No. 14-1822 (with Nos. 14-1888, 14-1899, 14-2006, 14-2012, 14-2023)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ERIC O'KEEFE, *et al.*,

Plaintiffs-Appellees,

v.

JOHN CHISHOLM, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Wisconsin
Case No. CV-139-RTR
District Judge Rudolph T. Randa

Brief of Former Members of the Federal Election Commission Lee Ann Elliott, David Mason, Hans von Spakovsky, and Darryl Wold as *Amici Curiae* in Support of Plaintiffs-Appellees

---

C. BOYDEN GRAY
ADAM J. WHITE
Counsel of Record
ADAM R.F. GUSTAFSON
KATHRYN M. KELLEY
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
202-955-0620
adam@boydengrayassociates.com

September 2, 2014

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1822 (with 14-1888, 14-1899, 14-2006, 14-2012, 14-2023)

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Lee Ann Elliott
David M. Mason
Hans A. von Spakovsky
Darryl R. Wold

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

Boyden Gray & Associates PLLC

(3) If the party or amicus is a corporation:

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

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Adam J. White Date: September 2, 2014

Attorney's Printed Name: Adam J. White

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No _____

Address: Boyden Gray & Associates, 1627 I Street NW, Suite 950, Washington, DC 20006

Phone Number: (202) 706-5488 Fax Number: (202) 955-0621

E-Mail Address: adam@boydengrayassociates.com

rev. 01/08 AK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

REGULATORY MATERIALS

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Amici are former members of the Federal Election Commission ("FEC") with many years of experience in interpreting the Federal Election Campaign Act, implementing regulations, devising enforcement policy, and investigating violations. They submit this brief to apprise the Court of the complexities and difficulties of applying campaign finance laws in a manner consistent with the First Amendment. And they urge the Court to ensure that the public's right to engage in issue advocacy, including coordinated issue advocacy, is protected at the state level no less than at the federal level.

Lee Ann Elliott was a member of the FEC from 1982 to 2000, and she was its chairman in 1984, 1990, and 1996.

David Mason was a member of the FEC from 1998 to 2008, and he was its chairman in 2002 and 2008.

Hans von Spakovsky was a member of the FEC from 2006 to 2007.

Darryl Wold was a member of the FEC from 1998 to 2002, and he was its chairman in 2000.

[1] No counsel for a party authored this brief in whole or in part, and no party, counsel, or other person, other than *amici* or their counsel, made a monetary contribution to its preparation or submission.

INTRODUCTION

To regulate "coordinated" speech in a manner consistent with First Amendment rights and values requires bright lines and clear, content-based standards. The Federal Election Commission (FEC) draws these lines in order to ensure that the law "give[s] the benefit of the doubt to speech, not censorship." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007) (opinion of Roberts, C.J.) (hereinafter *WRTL*).[2] To eschew such limits, and allow investigation and prosecution of issue advocacy based simply on allegations of collaboration between elected officials and the public, "would chill core political speech by opening the door to a trial on every ad." 75 Fed. Reg. 55947, 55957 (Sept. 15, 2010) (quoting *WRTL*, 551 U.S. at 467) (brackets omitted).

Vague or subjective approaches to regulating such "coordination" inherently chill political speech and association. This chill can be avoided only by ensuring that laws burdening the exercise of such rights are written narrowly and specifically, to provide the public with a clear understanding of what conduct and speech is proscribed, and thus what is allowed. "No reasonable speaker would choose to run an ad covered by [federal election law] if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'" *WRTL*, 551 U.S. at 468 (quoting *Buckley v. Valeo*, 424 U.S. 1, 43 (1976)).

---

[2] In this brief, all citations to *WRTL* are to Chief Justice Roberts's lead opinion.

SUMMARY OF ARGUMENT

Ever since *Buckley v. Valeo*, federal campaign finance law has drawn a sharp line between "contributions" and "independent expenditures": the former can be regulated to guard against *quid-pro-quo* corruption, while the latter present no equivalent risk of corruption and thus enjoy maximum constitutional protection, even when the expenditures fund "express advocacy" for or against a candidate. By the same token, when outside groups coordinate their communications with an elected representative, that communication may be regulated as a contribution only if it takes the form of express advocacy (or its "functional equivalent"). Coordination alone does not justify regulation, for assembling to petition government is a constitutional virtue, not a vice, and "[i]ngratiation and access . . . are not corruption." *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

By focusing on speakers' *intent* without regard to the *content* of their advocacy, Appellants' investigation into Appellees' issue advocacy goes far beyond those lines, "chill[ing] core political speech by opening the door to a trial on every ad." *WRTL*, 551 U.S. at 468. Neither the Supreme Court nor this Court has ever endorsed such invasive, open-ended investigations of issue advocacy.

