310 (2010), and was active in the development of the federal standards for coordination.

SUMMARY OF ARGUMENT

Under Wisconsin law, money spent in coordination with a candidate for the purpose of influencing an election is deemed a contribution to such candidate subject to limits and source restrictions, as well as disclosure obligations. *See, e.g.*, Wis. Stat. §§ 11.01(6)(a)1, 11.01(16); 11.06(1); Wis. Admin. Code § GAB 1.42. The goal of this law—and many similar laws at the federal and state level—is to block attempts by big donors to purchase influence over candidates "through prearranged or coordinated expenditures amounting to disguised contributions," and thereby to prevent political corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

Plaintiff Citizens for Responsible Government Advocates, Inc. ("CRG") wishes to make communications in coordination with three candidates, Kim Simac, Carl Pettis, and Jason Arnold, including materials lauding "their backgrounds, their efforts to become politically involved, and their work to further fiscal responsibility in government." Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction ("Pl. Br.") at 4. The constitutional question raised by CRG is whether the mere avoidance of words of express electoral advocacy in its planned coordinated communications so reduces their value as

contributions—and their corruptive potential—that they cannot permissibly be subject to limits or public disclosure.

The Supreme Court has specifically addressed this question and answered in the negative. It held that "there is no reason why Congress may not treat coordinated disbursements for electioneering communications,"[1] i.e., a form of non-express advocacy, "in the same way it treats all other coordinated expenditures." *McConnell*, 540 U.S. at 202-03.

The arguments made by plaintiff in support of its motion for preliminary injunction therefore cannot be correct. By the same token, this Court's Decision and Order granting CRG's motion for preliminary relief, as well as the ruling in *O'Keefe v. Schmitz*, Case No. 14-C-139, referenced in the Order, must be reconsidered. *See* October 14, 2014 Decision and Order, *CRG v. Barland*, Case No. 14-C-1222; May 6, 2014 Decision and Order, *O'Keefe v. Schmitz*, Case No. 14-C-139. The assertion that coordinated spending cannot be regulated absent express advocacy is directly contradicted by Supreme Court precedent.

First, plaintiff makes the error of analyzing this case as if it concerned independent expenditures, instead of coordinated spending (i.e., "disguised contributions"). This approach flies in the face of the Supreme Court's longstanding methodology for reviewing campaign finance laws wherein the distinctions between expenditure restrictions, contribution restrictions and disclosure requirements determine the level of review and applicable precedent.

Second, plaintiff fails to recognize that the Supreme Court formulated the express advocacy test in *Buckley* to narrow only the regulation of *independent* expenditures, and deemed the test unnecessary for the regulation of contributions and *coordinated* expenditures. *Buckley*

[1] An "electioneering communication" is defined as a television or radio advertisement that "refers to a clearly identified candidate for Federal office," is "targeted to the relevant electorate," and airs 30 days before a primary election or 60 days before a general election. 52 U.S.C. § 30104(f)(3).

found that "all expenditures placed in cooperation with or with the consent of a candidate," 424 U.S. at 78, that were "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(9)(A)(i), could be regulated as coordinated expenditures. Wisconsin's law regulating coordinated spending comports with this standard, so it is presumptively constitutional.

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

Finally, the relief plaintiff requests—the imposition of an express advocacy standard on the regulation of coordinated spending—would enable large-scale circumvention of the contribution limits, allowing precisely the type of quid pro quo corruption that the limits were designed to prevent. It defies common sense and experience to assert that a coordinated advertising campaign that meets a candidate's every specification and request is not a valuable "contribution" to his campaign simply because it lacks words of express advocacy.

For these reasons, plaintiff's motion for preliminary injunction should be denied, and the temporary restraining order should be dissolved.

ARGUMENT

I. Plaintiff Mischaracterizes the Regulation of Coordinated Spending as a Restriction on Independent Expenditures.

Although plaintiff challenges the Wisconsin statutory provisions and regulations governing *coordinated* election spending, it approaches this case as if it was challenging limits on *independent* issue speech. Because CRG confuses the nature of the alleged activities and laws under review, it requests the wrong standard of scrutiny and relies on inapposite judicial authority.

