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# An Opening for Quid pro Quo Corruption? Issue Advertising in Wisconsin Judicial Races Before and After Citizens United

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AN OPENING FOR QUID PRO QUO CORRUPTION?  
ISSUE ADVERTISING IN WISCONSIN JUDICIAL RACES  
BEFORE AND AFTER *CITIZENS UNITED*

Christopher Terry\* and Mitchell T. Bard\*\*

I. INTRODUCTION

A. *The Law*

In *Citizens United v. FEC*,<sup>1</sup> the Supreme Court curbed the ability of Congress to limit campaign finance, holding that federal law limiting independent political expenditures by corporations, unions, and other organizations violated their free-speech rights under the First Amendment. The decision marked a major turning point in campaign-finance law, striking down pieces of the Bipartisan Campaign Reform Act of 2002,<sup>2</sup> and overturning two Supreme Court precedents.<sup>3</sup> *Citizens United* immediately set off a debate about the underlying principle at stake—whether money is a corrupting force in politics.<sup>4</sup>

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1. 558 U.S. 310 (2010).

2. 2 U.S.C. §441(b) (now codified as 52 U.S.C. § 30118 (2015)) [hereinafter BCRA].

3. *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

4. President Obama predicted in his 2010 State of the Union Address that the ruling would “open the floodgates for special interests—including foreign corporations—to spend without limit in our elections,” and emphasized that “American elections” should not be “bankrolled by America’s most powerful interests . . . or . . . by foreign entities.” Barack Obama, Pres., U.S.A., State of the Union Address (Jan. 27, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>; *see also, e.g.*, Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech after Citizens United*, 31 CARDOZO L. REV. 2365 (2010).

*Citizens United* was concerned with issue ads, which do not come from the candidate's official campaign. Justice Kennedy's opinion for the Court rejected the notion that campaign donations were potential sources of corruption in most cases. He noted that not only did "few if any contributions to candidates . . . involve quid pro quo arrangements,"<sup>5</sup> but that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>6</sup> Yet Justice Stevens painted a different picture in dissent, asserting that "[t]he Court's ruling threatens to undermine the integrity of elected institutions across the Nation,"<sup>7</sup> and that

[t]he legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting "issue ads" to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense.<sup>8</sup>

Indeed, as he pointed out, "[t]he sponsors of these ads were routinely granted special access after the campaign was over."<sup>9</sup>

Two years later, *American Tradition Partnership v. Bullock*,<sup>10</sup> in which the Montana Supreme Court had upheld the state's Corrupt Practices Act and its contribution limits,<sup>11</sup> presented the Court with an opportunity to examine empirical evidence relevant to the potentially corrupting effect of campaign contributions. But rather than revisit *Citizens United*, the Court issued a short per curiam reversal, announcing that "Montana's arguments in support of the judgment below either

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5. *Citizens United*, 558 U.S. at 357.

6. *Id.*

7. *Id.* at 396.

8. *Id.* at 454–55.

9. *Id.* at 455.

10. \_\_\_ U.S. \_\_\_, 132 S. Ct. 2490 (2012).

11. *W. Tradition P'ship v. Attorney General*, 271 P.3d 1 (Mont. 2011) (upholding Mont. Code Ann. §13-35-227(1) (2011)), *rev'd sub nom.* *Am. Tradition P'ship v. Bullock*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2490 (2012); see also Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. APP. PRAC. & PROCESS 47, 53–58 (2015) (describing century-old history of corporate influence over Montana judges and judicial elections).

were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”<sup>12</sup>

Taken together, these two decisions indicate that the Supreme Court has limited the government interest in regulating campaign contributions to the narrow area of “quid pro quo arrangements.”<sup>13</sup> Thus, unless a donor receives an agreed-upon benefit in exchange for a contribution, the donation cannot be a corruptive influence sufficient to justify regulation of the free speech rights of the corporation, union, or other entity providing the campaign money.<sup>14</sup>

### B. Previous Research

In two earlier articles,<sup>15</sup> the authors examined issue ads on Milwaukee radio stations to empirically examine whether any changes in the use of the ads—or in the ads themselves—were visible as the changes in campaign-finance law brought about by the BCRA and then by *Citizens United* began to take effect. We found close correlations between the changes in the law and the number of entities buying issue ads, the amount of money spent, and the number of candidate mentions made in the ads.<sup>16</sup>

But if corruption is narrowly limited to quid pro quo arrangements, it seems unlikely that the general spending examined in those two studies would persuade the *Citizens*

12. *Am. Tradition P'ship*, 132 S. Ct. at 2491.

13. *Citizens United*, 558 U.S. at 356–57.

