STATE OF WISCONSIN

IN SUPREME COURT

No. 2010AP1937-OA

WISCONSIN PROSPERITY NETWORK, INC., et al.,

Petitioners,

v.

GORDON MYSE, et al.,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

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RESPONDENTS' BRIEF ON THE MERITS

Respondents ("Government Accountability Board" or "G.A.B.") respectfully submit this brief on the merits of the original action filed by Petitioners on August 9, 2010.

STATEMENT OF ISSUES

G.A.B. agrees with the statement of issues in the Brief of Petitioners.

STATEMENT ON ORAL ARGUMENT

The Court has already ordered oral argument in this case.

STATEMENT OF THE CASE

On August 9, 2010, Petitioners filed for leave to commence an original action, challenging the statutory validity and state and federal constitutionality of amendments to Wis. Admin. Code § GAB 1.28 published on August 1, 2010 (hereafter, "GAB 1.28").[1] GAB 1.28 defines what communications are "for a political purpose" when G.A.B. administers and enforces various provisions of Wis. Stat. ch. 11, pursuant to its authority under Wis. Stat. § 5.05(1).

Petitioners allege that they regularly engage in communication containing discussion of public issues and frequently including discussion of political candidates associated with those issues. In campaign finance law, such "issue advocacy" is contrasted with "express advocacy"—understood as communication referring to a clearly identified candidate and containing express language appealing for a vote for or against that

[1]Unless otherwise indicated, all references to "GAB 1.28" are to the 2010 version at issue here.

candidate or communication susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Petitioners have not alleged the extent to which they may engage in "express advocacy," nor have they stated claims related to "express advocacy" activities.

Petitioners' primary claim is that GAB 1.28 expands the meaning of communication for political purposes to cover issue advocacy that previously, in Wisconsin, was not subjected to registration, reporting, and disclaimer requirements in Wis. Stat. ch. 11. This expansion, Petitioners allege, will mandate compliance with those requirements by individuals and organizations previously not subjected to them. Petitioners contend that such expansion is statutorily unauthorized and contrary to the First Amendment to the United States Constitution and Article I, § 3 of the Wisconsin Constitution. On these grounds, Petitioners ask that the 2010 amendments to GAB 1.28 be declared invalid and permanently enjoined.

On August 13, 2010, the Court preliminarily enjoined G.A.B. from enforcing the 2010 amendments to GAB 1.28. On October 8, 2010, Petitioners filed a supplemental petition in the form of a complaint identifying their claims and legal theories with greater specificity

(hereafter, "Complaint"). On October 22, 2010, Mary Bell and the Wisconsin Education Association Council (collectively, "WEAC") moved to intervene. On November 30, 2010, the Court assumed original jurisdiction, granted WEAC's intervention motion, and ordered briefing.

The United States District Courts for the Western and Eastern Districts of Wisconsin have stayed two other cases involving related challenges to GAB 1.28, pending the outcome of this case. *See Wisconsin Club for Growth, Inc., et al. v. Myse, et al.*, No. 10-CV-427 (W.D. Wis. Oct. 13, 2010); *Wisconsin Right to Life Committee, Inc., et al. v. Myse, et al.*, No. 10-CV-669 (E.D. Wis. Sept. 17, 2010).

There has been one change to GAB 1.28 since this litigation began. As initially promulgated, GAB 1.28(3)(b) provided that a communication is for a "political purpose," if:

> (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.

Wis. Admin. Code § GAB 1.28(3)(b).

