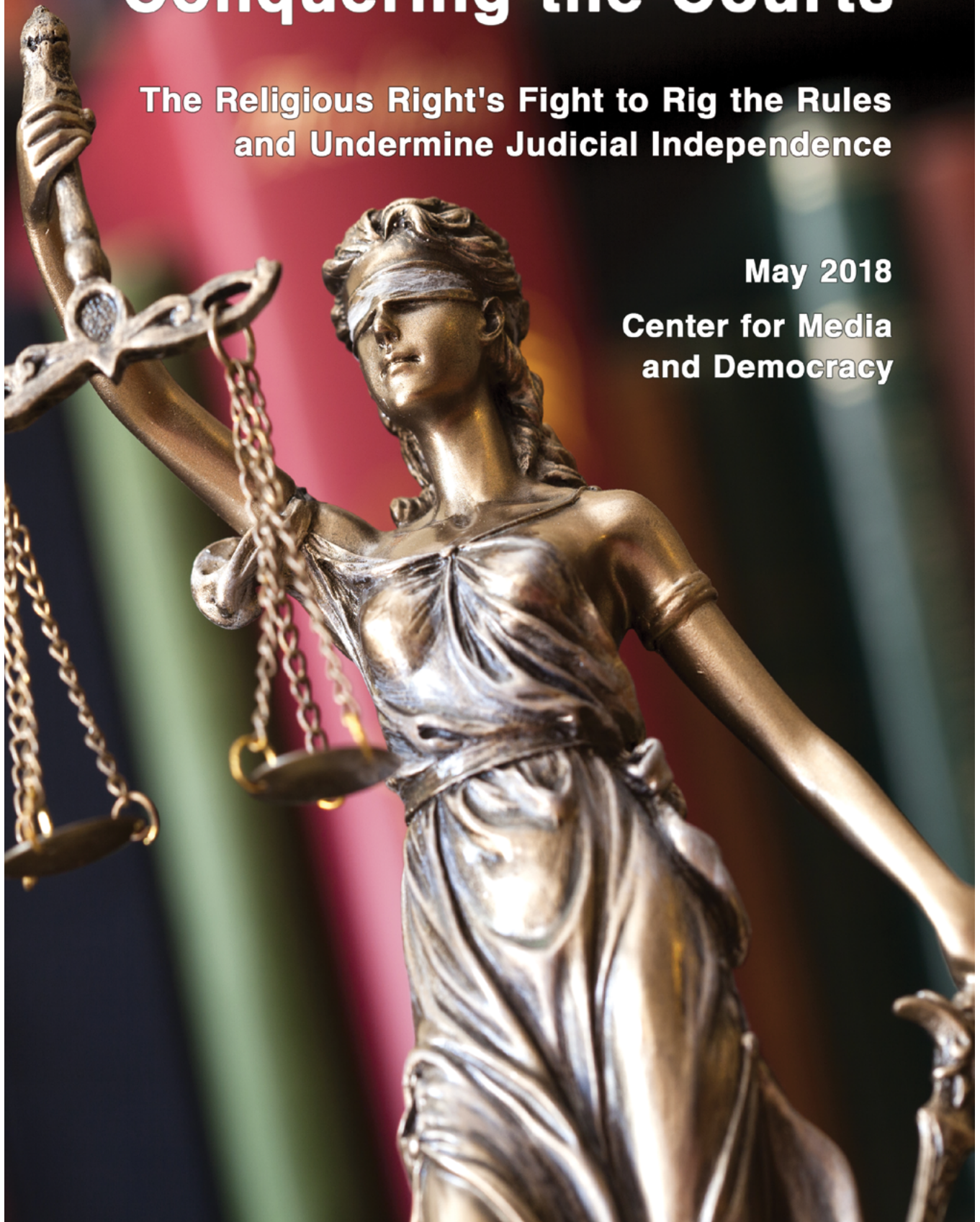


# **Conquering the Courts**

**The Religious Right's Fight to Rig the Rules  
and Undermine Judicial Independence**

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**Center for Media  
and Democracy**



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## The Religious Right's Fight to Rig the Rules and Undermine Judicial Independence

by Arn Pearson

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## Executive Summary

The ouster of three justices from Iowa's Supreme Court in 2010, as retaliation for a unanimous decision overturning the state's ban on same-sex marriage, sent shock waves through courts across the country. But it was just one battle in a long-term, well-funded, and highly organized crusade by Christian right groups to undermine rights by assailing the independence of America's judiciary.

The religious right and its political strategists have recognized the importance of the courts for advancing its social agenda and world view for decades. James Bopp, an Indiana lawyer and former Vice Chairman of the Republican National Committee, has effectively married the interests of partisan and corporate actors with conservative religious groups to mount a relentless attack on the walls that protect judges from popular pressures—merit selection, campaign finance laws, and judicial codes of conduct that limit what judges can say about their views on legal issues.

However, Bopp's 2010 U.S. Supreme Court victory in *Citizens United* has arguably done more to subject state courts to political pressures than anything else. That decision opened the door to unlimited political spending by corporations, including nonprofits, and outside spending on judicial elections since then has soared.

Religious right organizations have become a major player in that mix in a number of states, and have been emboldened by the Trump administration's recent assaults on rights and disdain for the separation of church and state.

Ten of the biggest politically active religious right groups have a combined budget of more than \$220 million. Focus on the Family and its advocacy partner, the Family Policy Alliance, have not received as much attention as some other groups, but spent \$92 million in fiscal year 2016, and funneled \$6.9 million to a network of local partners in 38 states between 2012 and 2015.

Over the past decade, the two groups have worked in coalition with other "values" organizations, partisan players, and corporate front groups in more than a dozen states—including Alaska, Arkansas, Florida, Iowa, Kansas, North Carolina, Tennessee, and Wisconsin—to politicize state courts through legal challenges, legislation, and election spending.

In addition to their Iowa victory, those coalitions have passed a 2014 ballot measure abolishing Tennessee's merit selection system; won a conservative majority on Wisconsin's Supreme Court; and mounted a major, but unsuccessful, challenge against four Kansas Supreme Court justices in 2016 based on their rulings on abortion, death penalty, and school funding cases.