14. See, e.g., Nicholas Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1427 (2015) (pointing out both that “the Supreme Court has recently narrowed the definition of corruption to quid pro quo exchanges,” and that quid pro quo corruption does “not occur with any regularity in contemporary America”). Stephanopoulos argues that with the Supreme Court limiting the government’s interest in preventing corruption to quid pro quo arrangements, campaign-finance reform legislation must begin to rely on governmental interests beyond preventing corruption. He proposes use of the governmental interest in ensuring that public policy aligns with the wishes of the electorate. *Id.* at 1328 (describing “preference alignment” and “outcome alignment,” and indicating that both have a “tight connection to core democratic values”).

15. Christopher Terry & Mitchell T. Bard, *Milwaukee Radio Public File Data, 1998–2011: An Empirical Analysis of Issue Advertising after the BCRA and Citizens United*, 24 U. FLA. J.L. & PUB. POL’Y 157 (2013) [hereinafter *2013 Analysis*]; Christopher Terry and Mitchell T. Bard, *Citizens United, Issue Ads, and Radio: An Empirical Analysis*, 20 COMM.LAW CONSP. 307 (2012) [hereinafter *2012 Analysis*].

16. *2013 Analysis*, *supra* note 15; *2012 Analysis*, *supra* note 15.

*United* majority that issue ads can have a corrupting effect. And, in fact, *American Tradition* indicates that it would not.<sup>17</sup>

By looking at the broad range of issue ads in a wide range of elections, including for president, governor, U.S. senator, and U.S. representative, our earlier studies examined issue ads in elections in which, generally, the candidates themselves raised substantial amounts of money. Since the federal limits on contributions directly to candidates were unaffected by *Citizens United*, the issue-advertisement spending made up only part of the larger pool of money allocated to advertising in an election.

To empirically examine the effect of issue advertising on an election in which something approaching quid pro quo arrangements would be more of a risk, it would be necessary to look at races in which this type of third-party spending—freed by *Citizens United*, both in allowing unlimited spending and, as importantly, the naming of candidates—made up the bulk of the spending in a campaign. We found that scenario in judicial races in Wisconsin during our period of study. While the relationship between outside groups and candidates for judicial office is subject to some debate, the potential for outside groups to influence an election in favor of a judicial candidate that they perceive to be (or hope to make) friendly to their positions substantially increases the potential for corruption.

A discussion of any potential corruption from campaign contributions has been made more urgent by *McCutcheon v. FEC*,<sup>18</sup> in which the Court struck down ceilings under federal law applicable to the aggregate limits a donor can contribute to political candidates, political parties, and political action committees. Again limiting the scope of corruption to quid pro quo arrangements, the Court held that aggregate limits burdened the free-speech rights of donors without furthering the government interest in limiting corruption.<sup>19</sup> For any limitation

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17. *Am. Tradition P'ship*, 132 S. Ct. at 2491 (reiterating *Citizens United* holding that “political speech does not lose First Amendment protection simply because its source is a corporation”).

18. 572 U.S. \_\_\_, 134 S. Ct. 1434 (2014).

19. *Id.* at 1442 (explaining that, although limits “restrict[ing] how much money a donor may contribute to a particular candidate or committee” have “the permissible objective of combatting corruption,” limits restricting “how much money a donor may contribute in total to all candidates or committees . . . do little . . . to address that concern, . . . seriously

on campaign finance to be upheld by the current Supreme Court, the government must be able to demonstrate that the law in question limits quid pro quo corruption. General influence of the type that concerned Justice Stevens<sup>20</sup> will not suffice.

For that reason we now move away from questions about the relationship between politicians and friendly outside groups and seek to examine the relationship between outside groups and judicial candidates, a relationship that should not be taken lightly. Research has already documented a correlation between donations to justices in Wisconsin and favorable rulings in favor of campaign supporters in more than fifty percent of cases, as well as the reality that Wisconsin Supreme Court justices failed to recuse themselves in at least ninety-eight percent of cases in which one or more of the participants had donated to one or more of the justices' election campaigns.<sup>21</sup> As a result, an empirical examination of issue ads in judicial races, where the potential for something approaching the quid pro quo benchmark for corruption is great, would provide a focused inquiry as to whether there are corruption risks in this setting.

In Part II we lay out the state of the law on campaign finance and the legal responsibilities of radio stations. Our questions and method are described in Parts III and IV. Part V and Part VI present our results and discussion, which track how the judicial races in the state of Wisconsin saw an increase in issue-ad spending by outside groups after *Citizens United*, and address the implications of this increase.

## II. BROADCAST RADIO, ADVERTISING, AND THE LAW

### *A. Political Advertising: The Rules*

Political advertising in broadcasting is divided into two major categories. Campaign advertising—as relevant to this

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restrict[] participation in the democratic process,” and are “invalid under the First Amendment”).