A. Strict Scrutiny Does Not Apply.

The Supreme Court's longstanding approach to campaign finance laws is to determine the standard of review based on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003); *McConnell*, 540 U.S. at 134-40. Since *Buckley*, the Court has distinguished between three different types of campaign finance regulations for purposes of judicial review: restrictions on expenditures, restrictions on contributions and public disclosure requirements. 424 U.S. at 19-23, 64-65. Restrictions on independent expenditures are deemed the most onerous campaign finance regulations and are consequently subject to strict scrutiny. *Id.* at 44-45; *see also FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464-65 (2007) ("*WRTL*"). Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136 (quoting *Beaumont*, 539 U.S. at 162) (internal quotation marks omitted). Disclosure requirements, the "least restrictive" campaign finance regulations, are subject only to "exacting scrutiny." *Buckley*, 424 U.S. at 64, 68.

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

scrutiny it applied to limits on their cash contributions"). *See also In re Cao*, 619 F.3d 410, 416-17 (5th Cir. 2010) (noting that "for purposes of First Amendment scrutiny, 'prearranged or coordinated expenditures' are constitutionally equivalent to contributions" and that "it followed that coordinated expenditures are subject to the same limitations and scrutiny that apply to contributions"), *cert. denied*, 131 S. Ct. 1718 (2011).

Plaintiff ignores this analysis. Instead of adhering to the well-established framework for reviewing campaign finance laws, wherein the nature of the regulation determines the level of review, plaintiff takes a novel approach and asserts that "strict scrutiny applies to restrictions imposed on issue advocacy." *See* Pl. Br. at 13. The problem with this claim—even putting aside its novelty and lack of legal support[2]—is that it confuses the nature of the laws at issue here and thus subverts the standard mode of review, which depends on such distinctions.

Restrictions on coordinated spending operate as contribution limits, and as such, warrant only "closely drawn" scrutiny. *Colorado II*, 533 U.S. at 456, 464. CRG does not contest that a "less rigorous" level of scrutiny is typically appropriate for coordination restrictions, but contends that its proposed coordinated materials are more analogous to "expenditures" than "contributions" for the purpose of First Amendment review because they express the basis for CRG's support of the three candidates involved. Pl. Br. at 13-14.

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[2] Recent Supreme Court rulings continue to respect the distinction between contributions and expenditures for the purpose of constitutional review. For instance, the plurality in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), specifically held that contribution limits remain subject to the "closely drawn" standard of review established by the Supreme Court in *Buckley*. *Id*. at 1445 ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."). *See also Citizens United*, 558 U.S. at 359 (noting that plaintiff had not made contributions and "ha[d] not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny").

But even assuming arguendo that the CRG's proposed coordinated expenditures are more "communicative" than the "payment of the candidate's bills," they still function as contributions because they are coordinated with the candidate, and thus are functionally the same as a cash contribution given to, and then spent by, the candidate. For that reason, restrictions on such coordinated expenditures do not warrant strict scrutiny review.

First, a coordinated expenditure, by definition, reflects a candidate's wishes as to content, media, audience or timing, and indeed may even be "requested" or "controlled" by the candidate. *See, e.g.*, Op. El. Bd. 00-2 (2000) (reaffirmed Mar. 26, 2008) at 12. Therefore, unlike an independent expenditure, a coordinated communication does not represent the complete and autonomous expression of the spender's viewpoint: it will never entirely be the spender's "own speech." Indeed, insofar as a candidate is suggesting the content or other attributes of CRG's proposed coordinated communications, CRG is in reality funding the candidate's speech, much in the same way that it would fund a candidate's speech by making a contribution to his campaign which the candidate then uses for spending on his ads. A coordinated expenditure, even if it contains some communicative content, is thus far closer to "speech by proxy" than direct speech. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) ("*CalMed*"). Because a coordinated expenditure "is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection," it does not warrant strict scrutiny review. *Id.*

Second, a limitation on coordinated expenditures is not as restrictive as a limitation on independent expenditures for the obvious reason that it still leaves the spender free to "engage in independent political expression." *Buckley*, 424 U.S. at 28. Quite simply, if CRG wishes to disseminate its "own speech," Wisconsin law does not prevent it from spending independently, without limitation, to do so. It would defy reason to apply the strict scrutiny reserved for limits

on independent spending to Wisconsin's restrictions on coordinated spending, when such restrictions clearly allow independent spending to continue unchecked.

