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To: Members of the Assembly Committee on Campaigns and Elections  
From: Brian Boyle, Executive Director & General Counsel at American Promise  
Re: Assembly Bill 599  
Date: January 9, 2024

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## **American Promise Testimony Concerning AB 599 And The Related Need For An Amendment To The United States Constitution**

### Introduction

My name is Brian Boyle and I currently serve as Executive Director & General Counsel at American Promise. Thank you for the opportunity to submit testimony concerning 2023 Assembly Bill 599 (“AB 599”).

American Promise is a nationwide nonprofit organization that mobilizes broad, cross-partisan support for an amendment to the United States Constitution that would empower the States and Congress to set reasonable guardrails on money in our political system. We are proud to have over 2,500 supporters in the State of Wisconsin, including several volunteer leaders who dedicate countless hours to educating their fellow citizens about a workable and enduring constitutional solution to the vexing problem of money in politics.

As explained more fully below, AB 599 would close an existing loophole in Wisconsin law by expressly prohibiting foreign nationals from making financial contributions to referendum committees. I offer my testimony today both in support of AB 599, and to urge the legislature to consider a future resolution in support of an amendment to the U.S. Constitution that would strengthen the legal basis for crucial measures like AB 599.

## The Need For Assembly Bill 599

Foreign interests understand that America’s existing campaign finance system presents many opportunities to exert influence over policy in the United States.<sup>1</sup> In recent years, they have not been shy in their attempts to influence ballot elections across the country. For example, foreign government-owned entities reportedly spent more than \$100 million in Maine’s ballot elections over the past three years.<sup>2</sup> In response to this threat, last year 86% of Maine’s voters passed a new law to prevent foreign government-owned entities from spending money in that state’s elections.<sup>3</sup>

By passing AB 599, Wisconsin can join Maine and several other states in protecting its ballot elections from foreign interference. Wisconsin’s current laws concerning campaign finance are contained in Chapter 11 of the state’s statutes.<sup>4</sup> Chapter 11 is a comprehensive regulatory scheme designed to vindicate “the right of the public to have a full, complete, and readily understandable accounting of those activities expressly advocating for or against candidates for office or for or against referendums.”<sup>5</sup> Chapter 11 also prohibits certain practices, such as the filing of false campaign finance reports or coordination between an independent expenditure committee and a candidate.<sup>6</sup> Such provisions reflect the legislature’s reasoned judgment that certain campaign finance practices should be prohibited in the public interest.

One of the prohibitions contained in Chapter 11 mirrors the existing federal prohibition on political contributions by foreign nationals. Section 11.1208 currently incorporates by reference federal provisions codified at [11 C.F.R. 110.20\(a\)\(3\)](#) and [52 U.S.C. 30121\(b\)](#). However, in 2021, a [decision](#) by the Federal Election Commission (“FEC”) held that those provisions do not apply to ballot measures. Construing the Federal Election Campaign Act, the FEC explained:

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<sup>1</sup> American Promise provides more context on this vulnerability in our November 2023 report, [The Problem of Foreign Money in Politics](#).

<sup>2</sup> See [Utility parent companies spend millions opposing public power amid foreign electioneering concerns](#).

<sup>3</sup> See [Question 2 passes, banning foreign electioneering in Maine](#) (“With the passage of Question 2, Maine closes a loophole in state law, preventing organizations owned by a foreign government from spending money on state referendum elections.”).

<sup>4</sup> See generally <https://docs.legis.wisconsin.gov/statutes/statutes/11>.

<sup>5</sup> Wis. Stat. § 11.0100.

<sup>6</sup> See generally Wis. Stat. § 11.1201-11.1208.