20. See text accompanying notes 7 & 8, *supra*.

21. “In instances where a contribution came in before a case was decided, justices favored those attorneys’ clients 59 percent of the time.” Jake Harper, *Wisconsin Supreme Court Justices Tend to Favor Attorney Donors*, available at <http://www.wisconsinwatch.org/2013/10/wisconsin-supreme-court-justices-tend-to-favor-attorney-donors/>.

article, advertising that originates with the official campaign of a legally qualified candidate for state office—is governed by the Communications Act of 1934, which requires broadcasters to provide equal access to advertising by opposing candidates, and to make candidates’ ads available at the lowest price charged to commercial customers.<sup>22</sup> The second category of political advertising—non-candidate political advertising (generically referred to as “issue ads”)—covers advertising that discusses a political issue but does not originate with the official campaign of a candidate for office. Issue ads are not given the same access and rate protections as campaign ads under federal law. Radio stations are not required to sell these ads, but a station accepting them is legally responsible for preserving the content of the ads that it sells and then clears.<sup>23</sup>

Assuming that a broadcast radio or television station is willing to sell issue advertising, it will typically make a decision to carry issue ads at a pre-specified rate, and will then publish a rate card that identifies the prices for issue-advertising sales.<sup>24</sup> This information will be available, along with a list of advertisers buying issue ads, in the station’s public file.<sup>25</sup> Licensed broadcast stations are required to keep information on

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22. 47 U.S.C. §315 (addressing duties and obligations of radio stations in connection with “candidates for public office”); *cf.* 47 U.S.C. § 312(7) (authorizing imposition of penalties on station willfully failing to offer access to, or to sell air time at a reasonable rate to, a “legally qualified candidate for Federal elective office”). Only the requirements of section 315 are applicable to Wisconsin Supreme Court campaigns.

23. 47 C.F.R. 73-1943(c) (requiring immediate placement of records into public file, and retention of those records for two years).

24. The rate card is a media outlet’s “menu” for purchasers of advertising. A broadcast station will usually maintain a special rate card for issue advertising during election cycles, which will then be part of the station’s public file. Rate cards may include the price of ads at different times of day, and for different days of the week, as well as any discounts for frequency, and rules for pre-emption. (Ads subject to pre-emption are typically cheaper, because they can be set aside in favor of more expensive ads sold to run in the same time slot; the pre-empted ads will be aired only after the term of the other—more profitable to the station—ad buy is over.) Rate cards will also specify whether a station will accept issue ads, as well as the guidelines that the station uses when accepting issue ads.

25. 47 C.F.R. § 73-1943 (requiring every station to keep a “political file” in its public file that contains “all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted”). In this context, “disposition” includes “the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.” *Id.* Each of the six radio stations included in this study had a published rate card available in its public file.

all political advertising on file for a period of two years.<sup>26</sup> Stations typically keep this information—which is likely to contain pricing information for all parts of the day, some of which are more expensive than others—in their public files for no longer than the required two-year period.<sup>27</sup>

Federal law relating to the airing of issue ads has changed back and forth in the last two decades, as the BCRA added additional limitations on this kind of spending that *Citizens United* then removed. One invalidated provision, the prohibition on “electioneering communications” made shortly before an election,<sup>28</sup> was in fact at the heart of *Citizens United*: Citizens United wanted to advertise and to release *Hillary: The Movie*, a documentary critical of then-senator and presidential candidate Hillary Clinton, within thirty days of a primary election. It sought a preliminary injunction against the FEC’s applying the BCRA to television ads promoting the video and its release, arguing that the FEC’s application of the provision to the ads would be unconstitutional.<sup>29</sup> The trial court granted the FEC’s motion for summary judgment, holding the electioneering provisions of the BCRA constitutional in light of *McConnell*.<sup>30</sup> On direct appeal, the Supreme Court asked the parties to re-argue and re-brief the issue of whether its earlier precedents should be overruled,<sup>31</sup> and then reversed, holding the spending provisions of the BCRA unconstitutional.<sup>32</sup>

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26. 47 C.F.R. § 73-3526(e)(6).

27. A station will routinely purge political material from its public files because the pricing-structure information that it contains can be valuable both to competing stations and to ad buyers who think that the station may offer lower prices to other advertisers.

28. 52 U.S.C. § 30104(f)(3)(A)(i) (prohibiting issue ads from identifying federal candidates if broadcast within thirty days of a primary contest or sixty days of a general election).

29. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 277 (D. D.C. 2008) (noting Citizens United’s claims that the relevant provisions of the BCRA were facially unconstitutional and would be unconstitutional infringements of its First Amendment rights if applied to the Clinton video).

30. *Id.* at 278–80. The BCRA’s restrictions on electioneering had already been limited in *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007) (holding that, to be considered electioneering subject to the BCRA’s ban on mentioning candidates within the specified periods, an ad must not be subject to being construed as anything but an appeal for or against the election of a specific candidate, and that its merely mentioning a candidate would not trigger the provision).