The first sentence above embodies the standard established by the U.S. Supreme Court for defining communication functionally equivalent to express advocacy. *See Federal Election Com'n v. Wisconsin Right to Life* ("*WRTL II*"), 550 U.S. 449, 469-70 (2007). The second sentence—*i.e.*, the remainder of sub. (3)(b)—created a conclusive presumption that any communication possessing the enumerated characteristics is automatically susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

The initial pleadings in this case and *Wisconsin Club for Growth* alleged that the presumption in the second sentence of sub. (3)(b) expanded the definition of communications for a political purpose to reach issue advocacy constitutionally protected against any campaign finance regulation. In promulgating GAB 1.28, however, G.A.B. intended the scope of sub. (3)(b) to be no broader than the definition of the functional equivalent of express advocacy in the first sentence of that subsection. Accordingly, in *Wisconsin Club for Growth*, G.A.B. stipulated that it would not enforce the second sentence and the parties jointly asked the federal

court to permanently enjoin that part of the rule. G.A.B. likewise represented to this Court that it would stipulate to a permanent injunction of the second sentence of sub. (3)(b).

On October 13, 2010, the *Wisconsin Club for Growth* Court denied the parties' permanent injunction request, noting that "G.A.B. has within its own power the ability to refrain from enforcing, or removing altogether, the offending sentence from a regulation G.A.B. itself created" and emphasizing that "removing the language—for example, by G.A.B. issuing an emergency rule—would be far more 'simple and expeditious' than asking a federal court to permanently enjoin enforcement of the offending regulation." *Wisconsin Club for Growth, Inc. v. Myse*, No. 10-CV-427, slip op. at 2 (W.D. Wis. Oct. 13, 2010). Following the Court's suggestion, on December 22, 2010, G.A.B. promulgated an emergency rule that amended GAB 1.28(3)(b) by deleting all text after the first sentence. As amended, GAB 1.28(3)(b) now provides, *in toto*, that a communication is for a political purpose, if "[t]he communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Wis. Admin. Code § GAB 1.28(3)(b).

ARGUMENT

I. STANDARD OF REVIEW

A. Statutory authority claim

Whether administrative rules exceed an agency's statutory authority is a legal question on which neither party bears a burden of proof. *See Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 10, 270 Wis. 2d 318, 677 N.W.2d 612. An agency generally possesses those powers expressly conferred by authorizing legislation and powers necessarily implied by that legislation. *See id.*, ¶ 14. The broadest grants are those expressly giving an agency general power to regulate a subject in the public interest and to make rules necessary to carry out that purpose. *See Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2003 WI App 119, ¶ 8, 265 Wis. 2d 476, 665 N.W.2d 417. Such sweeping provisions are construed as authorizing the agency to make any regulations reasonably related to the purposes of the authorizing legislation. *See id.*

B. Constitutional claims

An administrative rule, like a statute, "carr[ies] a heavy presumption of constitutionality and the challenger has the burden of proving

unconstitutionality beyond a reasonable doubt." *Citizens Concerned for Cranes and Doves*, 270 Wis. 2d 318, ¶ 10 n.6 (citations and internal quotation marks omitted).

When a state law is challenged as imposing an unconstitutional burden on speech rights, courts must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations omitted). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (citations omitted).

Under these principles, the U.S. Supreme Court applies two different standards of review for First Amendment challenges to campaign finance regulations. If the challenged regulation *prohibits* or *directly restricts* political speech, the Court applies strict scrutiny, which demands that the challenged regulation be narrowly tailored to advance a compelling state

interest. *See, e.g., Citizens United v. FEC*, ___ U.S. ___, 130 S.Ct. 876, 898 (2010). However, if the challenged regulation imposes *disclosure* requirements without directly prohibiting or restricting speech, then the Court applies a lesser "exacting scrutiny" standard, which demands only a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *See id.* at 914 (citing *Buckley v. Valeo*, 424 U.S. 1, 66; *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003)).

Recent Supreme Court decisions have eliminated earlier confusion as to the standard of review in disclosure cases. In *John Doe No. 1 v. Reed*, ___ U.S. ___, 130 S.Ct. 2811 (2010), the Court applied exacting scrutiny—*not* strict scrutiny—to a statute authorizing public disclosure of the signatories to a ballot initiative. The Court noted:

> We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed exacting scrutiny. . . .
>
> That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Id. at 2818 (citations and internal quotation marks omitted).

