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STATE OF WISCONSIN
SUPREME COURT

WISCONSIN PROSPERITY NETWORK, INC., THE MACIVER INSTITUTE FOR PUBLIC POLICY, INC., AMERICANS FOR PROSPERITY, REVEREND DAVID KING, CONCERNED CITIZENS OF IOWA COUNTY, INC., DANIEL O. CURRAN, ORIANNAH PAUL, THE SHEBOYGAN LIBERTY COALITION, KIMBERLY J. SIMAC, and NORTHWOODS PATRIOT GROUP, INC.,

Petitioners

v.

GORDON MYSE, Chair of the Wisconsin Government Accountability Board; THOMAS BARLAND, its Vice Chair; each of its other members, MICHAEL BRENNAN, THOMAS CANE, GERALD C. NICHOL, and DAVID G. DEININGER; and KEVIN KENNEDY, its Director and General Counsel; each only in his official capacity,

Respondents

Case No.:
2010AP1937-OA

BRIEF OF PETITIONERS

Dated: January 11, 2011

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REQUEST FOR ORAL ARGUMENT

This is a matter of significant public importance as it concerns basic constitutionally guaranteed rights. The Court will benefit from an opportunity to pose questions to the parties given the unique and developing areas of the law involved in this matter. Petitioners respectfully request that oral argument be allowed.

STATEMENT OF THE CASE

The background of GAB 1.28, which is now before the Court, is, to say the least, contentious, convoluted, and complicated—particularly for an administrative rule that will have been on the books for less than eight months when this Court considers the case at oral argument. While this action does not have a significant factual background, it is helpful for the Court to understand the series of events that have led to this Original Action.

A. GAB 1.28, as Originally Conceived by the Government Accountability Board

1. The Language of GAB 1.28

On July 31, 2010, the Government Accountability Board published a sweeping change to the rules that affect Wisconsin elections. The citizens of this State have conducted effective elections for decades without these new rules which, as described throughout this brief, present a host of problems for individuals and small groups who want to do nothing more than exercise their basic right to speak freely in the context of political campaigns.

As published on July 31, 2010, GAB 1.28 reads:[1]

SECTION 1. GAB 1.28 is amended to read:

GAB 1.28 Scope of regulated activity; election of candidates.

(1) Definitions. As used in this rule:

(a) "Political committee" means every committee which is formed primarily to influence elections or which is under the control of a candidate.

(b) "Communication" means any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose.

(c) "Contributions for political purposes" means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for ~~the purpose of expressly advocating the election or defeat of an identified candidate~~ political purposes.

(2) Individuals other than candidates and ~~committees~~ persons other than political committees are subject to the applicable ~~disclosure-related and recordkeeping-related~~ requirements of ch. 11, Stats., ~~only~~ when they:

(a) Make contributions or disbursements for political purposes, or

(b) Make contributions to any person at the request or with the authorization of a candidate or political committee, or

(c) Make a communication ~~containing~~ for a political purpose.

(3) A communication is for a "political purpose" if either of the following applies:

(a) The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate ~~that expressly advocates the election or defeat of that candidate~~ and ~~that~~ unambiguously relates to the campaign of that candidate:

[1] Petitioners have included the published rules edits, to provide the Court with the specific changes that were made to previous § GAB 1.28. § GAB 1.28 may be referred to herein as "GAB 1.28," "Rule 1.28," or simply the "Rule."

1. “Vote for;”
2. “Elect;”
3. “Support;”
4. “Cast your ballot for;”
5. “Smith for Assembly;”
6. “Vote against;”
7. “Defeat;” or
8. “Reject.”

(b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:

1. Refers to the personal qualities, character, or fitness of that candidate;
2. Supports or condemns that candidate’s position or stance on issues; or
3. Supports or condemns that candidate’s public record.

~~(3)~~(4) Consistent with s. 11.05 (2), Stats., nothing in sub. (1) ~~or ,~~ (2), or (3) should be construed as requiring registration and reporting, under ss. 11.05 and 11.06, Stats., of an individual whose only activity is the making of contributions.

SECTION 2. EFFECTIVE DATE.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.(22)(intro), Stats.

In short, the new rule extended regulation to virtually any form of communication and removed a longstanding (and constitutionally required) limitation of regulation to only those communications that expressly advocate the election or defeat of a candidate. With respect to the latter concept, the Rule included a set of conclusive presumptions that would

have treated a significant swath of issue advocacy as express advocacy. For the first time in Wisconsin elections, any pre-election reference to a candidate's qualifications or any support or criticism of his or her positions or record would bring the speaker within the State's regulatory web.

2. The Litigation Surrounding GAB 1.28

From the moment it was enacted, GAB 1.28 has been surrounded by controversy and litigation. Shortly after its publication, cases were brought in both of Wisconsin's federal district courts.[2] Petitioners brought this Original Action on August 9, 2010, filing a Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief.

On August 13, 2010, this Court ordered, among other things, injunctive relief to prevent GAB 1.28, as originally conceived, from going into effect. After extensive briefing by both sides, as well as briefing by numerous amici, this Court issued an Order on November 30, 2010,

[2] The U.S. District Court for the Western District of Wisconsin has stayed its pending case until this Court's decision. *Wisconsin Club for Growth v. Myse*, No. 10-CV-427 (W.D. Wis. Oct. 13, 2010) (Order staying all proceedings). The U.S. District Court for the Eastern District of Wisconsin has also stayed its pending case until this Court's decision. *Wisconsin Right to Life Committee, Inc. v. Myse*, No. 10-CV-669 (E.D. Wis. Sept. 17, 2010) (Order staying all proceedings).

granting Petitioners leave to file this Original Action. During the pendency of this briefing, the State has continued to take actions related to GAB 1.28.

On December 22, 2010, the Government Accountability Board ("GAB") held an emergency meeting to consider an emergency revision to GAB 1.28. GAB Meeting Information, http://gab.wi.gov/node/1500. At that emergency meeting the Government Accountability Board adopted a motion approving further changes to GAB 1.28. The adopted motion amended only GAB 1.28(3)(b), and, as amended, the administrative rule now states:

> SECTION 1. GAB 1.28(3)(b) is amended to read:
>
> (b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. ~~A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:~~
>
> ~~1. Refers to the personal qualities, character, or fitness of that candidate;~~
> ~~2. Supports or condemns that candidate's position or stance on issues; or~~
> ~~3. Supports or condemns that candidate's public record.~~
>
> This rule shall take effect upon its publication in the official state newspaper, the Wisconsin State Journal, pursuant to s. 227.24, Stats.

GAB Proposed EmR Order 1.28, available at http://gab.wi.gov/sites/default/files/event/74/proposed_emr_order_1_28_pdf_12258.pdf (last accessed December 27, 2010).