B. Plaintiff Relies Almost Entirely on Judicial Authority Reviewing Restrictions on *Independent* Spending.

Plaintiff's conflation of expenditure limits and contribution limits also causes it to repeatedly rely on the wrong case law, namely, on cases reviewing restrictions on *independent* spending, such as *WRTL* and *Citizens United*. These cases did not address contribution limits, and certainly did not suggest that coordinated spending should be treated as independent spending for the purposes of constitutional review. To the contrary, both cases reaffirmed that the difference between independent expenditures and contributions or coordinated expenditures is crucial in analyzing a First Amendment claim. *See WRTL*, 551 U.S. at 478-79 (noting that the Court has "long recognized" that the government's anti-corruption interest is "a reason for upholding contribution limits" but questioning whether that interest also justifies limits on independent "electioneering expenditures"); *Citizens United*, 558 U.S. at 345 (noting that "[t]he *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures").

Indeed, most of plaintiff's argument consists of plucking sentences out of these two decisions and attempting to apply them, out of context, to this case. For instance, CRG quotes *WRTL* for the principle that there is no recognized "interest in regulating ads . . . that are neither express advocacy nor its functional equivalent." Pl. Br. at 16 (citing *WRTL*, 551 U.S. at 476). But this proposition only holds with respect to restrictions on independent spending. The Supreme Court has not in any manner applied an "express advocacy" construction to a contribution limit. To the contrary, for example, it upheld the "soft money" limits on contributions to political parties even if the parties wished to spend such funds only on issue advocacy. *See McConnell*,

540 U.S. at 155 (noting that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part federal officeholders, *regardless of how those funds are ultimately used*") (emphasis added). Similarly, in the realm of campaign disclosure, the Supreme Court has specifically rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 369.

Wisconsin's legal regime for coordinated spending consists of contribution restrictions and disclosure requirements—not restrictions on independent spending. The entirety of the Supreme Court's campaign finance jurisprudence rests upon the distinction between independent expenditure restrictions, contribution limits and disclosure requirements. As argued in Section II, the express advocacy test was formulated for the specific purpose of narrowing FECA's regulation of independent expenditures. It has never been required in the context of coordinated spending.

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

A. The Express Advocacy Test Was Devised to Modify Laws Regulating Independent Spending.

The Supreme Court created the express advocacy test to narrow the broadly-worded definition of "expenditure"[3] in two federal statutory provisions regulating independent spending,

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

and later characterized the test as a "product of statutory interpretation, not a constitutional command." *McConnell*, 540 U.S. at 191-92.

In *Buckley*, the Supreme Court addressed constitutional concerns that the federal definitions of "expenditure" and "contribution" were vague and overbroad because both definitions relied on the broad operative phrase "for the purpose of influencing any election for Federal office." 424 U.S. at 79; *see also* 52 U.S.C. § 30101(8)(A)(i) (defining "contribution"); *id.* § 30101(9)(A)(i) (defining "expenditure"). The *Buckley* Court concluded, in the context of independent expenditures, that this phrase was vague because it potentially "encompass[ed] both issue discussion and advocacy of a political result." 424 U.S. at 79. Consequently, where the actor was "an individual other than a candidate or a group other than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80.

But this was in the context of independent expenditures. By contrast, the *Buckley* Court found that the "for the purpose of influencing" language "presents fewer problems in connection with the *definition of a contribution* because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 23 n.24 (emphasis added). Instead of imposing an "express advocacy" construction on the definition of "contribution," the Supreme Court merely clarified that a contribution includes: (1) "contributions made directly or indirectly to a candidate, political party, or campaign committee," (2) "contributions made to other organizations or individuals but earmarked for political purposes," and (3) "*all expenditures placed in cooperation with or with the consent of a candidate*, his agents, or an authorized committee of the candidate." *Id*. at 78 (emphasis added).

Thus, the *Buckley* Court recognized that within the bounds of the "general understanding" of what constitutes a political contribution—an understanding that included coordinated expenditures (i.e., expenditures "placed in cooperation with or with the consent of a candidate")—the limiting gloss of express advocacy was not necessary. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 77 n.50 (D.D.C. 1999) (noting *Buckley* found that "the First Amendment did not require a narrowing understanding of 'expenditure'" in the context of coordinated expenditures). Otherwise put, *Buckley* affirmed that a broad statutory provision governing contributions, and by extension, coordinated expenditures, was neither vague nor overbroad.