In explaining why disclosure requirements are subject to exacting scrutiny, the Court emphasized that the statute at issue was "not a

prohibition on speech, but instead a *disclosure* requirement." *Id.* The Court likewise noted in *Citizens United* that "disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Citizens United,* 130 S.Ct. at 914 (quoting *Buckley,* 424 U.S. at 64; *McConnell,* 540 U.S. at 201).

Petitioners are thus wrong in asserting that GAB 1.28 is subject to strict scrutiny. The requirements of Wis. Stat. ch. 11 that may be triggered by GAB 1.28(2) do not prohibit or directly restrict political speech, but only impose various disclosure requirements—*i.e.*, registration, reporting, and disclaimer requirements—on communications that are for a "political purpose" as defined in GAB 1.28(3). *See, e.g.*, Brief of Petitioners at 39-40, 46 (citing various disclosure requirements). Under *Reed* and *Citizens United*, it is clear that GAB 1.28 is subject to exacting scrutiny, rather than strict scrutiny. *See also Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010).

II. GAB 1.28 IS STATUTORILY AUTHORIZED

Petitioners first claim that G.A.B. lacked statutory authority to adopt the 2010 version of GAB 1.28. That is incorrect. The challenged rule

permissibly interprets the statutory definition of acts for a "political purpose" in Wis. Stat. § 11.01(16)(a) thereby providing prospective guidance as to the kinds of communication subject to applicable disclosure requirements in Wis. Stat. ch. 11.

G.A.B. is vested with responsibility for administering Wisconsin laws relating to elections and campaigns, including Wis. Stat. chs. 5 through 12. Wis. Stat. § 5.05(1). G.A.B. also has authority to promulgate rules "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). Similarly, Wis. Stat. § 227.11(2)(a) grants state agencies—including G.A.B.—authority to "promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute," as long as the rule does not "exceed[] the bounds of correct interpretation." *See also Elections Board v. WMC*, 227 Wis. 2d 650, 655, 597 N.W.2d 721 (1999) (hereafter, "*WMC*"). These statutes give G.A.B. clear authority to construe and implement the meaning of all Wisconsin laws governing the administration of election campaigns.

One of the laws G.A.B. is authorized to interpret and implement is Wis. Stat. § 11.01(16)(a), which defines acts for "political purposes," as that phrase is used in Wis. Stat. ch. 11. That section does not provide a narrow definition, as Petitioners have wrongly suggested, but rather leaves room for G.A.B. to further construe what sorts of acts are for political purposes. That definition states:

> **(16)** An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum. In the case of a candidate, or a committee or group which is organized primarily for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, or for the purpose of influencing a particular vote at a referendum, all administrative and overhead expenses for the maintenance of an office or staff which are used principally for any such purpose are deemed to be for a political purpose.
>
> (a) Acts which are for "political purposes" include but are not limited to:
>
> 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.
>
> 2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters

> concerning, in whole or in part, any campaign for state or local office.
>
> (b) A "political purpose" does not include expenditures made for the purpose of supporting or defending a person who is being investigated for, charged with or convicted of a criminal violation of state or federal law, or an agent or dependent of such a person.

Wis. Stat. § 11.01(16).

Petitioners incorrectly contend that *WMC* interpreted that statute in a way that precludes the definition of communications for a political purpose in GAB 1.28. The issue in *WMC* was whether the State Elections Board (G.A.B.'s predecessor agency) had correctly ruled that various registration and reporting requirements in Wis. Stat. ch. 11 applied to certain advertisements which, according to the board, unmistakably advocated election or defeat of named candidates, even though the ads did not contain explicit language advocating election or defeat of those candidates. *See id.* at 653-56. The Court concluded that the board erred, not because it lacked power to regulate communications not containing explicit language advocating election or defeat of a clearly identified candidate, but because it had not given fair warning that it would consider additional factors and regulate communications that unmistakably advocate election or defeat of a clearly identified candidate, even if they do not contain such explicit

language of advocacy. *Id.* at 676-79. The Court found that the board's action "amounts to an after-the-fact-effort to create a standard of express advocacy which is broader than the standard existing in Wisconsin when WMC ran its ads." *Id.* at 677. Such action was, in effect, retroactive rulemaking in violation of principles of constitutional due process. *Id.* at 678-80.