While the new emergency rule removed the set of presumptions converting much traditional issue advocacy into express electoral advocacy,[3] it left in place the remaining dramatic expansion of GAB's regulation of political speech. Various officials made clear that retaining the expansive scope of the July 31 amendments to GAB 1.28 was precisely what the Board intended. At the December 22, 2010, meeting, Kevin Kennedy, the Director and General Counsel of the GAB, stated that "[t]he Board agreed to drop the irrebuttable presumption but maintained a certain characteristic that is set out in the rule that would provide for regulation of campaign speech that had no other purpose but as a political purpose." Audio/Video recording: Government Accountability Board Meeting (Dec. 22, 2010) (available at http://wiseyebeta.yaharasoftware.com/Programming/VideoArchive/SegmentDetail.aspx? segid=4357). At the same meeting, Shane Falk, Staff Counsel for the GAB, stated that this

[3] In doing so, the State appears to have realized, in part, that the presumption aspect of GAB 1.28 as originally conceived was unconstitutional (*see*, *e.g.*, Petitioners' Memorandum in Support of Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief, pp. 15-18 (describing the unconstitutionality of the presumption aspect of GAB 1.28)).

language "expand[s] the definition of political purpose found in Wisconsin statutes to cover more than simple express advocacy." *Id*. In describing the same change in earlier public statements, Mr. Kennedy made equally clear that, while presumptions may be removed, the breadth of regulation is not reduced by the change. *See Wisconsin Club for Growth v. Myse*, No. 10-CV-427 (W.D. Wis. Aug. 11, 2010) (Telephone Status Conference) (available at http://www.wispolitics.com/1006/l00811Kennedy.mp3) (last accessed Aug. 23, 2010).

3. The Interplay of Chapter 11 and GAB 1.28

The new Rule potentially draws within the reach of Wisconsin regulators all of the prescriptions and proscriptions of Chapter 11 of the Wisconsin Statutes. Even a cursory review of its impact reveals that now virtually any person – whether or not associated with or even advocating the election of a particular candidate – who participates in what was previously believed to be issue-oriented, educational, and policy-based speech will be subject to sweeping regulation placing substantial burdens on that participation.

For example, all such organizations and persons now must:

- Create a separate depository account for all expenditures related to the communications and transfer funds from what were general treasuries into the specially designated account. Wis. Admin. Code § GAB 1.91(3), available online at https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=8203. (An official press release concerning Wis. Admin. Code § GAB 1.91(3) is also available at http://gab.wi.gov/sites/default/files/news/nr_gab_emergency_rule_05_20_10_pdf_34804.pdf.);

- Pay a $100 filing fee to the Government Accountability Board. Wis. Admin. Code § GAB 1.91(5);

- Prepare and file periodic reports on expenditures, including even 24-hour reports during the 15 days before a primary or general election. Wis. Stat. §§ 11.12(5) and 11.20;

- Register with the Government Accountability Board and file an oath for "independent disbursements" *prior to* any

communication subject to GAB 1.28. Wis. Stat. §§ 11.05 and 11.06(7); and

- Prepare and communicate or publish simultaneously with every regulated communications a disclaimer identifying the sponsor and demonstrating the independent nature of and the lack of coordination with all candidates. Wis. Stat. § 11.30.

While we could go on, there is no dispute that these new regulatory requirements are substantial in their cost, both monetary and otherwise, and, particularly for smaller speakers, compliance will be complex, difficult and costly. Even the State concedes these regulatory requirements are not *de minimis*. Answer, ¶ 65. More than that, failure to comply with any of them may result in criminal—possibly felony—prosecution. *See* Wis. Stat. § 11.61.

B. The Impact of GAB 1.28 on these Petitioners as Generally Applicable Examples

While a virtually limitless number of individuals and organizations will be affected by this new regulation, the Petitioners now before the Court provide a representative example of those who will suffer the immediate and irreparable impact of GAB 1.28.

1. Wisconsin Prosperity Network, Inc. and the John K. MacIver Institute for Public Policy

Both the Wisconsin Prosperity Network, Inc. (WPN) and The John K. MacIver Institute for Public Policy are Wisconsin non-profit entities, qualified as tax exempt under § 501(c)(3) of the Internal Revenue Service Code. WPN acts, in part, to coordinate the efforts of similarly qualified 501(c)(3)s, including the MacIver Institute, Wisconsin Americans for Prosperity, and First Freedoms Foundation, Inc. WPN is dedicated to limited government and other principals, and the MacIver Institute works on a broad array of public policy issues, providing analysis and studies that often criticize and support with data and information public policy in Wisconsin. Each of these groups, like other state-based educational organizations and think-tanks, also may represent a broad spectrum of interests, and play an important role in overseeing actions by State and local government officials by publishing those results and commentary on their websites, in publications, through the broadcast media and in news releases. *See, e.g.* James Widgerson, *Bauman's Winey Strategy Memo Not Funny, But Revealing*, MacIver Institute, http://maciverinstitute.com/2010/07/baumans-whiney-strategy-memo-not-funny-but-revealing, July 26, 2010 (discussing strategy memorandum drafted by Milwaukee Alderman).

Like all such organizations, the MacIver Institute must certify compliance with IRS regulations, including a certification that it has not engaged in political activities. If it fails to comply, it can lose its tax-exempt status.

Recent website publications include numerous examples of what have now become communications for a political purpose, and are subject to regulation under the new GAB 1.28. For example, a recent analysis of activities of J.B. Van Hollen lauded his work in preventing election-day fraud. *Van Hollen Forms Elections Integrity Task Force Boosts Efforts to Fight Voter Fraud Across Wisconsin*, MacIver Institute, http://maciverinstitute.com/2010/07/ van-hollen-forms-elections-integrity-task-force-boost-efforts-to-fight-voter-fraud-across-wisconsin, July 29, 2010. Mr. Van Hollen was a candidate for office at the time of that publication.

2. Reverend David King

Rev. King is a well-known personality in the State who, personally and through his Milwaukee Ministry (the Milwaukee God Squad, Inc., a non-stock, not-for-profit Wisconsin corporation), regularly addresses concerns in Milwaukee's African American community. Rev. King's comments are covered by the press and include comments on public office

holders and the issues faced by the poor and minorities. *See, e.g.*, Kyle Maichle, *Rev. David King Speaks on the Importance of Holding Elected Officials Accountable, North Shore Exponent*, http://northshoreexponent.wordpress.com /2009/03/07/rev-david-king-speaks-on-the-importance-of-holding-elected-officials-accountable, March 7, 2009; David King, http://www.youtube.com/ watch?v=aEWuh25ck90 (video of Rev. King speaking at Wausau Tea Party). Like others, Rev. King spends money, both his and that of his ministry, speaking out on the internet and at rallies. Like all the other Petitioners, none of those activities are coordinated with any candidate's campaign. Given his limited resources, with help for his efforts often received from volunteers and financial contributions from inside and outside the Milwaukee area, a requirement that he register, pay a fee, continually report and have attorneys or others review all of his statements in advance would have barred him from speaking.

3. Concerned Citizens of Iowa County, Inc., Northwoods Patriot Group, Inc., and Americans for Prosperity

Concerned Citizens of Iowa County, Inc. ("CCIC") and Northwoods Patriot Group, Inc. are each Wisconsin non-profit corporations qualified by Internal Revenue Service §501(c)(4) as tax exempt. Americans for

Prosperity is a national non-profit organization also qualified under § 501(c)(4) of the Internal Revenue Code. Like the MacIver Institute, the CCIC is required to comply with regulations that limit its participation in political campaigns. (Albeit, for a (c)(4) organization, the limitations are somewhat different and allow issue advocacy.) While CCIC is focused on rural Wisconsin issues, limited government, transparency in government and fiscal responsibility, and grew out of the efforts of Daniel O. Curran, The Northwoods Patriot Groups, Inc. grew out of the efforts of Kimberly J. Simac in Vilas County and reflects a powerful belief in the need to support our military, support traditional Christian and Judeo-Christian values, and to reform educational and other institutions to allow those values to flourish. Both CCIC and the Northwoods Patriot Groups, Inc. are a part of what has been dubbed the Tea Party Movement and they actively promote their beliefs on the internet, in pamphlets and through a host of both traditional and non-traditional methods of communication.