Indeed, Appellants' investigation shuns the bright-line safeguards for "coordinated communications" that the FEC adopted to minimize the constitutional dangers raised by inquiring into a speaker's subjective intent. The FEC regulates "coordinated communications," but only when the *content* of a communication

satisfies a bright-line standard designed to protect issue advocacy. *See* 11 C.F.R. § 109.21(c).

Such bright-line content standards are necessary to prevent regulation from becoming "broad and intrusive investigations to determine the speaker's *intent*." 75 Fed. Reg. at 55956 (emphasis added). Appellants' unbounded, invasive regulatory environment offers would-be policy advocates a stark choice: either forego all contact with one's elected officials and other candidates, or forego independent issue advocacy, or risk ruinously expensive and intrusive litigation. The FEC requires no such thing—nor can state prosecutors and investigators, under the Constitution.

ARGUMENT

I. Politically Salient Issue Advocacy Is at the Core of the First Amendment's Rights of Free Speech and the Right to Assemble and Petition Government

A. Issue Advocacy Is at the Core of the First Amendment's Right to Free Speech.

The investigations at issue in this case strike at the very heart of one of the First Amendment's "core" protections: the right to speak freely on political issues. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 811 (7th Cir. 2014) (*Barland II*). Although the scope of the First Amendment's speech protection is often debated, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Buckley*, 424 U.S. at 14 (quoting *Mills v. Alabama,* 384 U.S. 214, 218 (1966)). This consensus "reflects our 'profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide-open.'" *Id.* (quoting *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)).

The Supreme Court's decisions preserve issue advocacy's crucial role in our democratic system, drawing a bright line between issue advocacy and express advocacy—"communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. The Court has determined that issue advocacy must be protected even in circumstances when express advocacy need not be. *See id.* at 80 (upholding independent reporting requirement only after narrowly construing it to cover only express advocacy, not issue advocacy).

More recently, in *Wisconsin Right to Life*, the lead opinion's overbreadth analysis reaffirmed that "[i]ssue ads . . . are by no means equivalent to contributions and the *quid-pro-quo* corruption interest cannot justify regulating them." 551 U.S. at 478-79. It "decline[d] to adopt a test for as-applied challenges turning on the speaker's intent to affect an election," *id.* at 467, and recognized that an objective test was necessary to avoid vagueness that would "chill core political speech by opening the door to a trial on every ad" not clearly beyond the statute's reach, *id.* at 468. Thus, even before *Citizens United* invalidated limits on corporate independent expenditures, the Court refused to accept "the notion that a ban on campaign speech could also embrace issue advocacy." *Id.* at 480.

Restrictions on speech coordinated with elected officials implicate the same First Amendment values, because all limitations on political speech "necessarily

reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. Indeed, these costs are particularly high when it comes to coordinated speech, which serves an important role in our political system because "campaigns themselves generate issues of public interest." *Id.* at 42. Political speech that is informed by interaction between the public and political campaigns is thus part of a feedback loop that enriches the public discourse and facilitates a political system responsive to the public.

B. Interaction with Elected Officials is at the Core of the Public's First Amendment Right to Assemble and Petition Government.

Free speech is at the center of this case, but it is not the *only* First Amendment value implicated by wide-ranging investigations into coordinated issue advocacy. Such investigations also threaten the First Amendment right "to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I. "In a representative democracy such as this," the Supreme Court explains, the legislative and executive branches of government "act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) (construing the Sherman Act narrowly, to avoid federal restrictions on coordinated efforts by industry to persuade government on matters of policy).

The right of the people to directly engage elected leaders is all the more important on politically charged questions of public policy. *See, e.g.*, *Clifton v. FEC*,

114 F.3d 1309, 1314 (1st Cir. 1997) (limit on oral contact with candidates is "patently offensive to the First Amendment" because "it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office").

Thus, when Appellants and their *amici* discuss issue advocacy "coordination" exclusively in negative terms—a risk of "corruption"[3]—they ignore the good that arises from collaboration between citizens and their elected leaders on matters of policy. In the political arena such collaboration is the norm: "There is often extensive interaction between citizens' groups and public officials about proposed legislation and other governmental actions," as activists "work with sponsors of legislation to build public support for the proposed legislation and to influence other legislators to support or oppose it." James Bopp, Jr. & Heidi K. Abegg, *The Developing Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 Election L.J. 209, 220 (2002). Such coordination "is vital" to a functioning democracy, as "grass roots lobbying campaigns are conducted in conjunction with legislative or administrative consideration of such proposals, and groups work with public officials to coordinate their communications with the timing of the consideration of them." *Id.* As the recent White House counsel notes, "to value [political] action, we have to value, not distrust, collective political action and the strategies through which it is effected."

---

[3] *See*, *e.g.*, *Amicus* Brief of Brennan Center [Doc. 98] at 19 ("the act of coordination is a strong indicator of the potential for *quid pro quo* corruption").

Robert F. Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking About the Constitutional Protections for Political Action*, 9 Duke J. of Const. L. & Pub. Pol'y 67, 85 (2013).