The Supreme Court in *McConnell* went further and affirmatively recognized that a coordination rule could extend past "express advocacy" to encompass "electioneering communications," a category of non-express advocacy that was only first regulated by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81; *see* 52 U.S.C. § 30104(f). *McConnell* upheld a section of BCRA providing that disbursements for "electioneering communications" that are coordinated with a candidate or party would be deemed "coordinated expenditures," and treated as contributions to that candidate or party. 540 U.S. at 202.

Plaintiff attempts to counter the weight of this precedent by invoking the Supreme Court's 2007 decision in *WRTL*. *See* Pl. Br. at 12-13, 16-17. But *WRTL* is inapplicable here because that case concerned the regulation of *independent* spending, not *coordinated* spending, and reviewed a federal ban on independent corporate spending, 52 U.S.C. § 30118(b)(2), not a restriction on corporate contributions.

The spending in *WRTL*—three advertisements critical of the involvement of both Wisconsin Senators in the filibuster of certain judicial nominees—entailed no involvement with candidates or officeholders. Thus, the premise of the case was that WRTL's proposed spending was independent—and its independence is what concerned the plurality in their consideration of whether "the governmental interest in preventing corruption and the appearance of corruption" justified the broad corporate spending ban at issue. 551 U.S. at 478. The "*quid-pro-quo* corruption interest," the *WRTL* plurality determined, would only sustain a ban on independent corporate spending insofar as it applied to express advocacy or the "functional equivalent of express advocacy," and it defined the latter narrowly to cover only those ads that were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-71. At no point, however, did the Court suggest that the regulation of contributions and coordinated spending should be similarly limited to express advocacy and its functional equivalent. *See id*. at 478 (noting that the government's anticorruption interest had long "been invoked as a reason for upholding contribution limits").

In short, the *Buckley* Court devised the "express advocacy" test for a specific purpose: to limit FECA's regulation of *independent* spending. *See* 424 U.S. at 44 (applying express advocacy test to narrow expenditure limit); *id*. at 79-80 (applying test to narrow disclosure of independent "expenditures" by individuals and groups that were not political committees). The Court specifically declined to apply this test to the regulation of political contributions—finding instead that the "general understanding" of a contribution as including donations "to a candidate, political party, or campaign committee" and "all expenditures placed in cooperation with or with the consent of a candidate" was sufficiently precise. Similarly, the *WRTL* Court devised a test for the "functional equivalent of express advocacy," but only to limit the scope of the federal ban on

corporate *independent* spending. There is no justification for plaintiff's attempt to excise the express advocacy test from this context and graft it onto Wisconsin's regulation of coordinated spending.

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

Under Wisconsin law, coordinated spending is an in-kind contribution from the spender to the candidate, subject to contribution limits and source restrictions, as well as disclosure requirements. Wis. Stat. §§ 11.01(6)(a)1; 11.01(16); 11.06(1); Wis. Admin. Code § GAB 1.42(2), (6); *see also* Wis. Stat. §§ 11.26(1)(a)1; 11.38.

Wisconsin law is modeled on the coordination standard adopted in *FEC v. Christian Coalition*, *see* Section III.A *infra*, and accordingly, does not limit the regulation of coordinated spending to express advocacy. Instead, "speech which does not expressly advocate the election or defeat of a clearly identified candidate may, nevertheless, be subject to campaign finance regulation" if (1) "the speech is made *for the purpose of influencing voting* at a specific candidate's election"; and (2) "the speech is made at the request or suggestion of the campaign" or where "there has been substantial discussion or negotiation" between the spender and candidate about the communication. Op. El. Bd. 00-2 at 12 (emphasis added); *see also* Wis. Stat. § 11.01(6)(a)1, (7)(a), (16) (a "contribution" or "disbursement" is a gift or payment for "political purposes," i.e., "for the purpose of influencing the election or nomination for election").