31. *Citizens United v. FEC*, 557 U.S. 932 (2009) (restoring case to argument calendar). The Court eventually rejected the FEC’s claim that re-argument was improper, noting that

### *B. Political Advertising on the Radio*

Radio and television broadcasters are required by law to maintain political advertising information in their public files.<sup>33</sup> Even though these data are relatively easy to access, as they are available to any member of the public willing to go to a station and make a request,<sup>34</sup> these public files are notoriously hard to navigate without industry knowledge and/or some previous experience with the materials in them. Historically, interest in the files has been quite limited, and with much of the focus on television commercials,<sup>35</sup> the political advertising on broadcast radio has gone largely ignored.<sup>36</sup>

We believe this lack of focus on radio advertising to be an important oversight. Radio has a powerful ability to target very specific demographic groups at the local level. Thus, examining radio can reveal the strategies behind political spending in a way that an examination of television, with the mass-appeal approach of its programming, cannot. Radio is a major source through which citizens access political information, and remains an important contributor to political speech.<sup>37</sup> Still available through traditional means, but now also available via digital streaming, radio has become an increasingly popular choice for consumers—and thus advertisers—in part because of the ability for people to multitask while listening.<sup>38</sup> In fact, \$124 million

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Citizens United had consistently asserted a violation of its First Amendment rights. *Citizens United*, 558 U.S. at 330–31.

32. *Citizens United*, 558 U.S. at 372 (declaring BCRA’s “restrictions on corporate independent expenditures” unconstitutional, but upholding its “disclaimer and disclosure requirements”).

33. 47 C.F.R. § 73-3527.

34. 47 C.F.R. § 73-3527(c)(1).

35. See generally, e.g., ALICIA BANNON, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2011–12: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS, available at <http://newpoliticsreport.org/media/JAS-New Politics2012-Online.pdf> (including extensive discussion of television advertising in judicial races).

36. 2012 *Analysis*, *supra* note 15; 2013 *Analysis*, *supra* note 15.

37. One study indicated that in 2008, approximately sixty percent of news and talk radio content was about politics and the election. *The State of the News Media—Radio*, PEW PROJECT FOR EXCELLENCE IN JOURNALISM, available at <http://stateofthemediamedia.org/2009/a-year-in-the-news/radio/>.

38. See, e.g., Laura Santhanam, Amy Mitchell & Kenny Olmstead, *The State of the News Media—Audio: Digital Drives Listener Experience*, PEW PROJECT FOR EXCELLENCE

was invested in election advertising on AM and FM radio stations in the 2012 election cycle.<sup>39</sup> Our previous research has demonstrated that radio has been a major recipient of spending on political races as an increasing number of outside groups become involved in political advertising.<sup>40</sup> The earlier analysis also demonstrated changes in the content of ads, and the number of ads which mention a candidate by name.<sup>41</sup>

With all of this in mind, we turned our attention to issue ads related to judicial races and candidates on broadcast radio in Milwaukee, Wisconsin, between 1998 and 2013.

### III. THE RESEARCH PLAN

*Citizens United* made assumptions about the effects of corporate money (on corruption, influence, and advertising) without considering empirical evidence. The Court then declined in *American Tradition* to consider the Montana campaign-finance statute, which would have included analysis of historical and empirical data on the effects of corporate political spending in that state.<sup>42</sup>

We continue to believe that ignoring empirical evidence is a mistake, no matter where the data might lead. And with two statewide judicial elections in Wisconsin since *Citizens United*, it is possible to directly test the case's impact on spending in judicial elections by comparing the spending on issue ads in those elections to the spending in previous judicial races. We do just that by analyzing the use of radio in Wisconsin's largest media market—Milwaukee—through a unique fifteen-year sample of public-file data from six co-owned Milwaukee radio stations.

In light of the restrictions first placed on corporations, unions, and other organizations by the BCRA and then partially removed by *Citizens United*, we expected to find changes in

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IN JOURNALISM, available at <http://www.stateofthemediamedia.org/2013/audio-digital-drives-listener-experience/>.

39. *Id.*

40. 2012 Analysis, *supra* note 15; 2013 Analysis, *supra* note 15.

41. 2012 Analysis, *supra* note 15; 2013 Analysis, *supra* note 15.

42. *American Tradition* was resolved in a per curiam opinion issued concurrently with the denial of certiorari. *American Tradition*, 132 S. Ct. at 2491.

advertising behavior correlated with these changes in the law. Specifically, we were interested in the number of issue ads related to the judicial elections in each year between 1998 and 2013; the number of those ads that mentioned a candidate in the judicial election; whether those mentions are related to a positive endorsement or negative attack; and the amounts spent on advertising of this type. We expected to see increases in the number of groups running ads, the dollars spent on those ads, and candidate mentions in the judicial elections following *Citizens United*.