WMC did not say that the board could not change the Wisconsin standard of express advocacy "without an explicit grant by the legislature," as Petitioners wrongly assert. Brief of Petitioners at 22. On the contrary, the Court stated: "We stress that this holding places no restraints on the ability of the legislature *and the Board* to define a further constitutional standard of express advocacy to be prospectively applied. We encourage them to do so." *WMC*, 227 Wis. 2d at 681-82 (emphasis added); *see also, id.* at 685 ("the legislature or the elections board is now free to craft a standard for 'express advocacy[]' . . . I invite one or the other or both to craft a standard . . . posthaste.") (Bablitch, J., concurring).

GAB 1.28 does no more than respond to the invitation in *WMC*. Specifically, GAB 1.28(3)(a) applies only to communications containing the type of explicit language of electoral advocacy discussed and approved

in *WMC*. *See id.* at 669-70. Beyond that, GAB 1.28(3)(b) clarifies that express advocacy may also include functionally equivalent communications susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Those two subsections, applied in tandem with GAB 1.28(2), make it prospectively clear that any requirement in Wis. Stat. ch. 11 that, by its own terms, applies to a communication for a "political purpose," will henceforth apply not only to a communication using explicit language of electoral advocacy, but also to any communication susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.

This clarification is statutorily permissible for two reasons. First, regulation of the communications covered by GAB 1.28(3)(b) is not an *expansion* of G.A.B.'s authority, but rather is a *clarification* addressing the uncertainty highlighted in *WMC*. The definition of an act for political purposes in Wis. Stat. § 11.01(16)(a)1. already expressly covers any communication that "expressly advocates" the election or defeat of a candidate. A communication susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate is functionally equivalent to express advocacy and, therefore, is a

communication that "expressly advocates" within the meaning of § 11.01(16)(a)1. The clarification of the meaning of a communication for a political purpose in GAB 1.28(3)(b) thus is within the scope of the definition of an act for political purposes in Wis. Stat. § 11.01(16)(a) and, therefore, is statutorily authorized.

Second, even if the Court were to conclude that a communication *functionally equivalent* to express advocacy does not itself "expressly advocate" within the meaning of § 11.01(16)(a)1., GAB 1.28(3)(b) still is authorized because § 11.01(16)(a) expressly says that "[a]cts which are for 'political purposes' include *but are not limited to*: 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum." The use of the phrase "but are not limited to" expresses the Legislature's intent that a communication that "expressly advocates" is only one example of an act for a political purpose. *See also Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 2d 670, 680, 605 N.W.2d 654 (1999) ("And while, as plaintiffs point out, 'express advocacy' on behalf of a candidate is one part of the statutory definition of 'political purpose,' it is not the only part.").

By using the phrase "but are not limited to," the Legislature has left room for G.A.B., under the authority granted by Wis. Stat. §§ 5.05(1)(f) and 227.11(2)(a), to promulgate a rule supplying additional details elucidating what is meant by "[a]cts which are for 'political purposes.'" Wis. Stat. § 11.01(16)(a). For this reason, too, the clarification in GAB 1.28(3)(b) is statutorily authorized.

Petitioners also err in suggesting that GAB 1.28(3) is invalid because G.A.B. lacks authority to regulate issue advocacy, as opposed to express advocacy. The Court need not reach this question because GAB 1.28(3) only purports to regulate communications that expressly advocate the election or defeat of a clearly identified candidate—either because they use explicit words of advocacy in a way that unambiguously relates to a candidate's campaign or because they are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. In any event, even if GAB 1.28(3) did reach some communications that do not expressly advocate, Petitioners' suggestion still fails because the use of the phrase "but are not limited to" demonstrates that Wis. Stat. § 11.01(16) does not categorically preclude regulation of

non-express advocacy. Once again, however, in this case the Court need not address this issue.