While religious right groups have not been able to replicate their Iowa rout in the past three election cycles, they have stepped up their challenges to judicial independence and are in it for the long haul.



## Introduction

In 2009, six years before the U.S. Supreme Court affirmed marriage equality, the Iowa Supreme Court unanimously upheld a lower court ruling that denial of marriage licenses to same-sex couples violated the liberty and equal protection clauses of the state's constitution.<sup>1</sup>

The political backlash was swift and dramatic. A network of right-wing religious organizations poured \$1 million into the state to oppose the 2010 retention election of three of the justices, and all three were voted off the bench, marking the first time in state history that even one justice was ousted.

It was not, however, a first for the nation. Social conservatives successfully ousted three California Supreme Court justices based on their death penalty decisions in 1986, and Karl Rove engineered Republican supreme court upsets in Texas and Alabama in 1988 and 1994.<sup>2</sup>

But the Iowa sweep signaled a renewed push by the religious right to impose its ideology and agenda on state courts in the wake of the U.S. Supreme Court's ruling in *Citizens United v. FEC*, which legitimized the intervention of corporations—including nonprofits—in elections. Citizen United's legal mastermind, James Bopp, orchestrated challenges to judicial selection rules and sitting judges in Iowa, Kansas, and Alaska in 2009 and 2010. While the other two efforts failed, the Iowa upset caused a judicial earthquake, and the religious right came away with a winning playbook it could put to use across the nation to impose its ideology and social policies on state courts.

While we have become accustomed to news of powerful “dark money” groups flooding the airwaves and our mailboxes

in high-profile congressional, legislative, presidential, and gubernatorial elections, the push to politicize state judicial elections has received less attention. But the threat is just as real. The influence of big money—already pervasive in the making of our laws—increasingly casts a shadow on how laws and constitutions get interpreted.

The U.S. Constitution enshrined three branches of government as a check and balance against tyranny, but today's well-financed crusade against judicial independence threatens to collapse the separation of powers into a concentration of power instead.

All courts are under attack by conservative warriors, but since Iowa those most at risk are in the states. Newly empowered by *Citizens United*, the same special interests that have flooded statewide and legislative races with dark money are bearing down on courts to eliminate the last barrier to their ideological agenda.

The stakes are high. While the U.S. Supreme Court commands most of our attention, it hears only around 100 to 150 cases each session. By comparison, more than 100 million cases come before nearly 30,000 state court judges every year.<sup>3</sup> And those decisions touch lives in intimate, deeply personal ways. State courts very often have the final say in determining what human rights and freedoms we, as a society, affirm or deny under the rule of law.

## Stacking the Deck Against Rights

The organized religious right and its political strategists have long recognized the importance of the courts for advancing its social agenda and world view. Attorney James Bopp has spent a good part of the last two decades fighting to maximize the influence of his clients in the halls of justice by challenging restrictions on campaign spending, judicial selection laws, and ethics rules. In his quest, Bopp has married the interests of the Republican National Committee, where he served as special counsel and vice chairman, with powerful conservative clients like Focus on the Family, the National Right to Life Committee, the National Organization for Marriage, and the Christian Coalition.

The target? Any state that has some

form of election for their judges, exposing them to the public pressures of modern campaigns. Twenty-one states choose their Supreme Court justices by popular election, and another 16 have periodic retention elections requiring a 50-percent-plus vote for justices to stay in office after being appointed.

Bopp has also spearheaded a string of cases challenging restrictions on judicial “speech,” and won a major victory in *White v. Republican Party of Minnesota* in 2002, when the U.S. Supreme Court struck down that state’s bar against judicial candidates announcing their views on legal and political issues.<sup>5</sup> Bopp’s goal is to pressure judges and candidates to go on the record on hot-button issues and so that religious and partisan conservatives can mobilize voters to hold them accountable to their ideological views.<sup>6</sup>

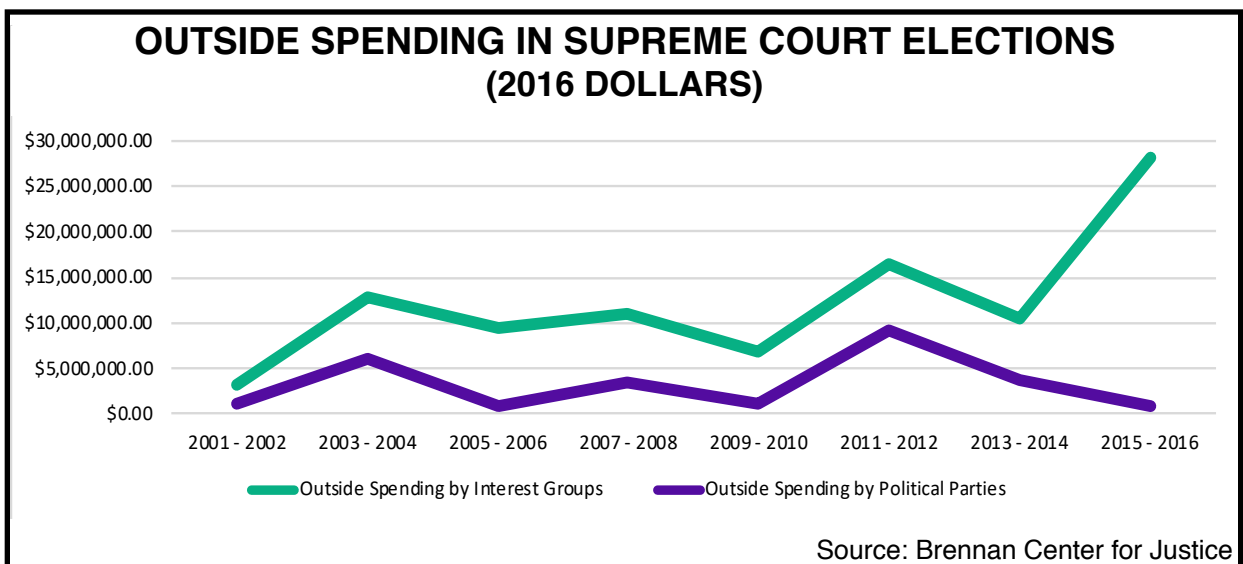


Source: Common Cause <sup>4</sup>

But Bopp's victory in *Citizens United* has arguably done more to politicize the judiciary than anything else. In 2010, the first election after the *Citizens United* decision, spending on retention elections in just four states (Alaska, Colorado, Illinois, and Iowa) reached \$4.6 million, more than double the \$2.2 million spent in all retention elections for the previous decade.<sup>7</sup> By the 2015-16 election cycle, outside spending on state supreme court races had skyrocketed to \$28.0 million out of total spending of \$69.3 million. As a result, one third of elected justices have now been through a \$1 million-plus campaign, and in 11 states more than half the Supreme Court justices have had such high spending races.<sup>8</sup>