During the study period, individual justices of the Wisconsin Supreme Court were chosen in statewide elections eleven times, in nine races before *Citizens United* (1998, 1999, 2001, 2003, 2005, 2006, 2007, 2008, and 2009), and two that followed the decision (2011 and 2013). Because our data set<sup>43</sup> includes issue advertising from election years that preceded the BCRA, our analysis examines three periods of advertising regulation: the pre-BCRA era, the BCRA era, and the post-*Citizens United* era.

#### IV. THE UNEXPECTED ARCHIVE

During our earlier research, we had been able to obtain access to archived public-file data for the four-year period between 2006 and 2010.<sup>44</sup> Initially, our focus was to compare data from even-numbered years during this time, contrasting empirical evidence of issue-advertising buys from 2008 (pre-*Citizens United*) and 2010 (post-*Citizens United*).<sup>45</sup> During our search of the stations' public-file records, however, we located several additional boxes filled with archival public-file records.<sup>46</sup> We approached the management of the cluster of six Milwaukee radio stations a second time and secured permission

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43. Christopher Terry & Mitchell T. Bard, Terry-Bard Political Advertising Database (2013) (unpublished data compilation) (on file with Dr. Terry).

44. 2012 *Analysis*, *supra* note 15.

45. *Id.*

46. Because the BCRA requires stations to retain information for only two years, most stations discard outdated files. These old boxes were retained only because they were so heavy that no one had wanted to carry them out for disposal. That historical accident led to our important find.

to examine the entire archive of public-file data, including any outdated files still intact. Our lengthy review of these additional boxes unearthed a complete archive of public-file data stretching back to 1998.

After substantial work in the archive, we were able to collect all of the files on issue ads between 1998 and 2010.<sup>47</sup> The archive contained out-of-date station rate cards, internal memos on company procedures for handling issue ads, National Association of Broadcasters disclosure forms, scripts for many of the ads, and copies of the checks used to pay for some ads. The sample also included copies of all of the invoices, providing details on the number of ads purchased, the amounts paid for ad buys, and station logs that indicated when spots were actually aired.<sup>48</sup> Data from 2010 to 2013 were collected from the existing public file and added to the original database that we first assembled in connection with our earlier research.<sup>49</sup>

To our knowledge, no other archive of this kind, with its breadth (six stations) and depth (all of the records for each advertisement) exists. Since FCC regulations require stations to retain records for only two years, in most cases it would be necessary for a researcher to collect data at least every two years beginning in 1998 to amass an archive like this one. Further, the six stations from which data were obtained provide a representative sample of the thirty-six commercial radio stations in Milwaukee.<sup>50</sup> Of the six stations covered, two are AM and four are FM, and they cover a range of programming types (music, sports, and news/talk formats), which bring with them a

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47. *2013 Analysis*, *supra* note 15. *Citizens United* did not affect the longstanding regulation of on-air political advertising by candidates, so our focus remains on issue ads.

48. Sales records discovered in the archive were tested against the advertising files we collected, demonstrating that the older information remained intact. We believe in consequence that our data accurately represent the issue advertising that appeared on the six radio stations for the earlier years reported in this study.

49. *See 2013 Analysis*, *supra* note 15; *2012 Analysis*, *supra* note 15. The data in the archive we have now assembled represent issue advertising during a span of fifteen years and includes purchases by 141 groups, political parties, or individuals, covering 17,468 individual issue ads and more than \$2,500,000 in spending.

50. Milwaukee-Racine was in 2012 the thirty-eighth largest media market in the country, serving 1,481,300 people. *Market Survey Schedule & Population Rankings*, ARBITRON (Fall 2012), [http://www.arbitron.com/downloads/fa12\\_market\\_survey\\_schedule\\_poprankings.pdf](http://www.arbitron.com/downloads/fa12_market_survey_schedule_poprankings.pdf).

diverse group of target demographics.<sup>51</sup> In the summer of 2001, the six stations were united under Clear Channel ownership, but when the period of study began, the stations had three different owners.

Once the issue ads in the archive were sorted and checked for accuracy based on the internal records, the study involved logging the ads, organizing them by year, calculating the number and amount of spending, and also noting when a candidate was mentioned by name; this archival information was then combined with campaign data we collected from current files.<sup>52</sup> As mentioned above, once the archive was compiled in 2012, we continued to collect campaign data each year, expanding the data set available for review. This study zeroes in on the eleven Supreme Court races in Wisconsin between 1998 and 2013.<sup>53</sup>

## V. RESULTS

Although our earlier research turned up issue ads in almost every year of the study period, the participation of outside groups buying issue advertising in judicial races is relatively new in Milwaukee. We were surprised to make this discovery.<sup>54</sup>

Prior to *Citizens United*, the only issue ads mentioning a judicial candidate at any level between 1998 and 2009 were a series of spots run in 2006 by Focus on the Family encouraging people to support confirmation of Justice Samuel Alito to the United States Supreme Court. The archive includes entries for

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51. The six stations are WISN-AM (news/talk), WKKV-FM (rap/hip-hop), WMIL-FM (country), WRIT-FM (oldies), WRNW (Top 40/CHR) and WOKY (classic country and other formats). During the fifteen-year period for which the public-file records were available, WRIT maintained the call letters WZTR-FM and WRNW was at times identified as WQBW (classic rock) and WLTQ (soft rock). WOKY also changed formats three times during the study period (from nostalgia to oldies to classic country before becoming a sports-talk oriented station).