4. Daniel O. Curran, Oriannah Paul and Kimberly J. Simac

Mr. Curran, Mrs. Paul and Mrs. Simac have all only recently taken up the mantel of policy leaders in their communities, energized by powerful beliefs about the inappropriate path being taken by government today.

Each in his or her own way has undertaken to lead with all manner of communication in the ongoing public debate, they have and will participate in the public debate of issues and candidates in the most traditional and most honored form of free speech.

5. The Sheboygan Liberty Coalition

The Sheboygan Liberty Coalition is typical of the vast array of community-based organizations premised on an idea: concern about the crushing debt and taxes imposed in recent years at the State and Federal level. It is not incorporated and it exists only by the voluntary association of Sheboygan area citizens concerned about their future. They want to speak out on the issues and they want to openly express their policy concerns. They have no financial resources, and they have no understanding or ability to wend their way through a maze of campaign organizations. They do not coordinate with any candidate their message or their beliefs. While they are now dubbed, at times pejoratively, a part of the "Tea Parties," they are no different than the thousands of similar associations of individuals who have come before them to try to affect change. Yet, under amended GAB 1.28, they would have been required to disband or be subject to prosecution for they would have certainly spoken

out in matters related to campaigns and candidates, and they would have spent their own money to do so about issues and candidates for office.

ARGUMENT

I. Standard of Review

This Court entertains Original Actions pursuant to Article VII, Section 3(2) of the Wisconsin Constitution, which states, "[t]he supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings." The different challenges to GAB 1.28 present different issues and standards for the Court.

When, as here, the Court examines administrative rules, "[a] court may declare an administrative rule invalid '*if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency* or was promulgated without compliance with statutory rule-making procedures.'" *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dept. of Natural Resources*, 2004 WI 40, ¶ 5, 270 Wis.2d 318, 328, 677 N.W.2d 612, 617 (quoting Wis. Stat. § 227.40(4)(a)) (emphasis added).

When the First Amendment is implicated, any law must err on the side of protecting speech:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.

Federal Elections Commission v. Wisconsin Right to Life ("*WRTL II*"), 551 U.S. 449, 474 (2007) (quotations and citations omitted).

Regulations that burden political speech are subject to strict scrutiny, which "requires the government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Federal Elections Commission*, ___ U.S. ___, 130 S. Ct. 876, 898 (2010); (quoting *WRTL II*, 551 U.S. at 464).

When challenging constitutionality under the Wisconsin Constitution, a statute is presumed constitutional. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 46, 205 N.W.2d 784, 792 (1973); *see also Wisconsin Professional Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, 243 Wis.2d 512, 627 N.W.2d 807.[4]

[4] These standards apply even though Petitioners are challenging an administrative rule, rather than a statute. "Administrative rules are accorded the same presumption of constitutionality as are statutes enacted by the legislature." *Richards v. Cullen*, 150 Wis.2d 935, 938, 442 N.W.2d 574, 575 (1989).

II. The GAB Lacked the Authority to Issue GAB 1.28

While the constitutional issues are compelling (*see* §§ III and IV, below), an analysis of a regulation must necessarily begin with an analysis of the statutory predicate on which the administrative rule relies.

A. The Standard for Rule-Making Requires Explicit Authority

It is axiomatic that an agency possesses no power to legislate. *See, e.g., Martinez v. Dept. of Industry, Labor, and Human Relations*, 165 Wis.2d 687, 699, 478 N.W.2d 582 (1992) ("It is understood that an administrative rule is not legislation as such . . . ."). An agency's powers, to the extent they exist at all for promulgation of rules, are limited to those that are "expressly conferred or [that] can be fairly implied from the statutes under which it operates." *Oneida County v. Converse*, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). The corollary that "Any reasonable doubt as to the existence of an implied power in an agency should be resolved against it" simply follows from the essential principles that leave to the legislature the act of legislating. *Madison Metropolitan School Dist. v. Dep't of Public Instruction*, 199 Wis. 2d 1, 13, 543 N.W. 2d 843 (Ct. App. 1995)

The GAB's authority for rulemaking derives from its "responsibility for the administration of chs. 5 to 12 and other laws relating to elections and election campaigns…." Wis. Stat. §5.05(1). The GAB may "[p]romulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration." Wis. Stat. § 5.05(1)(f). A corollary to this grant of authority, is a strict understanding of its limits, and those limits are explicit, "[n]o agency may promulgate a rule which conflicts with state law." Wis. Stat. § 227.10(2). *See, Seider v. O'Connell,* 2000 WI 76, ¶¶ 6, 70, 73, 236 Wis. 2d 211, 612 N.W. 2d 659 (rule contradicting statute held invalid); *Oneida County*, 180 Wis. 2d at 127 (DNR rule invalid as it exceeded legislative authority).

B. The GAB Has Reinterpreted its Statutory Grant to Accommodate Newly-Minted Objectives Repeatedly Rejected by the Legislature

Wis. Stat. § 11.01 (16) provides the framework for the rulemaking that lead to GAB 1.28. (Memorandum from Kevin Kennedy to the Members of the Wisconsin Government Accountability Board at 36 (March 23-24, 2010) (available at http://gab.wi.gov/sites/default/files/news/rule_gab_1_28_memo_to_board_march_2010_pdf_91828.pdf)). That

statute has been consistently understood to limit the speech subject to regulation as speech for "political purposes" to express advocacy. *See, e.g., Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 669-70, 597 N.W. 2d 721 (1999). Indeed, Wis. Stat. §11.01(16) explicitly provides that a definition of "political purpose" includes "[t]he making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate . . . ." Wis. Stat. § 11.01(16)(a)(1). It is quite clear that, prior to the recent amendments to GAB 1.28, both the statute and the rule were understood to limit regulation to such express advocacy.

In *Wisconsin Manufacturers & Commerce*, this Court explained that any attempt by the administrative agency even to apply a context-based standard for express advocacy was, in effect, retroactive rule-making that could not be allowed without an explicit grant by the legislature, followed by properly enacted rules. 227 Wis.2d at 678 ("By creating and attempting to apply its new, context-oriented interpretation of the statutory term express advocacy, the Board has, in effect, engaged in retroactive rule-making."). A statute cannot be re-interpreted, based on subsequent events, to include within its language broader authority than existed at the time of

its legislative passage; yet, that is what the GAB has done in fundamentally changing the definitions of "political purpose" in GAB 1.28.

Amended GAB 1.28 does not simply adopt a "*context based*" definition of express advocacy considered in the WMC decision, it extends Chapter 11 to communications that are not express advocacy at all. In so doing, the State contends that its authority to expand the reach of Chapter 11 is rooted in the statutory catch-all language "include but are not limited to," but that suggestion fails to account for numerous problems.

The issue in *Wisconsin Manufacturers & Commerce* was not the abandonment, as here, of the idea that Chapter 11's definition of "political purpose" is limited to express advocacy. Instead, the Court was focused on whether communications that do not use express words of advocacy may nevertheless be considered express advocacy. Nothing in that case – or the statute itself – hints that Chapter 11 may be applicable to issue advocacy or may be premised on redefining the reach of what the State may term "express advocacy." It is that lodestar – express advocacy only – that has been abandoned by the new GAB 1.28.