Petitioners also argue that the fact that the Legislature itself has not broadened the statutory definition of "political purposes" somehow proves that the definition of a "communication . . . for a 'political purpose'" in GAB 1.28(3) is statutorily unauthorized. That argument is illogical. G.A.B. is authorized to supplement the language of Wis. Stat. § 11.01(16) with examples of types of communication for a political purpose not enumerated in the statute. The fact that the Legislature has not altered the boundaries of the statutory definition is irrelevant to whether the definition of "communication . . . for a 'political purpose'" in GAB 1.28(3) is within existing boundaries. Nor is it relevant that some legislators may have proposed legislative changes that were not enacted into law. The scope of G.A.B.'s rulemaking power is limited by the language of statutes that have been enacted into law under the legislative procedures prescribed in the Wisconsin Constitution, but is *not* limited by things the Legislature has not done or by proposals that did not result in an enacted statute. Unexecuted legislative power does not have the force of law and is irrelevant to the scope of G.A.B.'s rulemaking power. *Cf. State ex rel. Kalal v. Circuit*

Court for Dane County, 2004 WI 58, 271 Wis. 2d 633, ¶ 44, 681 N.W.2d 110 ("It is the enacted law, not the unenacted intent, that is binding on the public").

Even if failed attempts to amend Wis. Stat. § 11.01(16) were deemed relevant, they still would not establish an affirmative intent to preclude G.A.B. from engaging in rulemaking that supplements statutory language. For example, some legislators may have believed that further elaboration of the meaning of "political purposes" should be developed by the agency with technical expertise in campaign finance regulation, rather than by the Legislature itself. In construing the scope of G.A.B.'s authority to regulate in this area, the Court should not rely on speculation about the intended meaning of past activities by individual legislators.[2]

For the above reasons, the Court should conclude that GAB 1.28 is statutorily authorized.

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[2]Furthermore, Petitioners' assertion that each and every attempt to broaden the definition of "political purpose" in Wis. Stat. § 11.01(16) failed is factually incorrect. Section 1ty of 2001 Wis. Act 109 did broaden that definition. That provision was subsequently invalidated by a non-severability clause when a different part of the legislation in question was held unconstitutional. *See Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp.2d 1078, 1081 (W.D. Wis. 2002).

III. GAB 1.28 DOES NOT VIOLATE THE FIRST AMENDMENT

A. Petitioners misstate the framework for analyzing a First Amendment challenge to campaign finance regulations.

Petitioners preface their federal constitutional claims with a description of what they characterize as bedrock constitutional guideposts in this area. Their view is as follows: Independent expenditures—*i.e.* expenditures of money on political speech not coordinated with a candidate's campaign—are protected by the First Amendment. All regulations that burden such expenditures by making them more difficult or less effective are subject to strict scrutiny. Under strict scrutiny, the only compelling governmental interest that can justify burdening political speech is the prevention of the reality or appearance of *quid pro quo* corruption. Independent expenditures, however, do not raise such a threat of corruption. Therefore, any regulations that burden independent expenditures—directly or indirectly—are impermissible. Moreover, according to Petitioners, non-express advocacy presents even less risk of corruption than does express advocacy and independent expenditures for

non-express advocacy, therefore, may not be regulated at all. *See* Brief of Petitioners at 28-32.

It is true that independent expenditures are protected political speech, but the rest of Petitioners' view is mistaken. First, as shown in section I above, regulations imposing *disclosure* requirements on political speech without directly prohibiting or restricting speech, are subject to exacting scrutiny, not strict scrutiny. Second, as shown in section III-D-1 below, the Supreme Court has recognized that disclosure regulations are justified by important informational interests and interests in facilitating regulatory compliance, as well as by the interest in deterring actual and apparent corruption. Finally, as shown in section III-B-2 below, the Supreme Court has rejected Petitioners' view that all non-express advocacy is categorically exempt from campaign finance regulations.[3]

B. GAB 1.28 does not impermissibly regulate non-express advocacy.

Petitioners' first constitutional claim is that GAB 1.28 is facially overbroad because it no longer regulates only express advocacy, but rather