ful new ally in the Trump administration, which has launched assaults on everything from access to contraceptives and abortion to civil rights protections and marriage equality, and has challenged long-cherished American principle of separation of church and state. "The Constitution says we shall not establish a religion – Congress shall not establish a religion," Senator Jeff Sessions, now Attorney General, said in 2016. "It doesn't say states couldn't establish a religion."<sup>9</sup>

Religious right organizations today have become a major political force. Ten of the largest groups have a combined annual budget of more than \$220 mil-



While lawyers, business groups, unions, and partisan political committees remain the heaviest hitters in judicial elections, conservative religious organizations play an increasingly significant role. Angered by modern trends in constitutional law that recognize rights relating to abortion, sexuality, and marriage, the religious right has stepped up its attacks on the judiciary under the guise of "religious liberty."

Those sentiments have found a power-

ful new ally in the Trump administration, which has launched assaults on everything from access to contraceptives and abortion to civil rights protections and marriage equality, and has challenged long-cherished American principle of separation of church and state. "The Constitution says we shall not establish a religion – Congress shall not establish a religion," Senator Jeff Sessions, now Attorney General, said in 2016. "It doesn't say states couldn't establish a religion."<sup>9</sup>

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## SPENDING BY TEN MAJOR RELIGIOUS RIGHT GROUPS

Organization	Total Expenses
Focus on the Family	\$89 million
Family Policy Alliance	\$3 million
Alliance Defending Freedom	\$58 million
American Family Association	\$20 million
Faith and Freedom Coalition	\$15 million
Family Research Council	\$12 million
Judicial Crisis Network	\$18 million
National Right to Life	\$5 million
National Organization for Marriage	\$2 million
Wall Builders	\$2 million
<b>Total</b>	<b>\$224 million</b>

Source: Latest available IRS form 990s (2015 and 2016)

Garland and pushing through Neil Gorsuch to fill the U.S. Supreme Court seat vacated by the death of Anthony Scalia. But others, like Focus on the Family and its advocacy group partner, the Family Policy Alliance, operate under the radar to exert substantial influence over state courts through an extensive network of affiliates and allies.

### Focus on the Family and the Family Policy Alliance

Focus on the Family (FOF) was founded in 1977 by Dr. James Dobson, who now serves as its chairman emeritus. Its current president and CEO is Jim Daley. The group's latest IRS filings situate it among the largest religious-right players—as of 2016, FOF had \$91,837,000 in revenues and net assets of \$54,158,519.<sup>10</sup>

FOF describes its work as supporting “families as they seek to teach their children about God and His beautiful

design for the family,” but the group only supports a specific type of family and has dedicated millions to promoting “gay conversion therapy,” opposing the right of same-sex couples to adopt, and fighting against equal marriage laws. Many of FOF's state affiliates filed amicus briefs in the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case that was argued before the U.S. Supreme Court in December 2017, backing the baker's claim to a First Amendment religious right to refuse service to homosexuals. And its North Carolina affiliate fought hard to promote House Bill 2 in 2016, which eliminated protections against discrimination against LGBT people and required transgender individuals to use bathrooms that correspond to their gender at birth.<sup>11</sup> FOF also strongly opposes reproductive rights and mobilizes its network to support religious exemptions.

Focus on the Family and its affiliates fight to inject their religious views into America's judiciary by opposing judges that fail to follow their “strict constructionist” judicial philosophy.<sup>12</sup> The groups



consider court-held privacy and civil rights to be “judicial activism,” a term coined by Rove decades ago. “Judges, primarily un-elected officials appointed for life, are not accountable to the people for their actions and, thus, should not be allowed to legislate,” FOF states on its site.<sup>13</sup>

Focus on the Family has three related legal entities, all of which share the same address as FOF’s national headquarters in Colorado Springs, Colorado. And all are national leaders in taking on the courts. The Family Policy Alliance (FPA), a 501(c)(4), is the largest and most influential. Formerly known as CitizenLink and Focus on the Family Action, FPA has built an alliance of 40 “pro-family” organizations in 38 states that it can mobilize to influence legislation and support “social conservative candidates.”<sup>14</sup>



FPA, funneled a total of \$6.9 million to those state partners in the form of grants between 2012 and 2015, and also provides valuable voter targeting and messaging resources. (See Appendix A.)

The Family Policy Foundation (FPF) is a 501(c)(3) that is set up to be a “catalyst for unleashing biblical citizenship.” Part of this work to promote a biblical citizenry is done through its Statesmen Academy, where it trains candidates for political office. Family Policy Alliance also has

a political action committee, the Family Policy PAC, although it is not very active. The PAC dispersed less than \$6,000 during the 2016 election cycle.<sup>15</sup>