In Wisconsin, for example, coordination on issue advocacy is an ordinary feature of political life, and by and large state investigators are not actively quashing it—the present investigations being a conspicuous exception. *See* Brief of Plaintiffs-Appellees [Doc. 131] at 101-02 (noting examples of coordination).

II. Prohibiting Coordinated Issue Advocacy Violates the First Amendment, Chilling Protected Speech.

A. The Anti-Corruption Interest Does Not Apply to Issue Advocacy, Even When It Is Coordinated with a Political Candidate.

Because political speech "is central to the meaning and purpose of the First Amendment," *Citizens United v. FEC*, 558 U.S. 310, 329 (2010), laws "that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 340 (quoting *WRTL,* 551 U.S. at 464).

The Supreme Court has identified only one interest that is "sufficiently important" to justify limits on political speech—the government's interest in "prevent[ing] corruption or its appearance." *Id.* at 356 (citing *Buckley*, 424 U.S. at 25). And in the case of independent expenditures, the Court has found even the anti-corruption interest inadequate to justify regulation. *Id.* at 356 (citing *Buckley*, 424 U.S. at 45); *id.* at 357 ("[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

Because campaign finance laws must be narrowly tailored to achieve the anti-corruption interest, *both* coordination and a close nexus between the speech and an election are required for a communication to be regulated as a campaign contribution. The fact that a speaker expressly advocates for the election of a candidate does not, without more, justify burdensome regulation. The "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id* at 357 (quoting *Buckley*, 424 U.S. at 47).

By the same token, coordination with public officials does not merit heavy regulatory burdens when the resulting communications are *issue* advocacy, for the absence of express advocacy (or its functional equivalent) reduces the value to the candidate of any coordinated communication and alleviates the risk of corruption. *See id.* at 360 ("Ingratiation and access . . . are not corruption."). Restricting coordinated *issue* advocacy, no less than limiting independent *express* advocacy, would amount to a "categorical ban[] on speech that [is] asymmetrical to preventing *quid pro quo* corruption." *Id.* at 361.

Of course, no constellation of abstract features (independent vs. coordinated, express vs. issue advocacy) can eliminate all possibility of *quid-pro-quo* corruption. But under the First Amendment, any regulatory scheme that would prevent *every* opportunity for corruption is overbroad, because it would chill constitutionally protected speech. Judicial scrutiny of campaign finance laws "must give the benefit

of the doubt to protecting rather than stifling speech." *Id.* at 327 (quoting *WRTL*, 551 U.S. at 469). Thus, when the Supreme Court struck down a ban on corporate "electioneering communications" as applied to certain issue ads, it did so despite the risk that some "issue advocacy [might] circumvent the rule against express advocacy[.]" *WRTL*, 551 U.S. at 479. But Chief Justice Roberts rejected "a prophylaxis-upon-prophylaxis approach to regulating expression" as "not consistent with strict scrutiny." *Id.* Instead, he applied an "objective" test to the content of the communication in issue, *id.* at 469, and "g[a]ve the benefit of the doubt to speech, not censorship," *id.* at 482.

Although the courts have taken care to protect issue advocacy from the restrictions that lawfully may govern express advocacy, *see supra* Part I.A, the Supreme Court previously recognized that some speech is the "functional equivalent" of express advocacy, that it involves the same risk of *quid-pro-quo* corruption that attends express advocacy, and thus that it may be regulated as such even though it does not include explicit words of advocacy of election or defeat of a candidate. *See McConnell v. FEC*, 540 U.S. 93, 206 (2003). But the Court defines "functional equivalent" narrowly to protect the First Amendment values at stake. A communication is "the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70, *quoted in Citizens United*, 558 U.S. at 325. This is an "objective . . . test" based on the *content* of the

communication. *Citizens United*, 558 U.S. at 335. The "functional equivalence" inquiry has "no application to issue advocacy." *WRTL*, 551 U.S. at 481.

B. Neither the Supreme Court Nor This Court Has Ever Allowed Such Heavy Burdens on Coordinated Issue Advocacy.

The Appellants and their *amici* identify no case in which this Court or the Supreme Court upheld punishment of coordinated issue advocacy. Indeed, the Supreme Court "has *never* recognized a compelling interest in regulating ads . . . that are neither express advocacy nor its functional equivalent." *WRTL*, 551 U.S. at 476 (emphasis added).

Instead, Appellants and their *amici* confuse the issue by relying on cases that deal with coordinated *express* advocacy. Defendant-Appellants' Joint Brief on Appeal of Motion to Dismiss [Doc. 76] at 34-39 (hereinafter "Appellants MTD Br."). Such cases are of no help to Appellants: "That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy." *WRTL*, 551 U.S. at 478. "[I]ssue ads . . . are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *Id.* at 478-79.