Wisconsin's content standard for coordinated spending is thus in harmony with *Buckley*'s holding and closely tracks the "for the purpose of influencing" language in the federal definitions of "contribution" and "expenditure." The Supreme Court found this standard sufficiently tailored and clear in the context of coordinated spending, and this Court should find likewise here with respect to Wisconsin law.

Furthermore, Wisconsin's approach has already been upheld by the state's courts. In *Wisconsin Coalition for Voter Participation, Inc. (WCVP) v. State Elections Board*, 231 Wis.2d 670, 605 N.W. 2d 654 (Wis. Ct. App. 1999), the state Court of Appeals considered the exact legal question that is at issue here, reviewing a lawsuit brought to enjoin an investigation of alleged coordination between WCVP and a judicial campaign. WCVP maintained that the investigation was unfounded because its mailings did not constitute express advocacy, but the court held that the communications were regulable "*whether or not* they constitute express advocacy." *Id*. at 659. The court reasoned that while *Buckley* held that "independent expenditures that do not constitute express advocacy of a candidate are not subject to regulation," *Buckley* did not "limit the state's authority to regulate or restrict *campaign contributions*." *Id*. at 658-59 (emphasis added). Plaintiff has offered no response to this clear holding.

Wisconsin's regulation of coordinated spending is also consistent with the Seventh Circuit's recent decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). The three-judge panel there invalidated the definition of "political purposes" on grounds of vagueness and overbreadth due to its reliance on "for the purpose of influencing" language. *Id.* at 832-33. But it did so in connection to the *independent* expenditures of the plaintiff and its political committee, both of which "operate[d] independently of candidates and their campaign committees." *Id*. at 809. *Barland* is thus consistent with *Buckley* and the principle expressed therein: the express advocacy test applies to the regulation of independent spending, not the regulation of contributions and coordinated spending.

III. The Evolution of Federal Law Demonstrates that an "Express Advocacy" Limitation on the Regulation of Coordinated Spending Is Not Constitutionally Required.

Federal campaign finance law defines coordinated spending as an "expenditure" made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 52 U.S.C. § 30116(a)(7)(B)(i). The FEC regulations applying this definition set forth two standards that must be met before a communication is regulable as a coordinated expenditure: (1) a standard for the "*content*" that a communication must contain; and (2) a "*conduct*" standard for the cooperation, consultation or discussion that must occur between a spender and a candidate. 11 C.F.R. § 109.21.

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

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

For more than 25 years, federal law had no "content standard" for the regulation of coordinated expenditures beyond the language of the statutory definition of "expenditure"—i.e., any payment "made by any person *for the purpose of influencing* any election for Federal office." 52 U.S.C. § 30101(9)(A)(i) (emphasis added). Congress amended FECA in 1976 to provide simply that an "expenditure" made "in cooperation, consultation, or concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall

be considered to be a contribution to such candidate." FECA Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475 (codified at 52 U.S.C. § 30116(a)(7)(B)(i)). There was no content standard beyond the statutory definition of "expenditure." Similarly, the FEC's 1980 regulation stated only that an "expenditure" was not considered "independent" if made pursuant to "any arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication." 11 C.F.R. § 109.1(b) (1980).[4] Again, the regulation contained no separate "content" standard.

The law remained materially unchanged until 2001, when the FEC promulgated a rule with a narrower "conduct" standard for coordinated spending in response to *FEC v. Christian Coalition*. *See* General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138, 76,140 (Dec. 6, 2000); *see also* Coordinated Communications, 75 Fed. Reg. 55,947, 55,948 (Sept. 15, 2010). In *Christian Coalition*, the court found the FEC's regulation of coordinated expenditures unconstitutionally overbroad because a spender could trigger the rule "merely by having engaged in some consultations or coordination with a federal candidate," 52 F. Supp. 2d at 91, but without having reaching any definitive agreement with such candidate. Importantly, however, while the court questioned the "conduct" necessary to support a finding of coordination, it rejected the Coalition's argument that the express advocacy test was applicable as a "content" standard for a finding of coordination. *Id.* at 88; *see also id.* at 77 n.50. Instead, the court affirmed the FEC's

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

longstanding position that if a spender and candidate met the Court's "conduct" standard, "any subsequent expenditures made *for the purpose of influencing* the election" would be rendered coordinated expenditures, "i.e., contributions." *Id.* at 89 (emphasis added). Otherwise put, the court recognized that the only "content" standard for coordinated spending was the broad definition of "expenditure" under federal law.