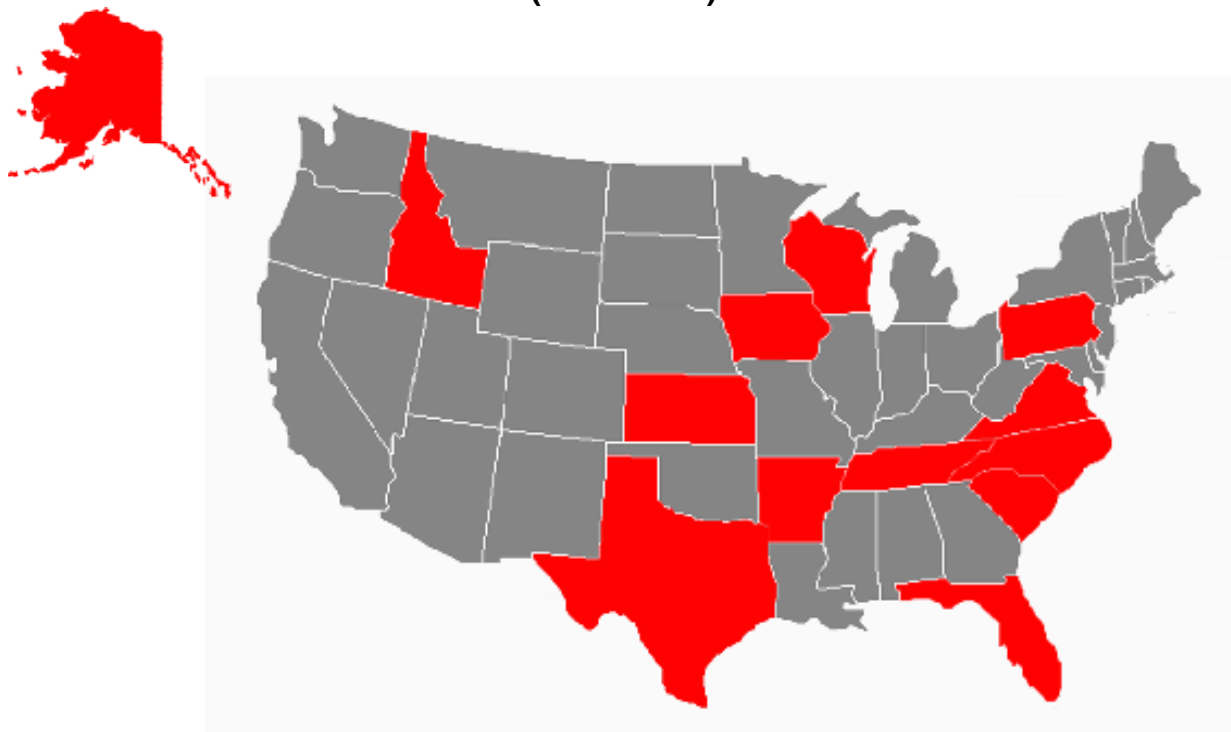
In 2017, Focus on the Family declared itself a church and stopped filing public tax returns with the IRS.<sup>16</sup>

In all, Focus on the Family and its national affiliates spent \$93,411,876 between October 1, 2015 and September 30, 2016, according to the latest IRS filings. FPA also has close ties with Alliance for Defending Freedom (ADF) and the Family Research Council, both considered anti-LGBT hate groups by the Southern Poverty Law Center. The group’s current president worked with ADF for 14 years, and its president emeritus is now vice chairman of ADF’s board.<sup>17</sup> ADF is an aggressive legal organization that litigates against LGBT rights and for “religious freedom,” and opposes the current bar on electoral involvement of churches.

Focus on the Family and the Family Policy Alliance typically act in coalition with right-wing allies, religious or not, to advance their efforts to influence state courts, including the Republican State Leadership Committee, Americans for Prosperity and other groups in the Koch brothers network, and WallBuilders. In some cases, they team up on ad campaigns to oppose sitting justices in retention elections. In other cases, they join forces to change judicial selection rules. Together they are able to spend millions in financial resources, aggressively use earned and social media, and mobilize thousands of members to inject their version of religious teachings into the nation’s secular judicial system.

Since 2010, Christian right groups have engaged in these tactics in at least 12 more states. Eight of those states are profiled in the next section.

## RELIGIOUS RIGHT ASSAULTS ON JUDICIAL INDEPENDENCE (2010-2016)



### State Profiles

#### Alaska

Religious right efforts to politicize the courts in Alaska have been led by the Anchorage-based Alaska Family Council, a registered 501(c)(3), and Alaska Family Action (AFA), a 501(c)(4), since the groups were launched in 2006.<sup>18</sup> Both groups are led by Jim Minnery, whose cousin, Tom Minnery, was the president of Family Policy Alliance (formerly CitizenLink) and senior vice president of Government and Public Policy for Focus on the Family until his retirement in 2015.<sup>19</sup>



AFC asserts that “the ‘separation of church and state’ is an ambiguous phrase that serves only one purpose: to keep those charged with stewarding righteous authority away from the seat of power.” Alaska Family Action has

attacked courts on numerous fronts to break down that wall of separation, such as leading efforts to repeal merit selection for judges and influence retention elections.

In 2010, AFA campaigned against state Supreme Court Chief Justice Dana Fabe, who authored a 3-2 decision invalidating the state’s parental consent law in 2007 as a violation of the right to privacy under the Alaska constitution.<sup>20</sup> In urging voters to reject the retention of Justice Fabe, Jim Minnery stated, “Alaskans have the right to vote on judges based on whether they agree with the judicial philosophy the judge brings to the bench.”<sup>21</sup> Nonetheless, Fabe held her seat with 53 percent of the vote.

Two years later AFA targeted Anchorage Superior Court Judge Sen Tan for rulings dating to the late 1990s related to abortion but once again lost, with Tan getting a 55 percent vote in favor of retention.<sup>22</sup> AFA also filed a complaint against the

Alaska Judicial Council, an independent commission created under the Alaska Constitution to screen nominees, evaluate judges and recommend whether voters should retain judges for another term. AFA alleged that the Council inappropriately campaigned on behalf of Tan, simply by publishing its findings and recommendations in a pamphlet and on the official website.<sup>23</sup> Bopp had made a similar challenge to the Council in a 2009 lawsuit that was summarily dismissed.<sup>24</sup>

Faced with losses on both fronts, the group took a different route in 2014. The year AFA backed legislative candidates supporting a proposed constitutional amendment to “double the number of public, non-attorney members on the Alaska Judicial Council from three to six, and require the attorney members to be confirmed by the Legislature,” in order to make it the Council more accountable.<sup>25</sup> That effort failed,<sup>26</sup> but AFA continued to endorse legislative candidates in the 2016 elections who pledged to reform an “out-of-control” judiciary” that it sees as “the source of most of our problems on social issues.”<sup>27</sup>

## Arkansas

The Little Rock-based Arkansas Family Council (AFC) is a 501(c)(3) organization founded in 1989 “as part of a nationwide network of State Family Policy Councils associated with Focus on the Family,” and claims to have a “network of over 10,000 families and churches [that] covers every part of Arkansas.”<sup>28</sup>

AFC’s stated purpose is to “review every bill introduced, advise lawmakers, provide committee testimony, and help citizens across the state make their voices

heard in the halls of government” about “a biblical perspective on issues ranging from abortion, to homosexuality, and taxes, to health care.”<sup>29</sup> Its work also includes targeting members of the judiciary over decisions it deems unfavorable. The group’s advocacy arm, the Family Council Action Committee, received \$272,857 from the national Family Policy Alliance between 2013 and 2015.