This is further supported by treatment of the statute and the rule in the eleven years since *Wisconsin Manufacturers & Commerce*. The rule has

remained as it existed essentially in its pre-July 31, 1999 form for that entire period,[5] and was, as *Wisconsin Manufacturers & Commerce* recognized, then thought to be limited to explicit express advocacy. In 2007, as part of a general reorganization, the GAB was tasked with reviewing all of the Rules of its predecessor entities (2007 Wisconsin Act 1 §§ 209(2)(e) and (3)(e)), and as part of that process it reaffirmed GAB 1.28's prior form that explicitly limited its reach to express advocacy. Wisconsin Government Accountability Board, Open Meeting Minutes, Aug. 27 and 28, 2008 (available at http://gab.wi.gov/sites/default/files/event/08_27_28_08_ openmeetingminutes_pdf_20925.pdf).

Not everyone was happy with this. Over the period preceding and following GAB's 2007 refusal to expand the reach of Chapter 11, the

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[5] The only change that had occurred to GAB 1.28 during this period was with regard to GAB 1.28(2)(c), which, in 2001, was amended as follows:

> (c) Make ~~expenditures for the purpose~~ a communication containing terms such as the following or their functional equivalents with reference to a clearly identified candidate that expressly ~~advocating~~ advocates the election or defeat of ~~an identified~~ that candidate and that unambiguously relates to the campaign of that candidate :
>
> 1. "Vote for;"
> 2. "Elect;"
> 3. "Support;"
> 4. "Cast your ballot for;"
> 5. "Smith for Assembly;"
> 6. "Vote against;"
> 7. "Defeat;"
> 8. "Reject."

legislature was asked no fewer than *29 times* to amend Chapter 11 so that communications made for a "political purpose" would include non-express advocacy. *See, e.g.*, 1999 Senate Bill 113; Senate Substitute Amendment 1 to 1999 Senate Bill 190; 1999 Assembly Bill 167; 1999 Senate Bill 93; 2001 Assembly Bill 18; 2001 Assembly Bill 155; 2001 Assembly Bill 801; 2001 Senate Bill 2; 2001 Senate Bill 62; 2001 Senate Bill 104; Assembly Substitute Amendment 1 to 2001 Assembly Bill 184; Assembly Substitute Amendment 1 to 2001 Assembly Bill 843; Assembly Amendment 3 to 2005 Assembly Bill 1187; 2005 Assembly Bill 392; 2005 Senate Bill 538; Senate Amendments 1 and 4 to 2005 Senate Bill 46; 2007 Senate Bill 1; 2007 Senate Bill 77; 2007 Assembly Bill 272; 2007 Assembly Bill 355; 2007 Assembly Bill 704; 2007 Senate Bill 12; 2007 Senate Bill 182; 2007 Senate Bill 463; Senate Amendment 6 to 2009 Senate Bill 40; 2009 Senate Bill 221; 2009 Assembly Bill 388; 2009 Assembly Bill 812. Each time – every one – the legislature refused. Traditional principles of statutory interpretation suggest that, even without the constitutional difficulties outlined below, both the legislature and (until now) the regulators have understood Chapter 11 to be limited to express advocacy.

This Court's decision in *Wisconsin Manufacturers & Commerce* alerted both the legislature and regulators that it regarded Chapter 11 and its implementing rules to be limited to express advocacy. It is a well-accepted principle of statutory construction that legislative inaction following judicial construction of a statute, while not conclusive, evinces legislative approval of the interpretation. *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 52, 281 Wis.2d 300, 330, 697 N.W.2d 417. Going further, where we have (as here), repeated legislative *rejection* of the expansion of the definition of "political purpose" it is reasonable to conclude that the legislature does not recognize the existence of such an expansive definition in existing law or desire judicial or administrative expansion.[6]

[6] While the GAB has now adopted – after it earlier refused to adopt – a more expansive construction, it is entitled to no deference here. A reviewing court "accords an agency's statutory interpretation no deference when the issue is one of first impression, when the agency has no experience or expertise in deciding the legal issue presented, or when the agency's position on the issue has been so inconsistent as to provide no real guidance." *MercyCare Ins. Co. v. Wisconsin Commissioner of Insurance*, 2010 WI 87, ¶ 29, 328 Wis.2d 110, 786 N.W.2d 785. Here the GAB promulgated a rule moving in a completely different direction, almost immediately announced (in response to a "flash mob" of litigation) that it would not – that it constitutionally could not – enforce all of what it had just adopted and then amended the rule again less than three months after the first set of amendments – all the while claiming that it had been consistent throughout its byzantine retreat from the July 31 version of GAB 1.28.

The GAB exceeded its authority in amending GAB 1.28, and the Rule, accordingly, cannot be valid.

III. GAB 1.28 Violates the First Amendment

The constitutional problems with amended GAB 1.28 are legion. First, it clearly expands the state's reach to mere issue advocacy, *i.e.*, to communications that can be reasonably interpreted as something other than as an appeal to vote for or against a specific candidate. In this, it is constitutionally over broad. Second, even if the new rule was susceptible of an interpretation that might not make it applicable to issue advocacy, that interpretation is neither clear nor apparent. Thus it remains unconstitutionally ambiguous. Third, even as to express electoral advocacy, it extends burdensome regulation to grass roots advocacy that has never been subject to regulation and whose restriction cannot be justified by the state's interest in preventing actual or apparent corruption – the only justification recognized by the United States Supreme Court for the regulation of political speech. Fourth, it unconstitutionally favors media corporations and members of the "institutional press." Finally, its application, even as to express electoral advocacy, is barred by the Court's

recent decision in *Citizens United* and by application of the more robust protection for speech provided by the Wisconsin Constitution.

A. The Federal Constitutional Guideposts

Although the United States Supreme Court's constitutional jurisprudence on campaign finance is complex and often the product of lengthy and sharply divided opinions, there are a few bedrocks that are clearly established and foundational for the issues presented here. First, the old canard that "money is not speech" is simply not good constitutional law. *Citizens United*, 130 S.Ct. at 898 ("Section 441b's prohibition on corporate independent expenditures is . . . a ban on speech."); *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) ("'A restriction on the amount of money a person or group can spend on political communication during a campaign,' necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'"). Restricting the ability of persons to convey a message by limiting their capacity to spend money to craft and disseminate it raises grave constitutional questions and is subject to strict scrutiny. *Citizens United*, 130 S.Ct. at 898 *; WRTL II*, 551 U.S. at 464; *Davis v. Federal Election Commission*, 554 U.S. 724 (2008) *; McConnell v. Federal Election*

Commission, 540 U.S. 93, 205 (2003). This is so, moreover, not only for direct prohibitions or restrictions (*see, e.g.*, *Buckley*, 424 U.S. at 44-45), but also for regulations that indirectly burden speech by making it unnecessarily difficult or less effective. *Citizens United*, 130 S.Ct. at 876; *WRTL II*,551 U.S. at 464-65; *Davis*, 554 U.S. at 739, quoting *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) ("Because § 319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, that provision cannot stand unless it is 'justified by a compelling state interest.'").