Buckley v. Valeo, 424 U.S. 1 (1976), is the first case Appellants cite for the proposition that "coordinated issue advocacy constitutes a campaign contribution and is subject to regulation." Appellants MTD Br. 34. *Buckley* did not involve a challenge to restrictions on coordinated communications; but in striking down a cap on independent expenditures, the Court noted that a separate provision of the law "prevent[s] attempts to circumvent the Act through prearranged or coordinated

expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. Of course, this dictum did not explicitly address what *kind* of coordinated expenditures amounts to "disguised contributions," because that question was not before the Court. But the entire discussion of coordination reflects the Court's unremarkable assumption that coordination with a political party would be directed toward *express* advocacy in support of the party's candidate. *See id.* at 46 n.53 (taking as an example, "billboard advertisements endorsing a candidate").[4]

Next Appellants rely on *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). But that case does not deal with issue advocacy at all. Indeed, the Court expressly reserved the question raised by this case—whether regulation of coordinated spending that is not the functional equivalent of express advocacy may require a higher standard of review. *Id.* at 456 n.17 ("Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that, as Justice Thomas notes, we need not reach in this facial challenge.") (citation omitted). Moreover, even if, at the time, *Colorado II*'s holding that a political party's coordinated *express* advocacy

[4] *Amici* Campaign Legal Center and Democracy 21 lean heavily on *Buckley*'s reference to its definition of "contribution" as including "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." Br. of Campaign Legal Center [Doc. 118] at 3, 11 (quoting 424 U.S. at 78). But that passage in *Buckley* explicitly cross-references the Court's prior discussion "[i]n Part I," *Buckley*, 424 U.S. at 78, and its evident assumption that only *express* advocacy can be a "disguised contribution," *id.* at 46-47 & n.53.

faces the same scrutiny as other groups' had some bearing on *issue* advocacy, that case espoused an overbroad conception of the anti-corruption interest that the Court has since rejected as "at odds with standard First Amendment analyses," *Citizens United*, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 296).[5]

Appellants also cite *McConnell v. FEC*, 540 U.S. 93. Appellants MTD Br. 34-35. But as with *Buckley* and *Colorado II*, the discussion of coordination in *McConnell* deals not with the content of coordinated communications, but rather the sort of *conduct* that qualifies as coordination. 540 U.S at 219-23. Appellants state parenthetically that *McConnell* "uph[e]ld[] application of 2 U.S.C. § 441a(a)(7)(B)(i)(ii) [sic] to coordinated expenditures for communications that avoid express advocacy." Appellants MTD Br. 35. This is misleading. *McConnell* affirmed regulation of "coordinated disbursements for *electioneering communications*," 540 U.S. at 202 (emphasis added); it did not categorically endorse regulation of all coordinated communications regardless of content.[6] And in *Citizens United*, the

---

[5] *Colorado II*'s variant of the anti-corruption interest justified regulations intended to prevent "undue influence on an officeholder's judgment[] and the appearance of such influence." 553 U.S. at 441. *Contra Citizens United*, 558 U.S. at 359 ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."); *id.* (reaffirming *Buckley*'s more narrow conception of the corruption rationale—"financial *quid pro quo*: dollars for political favors").

[6] Moreover, in *Wisconsin Right to Life*, the Supreme Court strictly limited the holding of *McConnell*, by striking down the Bipartisan Campaign Reform Act's restriction on "electioneering communications" as applied to issue advocacy, 551 U.S. at 476 & n.8, and by narrowly interpreting *McConnell*'s definition of that phrase as the "functional equivalent" of express advocacy to exclude "ads [that] may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." *Id.* at 476.

Supreme Court overruled *McConnell*, rejecting the "antidistortion interest" that *McConnell* had relied on to uphold the electioneering ban. 558 U.S. at 365-66. *McConnell's* approval of a statute governing coordination of electioneering communications therefore has no bearing on this case.

Next, Appellants rely on *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011) (*Barland I*), which struck down a state cap on contributions to independent-expenditure committees as a violation of the First Amendment. In dicta, the Court stated that "the First Amendment permits the government to regulate coordinated expenditures." *Id.* at 155. But the Court had no occasion to consider what *kind* of coordinated expenditures could be regulated or whether issue advocacy would be protected. That question was not before the Court.

The only other decision of this Court that Appellants cite[7] as support for their investigation of coordinated issue advocacy is *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012). That case upheld an Illinois statute regulating coordinated electioneering communication, which the Court defined narrowly as the functional equivalent of express—not issue—advocacy. *Id.* at 495;

[7] The Campaign Legal Center argues that *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014) (*Barland II*), is "consistent with . . . the principle [that] the express advocacy test" does not apply to "the regulation of . . . coordinated spending." Br. of Campaign Legal Center [Doc. 118] at 13-14. But the Center's only basis for this claim is this Court's factual observation that the prevailing appellants "operate independently of candidates and their campaign committees." 751 F.3d at 809. This statement explains why *Barland II* had no occasion to consider the law's application to coordinated expenditures, but it hardly supports the inference that any such limitation passes constitutional muster.

see id. at 497 ("[A] broadcast counts as an electioneering communication [under Illinois law] only if it 'refers to a clearly identified candidate' and is 'susceptible to no reasonable interpretation other than as an appeal to vote for or against' that candidate." (quoting 10 Ill. Comp. Stat. 5/9-1.14(a))). *Madigan* therefore offers no support to Appellants' argument that the First Amendment countenances their restriction on *issue* advocacy.