In 2014, AFC backed a legislative resolution condemning Circuit Court Judge Chris Piazza for striking down a constitutional amendment banning same-sex marriage and threatened to put a judicial recall measure on the ballot.<sup>30</sup> AFC did not follow through on its threat.

## Florida



The Florida Family Policy Council (FFPC) is a “pro-life, pro-family values” educational advocacy organization based in Orlando, Florida “formally associated” with Focus on the Family since 2005.<sup>31</sup> The organization pushes for “judicial accountability,” conducts voter registration drives, analyzes state legislation, and hosts events such as “Pro-Family Days at the Capitol,”<sup>32</sup> and has a lobbying arm, Florida Family Action.<sup>33</sup>

In 2006, the FFPC announced the launch of its “Florida Judicial Accountability Project,” and sent questionnaires to every judicial candidate on the ballot concerning judicial philosophy and topics like abortion, assisted suicide, and gay adoptions for the purpose of compiling voter guides.<sup>34</sup> When three justices up for retention election declined to respond, saying that answering would violate the state’s judicial code of conduct, the FFPC, represented by Bopp, filed a

federal lawsuit claiming the code violated the First Amendment.<sup>35</sup> The case was dismissed, and FFPC lost its appeal to the 11th Circuit.<sup>36</sup>

The FFPC still publishes scaled-back judicial voter guides and maintains a Judicial Activism page, which states that “the left in this country and in Florida cannot and will not succeed in establishing their liberal, anti-family agenda without activist judges—judges who legislate from the bench and force their social agenda on the American people.”<sup>37</sup> The group publishes its voter guides through a project called Florida Votes Values (FVV), along with recommendations by Pastor Bryan Longworth for which judges should be voted out, and a push for circulating the guides and recommendations in churches, with the legal backing of Alliance Defending Freedom.<sup>38</sup> Longworth is a Tea Party Advocate and connected to several religious right groups, including Wall Builders and the Family Research Council.<sup>39</sup>

“Activist judges in America have accomplished in the courts what the House and Senate couldn’t accomplish legislatively. They’ve twisted and changed the constitution,” Longworth says on the voter guide website. “Our founding fathers feared that the courts would one day rule our country and strip our freedoms from us.”<sup>40</sup>

Despite its setbacks in court, FFPC has managed to wield considerable influence. While it was not among the biggest spenders in the hotly contested 2012 retention elections of three Florida Supreme Court justices targeted by the Republican Party, Americans for Prosperity and a Tea Party group, Restore Justice 2012, its 501(c)(4) arm, Florida Family Action, ran ten field offices with 25 staff. FFPC claims that its judicial voter guides

reached four million voters that year.<sup>40</sup>

In addition, FFPC’s president, John Stemberger, sits on Florida’s Constitution Revision Commission. The commission meets every 20 years and proposes amendments to the state constitution, which are then voted on by the public. The next vote will be in November 2018. Stemberger was pushing a proposal that would limit privacy rights in the state constitution to “informational privacy,” but it has been withdrawn due to lack of support.<sup>42</sup> The proposal was widely seen as an attempt to allow restrictions on abortion rights, such as a 24-hour waiting period, which the Florida Supreme Court previously rejected by relying upon privacy rights.<sup>43</sup>

## Iowa



The Family Leader (formerly Iowa Family Policy Center ACTION) is a 501(c)(4)

organization that seeks to “protect and defend family values by influencing public policy, campaigns, and elections.”<sup>44</sup>

The group maintains formal associations with Focus on the Family and the Family Research Council, and its President and CEO, Bob Vander Plaats, led Iowa for Freedom, a project of the American Family Association, during the religious right’s successful 2010 campaign to oust three state Supreme Court justices.<sup>45</sup>

That campaign came on the heels of a unanimous 2009 Iowa Supreme Court ruling that found denial of marriage licenses to same-sex couples violated the liberty and equal protection clauses of the state constitution. The decision made Iowa the third state to affirm marriage equality—and politicized judicial races as never seen before in Iowa.



Iowa had seen zero spending on retention elections in the previous decade, but in 2010 a coalition of Christian right groups spent nearly \$1 million to defeat the three justices up for retention election that year, and backed three legislative candidates who promised to impeach the remaining four justices.<sup>46</sup> Most of the money came from out-of-state groups. The National Organization for Marriage reported spending \$635,628, the American Family Association \$171,025 (through Iowa for Freedom), Campaign for Working Families \$100,000, and the Family Research Council \$55,997. Lesser amounts were spent by Citizens United for Political Victory Fund (\$17,823) and the Iowa Family Policy Center (\$10,178).<sup>47</sup>

Their success was ground-shaking. All three justices lost their retention elections<sup>48</sup>—the first time in state history that even one justice was removed from the bench—and the groups’ legislative candidates each won election. The effort to impeach the remaining four justices, however, failed after GOP leaders split over resolutions introduced by five House Republicans.<sup>49</sup>

The Family Leader joined with Iowa for Freedom, CitizenLink, National Organization for Marriage, and other religious right groups in 2012 in a campaign to oust Justice David Wiggins in his 2012 retention election, spending \$466,001 and driving a bus across the state with a “NO Wiggins” sign, but came up short.<sup>50</sup> Wiggins was retained with 55% of the vote. By comparison, the justices who replaced the three removed in 2010 each received 74 percent of the vote.<sup>51</sup>