The United States Supreme Court has long recognized that the Act “regulates only candidate elections, not referenda or other issue-based ballot measures.” [*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 (1995).] Consistent with the Act and court precedents, the Commission has observed that spending relating only to ballot initiatives is generally outside the purview of the Act because such spending is not “in connection with” elections.<sup>7</sup>

When that FEC decision came out, many recognized that this loophole—permitting foreign nationals to spend money in ballot elections—posed an immediate and concrete threat to American self-government.<sup>8</sup>

It would be wise and appropriate for Wisconsin’s legislature to pass AB 599 to protect the state’s ballot referenda from foreign influence. In doing so, Wisconsin would join eleven other states that have already taken similar steps to guard against foreign interference in their ballot elections.<sup>9</sup> Furthermore, passage of AB 599 would be consistent with current bi-partisan support in Congress, which is now considering multiple proposals to close this loophole as a matter of federal law, including a proposal co-sponsored by Congressman Mike Gallagher (R-WI-8).<sup>10</sup> Indeed, the FEC itself is unanimously urging Congress to pass a law that would prohibit foreign nationals from spending money in U.S. ballot elections.<sup>11</sup>

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<sup>7</sup> See <https://s3.documentcloud.org/documents/21096628/fec-ballot-measure-ruling.pdf>. See also [Statement of Reasons of Chair Broussard](#), MURs 7523 & 7512, at 4 (“Until Congress expands the Act’s foreign national prohibition to encompass state and local ballot activities, which I urge it to do, the Commission is bound by the law as it currently stands.”).

<sup>8</sup> See, e.g., <https://www.axios.com/2021/11/02/fec-foreign-money-referendum>

<sup>9</sup> These states include California, Colorado, Florida, Idaho, Maine, Maryland, Nebraska, Nevada, North Dakota, South Dakota, and Washington. See [Cal. Gov’t Code § 85320](#); [Colo. Rev. Stat. § 1-45-107.5](#); [Fla. Stat. § 106.08\(12\)\(b\)](#); [Idaho Code Ann. § 67-6610d](#); [21-A Me. Rev. Stat. § 1064](#); [Md. Code, Election Law § 13-236.1](#); [Neb. Rev. Stat. § 49-1479.03](#); [Nev. Rev. Stat. § 294A.325](#); [N.D. Cent. Code § 16.1-08.1-03.15](#); [S.D. Codified Laws § 12-27-21](#); [Wash. Rev Code § 42.17A.417](#).

<sup>10</sup> See, e.g., [H.R. 3229](#) (Stop Foreign Funds in Elections Act); [H.R. 6471](#) (Stop Foreign Interference in Ballot Measures Act), which is [co-sponsored](#) by Congressman Mike Gallagher.

<sup>11</sup> See <https://www.opensecrets.org/news/2023/12/fec-urges-congress-to-close-foreign-money-loophole/>. See also [FEC’s Draft Legislative Recommendations 2023](#), at p. 9 (“Congress should revise [the Federal Election

In sum, AB 599 is a smart, sensible, and timely policy that should easily earn bi-partisan support from the Wisconsin legislature.

### The Need For An Amendment To The United States Constitution

Unfortunately, even if Wisconsin passes AB 599, its ballot elections will remain vulnerable to foreign influence. Why? Because decisions by the United States Supreme Court over the past five decades have emboldened foreign entities to claim that they have a right—*under the United States Constitution*—to spend money in American elections, regardless of state or federal laws to the contrary.

If you haven't been closely following the Supreme Court's campaign finance decisions, it might sound absurd that foreign entities are asserting a constitutional right to spend money in our elections. But it's no laughing matter. At this moment, foreign entities are asserting such rights in federal district court in Maine in their attempts to overturn that state's recently-enacted law protecting its elections.<sup>12</sup>

So how did we get to this point? Over a number of years, the Supreme Court has made itself the nation's chief regulator of money-in-politics, and along the way it has decided cases that take most options off the table for policymakers in the States and Congress.

The crucial first step came in 1976 in *Buckley v. Valeo*.<sup>13</sup> Although the First Amendment had been in existence for 185 years at that point, *Buckley* held for the first time that spending money in elections is a form of political expression and association that is protected by the First Amendment.<sup>14</sup> As a practical matter, what *Buckley* created is a system where the judiciary—and ultimately the Supreme Court—gets to have the final say on all issues of campaign finance.