The United States Supreme Court has made clear, moreover, that the only justification for such burdening of political speech is the prevention of actual *quid pro quo* corruption or its appearance. *Citizens United*, 130 S. Ct. at 901-902; *Davis*, 554 U.S. at 741; *Buckley*, 424 U.S. at 25-27. The state, for example, has no interest in "leveling the playing field." *Citizens United*, 130 S.Ct. at 904; *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."); *Davis*, 554 U.S. at 742 ("Leveling electoral opportunities

means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives (Art. I, § 2), and it is a dangerous business for Congress to use the election laws to influence the voters' choices.") Nor does the state have an interest in acting as the arbiter of what should and should not be said or in determining what advantages a candidate or political movement should and should not have. *Davis*, 554 U.S. at 742-43.

Recognition of the limited nature of the state's interest has resulted in two long standing distinctions. The first – and perhaps most robust – is that between independent expenditures, on the one hand, and contributions or expenditures coordinated with a campaign on the other. The former have consistently been held to be unlikely to raise a threat of *quid pro quo* corruption or its appearance. *Buckley*, 424 U.S. at 45 ("[T]he governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures."); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid*

pro quo; dollars for political favors."); *Citizens United*, 130 S.Ct. at 909 ("When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *WRTL II*, 551 U.S. at 486*; Davis*, 554 U.S. at 754.

The Court has also distinguished between express electoral advocacy, *i.e.*, speech which expressly calls for the election or the defeat of a candidate, and genuine issue advocacy. Again, the latter does not present the same risk of *quid pro quo* corruption as the former. Significantly, it is black letter constitutional law that the fact issue advocacy may influence – in fact may be intentionally used to influence – elections does not render it phony or less deserving of constitutional protection. Of course, it is possible that issue advocacy is intended to and does affect elections. The Court has always recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42; *WRTL II*, 551 U.S. at 474.

But this is not a constitutional loophole. It is constitutionally designed. As the Supreme Court has explained, "[d]iscussion of issues

cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 551 U.S. at 474. As noted above, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id*. Thus, the Court has made clear that a communication is issue advocacy (and free from regulation) and not express electoral advocacy unless it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. *Id.* at 469-70.[7]

B. GAB 1.28 Expands GAB Regulation to Non-Express Advocacy

Overbreadth and ambiguity are two well-established parts of First Amendment doctrine. In *City of Chicago v. Morales*, , the Court explained:

> [I]mprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

527 U.S. 41, 52, 119 S.Ct. 1849 U.S. (1999)

[7] This does not mean that express electoral advocacy is freely subject to regulation. *See*, § III.D, *infra*.

GAB 1.28 is both unconstitutionally overbroad and impermissibly vague. It is overbroad because its impermissible applications are not only substantial in relation to its potentially permissible scope, but because the former overwhelms the latter. The GAB has dramatically expanded the scope of its regulatory authority by redefining political purpose to include non-express advocacy. It has done so by inverting the United States Supreme Court's decision in *WRTL II*. That decision does not simply say, as the GAB argues, that a communication *may* be regulated if it is susceptible of "no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[8] To the contrary, it *may only* be regulated if it can be interpreted in this way. In other words, *WRTL II* defines an exclusive basis for regulation, not just one permissible basis. *It is express advocacy only*.

But the Rule is no longer limited to express advocacy. While GAB 1.28(3)(b) incorporated the *WRTL II* standard, it is only one way for a communication to fall with its scope. GAB 1.28(3)(a) offers an alternative basis unsanctioned by and inconsistent with *WRTL II*. It purports to apply the rule to any communication that mentions a candidate and contains

[8] "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-70.

certain words or their "functional equivalent." While some of these words may be more likely to indicate express advocacy, others (such as "support" or "reject") are not and nothing in the rule limits its scope to express advocacy. In fact, the amendments specifically removed language so limiting the rule (Complaint, ¶ 57; *see also* Statement of the Case, § 2, above).

For example, the requirement that a communication have "the purpose of expressly advocating the election or defeat of an identified candidate" was removed from the contribution provision of GAB 1.28(1)(c) and the qualification that it "expressly advocates the election or defeat of that candidate" was removed from the political purposes provision of GAB 1.28(3)(a)). Not only does the Rule no longer contain a bright line requiring certain specified terms that "expressly advocates the election or defeat of that candidate," it does not require that the terms that are specified (or their functional equivalents) be directed toward express advocacy at all. Instead, if any of a group of specified terms are used "with reference to a clearly identified candidate and unambiguously relates to the campaign of that candidate" then it falls within Wisconsin Statutes Chapter 11 regulation. §1.28(3)(a)(1-8). This is inconsistent with *WRTL II* which

makes clear that issue advocacy may not be regulated. This is, as we have noted, a long standing principle of constitutional jurisprudence.

By expanding the regulation to anything that 'relates to the campaign,' the Board has granted to the regulators an unimagined scope of regulation. A discussion, for example, of a sitting mayor's actions on city budget matters would likely use terms such as "support" or "reject," and arguably any such discussion when a campaign is ongoing would 'relate to the campaign.' When coupled with the expansion of "communication" to include all types of internet communications including e-mail (GAB 1.28(1)(b)) and "functional equivalents" of a variety of terms

(GAB 1.28(3)(a)), it is hard to imagine what would arguably not be covered that ever mentions a then candidate for office.[9]

It is certainly likely that future government bureaucrats or organizations bent on disrupting the political process and silencing speech will scour the internet blogs, e-mails, personal communications, public rallies of groups such as the tea party groups of 2010, and will scour every other form of active participation in the process, all in search of potential claims. Here, any word that is merely the "functional equivalent" of "support," "defeat" or "reject" will be enough to silence the speech. And, because the regulation encompasses not only contributions, but also mere "disbursements" (GAB 1.28(2)(a)), the otherwise personal, non-

[9] The State's Answer to the Complaint is instructive in what it carefully avoids. In ¶ 119 of the Answer, the State argues, "[t]he text of GAB 1.28 (3)(a)…still refers to express advocacy because the terms enumerated therein—such as "vote for" and "vote against"—when unambiguously related to the campaign of a candidate themselves constitute express advocacy." (Answer, ¶ 119). First, the terms "support" and "reject" are also part of the Rule and far broader, and they are not mentioned by the State. Second, why, if the State is correct, was "expressly advocates" removed from the Rule in these very same provisions? Did that term(s) have no meaning? Was the Board's amendment superfluous? Of course, the law does not assume word changes are meaningless. *Pittman v. Lieffring*, 59 Wis.2d 52, 64, 207 N.W.2d 610, 615 (1973) ("Generally, the studied omission of a word or words in the re-enactment or revision of a statute indicates an intent to alter its meaning."). The Board members and staff of the GAB explicitly noted that these changes were meant to broaden coverage of what was, in the past, unregulated (*see Wisconsin Club for Growth v. Myse*, No. 10-CV-427 (W.D. Wis. Aug. 11, 2010) (Telephone Status Conference) (available at http://www.wispolitics.com/1006/l00811Kennedy.mp3) (last accessed Aug. 23, 2010)). That the Attorney General and the GAB disagree on the meaning of the Rule is perhaps the most instructive lesson to the Court regarding the overbreadth and ambiguity that doom this amended Rule (*see*, §§ III.B and C, *infra*, discussing ambiguity).

coordinated expression of views will be drawn into the regulatory structure.[10]

Thus, the amendment of GAB 1.28 is fatally overbroad. This cannot be remedied by regulatory restraint or a narrowing construction.