The FEC's post-*Christian Coalition* rule added a restrictive conduct standard that required an actual "agreement or collaboration" for a finding of coordination, but *still contained no separate content standard*. 11 C.F.R. § 100.23 (2001); 65 Fed. Reg. 76,138 (Dec. 6, 2000). Concerned that this new rule unduly narrowed the regulation of coordinated spending, Congress explicitly addressed coordination in BCRA. It repealed the FEC's 2000 coordination rule and instructed the FEC that its new regulation "shall not require agreement or formal collaboration to establish coordination." BCRA § 214(c), 116 Stat. at 95. Significantly for this case, BCRA also mandated a more specific content standard for the FEC's coordination rule, directing that disbursements for "*electioneering communications* that are coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party." 52 U.S.C. § 30116(a)(7)(C). "Electioneering communications" were defined by BCRA as television and radio advertisements that "refer[] to a clearly identified candidate for Federal office," are "targeted to the relevant electorate," and air 30 days before a primary election or 60 days before a general election. 52 U.S.C. § 30104(f)(3). BCRA thus explicitly extended the regulation of coordinated spending to non-express advocacy communications, i.e., "electioneering communications," a category of speech that plaintiff would clearly characterize as "issue speech."

These sections were challenged in *McConnell*, but the Supreme Court specifically upheld the statutory mandate that the FEC include "electioneering communications" in its coverage of coordinated spending. The Court noted that "*Buckley*'s narrow interpretation of the term 'expenditure' was not a constitutional limitation on Congress' power to regulate federal elections," and consequently concluded that "there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." *Id.* at 202-03.

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

Following the *McConnell* decision, the FEC promulgated a new coordination rule governing "coordinated communications" that took into account the BCRA mandates. The rule contained a new, more encompassing "conduct" standard and, for the first time, a "content" standard for coordinated communications. 11 C.F.R. § 109.21 (2003). In terms of the latter, the FEC regulation provided that the following content could trigger the coordination rule: (1) the

republication of campaign materials; (2) express advocacy; (3) "electioneering communications"; and (4) "public communications"[5] that "refer[] to a political party or to a clearly identified candidate for Federal office," are distributed 120 days before a primary election or a general election, and are targeted to the relevant electorate. *Id.* § 109.21(c)(1)-(4); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 427-31, 453-54 (Jan. 3, 2003). In short, the new regulation provided that a finding of coordination could be predicated on not only express advocacy and electioneering communications, but also *any public communication mentioning a federal candidate within a 120-day pre-election window*.

Although the FEC's 2003 coordination rule clearly swept far more broadly than the express advocacy standard urged by CRG, it was not criticized as overbroad, but rather immediately attacked as too narrow. Two of BCRA's congressional sponsors, Representatives Martin Meehan and Christopher Shays, filed suit under the Administrative Procedure Act ("APA") to challenge the regulation as contrary to the law it purported to implement, contending that outside the regulated 120-day pre-election periods, the rule's reliance on an express advocacy standard would "permit a candidate to engage in massive, unregulated coordination with corporations, unions, wealthy individuals, and interest groups"—"free from any contribution limitations, source restrictions, or even disclosure requirements." Amended Compl. ¶ 95, *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (No. 02-1984).[6]

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

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[5] A "public communication" covers all communications to the general public by means of any "broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank." 52 U.S.C. § 30101(22).

[6] CLC represented *amici curiae* Senators John McCain and Russ Feingold in the *Shays I* and *Shays III* litigation.

"fatal defect" was that it regulated only express advocacy outside of the 120-day pre-election window—and that the FEC had provided no "persuasive justification" for such "weak restraints" on potentially corruptive coordinated activity. *Shays v. FEC*, 414 F.3d 76, 100 (D.C. Cir. 2005) ("*Shays I*"), *petition for reh'g en banc denied*, No. 04-5352 (D.C. Cir. Oct. 21, 2005). If the FEC was intent on using an express advocacy standard outside of the 120-day window, the Court opined, that decision "requires some cogent explanation, not least because by employing a 'functionally meaningless' standard outside that period, the FEC has in effect allowed a coordinated communication free-for-all for much of each election cycle." *Id.*

Following the *Shays I* litigation, the FEC issued a revised coordination regulation in 2006. Coordinated Communications, 71 Fed. Reg. 33,190, 33,190 (June 8, 2006). The new regulation regarding congressional elections was materially identical to the one struck down by *Shays I*, except that it *shortened*, from 120 days to 90 days, the pre-election windows in which all public communications were subject to the coordination rule with respect to a primary election for a congressional race. *Id*. at 33,193; 11 C.F.R. § 109.21(c)(4) (2006).