[3]Of course, the question of whether non-express advocacy can be regulated at all is not presented here because GAB 1.28 only regulates express advocacy and its functional equivalent.

has expanded in scope by redefining political purpose to include non-express advocacy. Brief of Petitioners at 33. In their original pleadings, Petitioners directed this claim primarily against the conclusive presumption in the now-repealed second sentence of GAB 1.28(3)(b). Petitioners now appear to have accepted that the existing version of sub. (3)(b) does not apply to non-express advocacy. *See* Brief of Petitioners at 33 ("GAB 1.28(3)(b) incorporated the *WRTL II* standard"). Accordingly, Petitioners now change focus, arguing that non-express advocacy is impermissibly regulated by *subsection (3)(a)*, which provides that a communication is for a political purpose, if:

> The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate and 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;" or
> 8. "Reject."

Wis. Admin. Code § GAB 1.28(3)(a).

That provision, according to Petitioners, now extends to non-express advocacy because it previously included language stating that a communication not only must refer to a clearly identified candidate, but

also must "expressly advocate[] the election or defeat of that candidate." Wis. Admin Code § GAB 1.28(2)(c) (2008). The removal of that phrase, according to Petitioners, broadens the scope so that any use of the enumerated terms (or synonyms) in a communication referring to a candidate will be subject to regulation, even if the communication only discusses issues associated with the candidate, without expressly advocating the candidate's election or defeat. *See* Brief of Petitioners at 34-37.

Petitioners are wrong both because the definition of communication for a political purpose in GAB 1.28(3) does not apply to non-express advocacy and because, even if it did, it still would not be overbroad.

1. The definition of communication for a political purpose in GAB 1.28(3) is not overbroad and applies only to express advocacy and its functional equivalent.

In the First Amendment context, a statute is overbroad if, in addition to imposing a permissible burden on some speech, it also sweeps within its coverage other speech that may not be burdened. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Where the overbreadth doctrine applies, a statute may be facially invalidated because the mere existence of

an overbroad statute could have a chilling effect on speech that may not be restricted. *Id.*

The risk of a chilling effect is not present to the same degree, however, where a court can readily establish the line between conduct that may and may not be burdened. Accordingly, *Broadrick* curtailed use of facial overbreadth analysis in First Amendment cases, noting that it is "strong medicine" that should be employed "sparingly and only as a last resort" and should not be invoked "when a limiting construction has been or could be placed on the challenged statute." *Id.* at 613. Under this approach, a statute will not be facially invalidated unless its overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. Such a rule invalidates statutes for overbreadth "only when the flaw is a substantial concern in the context of the statute as a whole." *Id.* at 616 n.14.

Here, the alleged overbreadth of GAB 1.28(3)(a) is neither real nor substantial for the simple reason that Petitioners misread the rule. They contend that "any word that is merely the 'functional equivalent' of 'support,' 'defeat,' or 'reject' will be enough to silence the speech." Br. at 36. However, under the language of the provision, a communication

using a word functionally equivalent to "support," "defeat," or "reject" is for a political purpose *only* if that word is used in a way that "unambiguously relates to the campaign of [a clearly identified] candidate. Wis. Admin. Code § GAB 1.28(3)(a).

For example, Petitioners contend that a communication using the terms "support" or "reject" in connection with discussion of a mayor's action on a budget item, if made during the mayor's re-election campaign, would be for a political purpose under sub. (3)(a) because the communication would "arguably" relate to the campaign. Brief of Petitioners at 35. That is incorrect. Under sub. (3)(a), it is not enough for a communication to "arguably" relate to the campaign—it must "unambiguously" relate to the campaign. If the communication used "support" or "reject" in a way that "unambiguously relates to" the campaign, then it would indeed be for a political purpose under sub. (3)(a), but it would likewise be express advocacy under the "magic words" approach set out in the famous footnote 52 of *Buckley*—with which Petitioners have stated no quarrel. *See Buckley*, 424 U.S. at 44 n.52. Conversely, if the communication did not unambiguously relate to the campaign, but instead used "support" or "reject" only as part of a

discussion of the mayor's position on a budget issue, then the communication would *not* be for a political purpose under sub. (3)(a).