The other cases Appellants attempt to rely on are not binding on this Court; nor are they persuasive. In the first of these two cases, *Republican Party of New Mexico v. King*, 741 F.3d 1089 (10th Cir. 2013), the Tenth Circuit affirmed a preliminary injunction blocking enforcement of New Mexico's cap on contributions to a political committee. The court noted that "[i]f political committees are indirectly controlled by political parties," then their "expenditures *could* be deemed contributions to a political party." 741 F.3d at 1103 (emphasis added). But the court implied a distinction between "*improper* coordination" and lawful coordination, *id.* (emphasis added), and it had no occasion to decide on which side of that divide coordinated *issue* advocacy would fall: the appellee political action committees were "organized to engage in express advocacy," *not* issue advocacy. *Id.* at 1091.[8] Moreover, the court's reference to coordination was limited to coordination with

[8] The court noted only that the record "did not disclose any *unlawful* coordination," 741 F.3d at 1103 (emphasis added), even though the chairman of a local Republican Party served simultaneously as treasurer of one of the political action committees, which had been "organized by" the state Republican Party, *id.* at n.12.

political parties—not elected officials—and it was dictum. *See id.* at 1103 ("this question is not before us").

The second other case, *Wisconsin Coalition for Voter Participation v. State Elections Board*, 605 N.W.2d 654 (Wis. Ct. App. 1999), is the only case Appellants cite that actually agrees with their argument that mere coordination, without regard to the content of the resulting speech, is enough to justify application of a restrictive regulation. *Id.* at 682. But that decision long predates *Wisconsin Right to Life*, which drew a bright line between issue advocacy and contributions, clarifying that the government's interest in preventing corruption does not justify restrictions on issue advocacy. 551 U.S. at 478-79. And the state court decision is not binding on this Court.

In sum, no case binding on this Court has ever approved the use of limitations on coordination to restrict issue advocacy.

C. Regulation of Coordinated Issue Advocacy Chills Speech, Association, and the Right to Petition.

As the facts of this case demonstrate, restricting the coordination of issue advocacy chills a broad spectrum of protected First Amendment speech. *See* Dist. Ct. Op. 9-10. Indeed it is (in the words of one former FEC commissioner) "among the most aggressive moves" that a government could take "towards chilling debate in the United States." *In re: The Coalition, Nat'l Repub. Cong. Comm.*, MUR 4624 (Nov. 6, 2001) (statement of Comm'r Bradley A. Smith), at 25.[9]

[9] http://eqs.fec.gov/eqsdocsMUR/0000018E.pdf.

This Court and the Supreme Court have long recognized that "First Amendment freedoms need breathing space to survive," because "vague laws . . . inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41.n48 (quotation marks and alteration omitted). The courts' concerns about chilling protected speech "loom large" in the area of political speech, "especially when the regulatory scheme reaches beyond candidates, their campaign committees, and political parties," *Barland I*, 664 F.3d at 811, as in this case.

The chilling effect of vague campaign finance laws that led the Supreme Court to limit the scope of disclosure requirements to express advocacy, *Buckley*, 424 U.S. at 80, and to reject an "expansive definition of [its] 'functional equivalent'" in the context of electioneering, *WRTL*, 551 U.S. at 479, is even more problematic in the context of restrictions on coordinated speech. When government officials are free to initiate criminal investigations based only on speculation about the intent underlying a speaker's collaboration with his elected officials, and without regard to the content of the resulting speech, the prior restraint of self-censorship is the inevitable result. Civic-minded speakers will either avoid speech on politically salient issues or cut off contact with their elected representatives to avoid the risk that coordinated issue advocacy will be deemed to be "for the purpose of influencing" an election. Wis. Stat. 11.01(16).

The risk of chilling protected speech is particularly great in the coordination context, because individuals and organizations with an interest in speaking on

matters of public policy naturally tend to interact with the political representatives responsible for making and enforcing public policy. *See In re: The Coalition,* MUR 4624 (statement of Comm'r Bradley A. Smith), at 25 ("Given that groups frequently have contacts with officeholder/candidates, credible allegations of coordination will be easy to make."). If the government may punish coordinated issue advocacy, then public interest groups "will be unable both to work with elected representatives and to run ads attempting to influence public opinion on issues of mutual interest." *Id.* at 11. Ultimately, such groups "will be asked to surrender either their rights of free speech and association or their rights of speech and to petition for redress." *Id*. And the chilling effect would extend beyond the groups and individuals actually prosecuted to third parties aware of the prosecution. *See id.* at 12.