C. Alternatively, GAB 1.28(3)(a) is Fatally Ambiguous

Of course, there is an alternative as well to the overbreadth – perhaps the amended GAB 1.28 is simply ambiguous. Perhaps it can be interpreted in some way – not apparent to us – that limits its application to express advocacy. That makes it no less unconstitutional. A lack of clarity is particularly troublesome during the campaign season because the public is uniquely receptive to political and issue advocacy at that moment in time. It is, for all practical purposes, impossible to obtain an authoritative determination within a campaign period about what forms of speech are "permitted," and so "[t]he censor's determination may in practice be final." *Citizens United*, 130 S. Ct. at 896 (quoting *Freeman v. State of Maryland*, 85 U.S. 734, 738 (1965)).

[10] While not directly on point, a cautionary tale is presented by the recent harassment of a group of volunteers from across the political spectrum who attempted to promote greater interest in the Milwaukee School Board and to encourage talented people of all ideological stripes to run for office. *See* Richard M. Esenberg, "L'Affaire ASA: Not What it Seemed to Be," *Shark and Shepherd*, March 23, 2010 (available on line at http://sharandshepherd.blogspot.com/2010/03/ laffaire-asa-not-what-it-seemed-to-be.html) (last visited on August 8, 2010).

In *Citizens United*, the Court expressed its disapproval of the FEC's response to *WRTL II*, criticizing its verbatim adoption of the "susceptible of no other reasonable interpretation" standard, combined with "a two-part, 11-factor balancing test." 130 S. Ct. at 895-96. The uncertainty those FEC rules created was "precisely what *WRTL II* sought to avoid." *Id.* at 896. The State's position here is eerily similar when they argue that the use of certain terms (or their functional equivalent) restricted to circumstances that "unambiguously relates to the campaign . . ." is enough certainty (Answer, ¶ 119). Indeed, the State's position is even less certain than that faced by the *Citizens United* court, as the GAB is not restricted to the "susceptible of no reasonable interpretation" limitation, but instead has the much broader "unambiguously relates" language as its only limit. GAB 1.28(3)(a).

The addition of terms such as "support" or their equivalent into the equation for determining if speech is "express" enough to be regulated has been rejected as equally ambiguous. Without the prism of "expressly advocates," terms like "support" or their "functional equivalents" in GAB 1.28(3)(a)(3) are vague and overbroad. *WRTL II*, 551 U.S. 449, 492-93 (Scalia, J., concurring in part and concurring in the judgment, calling promote-support-attack-oppose "impermissibly vague.")

The amended rule, if not fatally overbroad, is patently ambiguous, and so cannot pass constitutional muster.

D. Even as to Express Advocacy, There Is No Justification for the Scope of GAB 1.28

Even if these regulations might be permissible for some forms of express advocacy, and speakers engaged in it, GAB 1.28 simply goes too far.

Recall that regulation of speech must be narrowly tailored to achieve a compelling interest. Here, with the breadth of groups covered by the amended GAB 1.28 so clearly expanded, it is essential to determine if such expansion has any of the predicate justification that can meet that strict standard. It would seem apparent that, based on previously accepted justifications, it is both unnecessary and constitutionally impermissible to now move the grass roots into the regulator's sights. In that respect, an examination of recent developments at the federal level is illustrative.

The reporting requirements caused by application of GAB 1.28 are not *de minimis*. Complaint, ¶ 65; Answer, ¶ 65. As noted earlier, the Rule includes obligations to:

a. Create a separate depository account for all expenditures related to the communications and transfer funds from what were general treasuries into the specially designated account (Wis. Admin. Code § GAB 1.91(3));

b. Pay a $100 filing fee to the Government Accountability Board (Wis. Admin. Code § GAB 1.91(5));

c. Prepare and file periodic reports on expenditures, including even 24-hour reports during the 15 days before a primary or general election (Wis. Stat. §§11.12(5), 11.20);

d. Register with the Government Accountability Board and file an oath for "independent disbursements" *prior to* any communication subject to GAB 1.28 (Wis. Stat. §§11.05, 11.06(7)); and

e. Prepare and communicate or publish simultaneously with every regulated communications a disclaimer identifying the sponsor and demonstrating the independent nature of and the lack of coordination with all candidates (Wis. Stat. § 11.30).

These new regulations, at a minimum, now extend to all manner of communications (GAB 1.28(1)(b)) and extend not only to contributions, but extend to disbursements as well (GAB 1.28(2)(a)(7)). They apply without regard to the size of the speaker or the extent of the communication.

Consider, for a moment, the much narrower scope of the regulation struck down in *WRTL II* and *Citizens United*. Those regulations were limited to: substantial expenditures (2 U.S.C. § 434(f)(1) ($10,000)), mass media (2 U.S.C. §434(f)(3)(A)(i) ("broadcast, cable, satellite

communication")); reference to a candidate by name (2 U.S.C. §434(f)(3)(A)(i)(I)), time period limits (2 U.S.C. §434(f)(3)(A)(i)(II)), targeting of the communication to at least 50,000 (2 U.S.C. §434(f)(3)(C)) and a provision for safe harbors (2 U.S.C. §434(f)(3)(B)). Thus, federal campaign cases tend to involve regulation of expensive broadcast, cable and satellite communications run by well financed organizations who have the sophistication and resources to seek the advice of counsel and clarification of the scope of potentially applicable regulations.

In contrast, GAB 1.28 applies – literally – to almost anyone who wants to communicate his or her views during an election – whether about issues or candidates – at least if those persons intend to refer to candidates.

GAB 1.28 may, for example, apply to: 1) Private communications by e-mail discussing public policy issues of candidates and the efforts of citizen bloggers through normal channels fall within the Rule and Statute as cable services cost in excess of $25.00; 2) posters and pamphlets publicizing grass roots rallies and assemblies; 3) books and videos published and distributed during the period immediately preceding an election; 4) newsletters sent by grass roots organizations to persons other than members of the organization; and 5) academic and scholarly work

published or distributed during this period. It is a trap for the unwary and a vehicle for intimidation of the grass roots.

The Petitioners here, for example, are individuals, small groups and issue-oriented organizations. They do not have the resources to fight the unending private complaints (*see, e.g.,* Wis. Admin. Code GAB ch. 20 (setting forth complaint procedure for complaints filed with the GAB)) or actions brought by a GAB bent on "cleaning up" elections. First Amendment jurisprudence recognizes that very practical, and critical, problem, as such requirements "impose administrative costs that many small entities may be unable to bear" and "may create a disincentive for such organizations to engage in political speech." *Mass. Citizens for Life, Inc.* 479 U.S. at 254-55. Such burdens are unconstitutional restrictions on First Amendment rights. *Id.*

As recently as this last year, the United States Supreme Court reiterated the importance of recognizing, and barring, administrative procedures that, as here, burden speech. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill

speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.' *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 3222 (1926)." *Citizens United*, 130 S. Ct. at 889 .

Here, anyone who spends more than $25 on "political communications" is then potentially subject to the admittedly not *di minimis* reporting requirements of Wisconsin Statutes, Chapter 11. This is not narrowly tailored to any legitimate public interest in disclosure.