52. See note 43, *supra*, and accompanying text.

53. The 2015 election for associate justice of the Wisconsin Supreme Court came after the study, and data relating to that race are not included here.

54. Although most of the data for this project were part of our database before we began this investigation, we had been focused on evaluating the macro-level changes before and after *Citizens United*. Our micro-level analysis of issue spending in judicial elections was developed as a research question in response to the high volumes of issue ads about judicial candidates that ran during 2011 and 2013.

candidate advertising in several judicial elections—at both the local and state levels—but the public-file data suggest that issue groups become involved in judicial elections only after the changes to the advertising regulations implemented by the BCRA were repealed by *Citizens United*.<sup>55</sup> The removal by *Citizens United* of the limits on when issue ads could mention candidates by name seems to have played a significant role in introducing third-party ads to judicial races. In fact, the 2011 and 2013 elections were the only races in our period of study that featured issue ads on the studied radio stations, and both came after *Citizens United*, which allowed third-party expenditures and references to candidates' names in the period leading up to the election.

The first statewide judicial election in Wisconsin after *Citizens United* was a spring 2011 race between incumbent conservative David Prosser and his liberal challenger Joanne Kloppenburg. Although judicial races are nonpartisan in Wisconsin, the Prosser-Kloppenburg race was widely seen as a proxy for the ongoing debate over Governor Scott Walker's controversial legislation limiting the role of unions for most state employees.<sup>56</sup> The Wisconsin Club for Growth, a GOP-supporting issue- and industry-lobby group, purchased 188 radio ads attacking Kloppenburg on the stations covered by the study. A second issue group, We Are Wisconsin, purchased and ran four ads in support of Kloppenburg's candidacy on those stations.

In 2013, a Wisconsin Supreme Court race and a local judicial race each attracted issue-group advertising, with a total of 369 issue ads appearing on five of the six stations covered by the study. Two advertisers representing industry-lobby groups, the Wisconsin Club for Growth and the Wisconsin Realtors Political Fund, ran a total of 214 issue ads directly attacking the perceived liberal candidate for the Wisconsin Supreme Court, Marquette University Law Professor Ed Fallon, and supporting

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55. A check of the data we used for other in-market stations in our study of issue advertising changes between 2006 and 2010 also supports the finding that outside groups were not purchasing issue ads for judicial elections prior to *Citizens United*. 2013 Analysis, *supra* note 15.

56. See, e.g., Monica Davey, *Wisconsin Election is Referendum on Governor*, N.Y. TIMES, Apr. 4, 2011, at A13.

the conservative incumbent, Justice Patience Roggensack.<sup>57</sup> We Are Wisconsin, a group affiliated with labor interests, purchased thirty-nine additional ads advocating Fallone's election.

## VI. DISCUSSION

There can no longer be a debate about the nature of the changes to issue advertising in the wake of *Citizens United*. Increases in the number of groups and the amount of spending, and the increasingly negative nature of the mentions of political candidates have all been documented.<sup>58</sup> Two changes—the increase in the number of issue ads, and the increase in issue ads that mention candidates by name—are especially important given the Supreme Court's striking down the aggregate limits on political spending.<sup>59</sup> Simply put, the repeal of the BCRA's electioneering communication standard in *Citizens United* has changed the nature of political advertising.

Direct contributions to judicial candidates have already been demonstrated to be correlated with favorable rulings.<sup>60</sup> Spending on behalf of candidates, especially in low-turnout elections like statewide judicial races, is potentially more effective than contributions made directly to candidates. Although the Supreme Court declined in *American Tradition* to address the empirical data on the effect of *Citizens United*,<sup>61</sup> the Court may eventually have to address the evidence of favorable rulings. It may in some cases point to the kind of quid pro quo corruption that *Citizens United* deems an appropriate ground for

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57. In addition, the Wisconsin Club for Growth spent more than \$29,000 on four individual ad buys for 136 individual ads supporting Rebecca Bradley's 2013 campaign for a Milwaukee County Circuit Court judgeship to which she had been appointed by Governor Walker in 2012. Terry & Bard, *supra* note 43 (collecting ad-purchase data). She won that election, and was later appointed to the Wisconsin Supreme Court by the governor. See, e.g., *Justice Rebecca G. Bradley*, WISCONSIN COURT SYSTEM—WISCONSIN SUPREME COURT, <http://wicourts.gov/courts/supreme/justices/rbradley.htm> (summarizing Justice Bradley's professional biography).