Unsurprisingly, this new regulation was challenged once again in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), and once again, the D.C. Circuit Court of Appeals found that the regulation was unduly narrow and lacked the reasoned justification required by the APA. The Court of Appeals noted that the new regulation "still permits exactly what we worried about in *Shays* [*I*], i.e., more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words." *Id.* at 925. The Court of Appeals therefore arrived at the same "inexorable" conclusion: the FEC's "decision to apply a 'functionally meaningless' standard outside [the 120-day] windows" was not reasonable. *Id.* at 924 (citing *McConnell*, 540 U.S. at 193).

Following the *Shays III* decision, the FEC again revised its coordination rule, this time providing that outside the 90- and 120-day pre-election windows, both express advocacy *and* the "functional equivalent of express advocacy" would meet the content standard for coordination. Coordinated Communications, 75 Fed. Reg. 55,947, 55,952-54 (Sept. 15, 2010). The FEC defined the "functional equivalent of express advocacy" in a manner similar to the *WRTL* decision, as a communication "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." *Id.*; *see also* 11 C.F.R. § 109.21(c)(5). Representatives Shays and Meehan did not again sue. The content standard adopted as part of the 2010 rule governs determinations of "coordinated spending" at the federal level today.

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

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

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

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

Most fundamentally, in reviewing various federal laws, the Supreme Court has questioned the basic functionality of the express advocacy test. The *McConnell* Court observed that this test was neither effective nor constitutionally required. While the Supreme Court in *WRTL* revisited the test—or at least formulated a new test for the "functional equivalent of express advocacy"—it did so in the process of narrowing a restriction on *independent* spending, not *coordinated* spending. Finally, the Supreme Court effectively mooted *WRTL* and its "functional equivalent" test in *Citizens United* by striking down the federal ban on corporate independent expenditures in its entirety, regardless whether it applied to express advocacy or the functional equivalent of express advocacy. 558 U.S. at 365-66. *Citizens United* also made clear that these tests were not relevant to the review of a disclosure law. The Court upheld the challenged "electioneering communications" disclosure requirements, *id.* at 366, and expressly "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 369.

A resurrection of the express advocacy in the context of coordinated spending would thus run counter to decades of federal law and practice, as well as the Supreme Court's recent decisions in *McConnell*, *WRTL* and *Citizens United*.

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

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

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

Limits on coordinated spending represent just one of the measures the Supreme Court has upheld to reduce circumvention of the contribution limits and thereby safeguard the integrity of the political system. *See, e.g.*, *McConnell*, 540 U.S. at 144 (upholding the party "soft money" restrictions on grounds that "[anti-corruption] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *CalMed*,, 453 U.S. at 197-98 (upholding limits on contributions to political committees "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*"); *Beaumont*, 539 U.S. at 155 (upholding restriction on corporate contributions because it "hedges" against the use of corporations "as conduits for circumvention of [valid] contribution limits")

(alteration in original) (citation and internal quotation marks omitted). As noted in *Colorado II*, "all Members of the [Supreme] Court agree that circumvention is a valid theory of corruption . . . ." 533 U.S. at 456.

These decisions make clear that laws to prevent circumvention of valid contribution limits advance the governmental interest in preventing real and apparent corruption, and that coordinated spending limits in particular serve this important interest.[7]

Plaintiff's argument that the regulation of coordinated spending must be limited to express advocacy, if accepted, would both authorize circumvention of the state contribution limits through coordinated non-express advocacy spending, and allow such activity to escape Wisconsin's public disclosure laws. Its rationale is that "[i]ssue advocacy simply does not present that degree of value to the candidate available with a contribution." Pl. Br. at 18. But CRG offers no evidence or support for this conclusory statement and it contradicts not only Supreme Court precedent, but also real world experience. *Id.*