District Court Judge Karen Romano also withstood a Family Leader attack during her retention election in 2016. Romano issued a temporary stay on the Iowa

Board of Medicine’s 2013 ban of telemedicine for patients seeking an abortion-inducing pill. In response, Family Leader released a statement stating that telemedicine abortion would continue because “an activist, pro-abortion judge thinks her role is lawmaker.”<sup>52</sup> The Iowa Supreme Court unanimously upheld Romano’s ruling, noting that telemed routinely is used for other types of health care, and she was returned to the bench with 75 percent of the vote.<sup>53</sup>

The Family Leader has also worked to influence the selection of federal court judges. In April 2014, the group hosted a forum with four GOP candidates for the U.S. Senate, three of whom promised to block judicial nominees who do not follow “natural law.” Among them was Joni Ernst, now Iowa’s junior senator, who stated that judges need to have an “understanding” that our Constitution and laws “come from God” and rule on cases “within that criteria.”<sup>54</sup>

The group is currently making headlines for supporting a bill in the 2018 legislative session that would require a supermajority vote by the Iowa Supreme Court in order to overturn any state law as unconstitutional.<sup>55</sup>

## Kansas



The religious right’s efforts to influence the judiciary in Kansas are led by Kansans for Life and the Family Policy Alliance of Kansas (FPAK), a 501(c)(4) “public policy partner” of Focus on the Family.<sup>56</sup>

The groups have put the Iowa playbook into action in Kansas with a series of efforts leading up to a \$2 million campaign in 2016 against the retention of four state

Supreme Court justices based on their rulings on controversial abortion and school funding cases.

Mary Kay Culp, director of Kansans for Life, is clear on the purpose behind this work. “We have a pro-life house and a pro-life senate and a pro-life governor,” Culp said in 2014. “We pass pro-life legislation—and we get sued. The next frontier is the courts.”<sup>57</sup>

In 2010, James Bopp filed a lawsuit, similar to his Alaska case, charging that the state’s judicial nominating commission, established in the state constitution, violated citizens’ voting rights. The lawsuit was dismissed,<sup>58</sup> but it set the stage for coming fight over judicial selection in Kansas.

In 2013, Kansans for Life advocated for the successful passage of legislation to change selection of Appellate court judges from a merit system, reliant on recommendations by the state’s nominating commission, to appointment by the governor and confirmation by the State Senate with no formal merit review.<sup>59</sup>

Hoping to extend that change to the selection of state Supreme Court Justices, Kansas for Life issued a report in 2015 titled “The Untold Story Behind the Unchecked Power of the Kansas Supreme Court.” The report calls the 1958 decision introducing merit selection a “conspiracy of attorneys” designed to “cut the people of Kansas out.”<sup>60</sup> Kansas for Life lobbied hard for a bill to make the change in 2016, and used it as a basis for choosing its legislative endorsements for the upcoming election,<sup>61</sup> but the legislation failed.<sup>62</sup>

The big fight came in the 2016 elections when Kansans for Life, FPAK, and Republican politicians targeted four state

Supreme Court justices in retention elections based on rulings involving school funding, the death penalty, and abortion.<sup>63</sup> A combined \$2,041,220 was spent on the races, with a PAC called Kansans for Justice chipping in more than \$1 million, including \$381,582 spent on TV ads.<sup>64</sup>

The national FPA issued a statement about the fight on August 30, 2016: “[B]ecause judges so often strike down pro-family legislation, Family Policy Alliance is working to hold judges accountable. Among states we are focused on is Kansas, where several activist liberal judges are facing key retention votes.”<sup>65</sup> In a TV ad, FPA attacked the justices for “not representing Kansas values,”<sup>66</sup> and Steve Brunk, executive director of FPAK, urged residents to vote no in an op-ed appearing in the *Wichita Eagle* titled “Stand Up to Bad Judicial Decisions.”<sup>67</sup>

Despite the organized opposition, all four justices were retained, each with about 56 percent of the vote. By comparison, Justice Caleb Stegall, a former attorney for the Koch-funded American’s for Prosperity<sup>68</sup> appointed by Republican Gov. Sam Brownback in 2014, did not draw the groups’ fire and was retained with nearly 71 percent of the vote.<sup>69</sup>

The group also targeted four judges on the state Court of Appeals that year. Kansans for Life argued that they “indefensibly sid[ed] with abortion attorney’s [sic] invention of a state right to abortion, even broader than that of *Roe v Wade*.” Although each was returned to the bench, Kansans for Life claimed victory—stating that the judges “felt the public’s disapproval when they received only 59-60 percent support, down from 71-74 percent in 2012.”<sup>70</sup>

## North Carolina



The religious right has not been the lead player in the large-scale attacks against judicial independence in North Carolina in recent years, but it has enthusiastically lent its support to the effort. Focus on the Family's North Carolina state affiliate is the Raleigh-based NC Values Coalition, a 501(c)(4) organization founded in 2011 that has received funding from the Family Policy Alliance and its Family Policy PAC.

The state's high court conservative majority, as well as redistricting, was on the line in 2012 when NC Values spent \$28,000 to support state Supreme Court Justice Paul Newby and defeat his opponent Samuel Ervin, then a judge on the North Carolina Court of Appeals.<sup>71</sup> In one radio ad, NC Values Executive Director Tami Fitzgerald maintained that Ervin was backed by "radical homosexual activist groups" and "worked to defeat the marriage amendment."<sup>72</sup>

But the big money in that race came from the North Carolina Judicial Coalition, a Super PAC financed by corporate and conservative interests that spent \$2.9 million to reelect Newby.<sup>73</sup> The Republican State Leadership Committee kicked in \$1.2 million to that effort, and the Koch brothers' Americans for Prosperity spent \$250,000 on a direct mail campaign.<sup>74</sup>

In 2014, NC Values ran ads attacking U.S. District Judge Max Cogburn, Western District of North Carolina, for striking down North Carolina's Marriage Amendment, which defined marriage as a union between a man and a woman.<sup>75</sup> The group also targeted U.S. Senator Kay Hagan (D-NC) for nominating him. Hagan lost her seat to Republican Thom Tillis that year.