58. See, e.g., *2013 Analysis*, *supra* note 15.

59. See *McCutcheon*, 134 S. Ct. 1434.

60. Harper, *supra* note 21.

61. *Am. Tradition P'ship*, 132 S. Ct. at 2491 (opining that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case").

limiting the free-speech rights of those seeking to spend on political advertising.

This study demonstrates that *Citizens United* appears to have had a powerful effect on advertising in judicial races in Wisconsin, opening the door for third-party groups to make significant investments in ads attacking one candidate, supporting another, or both. And the success of issue ads like these can prompt judges to be friendly to those who buy them.<sup>62</sup>

Judicial elections—which the Court did not distinguish from political elections in *Citizens United*—are especially vulnerable to the influences of third-party financing. Industry groups, for example, can support anti-regulation candidates for the bench, spending unlimited amounts of money to advertise on their behalf. With Wisconsin Supreme Court justices often unwilling to recuse themselves,<sup>63</sup> corporations, unions, and other groups aware that issues in which they are interested will end up before the Wisconsin Supreme Court could view spending money on issue advertising as a practical, effective investment in influencing a candidate to rule in their favor.

The data in this study, much as in our earlier research, demonstrate the correlation between the change in campaign-finance law (in this case, before and after *Citizens United*) and changes in the patterns of issue advertising on Milwaukee radio. For more than a decade before *Citizens United*, there was no issue advertising for Wisconsin judicial candidates at any level. Not a single judicial-election ad was purchased or run, not even on the conservative-leaning talk radio station that was attracting issue ads in connection with political candidates, before, during and after the BCRA was in place, and both before and after the Court limited the BCRA's reach in *Citizens United*.<sup>64</sup>

The first statewide judicial race after *Citizens United* was in 2011, and it is not surprising to see that outside groups were already participating in judicial races. It bears noting, however, that 2011 was an unusually combative year in Wisconsin politics. Although an off year for national elections, 2011 was

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62. Harper, *supra* note 21.

63. *Id.*

64. During the study period more than thirty-six percent of all issue ads ran on WISN-AM, the conservative talk station, and more than forty percent of issue-ad spending in the six-station cluster went to WISN. 2013 *Analysis*, *supra* note 15.

marked in Wisconsin by several recalls and the Supreme Court race, and without the issue advertising brought about by *Citizens United*, interested parties would not have been able to act on their passion in the same ways. No matter how much of an outlier it might be in Wisconsin political history, 2011 has to be examined through the prism of the changes in federal campaign-finance law. Issue advertising exploded in that first full year after *Citizens United*, when 202 issue ads relating to the Wisconsin Supreme Court election were run, after more than a decade of no issue ads being run in this type of election. Notably, the Supreme Court race represented sixteen percent of the total number of issue ads that ran in 2011 on the six stations in the cluster.<sup>65</sup> Without the changes in the law brought about by *Citizens United*, many of the issue ads that ran in 2011 (including all of the ads directed to the election for the Wisconsin Supreme Court and other judicial races) would not have been permissible under federal law and station policies.

The data on issue advertising in 2013 present an even stronger illustration of the effect of *Citizens United* on the Wisconsin judicial elections. While the quantity of issue advertising in 2011 can be at least partially attributed to the high-stakes political climate in Wisconsin that year, 2013 offers no such alternative explanations. In 2013, issue advertising relating to the Wisconsin Supreme Court election represented all of the issue advertising through October across the six diverse radio stations studied.

In fact, in 2013 there was more advertising by issue groups than by both of the candidates combined.<sup>66</sup> The media debate (which looms large in shaping the overall debate in an election) in the 2013 election for the Wisconsin Supreme Court was not primarily set by the candidates, but was in the hands of outside groups. And, in most cases, these outside groups had interests likely to come before the court.<sup>67</sup> The potential for quid pro quo

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65. See Terry & Bard, *supra* note 43 (containing data from which percentage was calculated).

66. *Id.*

67. Compare *id.* (containing data about ad purchases by entities like Wisconsin Club for Growth in connection with Wisconsin Supreme Court elections) with, e.g., Dee J. Hall, *Justices Face Questions as "John Doe" Probe Lands in Supreme Court*, WIS. ST. J., October 6, 2014, available at [http://host.madison.com/wsj/news/local/govt-and-politics/politics/justices-face-questions-as-john-doe-probe-lands-in-supreme/article\\_b082257c-3b2](http://host.madison.com/wsj/news/local/govt-and-politics/politics/justices-face-questions-as-john-doe-probe-lands-in-supreme/article_b082257c-3b2)

corruption in this arrangement is clear, especially as the justices of the Wisconsin Supreme Court are not required to recuse themselves from cases in which campaign donors appear before them.<sup>68</sup>