As noted earlier, the decisions in *Citizens United*, *WRTL II* and *Davis* make clear that the restriction of campaign speech can only be justified by fear of actual or apparent *quid pro quo* corruption. After *Citizens United*, it is unclear that this can ever arise from independent and uncoordinated expenditures – even for expensive broadcast, cable and satellite communications.

But it is even less clear that it can arise from any communication costing more than twenty five dollars. Democratic candidates might appreciate passing a barn on which a farmer has crudely painted a call to "Vote Democratic" or even to vote for a particular Democratic candidate.

Republican candidates might smile at homemade t-shirts handed out at a Tea Party rally calling for voters to "Defeat Obama." But no one can seriously believe that this raises the specter of corruption or its appearance.

Even as to express electoral advocacy, these burdens are unconstitutional. Not only did *Citizens United* confirm, yet again, that regulation of non-express advocacy was strictly prohibited, but it made clear even as to express advocacy, the Government could not take any action that would prevent such independent advocacy for or against a particular candidate. *Id*. at 889. The communication in that case – a film critical of Hillary Clinton and ads promoting it – were susceptible of "no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton." *Id*. at 890. Nevertheless, the Court held that the restriction in question – prohibition of the use of corporate treasury fund to finance broadcast, media, and satellite communications during a period preceding federal elections – could not be applied even to express advocacy. *Id*. at 886.

In addressing these profound restrictions on what the Government could regulate, the Court addressed the issue of the burdensome nature of regulations. After all, a Government bent on restricting activities can do so

in a number of ways short of the obvious "ban" it would prefer to impose, including imposing an onerous regulatory structure. Such gambits are simply impermissible as "onerous restrictions function as the equivalent of prior restraint by the giving the [government] power analogous to licensing laws." *Citizens United,* 130 S.Ct. at 895-96. As the Court noted, "[l]imits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption" and the Court recognized that imposing PAC regulations acted as "burdensome alternatives," "expensive to administer and subject to extensive regulations." *Citizens United*, 130 S.Ct. at 897.

GAB 1.28 regulates more speech, more aggressively than the regulation already struck down in *Citizens United.* Consider the following description provided by that Court:

> PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. . . .
>
> And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur . . . PACs have to comply with these regulations just to speak.

Citizens United, 130 S. Ct. at 897. Here, the similarities to what the Court found onerous in *Citizens United* are striking.

Once Chapter 11 is applied, individuals and groups must file initial organization statements and report changes within 10 days (§§ 11.05(3), (5)), must report contributions and disbursement of over $20 and account for them in detail (§11.06(1)), appoint a treasurer if a committee (§11.11(3)) and retain records for three years (§11.12). Extending these PAC type restrictions to citizen speech, as GAB 1.28 now does, will have precisely the chilling effect the Supreme Court found improper in *Citizens United*.[11]

E. GAB 1.28(1)(b), When Interpreted Consistently with Wis. Stat. § 11.30(4), Creates a Favored Category of Speakers Contrary to the First Amendment

GAB 1.28 (1)(b) creates a broad definition of "Communication" when it provides:

> "Communication" means any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose.

[11] The real and negative impact of such regulations on the willingness of people to speak out is apparent. *See, Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Jeffrey Milyo, Ph.D., October 2007, *available online* at http://www.ij.org/images/pdf_folder/ CampaignFinanceRedTape.pdf.; *Locking Up Political Speech: How Electioneering Communications Laws Stifle Free Speech and Civic Engagement*, Michael C. Munger, Ph.D. June 2009, *available online* at http://www.ij.org/images/pdf_folder/other_pubs/locking_up_ political_speech.pdf.

On first reading this provision appears to carefully limit its coverage of newspapers, television and radio to "advertisement" (Complaint, ¶ 113). As such, this provision creates a favored category of speakers—the old-line media—and such categorizations squarely violate the First Amendment. *See, e.g.*, *Citizens United*, 130 S.Ct. at 906 ("The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted."); *id.*, 130 S.Ct. at 908 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

Interestingly, the State has "Denied" the allegation of Paragraph 113, apparently by reading the ending catch-all, "any other form of communication," to be inclusive of such other media (Answer, ¶ 113). In fact, that denial is meaningless as it fails to account for the impact of Wis. Stat. § 11.30(4), in tandem with GAB 1.28. The statute provides, "This

chapter shall not be construed to restrict…editorial comment or endorsement. Such activities need not be reported as a contribution or disbursement." Wis. Stat. § 11.30(4). So, while virtually every form of communication by ordinary citizens is now covered by the requirements of Chapter 11 through newly minted GAB 1.28(1)(b), the old-line media is exempted. Such blatant favoritism toward certain media, while simultaneously causing other forms of communication to comply with non-*di minimis* regulations cannot be considered either "narrowly tailored" or be considered an advancement of a "compelling government interest." While a blog posting by one of the Petitioners relating to a candidate may "endorse" that candidate after interviews and consideration of public matters, and would then subject the Petitioner to all of the Chapter 11 obligations, an editorial endorsement in Capital Times printed and distributed to thousands and posted on the Capital Times website will be exempt. Neither is coordinated with the candidate and both are the result of a process of evaluation, yet one subjects the party to enormous cost and expense (and thus will be silenced) while the other goes forward.

All of this points to the disparate treatment that inevitably follows from the overreaching of the GAB in this newly minted rule. The field of

speech must always seek more speech, not less. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 475.

F. GAB 1.28 (3)(b) Violates the First Amendment

The State has indicated it does not intend to defend the validity of second sentence of GAB 1.28(3)(b) (Answer, ¶ 64). Following the State's Answer, the GAB revoked the offending portion of GAB 1.28(3)(b) by an emergency rule (*see* Emergency Rule Order Creating GAB 1.28, Wis. Admin. Code; Emergency Rule Order Amending GAB 1.28, Wis. Admin. Code). Though WEAC, the intervening Defendant, argued in its request to intervene that this provision was, in its view valid (Brief in Support of Motion to Intervene by Mary Bell and the Wisconsin Education Association Council, pp. 10-15), the revocation of that provision would appear to moot the issue. In the event the new emergency rule does not moot the issue and this Court addresses the provision (perhaps on the assumption that, absent further rule-making, the emergency rule will expire (Wis. Stat. §227.24(1)(c) (An emergency rule "remains in effect only for 150 days"), the Petitioners hereby incorporate their argument as described in the Complaint ¶¶ 64; 69-74, their Petition for Leave to Commence an

Original Action Seeking Declaratory Judgment and Other Relief, ¶ 27, and their Memorandum in Support of Petition for Leave to Commence and Original Action Seeking Declaratory Judgment and Other Relief, pp. 13-18).

IV. GAB 1.28, as Amended, Violates Art. I, Section 3, of the Wisconsin Constitution

The Wisconsin Constitution provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

Wis. Const. Art I, §3.[12] As this court has previously stated, "Art. I, sec. 3 has plain, unambiguous meaning that free speech is protected constitutionally against state interference. There cannot be a different understanding of Art. I, sec. 3 by reasonable persons and therefore there is

[12] When interpreting provisions of the Wisconsin Constitution, this Court looks to three aspects of the provision in its interpretation: "(1) The plain meaning of the words in the context used; (2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution . . . and (3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution." *Jacobs v. Major*, 139 Wis.2d 492, 502-03, 407 N.W.2d 832, 836 (1987) (citations and quotations omitted). In the cited case, *Jacobs v. Major*, this Court both engaged in the interpretation of Article I, Section 3 of the Wisconsin Constitution, and looked to the opinion in the Court of Appeals to come to the conclusions that are now cited here by Petitioners. The Court of Appeals' analysis of the history of the Wisconsin Constitution, *Jacobs v. Major*, 132 Wis.2d 82, 390 N.W.2d 86 (Ct. App. 1986), is cited favorably in the Supreme Court's opinion. *Jacobs v. Major*, 139 Wis.2d at 505, n. 2.

no ambiguity." *Jacobs v. Major*, 139 Wis.2d 492, 504, 407 N.W.2d 832, 837 (1987).