What plaintiff's preferred express advocacy construction would do, in practice, is allow wealthy donors to pay for sophisticated, million-dollar ad campaigns "for the purpose of influencing" an election in coordination with the candidates of their choice. To do so, these

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[7] The recent *McCutcheon* decision, which invalidated the federal aggregate limits on contributions to candidates and parties, 52 U.S.C. § 30116(a)(3), did nothing to undermine the principle that the government has a compelling interest in anti-circumvention measures. Instead, in the course of determining whether the aggregate limits were justified by an important governmental interest, the Court considered whether the aggregate limits *in fact* were needed to forestall circumvention of the base contribution limits. 134 S. Ct. at 1456. The Court ultimately found that the circumvention scenarios offered by defendants to demonstrate the necessity of the aggregate limits were "highly implausible," *see id*. at 1454, and on this ground, invalidated the limits. At no point, however, did the *McCutcheon* Court state or imply that preventing circumvention of the contribution limits was not a crucial governmental interest. To the contrary, it noted that circumvention involving "money beyond the base limits funneled in an identifiable way to a candidate [and] for which the candidate feels obligated" remained a concern, but distinguished this type of scenario from those posited by the government in *McCutcheon*. *Id*. at 1461.

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

Plaintiff also makes a related argument, asserting that "typical issue communications . . . reflect the views of the speaker, not just the views of the candidate," and that consequently it warrants greater constitutional protection. Pl. Br. at 16. But the potential for corruption is in no way lessened—indeed, it is precisely the same—in the case of a coordinated expenditure that allegedly conveys the basis for the spender's support of the candidate.

There is no reason to believe that a coordinated expenditure for a communication that CRG claims is its "own speech" is any less valuable to a candidate than a coordinated expenditure that lacks such content. For instance, the CRG's proposed favorable communications about their chosen three candidates' "backgrounds" and "work to further fiscal responsibility," Pl. Br. at 3, if requested or controlled by the candidates' campaigns, will undoubtedly benefit the candidates, regardless of whether the communications can also be characterized as CRG's "own speech." Indeed, even if the candidates have only moderate input into the communications' content, timing or audience, the communications represent real value to their campaigns—value that could be a source of undue influence and political corruption. A coordinated expenditure for the spender's "own speech" therefore still functions as a

contribution, and for this reason, poses the danger of actual or apparent quid pro quo arrangements.

Footnote 17 of the *Colorado II* decision does not suggest otherwise. *See* Pl. Br. at 11, 12 (citing *Colorado II*, 533 U.S. at 456 n.17). Although the *Colorado II* majority noted that it did not address the regulation of "expenditures that involve more of the party's own speech," the reasoning of the majority opinion compels the conclusion that coordinated expenditures that convey the basis for the expressed support are as corruptive as coordinated expenditures that do not. The act of coordination is the "the constitutionally significant fact" that justifies the regulation of coordinated expenditures as contributions and creates the "danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 533 U.S. at 464. Because coordination is thus the source of corruptive potential, it follows that a coordinated expenditure will be corruptive regardless of whether it funds the spender's "own" issue speech.

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

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

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

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

Precisely the same scenarios would be permitted if plaintiff's argument is accepted and this Court's Decision and Order of October 14 continues to stand. A claim that "no one will take advantage of the enormous loophole [that would be] created ignores both history and human nature." *Id.* at 928.

CONCLUSION

For all these reasons, this Court should deny plaintiff's motion for preliminary injunction and dissolve the temporary restraining order of October 14, 2014.

RESPECTFULLY SUBMITTED this 29th day of October 2014.

CULLEN WESTON PINES & BACH LLP

/s/ Lester A. Pines
Lester A. Pines*
SBN 1016543
122 West Washington Avenue, Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
pines@cwpb.com

J. Gerald Hebert
Tara Malloy
Paul S. Ryan
Megan P. McAllen
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
(202) 736-2200 (telephone)

Counsel for *Amicus Curiae*

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2014, I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court of the U.S. District Court for the Eastern District of Wisconsin by using the appellate CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

CULLEN WESTON PINES & BACH LLP

/s/ Lester A. Pines

Lester A. Pines
SBN 1016543
122 West Washington Avenue, Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
pines@cwpb.com