The most direct example of a potential quid pro quo involves the John Doe investigation of illegal campaign coordination during Governor Scott Walker's recall election.<sup>69</sup> Groups like Wisconsin Manufacturers and Commerce, the Wisconsin Club for Growth, and Citizens for Responsible Government each spent significant amounts of money on issue advertising during both political and judicial elections in Wisconsin and then instituted a series of actions intended to halt the investigation of their allegedly illegal campaign activities.<sup>70</sup> Collectively, these three groups spent more than \$8,000,000 in support of candidates for the Wisconsin Supreme Court,<sup>71</sup> which eventually held that their activities were not barred by the Wisconsin statute that prohibits coordination between candidates' campaigns and outside groups.<sup>72</sup>

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d-5ac9-b7ee-63bc64286beb.html (featuring chart that shows "money spent in support of candidates" that traces contributions from entities including Wisconsin Club for Growth to Supreme Court candidates Ziegler, Gableman, Prosser, and Roggensack, and reporting that those groups had spent "millions" in support of their candidacies).

68. Harper, *supra* note 21 (asserting that the Wisconsin Supreme Court enacted recusal rules "written by lobbying groups Wisconsin Manufacturers & Commerce and the Wisconsin Realtors Association stating that 'the receipt of a lawful campaign contribution shall not, by itself, warrant judicial recusal.'"); *see also* Wis. S. Ct. R. 60.04(1)(g)(7) (providing that "[a] judge shall not be required to recuse himself or herself in a proceeding based solely on . . . the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding").

69. *See, e.g.*, Hall, *supra* note 67 (pointing out that "[t]hree groups that have fought in court to end the John Doe probe—Wisconsin Club for Growth, Citizens for a Strong America, and Wisconsin Manufacturers and Commerce—also have spent millions to support the candidacies of Justices David Prosser, Pat Roggensack, Annette Ziegler and Michael Gableman over the past seven years").

70. *See* State v. Peterson, 866 N.W.2d 165 (Wis. 2015).

71. *Spending for Supreme Court Justices*, MADISON.COM (Oct. 3, 2014), [http://host.madison.com/spending-for-supreme-court-justices/pdf\\_0ce418a7-6064-5c77-a5be-7188f5c93e3c.html](http://host.madison.com/spending-for-supreme-court-justices/pdf_0ce418a7-6064-5c77-a5be-7188f5c93e3c.html) (noting that Wisconsin Club for Growth, Citizens for a Strong America, and Wisconsin Manufacturers and Commerce, then "before the Supreme Court challenging the legality of the 'John Doe' investigation," had "spent heavily . . . to elect the court's four-member conservative majority," but had "spent no money boosting the candidacies of the other three justices").

72. *Peterson*, 866 N.W.2d at 179 (holding that "the definition of 'political purposes' in Wis. Stat. § 11.01(16) is unconstitutionally overbroad and vague under the First

We are not suggesting that *Citizens United* turned judicial races in Wisconsin negative. To do so would ignore the reality of the 2008 race between incumbent Louis Butler and challenger Michael Gableman, in which a misleading ad run by Gableman's campaign ultimately led the state Judicial Commission to file a formal ethics complaint against Gableman after he joined the Court.<sup>73</sup> Candidates who run improper ads can be held accountable.<sup>74</sup> But as the 2013 election for the Wisconsin Supreme Court demonstrates, candidates are not held responsible for issue ads run by third-party advertisers.

While the nature of the study makes it impossible to isolate a causal effect between the development of campaign-finance law and the changes in issue advertising at Milwaukee radio stations, the correlation between the two factors is worthy of attention and consideration. Issue advertising was essentially nonexistent in Wisconsin judicial elections prior to *Citizens United*. The growth in outside spending on judicial elections since *Citizens United* is especially concerning because issue advertising by third parties in recent Wisconsin Supreme Court elections has outpaced spending by the candidates themselves.

The data we present in this study suggest that radio was—and continues to be—used by outside groups to broadcast political messages to specific demographic groups at the local level. This is not a surprising finding, as niche targeting is one of radio's strengths as an advertising medium. But the apparent effect that the changes in federal campaign-finance law have had on issue-ad campaigns in judicial races in which the candidates did not spend as much as outside groups is telling. If *Citizens United* recognizes only quid pro quo corruption as a legitimate basis for regulating political spending, the changes in issue advertising on Milwaukee radio after *Citizens United* are worthy of the United States Supreme Court's attention.

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Amendment to the United States Constitution and Article 1, Section 3 of the Wisconsin Constitution").

73. See, e.g., Patrick Marley & Steven Walters, *Judicial Commission Says Gableman Ad Was Deceiving*, MILWAUKEE JOURNAL SENTINEL (Oct. 8, 2008), <http://www.jsonline.com/news/statepolitics/32440994.html>.

74. See, e.g., *id.* (reporting that "[i]f Gableman is found to have violated the [judicial ethics] code, his colleagues on the court could reprimand him, censure him, suspend him or force him off the high court").