On its face, Article 1, Section 3 is broader than the First Amendment. While the First Amendment limits its reach to the negative ("Congress shall make no law…abridging the freedom of speech…."), the Wisconsin counterpart contains both that prohibition ("no laws shall be passed…") and an affirmative right ("Every person may freely speak….").

The principle that there are two distinct rights contained in Wisconsin's constitutional protection of speech was acknowledged by this Court, when it noted, "Article I, sec. 3 is not redundant. The two independent clauses are neither verbose nor repetitious in expressing the idea of the section. They are related to each other with the first expressing the right to free speech and the second stating the entity, the state, against whom the right is shielded." *Jacobs v. Major*, 139 Wis.2d 492, 504, 407 N.W.2d 832, 837 (1987).

Article I, Section 3, like other provisions of the State Constitution, grants to the citizens of the State additional protections that might not otherwise be afforded by similar, but not identical, provisions of the United States Constitution. *Jacobs*, 139 Wis.2d at 534, 407 N.W.2d at 850 (1987)

(Abrahamson, J., concurring in part and dissenting in part) ("This court has recognized that our state constitution may permit greater freedom of speech than the federal Constitution. . . . Our state constitutional convention considered a provision very similar to the first amendment, but rejected it as too indefinite. Instead, the people of the state of Wisconsin chose to frame the state constitutional right of free speech more broadly and more definitely than the first amendment.") (footnote and citation omitted); *see also Jacobs*, 132 Wis.2d at 142.

That the freedom of speech guaranteed by the Wisconsin Constitution is greater than that of the First Amendment to the United States Constitution is illustrated by looking to how this Court treats those provisions of the Wisconsin Constitution that mirror the U.S. Constitution, as opposed to how it treats those provisions of the Wisconsin Constitution that do not mirror provisions of the U.S. Constitution.

For reasons of judicial modesty and restraint, provisions of the Wisconsin Constitution that mirror those of the U.S. Constitution are normally treated in the same manner by both this Court and the U.S. Supreme Court. "Where . . . the language of the provision in the state constitution is 'virtually identical' to that of the federal provision or where

no difference in intent is discernible, Wisconsin courts have *normally construed* the state constitution consistent with the United States Supreme Court's construction of the federal constitution." *State v. Jennings*, 2002 WI 44, ¶ 39, 252 Wis.2d 228, 647 N.W.2d 142 (quotation omitted) (emphasis in original); *State v. Knapp*, 2005 WI 127, ¶ 58, 285 Wis.2d 86, 114, 700 N.W.2d 899, 913 (quoting same).

However, where provisions in the Wisconsin Constitution and the U.S. Constitution are not virtually identical, "it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court." *State v. Doe*, 78 Wis.2d 161, 171, 254 N.W.2d 210 (1977); *Knapp*, 2005 WI 127, ¶ 59, 285 Wis.2d at 115, 700 N.W.2d at 914 (quoting same). Most notably, Wisconsin has interpreted the robust protection of the free exercise of religion to require strict scrutiny of all regulation substantially burdening religion. *Compare State v. Miller*, 202 Wis.2d 56, 549 N.W.2d 235 (1995) with *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

The Court of Appeals in *Jacobs* delved deeply into the historical underpinnings of Article I, Section 3 in both its majority and concurring

opinions.[13] Although there was little debate on what became Article I, Section 3 of the Wisconsin Constitution, *Jacobs*, 132 Wis.2d at 140-143, what little exists regarding Article I, Section 3 makes it clear that the original version of what became Article I, Section 3 was considered "indefinite" and that what became Article I, Section 3 is a guarantee to the right to speak, and a restraint on the State's limitation of that unfettered right. *Id*. at 142-43. That the drafters of the Constitution deliberately chose to draft the right to speak in Wisconsin differently than in the First Amendment, and to make such right definite and absolute, suggests that the Wisconsin Constitution provides greater protections of speech than does the First Amendment.

All of the provisions noted earlier of GAB 1.28 (*see* § III, above) even if not invalid under the First Amendment, are certainly invalid under any fair reading of the broader protections provided by Article I, Section 3 of the Wisconsin Constitution. Individuals who speak, write, and publish their thoughts on political issues—a right expressly guaranteed by the Wisconsin Constitution ("Every person may freely speak, write and publish his sentiments on all subjects. . . .")—are subject to extensive and onerous

[13] Although the Supreme Court ultimately overruled the Court of Appeals, as set forth in footnote 12, above, the Supreme Court favorably cited the Court of Appeals' detailed historical analysis.

regulations by the State through GAB 1.28. That those expressions "relate to a campaign" does not remove them from the affirmative protections of the Wisconsin Constitution. Things such as the imposition of a one hundred dollar "speakers fee," the requirement of extensive reporting, even the need for nonlawyers to sit down and puzzle through dense and prolix legalese to ensure that speech will not result in fines and incarceration all constitute substantial burdens on the right to speak freely.

This is particularly true given that there is no requirement—or even suggestion—of coordination with candidates in the newly minted rule, so there is no government interest sufficient to overcome the Wisconsin Constitution's affirmative grant of a right to speak. Moreover, there is no legislative history, no finding, and no affirmative demonstration of any justification that is a part of this amended GAB 1.28. On the contrary, the Board itself, by its recent Emergency Rule, acknowledges *sotto voce* that the legislature of this State has not seen any need to expand regulation beyond the past rule. Indeed, as noted earlier, the action of the Board here has been rejected time and again by the legislature (§ II.B, *supra*).

It is appropriate that this Court breathe real life into our State Constitution by acknowledging that it bars the actions taken by the GAB.

The words of the Wisconsin Constitution are clear and unambiguous: "Every person may freely speak, write and publish his sentiments on all subjects. . . . and no laws shall be passed to restrain or abridge the liberty of speech."

CONCLUSION

Whatever one's views may be about the state of American elections, the threat to freedom of speech by government regulation was recognized by the Founders of the country and the authors of our own Wisconsin Constitution. It is critical that this Court stop the march toward political correctness that inevitably, as here, would grant to the State the power to divine what speech is to be regulated and what speech is to remain freely exercised.

The Petitioners respectfully request that the Court grant the Prayer of the Petition in every respect.

Dated this 11th day of January, 2011.

Respectfully submitted,

WISCONSIN PROSPERITY NETWORK, *ET AL*.

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APPENDIX CERTIFICATION

I hereby certify that there is no appendix filed with this brief because this is an original action and there are no findings of opinion of the circuit court, nor does this brief contain any unpublished opinions. Further, the record in this original action has been created entirely in this Court.

Dated this 11th day of January, 2011.

Signed: _____
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COMPLIANCE CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,182 words.

Dated this 11th day of January, 2011.

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