Of course, the latter type of communication still could be for a political purpose under sub. (3)(b), but *only* if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against" the mayor—a standard that Petitioners acknowledge has been approved by the Supreme Court as functionally equivalent to express advocacy. *See* Brief of Petitioners at 33 ("GAB 1.28(3)(b) incorporated the *WRTL II* standard"). On the other hand, if a communication is capable of being reasonably interpreted as something *other* than such an electoral appeal, then it would not be for a political purpose under sub. (3)(b) and hence would not be regulated, in spite of the fact that it used "support" or "reject."

In short, contrary to Petitioners' suggestions, a communication that uses terms like "support" or "reject" and refers to a clearly identified candidate may not be for a political purpose under either sub. (3)(a) or (3)(b) of GAB 1.28—as long as it: (a) does not use those terms in a way that "unambiguously relates to the campaign of that candidate"; or (b) is reasonably susceptible of being interpreted as something other than appeal to vote for or against that candidate.

Petitioners also misread GAB 1.28(3)(a) by exaggerating the significance of the deletion of "expressly advocates" from the text of that provision. According to Petitioners, this Court has recognized that an omission of language from a re-enactment or revision of a statute generally indicates an intent to alter its meaning. *See* Brief of Petitioners at 36 n.9 (*citing Pittman v. Lieffring*, 59 Wis. 2d 52, 64, 207 N.W.2d 610 (1973)). In support of that proposition, however, *Pittman* cited an earlier case in which this Court had recognized that "*a change of language does not always indicate an intent to change the rule, but to express the same rule in shorter and more comprehensive words.*" *Mundt v. Sheboygan and Fond du Lac R.R. Co.*, 31 Wis. 451, 463 (1872) (quoting *Harwood v. Lowell*, 58 Mass. 310, 4 Cush. 312 (1849)). Accordingly, it is G.A.B.'s position that the deletion of "expressly advocates" did not expand GAB 1.28(3)(a), but was made for stylistic reasons because it was redundant to include that phrase in a subsection whose purpose was to enumerate words which, by their nature, expressly advocate when used in a way that unambiguously relates to the campaign of a clearly identified candidate.

Moreover, under Wis. Stat. § 990.001(7), "[a] revised statute is to be understood in the same sense as the original unless the change in language

indicates a different meaning so clearly as to preclude judicial construction." *See also Danielson v. City of Sun Prairie*, 2000 WI App 227, 239 Wis. 2d 178, ¶ 11, 619 N.W.2d 108; *Guse v. A.O. Smith Corp.*, 260 Wis. 403, 406, 51 N.W.2d 24 (1952) ("revisions of statutes do not change their meaning unless the intent to change the meaning necessarily and irresistibly follows from the changed language"). It is implausible to suggest that the language of GAB 1.28(3)(a) necessarily and irresistibly leads to Petitioners' interpretation, under which any use of the enumerated terms (or synonyms) in a communication referring to a candidate would automatically be subject to regulation. On the contrary, the plain language provides that such terms must also be used in a way that "unambiguously relates to the campaign of that candidate." Wis. Admin. Code § GAB 1.28(3)(a). Because the deletion of "expressly advocates" thus does not indicate Petitioners' suggested meaning so clearly as to preclude judicial construction, Wis. Stat. § 990.001(7) requires that the 2010 version of GAB 1.28(3)(a) be understood in the same sense as the prior version of the provision.[4]

[4]"Construction of administrative rules is governed by the same principles that apply to construction of statutes." *Basinas v. State,* 104 Wis. 2d 539, 546, 312 N.W.2d 483 (1981).