These same groups are expected to resurface in the 2018 elections, given that State Supreme Court Justice Barbara Jackson's term expires this year. A legislative panel is also looking to set new boundaries for trial court judgeships and prosecutors, which is sure to attract a fight.

## Tennessee



The Family Action Counsel of Tennessee (FACT) and its advocacy arm, Family Action of Tennessee, operate out of the same office in Franklin "to equip Tennesseans and their elected officials to effectively promote and defend a culture that values God's design for the family, for the sake of the common good."<sup>76</sup> FACT is associated with several of the largest national religious right organizations, including Focus on the Family, the Family Policy Alliance, Family Research Council, and Alliance Defending Freedom.<sup>77</sup>

In 2006, FACT teamed up with Tennessee Right to Life, American Family Association, Eagle Forum, and Focus on the Family in an effort to defeat four state Supreme Court justices, who six years earlier had affirmed a right to abortion in *Planned Parenthood of Middle Tennessee v. Sundquist*.<sup>78</sup> The coalition surveyed dozens of appellate judges on their philosophy and position on abortion rights and other issues, which most judges refused to answer, and then distributed 300,000 information packets about the justices to voters. Despite those efforts, the justices all won their retention elections.<sup>79</sup>

FACT targeted three state Supreme Court justices facing retention elections

again in 2014, armed with voter data provided by the Family Policy Alliance. Another FACT judicial survey<sup>80</sup> failed to elicit any response, prompting an angry response by the group's president, David Fowler. "They are beginning to sound like a bunch of politicians playing politics by hiding their views from voters on issues they don't want them to know about," Fowler said.<sup>81</sup>

The big money in the 2014 fight, however, came from partisan and corporate players. Former Lt. Gov. Ron Ramsey led the opposition, with his PAC contributing \$605,000 of the \$790,000 spent by Tennessee Forum's PAC against the justices to "break the liberal monopoly on Tennessee's Supreme Court."<sup>82</sup> The Republic State Leadership Committee contributed another \$140,000<sup>83</sup> and ran separate TV and radio ads. And the Koch brothers' Americans for Prosperity launched an independent radio and direct mail campaign attacking the justices for their "liberal records."<sup>84</sup> All three justices were returned to the bench, garnering between 55 and 57 percent of the vote.<sup>85</sup>

However, FACT was able to score an even more significant win that year in its campaign to politicize the courts, when conservatives and business interests spent \$1.7 million to successfully abolish the state's merit selection system through a constitutional amendment.<sup>86</sup> The ballot measure fight, led by Republicans Gov. Bill Haslem, former Gov. Phil Bredesen, and former U.S. Senator Fred Thompson, passed with 61 percent of the vote, alongside a constitutional amendment giving the legislature more control over abortion laws.<sup>87</sup> With the amendment's passage, the governor now appoints Supreme Court and Appellate Court judges, subject to review by the state legislature.<sup>88</sup>

In a December 2017, FACT's leader urged judges in Tennessee to rule that the state must refrain from issuing marriage licenses to same-sex couples until the legislature brings state law into accordance with the U.S. Supreme Court decision in *Obergefell v. Hodges*. "It's time state judges begin to restore the rule of law that the United States Supreme Court subverted in *Obergefell* ... and the states quit pretending we have laws we don't have," Fowler said.<sup>89</sup>

## Wisconsin



Religious right groups in Wisconsin have teamed up with partisan and corporate heavy hitters over the years to radically transform the Wisconsin Supreme Court, and have acted as conduits for dark money spending on judicial elections.

The Wisconsin Family Council (WFC), a 501(c)(3), and its 501(c)(4) advocacy arm, Wisconsin Family Action (WFA), are the Focus on the Family partners in Wisconsin. In 2015, WFC and WFA had a combined income of \$824,055.<sup>90</sup> It lobbies and spends money in campaigns and elections, including those for Wisconsin Supreme Court.

In 2006, WFA teamed up with the Family Research Institute of Wisconsin and Focus on the Family to spend large amounts on TV ads and mailings supporting a constitutional amendment banning gay marriage, much of which went undisclosed.<sup>91</sup> The amendment passed but was overturned in 2014, when the Seventh Circuit Court of Appeals declared the marriage ban unconstitutional.<sup>92</sup>

In 2008, Wisconsin Family Action and Wisconsin Right to Life joined with parti-



san groups in the contentious campaign of Michael Gableman to unseat Justice Louis Butler. According to IRS filings, the Coalition for America's Families contributed \$189,000 to WFA and \$99,199 to Wisconsin Right to Life that year.<sup>93</sup> Altogether, CAF and the Wisconsin Manufacturers and Commerce Association reported spending \$1.9 million to defeat Butler, although Butler has argued that actual spending on the race was closer to \$10 million.<sup>94</sup>

The race turned especially ugly when Gableman ran a "Willie Horton"-style ad falsely insinuating that Butler, the Court's only African-American, was responsible for setting free a child rapist who went on to molest another child. The Wisconsin Judicial Commission charged that the ad was "made knowingly with reckless disregard for the truth" and that Gableman had violated the state's judicial code of conduct, but the Supreme Court deadlocked on the matter.<sup>95</sup> Gableman hired James Bopp, who was also the lawyer for Wisconsin Right to Life, to defend him on First Amendment grounds, in addition to receiving approximately \$100,000 in free representation from a major corporate law firm.<sup>96</sup>

WFA continued to receive substantial funds from corporate influence groups during a wave of controversial recall elections for a number of state senators

and Gov. Scott Walker during 2011 and 2012. WFA received \$916,045 from Wisconsin Club for Growth and Citizens for a Strong America in 2011, and an additional \$253,000 in 2012. The 2011 donation amounted to 90 percent of funds WFA received that year. WFA spent an estimated \$850,000 on the recall elections. CitizenLink transferred \$190,807 to WFA in 2011 and \$120,000 in 2012.<sup>97</sup>

It was later revealed that WFA's recall ads were part of a coordinated \$20 million effort spearheaded by Walker and Johnson.<sup>98</sup> Johnson's unprecedented coordination of independent expenditures on behalf of half a dozen groups became the focus of a bipartisan, five county criminal investigation called the "John Doe" investigation. WFA was one of many groups subpoenaed before the Wisconsin Supreme Court, in a historic first-in-the-nation decision, shut down the investigation and legalized campaign coordination with dark money issue ad groups. The decision was written by Justice Gableman, despite demands that he recuse himself.<sup>99</sup>