Another factor that increases the chilling effect of a vague anti-coordination rule is cost. Investigating a group's interaction with elected officials is more intrusive than investigating the content of its public speech. *See id.* at 4 ("Absent a content standard, . . . such an investigation [into alleged coordination] is likely to be highly intrusive" and "can include extensive rifling through the respondents' files, public revelations of internal plans and strategies, depositions of group leaders, and the like.").

The related costs of defending against a prosecution for coordination are therefore much greater than the costs of defending against allegations of objective campaign finance violations. "Litigation on [a speaker-intent based] standard . . .

will unquestionably chill a substantial amount of political speech." *WRTL*, 551 U.S. at 469.

And predictably, political opponents will use these costs as weapons against rivals, alleging coordination in order to trigger intrusive investigations and lengthy litigation. *See Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986) ("[D]isgruntled opponents . . . could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters."); *In re: The Coalition*, MUR 4624 (statement of Comm'r Bradley A. Smith), at 2 ("These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing 'corruption or the appearance of corruption.'"); *id.* at 12 n.18 ("Everyone at this Commission is well aware of a favorite saying of the practicing campaign finance law bar: 'The process is the punishment.'").

III. The FEC Respects the Right to Engage in Issue Advocacy, Even Coordinated Issue Advocacy, Precisely to Avoid Chilling Political Speech.

The FEC long has grappled with the question of how lawfully to regulate coordinated advocacy among candidates and the public. And the narrowly tailored rules born out of that experience serve as a stark contrast to the state investigation challenged here.

The FEC restricts "coordinated communications" *only* when the *content* of the communications meets specific standards. 11 C.F.R. § 109.21. The FEC does not assert blanket enforcement power over issue advocacy whenever coordinated; rather, it insists upon bright-line distinctions drawn in *Buckley* and *WRTL*, to

defend the First Amendment values at the heart of constitutionally circumscribed campaign finance regulation.

A. The FEC's "Coordination" Rules Are Limited By Bright-Line Content Standards to Avoid Chilling Issue Advocacy.

To trigger the FEC's restrictions on "coordination," a private speaker's communication must do more than collaborate with a candidate. True, such conduct is *necessary* to trigger FEC authority, but it is not *sufficient*. Thus, the FEC's "coordination" regulations are triggered only by communication that meets *both* "conduct" standards *and* "content" standards. 11 C.F.R. § 109.21(a) (setting both requirements); 11 C.F.R. § 109.21(c) (listing content standards).

A communication coordinated with a candidate will meet the content standard only if it is express advocacy or its functional equivalent; or it is an "electioneering communication" (defined in turn by 11 C.F.R. § 100.29 and limited to a 30- or 60-day window preceding elections); or it refers to a "clearly identified" federal candidate or his party and is published in his jurisdiction within a 90- or 120-day timeframe preceding the election. *Id.* § 109.21(c).[10]

---

[10] In recounting these content standards, the signed *amici* do not necessarily endorse their constitutional or policy merits. *See*, *e.g.*, Statement of FEC Commissioner Hans A. von Spakovsky on the Commission's Implementation of the Supreme Court's Decision in *Wisconsin Right to Life v. FEC* (Nov. 20, 2007) ("The Court in [*WRTL*] held that the electioneering communication provision cannot be applied to issue ads because they are not electoral campaign activity. We therefore have no authority to impose regulations on such speech."), *available at* http://www.fec.gov/members/former_members/von_Spakovsky/speeches/statement20071120.pdf. For present purposes, *amici* merely note that the standards are bright-line content standards intended by

(*footnote continued on next page*)

Indeed, because the content standards regarding "electioneering" and "clearly identified" candidates are bound by time and place restrictions (that is, they apply only within certain time periods before elections, and only to communications targeted at relevant voters), *see id.* §§ 109.21(c)(1), (c)(4), *id.* § 100.29, the only "coordinated" communications regulated by the FEC without time and place limits are the well-established categories of "express advocacy" and its "functional equivalent," and the outright republication of the candidate's own political materials. Not issue advocacy.

The FEC established these content requirements in order to minimize the risk of burdening or chilling non-election political advocacy: "The Commission is including content standards in the final rules on coordinated communications to limit the news rules to communications whose subject matter is reasonably related to an election." 68 Fed. Reg. 421, 427 (Jan. 3, 2003). In light of commenters' concerns about "overbreadth" and "vagueness," the FEC concluded that it was necessary to include content standards that would "provide bright-line tests and subject to regulation *only* those communications whose contents, in combination with the manner of its creation and distribution, indicate that the communication is made for the purpose of influencing the election of a candidate for Federal office." *Id.* at 428 (emphasis added).

---

the FEC to limit the "coordinated communications" regulation to objectively discernible campaign advocacy.