How does this work in practice? Well, the Supreme Court has created a basic framework for analyzing whether a particular campaign finance regulation has adequate

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Campaign Act's] foreign national prohibition to include state and local ballot initiatives, referenda and any recall elections that are not already included in the prohibition.”).

<sup>12</sup> See *Central Maine Power Co. (CMP) v. Maine Commission on Governmental Ethics and Election Practices*, No. 1:23-cv-00450-NT (D. Me. 2023) and *Versant Power, et al. v. Schneider*, No. 1:23-cv-00451-NT (D. Me. 2023).

<sup>13</sup> 424 U.S. 1 (1976).

<sup>14</sup> *Id.* at 25.

legal justification. Step one is to ask whether the regulation serves a “compelling interest.”<sup>15</sup> One might imagine that campaign finance regulations could serve a variety of compelling interests, such as preventing bribery and corruption, protecting the integrity of the electoral process, safeguarding self-government from outside interference, and promoting the political equality of citizens. However, over the past 50 years, the Supreme Court has identified one—and only one—compelling interest that can justify a campaign finance regulation: preventing *quid pro quo* corruption or its appearance.<sup>16</sup>

The Supreme Court’s extremely limited recognition of the types of interests that can justify a campaign finance regulation leaves AB 599 and similar state and federal laws vulnerable to challenge. Why? Because the most natural and intuitive interests served by laws such as AB 599 are the compelling interests in protecting the integrity of Wisconsin’s electoral process and in safeguarding self-government from foreign interference—but those interests have never been recognized explicitly by the Supreme Court as adequate to justify a campaign finance regulation.

Regrettably, the Supreme Court has not created a workable and enduring framework for dealing with money in politics, but a new constitutional amendment would do just that. I hope that in the near future the Wisconsin legislature will consider and adopt a resolution in support of the [For Our Freedom Amendment](#). More than one hundred and seventy municipalities in Wisconsin have already passed local resolutions in support of such an amendment,<sup>17</sup> and recent polling on the amendment shows support from 78% of Wisconsinites.<sup>18</sup>

The For Our Freedom Amendment provides as follows:

**Section 1.** We the People have compelling sovereign interests in the freedom of speech, representative self-government, federalism, the

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<sup>15</sup> *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 197 (2014).

<sup>16</sup> *Id.* at 206-207 (“This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.”).

<sup>17</sup> See <https://americanpromise.net/state/wisconsin/>.

<sup>18</sup> See [American Promise - Wisconsin Polling Toplines](#) (Question 1).

integrity of the electoral process, and the political equality of natural persons.

**Section 2.** Nothing in this Constitution shall be construed to forbid Congress or the States, within their respective jurisdictions, from reasonably regulating and limiting contributions and spending in campaigns, elections, or ballot measures.

**Section 3.** Congress and the States shall have the power to implement and enforce this article by appropriate legislation and may distinguish between natural persons and artificial entities, including by prohibiting artificial entities from raising and spending money in campaigns, elections, or ballot measures.

The For Our Freedom Amendment understands that questions about whether and how to regulate money in our political system are ultimately *policy* questions that should rest with state and federal policymakers. The amendment also radically lowers the stakes of “bad” campaign finance laws. Under our current system, if the Supreme Court makes a bad campaign finance ruling—for example, by holding that foreign entities *do* have a right to spend money in American ballot elections—the only way to correct that mistake is through a constitutional amendment. But, once the For Our Freedom Amendment is in place, “bad” campaign finance laws would always be subject to change or correction through the normal legislative process at the state or federal level. As a matter of prudence and constitutional structure, that makes good sense.

### Conclusion

Thank you again for the opportunity to submit this testimony. I hope that AB 599 becomes part of Wisconsin law soon, and I look forward to the legislature’s future consideration of a bi-cameral, bi-partisan resolution in support of the For Our Freedom Amendment to the United States Constitution.

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