In the 2011 judicial elections, Wisconsin Right to Life spent an estimated \$2.7 million on issue ads to defend Justice David Prosser from a challenge by Appeals Court Judge Joanne Kloppenburg.<sup>100</sup> Prosser narrowly held on to his seat after a recount.<sup>101</sup>

## Conclusion

While the religious right has not been able to replicate its rout of the Iowa Supreme Court in the past three election cycles, the threat to our rights and the rule of law posed by attacks on judicial independence remains high. Groups like Focus on the Family, the Family Policy Alliance, and their local partners continue to team up with corporate and partisan players to spend millions each year to politicize state courts and swing judicial elections. They may have come up short in Kansas in 2016, but they are in it for the long game.

As Grover Norquist—a Republican strategist who has made conservative Christian groups a key part of his grand alliance—once put it, “There isn’t anything you can do about next week, but there’s no limit to what you can do to affect the world 25 years from now. The lever that allows you to move the world is time.”<sup>102</sup>

In the view of the Christian right, judges should be accountable to “values” voters combined with, by extension, powerful dark money groups—just like other elected officials. Notions like an independent judiciary and separation

of church and state hold little sway with their constituency. Groups like the Alaska Family Council argue that, “The ‘separation of church and state’ is an ambiguous phrase that serves only one purpose: to keep those charged with stewarding righteous authority away from the seat of power.”<sup>103</sup>

For legal strategists like Bopp, getting “Christ-centered” judges on the bench takes winning a series of smaller battles, aimed at breaking down the walls that insulate the courts from political spending and popular opinion. That has meant relentless attacks on merit selection, campaign finance laws, and judicial codes of conduct that prevent judges from announcing their views on issues—and big spending on elections. “[M]ilitary strategy and litigation and politics” all require “the same turn of mind,” says Bopp.<sup>104</sup>

For those who seek to protect the constitutional and civil rights of all Americans regardless of their religious views, defending an independent judiciary will require an equally long commitment.

## Appendix A

### FAMILY POLICY ALLIANCE FUNDING FOR STATE PARTNERS (2011-2015)

State Affiliate	CitizenLink 2011	CitizenLink 2012	CitizenLink 2013	CitizenLink 2014	Family Policy Alliance 2015
California Family Alliance	\$0	\$0	\$0	\$0	\$19,200
California Family Council	\$7,610	\$0	\$0	\$0	\$0
Center for Arizona Policy	\$7,610	\$0	\$0	\$9,000	\$9,000
Christian Civic League of Maine	\$0	\$0	\$0	\$10,000	\$0
Citizens for Community Values	\$301,267	\$397,575	\$0	\$0	\$0
Colorado Family Action	\$59,729	\$107,104	\$197,875	\$11,651	\$0
Cornerstone Action PAC	\$0	\$92,475	\$0	\$0	\$0
Family Action Council of Tennessee	\$7,610	\$0	\$0	\$9,600	\$9,600
Family Council Action Committee (AR)	\$0	\$0	\$151,121	\$109,736	\$12,000
Family Foundation Action (VA)	\$236,673	\$183,781	\$0	\$0	\$0
Family Foundation of Virginia	\$50,794	\$0	\$0	\$0	\$0
Family Leader	\$99,456	\$150,275	\$113,919	\$70,833	\$37,200
Family Policy Action (WA)	\$0	\$50,200	\$0	\$0	\$0
Family Policy Council of West Virginia	\$0	\$0	\$43,440	\$10,284	\$0
Family Policy Institute of Washington	\$0	\$0	\$0	\$10,000	\$0
Florida Family Action	\$522,862	\$936,399	\$220,994	\$129,535	\$281,717
Florida Family Policy Council	\$7,610	\$0	\$0	\$9,000	\$0

<b>State Affiliate</b>	<b>CitizenLink 2011</b>	<b>CitizenLink 2012</b>	<b>CitizenLink 2013</b>	<b>CitizenLink 2014</b>	<b>Family Policy Alliance 2015</b>
Indiana Family Action	\$156,987	\$78,401	\$0	\$15,000	\$0
Indiana Family Institute	\$0	\$0	\$0	\$0	\$0
Louisiana Family Forum Action	\$0	\$0	\$134,754	\$40,686	\$7,000
Maryland Marriage Alliance	\$0	\$32,000	\$0	\$0	\$0
Massachusetts Family Institute	\$7,610	\$0	\$0	\$10,000	\$0
Michigan Family Institute	\$7,610	\$0	\$0	\$0	\$0
Minnesota Family Council	\$32,702	\$97,157	\$0	\$9,600	\$9,600
Montana Family Foundation	\$107,208	\$52,986	\$0	\$74,500	\$14,000
NC Values Coalition	\$15,700	\$39,069	\$0	\$0	\$0
ND Family Alliance-Action	\$72,772	\$15,198	\$0	\$0	\$0
Nebraska Family PAC	\$0	\$9,500	\$0	\$0	\$0
New Jersey Family First	\$0	\$90,600	\$0	\$0	\$0
New Jersey Family Policy Council	\$7,610	\$0	\$0	\$0	\$7,000
Nonpartisan Family Coalition	\$13,457	\$23,045	\$0	\$0	\$0
North Carolina Family Policy Council Action	\$58,543	\$0	\$168,429	\$111,766	\$42,000
Pennsylvania Family Institute	\$7,610	\$0	\$0	\$9,000	\$9,000
Texas Values Action	\$0	\$0	\$0	\$0	\$10,000
Traditional Values Action (NM)	\$53,957	\$66,220	\$0	\$0	\$0
Wisconsin Family Action	\$190,907	\$120,000	\$0	\$9,600	\$9,600
Wisconsin Family Council	\$7,610	\$0	\$0	\$0	\$0
<b>Total</b>	<b>\$2,062,769</b>	<b>\$2,706,645</b>	<b>\$1,030,532</b>	<b>\$659,791</b>	<b>\$476,917</b>



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