The last of these content standards to be promulgated was the "functional equivalent of express advocacy" standard. And its promulgation, in 2010, exemplifies the FEC's approach to ensuring that the "coordinated communications" provision not be allowed to unduly burden issue advocacy.

Prior to 2010, express advocacy and outright republication of candidate materials were "the only content standard[s] outside the 90-day and 120-day windows" before elections. *See* 75 Fed. Reg. 55947, 55951 & n.10 (Sept. 15, 2010). But the D.C. Circuit held that "express advocacy" alone was too narrow under the statute, since speakers could evade that standard by simply avoiding the "magic words" endorsing or opposing a candidate. *Shays v. FEC*, 528 F.3d 914, 926 (2008) (citing *McConnell v. FEC*, 540 U.S. 93, 193, 221 (2003)). The court directed the FEC to expand its content standard to prevent such evasion, but it also recognized that the FEC's cautious approach on these matters was "properly motivated by First Amendment concerns." *Id.*

On remand, the FEC complied with the D.C. Circuit's instruction to add a new content standard not limited by time windows, but the FEC defined this new standard as narrowly as possible, consistent with the Supreme Court's recent jurisprudence. To supplement the "express advocacy" content standard, the FEC added the familiar "functional equivalent of express advocacy" standard that the Supreme Court had established in *Wisconsin Right to Life* and *Citizens United*. *See* 75 Fed. Reg. at 55952 (discussing both cases). And the FEC stressed that this newly adopted standard shared precisely the same definition offered by the Supreme

Court: a communication is "the functional equivalent of express advocacy" if and only if "it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." *Id.*

The FEC quoted extensively from *Wisconsin Right to Life*'s explication of that standard, demonstrating how the standard respects the right to coordinate with candidates on "genuine issue ad[s]"—such as ads that "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter"—while still leaving room for regulation of coordinated communications having defined "indicia of express advocacy." *Id.* at 55953 (quoting *WRTL*, 551 U.S. at 470). The FEC added that the narrow "functional equivalent of express advocacy" standard "has the imprimatur of the Supreme Court and the virtue of using language with which the regulated community is now familiar." *Id.*

But still more importantly, the FEC rejected a proposal to blur the content/conduct distinction by allowing "[e]xplicit [a]greement" between the speaker and a candidate to satisfy the content standard as well as the conduct standard. The FEC shared commenters' concerns that "the 'fact specific' determination of whether a communication or agreement was made for the purpose of influencing a Federal election would require *broad and intrusive investigations to determine the speaker's intent*." *Id.* at 55956 (emphasis added). The FEC warned that such investigations "would chill core political speech by opening the door to a trial on every ad." *Id.* at 55957 (quoting *WRTL*, 551 U.S. at 467).

And the FEC continues to maintain the lines between *express* and *issue* advocacy, between subjective tests of *intent* and objective tests of *content*. *See*, *e.g.*, *In re: Americans for Job Security*, MUR 6538 (July 20, 2014) (statement of Chairman Goodman & Comm'rs Hunter & Petersen), at 1 ("The agency's controlling statute and court decisions stretching back nearly forty years properly tailor the applicability of campaign finance laws to protect non-profit issue advocacy groups . . . from burdensome political committee registration and reporting requirements.").[11]

These are precisely the bright lines that the challenged investigation refuses to draw. Absent the protection of clear content standards limited strictly to matters of genuine election-focused advocacy, state regulation of "coordination" risks granting prosecutors open-ended mandates to inquire into any collaboration between members of the public and their elected leaders, thus chilling the public's engagement in constitutionally protected issue advocacy.

B. Before Adopting Narrower, Bright-Line Content Standards for its Regulations, the FEC Experienced Firsthand the Dangers of Broad Inquiry Into Allegedly "Coordinated" Communications.

Before Congress enacted the Bipartisan Campaign Reform Act of 2002, the FEC promulgated standards on coordinated communications that were less clear than the lines drawn by the current regulations. Those regulations provided that a private party's expenditure "for general public political communication" would nevertheless be deemed an in-kind contribution if the communication merely

[11] http://eqs.fec.gov/eqsdocsMUR/14044361962.pdf.

"includes a clearly identified candidate and is coordinated with that candidate, an opposing candidate or a party committee"; and "coordination," in turn, was defined broadly to include, *inter alia*, communications produced after "substantial discussion" with the candidate regarding the communications that results in "collaboration or agreement." 65 Fed. Reg. 76138, 76146 (Dec. 6, 2000).[12]

The FEC's open-ended standard proved deeply problematic in practice. Lacking bright lines clearly defining what content would be encompassed by the broad definition of "coordination," general allegations of collaboration sufficed to trigger (in the words of one Commissioner) "high-profile" investigations involving "extensive rifling through the respondents' files, public revelations of internal plans and strategies, depositions of group leaders, and the like." *In re: The Coalition*, MUR 4624 (statement of Comm'r Bradley A. Smith), at 4.[13] Commissioner Smith cited two prominent examples of this trend. First was the case then at hand: a set of complaints filed by the Democratic National Committee alleging coordination by "various Republican Party affiliated committees, and a large number of business and trade associations." *Id.* at 2. The FEC ultimately closed the case without taking action against the respondents, after "a four-year investigation of more than 60 committees and organizations plus several individual respondents," in which FEC attorneys "took nine depositions, collected thousands of pages of documents, and

---

[12] The Bipartisan Campaign Reform Act of 2002 specifically repealed these standards, which had been codified at 11 C.F.R. § 100.23. Pub. L. 107-155, 116 Stat. 81, § 214 (Mar. 27, 2002).

[13] http://eqs.fec.gov/eqsdocsMUR/0000018E.pdf.

interviewed numerous other witnesses[.]" *Id.* Second, Commissioner Smith cited an investigation into alleged coordination by the AFL-CIO, "another recent high-profile matter eventually resulting in no finding of a violation." *Id.* at 4.[14]

Commissioner Smith stressed that a "content test" was necessary to provide "a bright line" for would-be speakers to know what communications could give rise to FEC regulation and investigation. *Id.* "Absent a content standard, however, no such immediate defense is available if the Commission launches an investigation into the alleged coordination with candidates"; instead, such "allegations and investigations may be avoided only by completely avoiding all contact with candidates, because even minimal conduct could trigger a credible allegation" of coordination, sparking an investigation. *Id.*

Commissioner Smith warned that because elected officials and political organizations regularly come into contact, such an uncertain regulatory environment effectively required activists to choose between making contact with elected officials and making independent expenditures. "Groups and individuals who petition the government [or] contact their elected representatives," he wrote, "need guidance on what conduct falls short of coordination without concluding that the only clear way to avoid liability is to refrain from making independent expenditures." *Id.* at 3. Absent a bright-line content standard, the coordination regulation "treads heavily upon the right of citizens, individual or corporate, to

[14] The General Counsel's report from that case, designated MUR 4291, is available at http://eqs.fec.gov/eqsdocsMUR/000008FC.pdf.

confer and discuss public matters with their legislative representatives or candidates for such office[.]" *Id.* at 4 (quoting *Clifton v. FEC*, 114 F.3d 1309, 1314 (1st Cir. 1997)).

Many others press these same points. Several organizations have called for Congress and the FEC to maintain bright lines preserving the freedom to undertake issue advocacy, in order to prevent chilling constitutionally protected speech. Last year, the ACLU urged in a letter to Congress that "coordination rules should draw clear lines between issue and express advocacy to prevent the chilling of legitimate issue advocacy." Letter from Laura W. Murphy & Gabriel Rottman, ACLU, to Sens. Sheldon Whitehouse & Lindsey Graham 3-4 (Apr. 9, 2013).[15] As the ACLU stressed in an earlier letter, "[t]he First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, not to drive a wedge between the people and their elected representatives." ACLU, "Letter to the Senate in Opposition to the McCain-Feingold Bipartisan Campaign Finance Reform Act of 2001" (Mar. 20, 2001) (citation omitted).[16] Similarly, the AFL-CIO urged the Supreme Court in 2003 that, "in the absence of a clear and narrow definition of coordination, an organization's ideological opponents need only assert that it is engaged in such activity to initiate a crippling litigation process that could prevent the organization from participating, legally, in lobbying or speech activities." Br. of

---

[15] https://www.aclu.org/files/assets/4-9-13_--_campaign_finance_hearing_final.pdf.

[16] https://www.aclu.org/free-speech/letter-senate-opposition-mccain-feingold-bipartisan-campaign-finance-reform-act-2001.

AFL-CIO, *AFL-CIO v. FEC*, No. 02-1755, 2003 WL 22002431 at 34-35 (July 8, 2003) (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 382 (D.D.C. 2003) (Henderson, J., concurring in part and dissenting in part)).

CONCLUSION

The "tendency of the law must always be to narrow the field of uncertainty." Oliver Wendell Holmes, Jr., *The Common Law* 127 (1881). Nowhere is this truer than in matters of issue advocacy, which are entitled to maximum constitutional protection, and which are chilled when not protected by bright line rules defining and limiting government power. "In short," the law "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U.S. at 469.

Respectfully submitted,

/s/ Adam J. White
C. BOYDEN GRAY
ADAM J. WHITE
Counsel of Record
ADAM R.F. GUSTAFSON
KATHRYN K. KELLEY
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
202-955-0620
adam@boydengrayassociates.com

September 2, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 29(d), because the brief contains 6,993 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with 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 proportionally spaced typeface using Microsoft Word in Century Schoolbook 12-point font.

/s/ Adam J. White
Adam J. White
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
202-955-0620
adam@boydengrayassociates.com

September 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2014, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam J. White
Adam J. White
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
202-955-0620
adam@boydengrayassociates.com

September 2, 2014