In addition, an explanatory note accompanying legislation is indicative of whether a revised version of a statute is intended to have a changed meaning. *See* Wis. Stat. § 990.001(7); *see also Danielson*, 239 Wis. 2d 178, ¶ 11. Here, the 2010 version of GAB 1.28 was accompanied by a detailed analysis by G.A.B. *See* Order of the Government Accountability Board, CR 09-013 (July 13, 2010) ("Order").[5] Such an analysis is required to include a detailed explanation of the basis and purpose of the rule. *See* Wis. Stat. § 227.19(3)(a). The analysis of GAB 1.28 made it clear that the amendments were intended to expand the scope of the previous version by "subject[ing] to regulation communications that are 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" Order, ¶ 5. In other words, the purpose of the 2010 amendments was to expand coverage to communications falling within the language of new subsection (3)(b)—with which Petitioners no longer take issue in their brief. There is nothing, however, in the G.A.B. analysis supporting

[5] *See http://legis.wisconsin.gov/cr final/09-013.pdf* (visited February 22, 2011).

Petitioners' view that the new subsection (3)(a) was intended to be broader in scope than its predecessor, GAB 1.28(2)(c) (2008).[6]

Finally, Petitioners' claim that GAB 1.28(3)(a) is facially overbroad is precluded by the analysis of the alleged overbreadth of federal reporting requirements in *Buckley*. Plaintiffs there had challenged the constitutionality of a federal provision requiring reporting of expenditures

[6]Petitioners support their argument that GAB 1.28(3)(a) is overbroad by quoting statements by G.A.B. staff indicating that the 2010 changes were intended to broaden the rule. Such factual materials should be disregarded by the Court because they were not entered into the record during the time set aside for the parties to clarify factual issues.

In any event, the staff quotations do not support Petitioners' position. There is no dispute that the amendments were intended to broaden the rule. They did so by adding subsection (3)(b), which makes it prospectively clear that the rule will apply to any communication susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate. That guidance is exactly what this Court had previously invited. *See WMC*, 227 Wis. 2d at 681-82. The staff quotations do not suggest that the change in the wording of GAB 1.28(3)(a) was meant to expand that subsection. On the contrary, the quotations are consistent with the G.A.B. report, which indicates that any expansion is provided by sub. (3)(b), not by changes to sub. (3)(a).

"for the purpose of . . . influencing" the nomination or election of candidates for federal office. *Buckley*, 424 U.S. at 78. The Court found that provision potentially overbroad and, to avoid constitutional problems, held that it had to be construed as applying only to expenditures expressly advocating the election or defeat of a clearly identified candidate. *Id.* at 80. The Court also included a footnote referring back to earlier footnote 52, which had said that a communication advocates in express terms the election or defeat of a clearly identified candidate if it "contain[s] express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. These "express words of advocacy" correspond precisely with the terms in GAB 1.28(3)(a).[7]

Contrary to Petitioners' suggestions, then, *Buckley* did not say that a regulation not containing the phrase "expressly advocates" is facially overbroad, but instead upheld the facial validity of regulations that did not contain such language, subject to a narrowing judicial interpretation.

[7]Petitioners try to make hay out of the fact that ¶ 119 of G.A.B.'s Answer referred to "vote for" and "vote against" in GAB 1.28(3)(a), but did not refer to broader terms, like "support" and "reject." *See* Brief of Petitioners at 36 n.9. Petitioners overlook the fact that "support" and "reject" were included in the list of magic words provided by *Buckley*. Obviously, the Court did not find those terms inherently overbroad, as Petitioners suggest.

Furthermore, *Buckley*'s narrowing interpretation indicated that a regulation is not overbroad if it applies to "communications containing express words of advocacy of election or defeat" and, as examples, supplied a list that corresponds, item-by-item, to GAB 1.28(3)(a). It strains credulity to suggest that a regulation that applies to communications containing the very terms listed in *Buckley* could be facially overbroad or vague, when the much broader and less precise statutory language at issue in *Buckley* was not facially invalid.

Here, no saving interpretation of GAB 1.28(3)(a) is needed because that provision already closely tracks the saving interpretation provided by *Buckley*. In fact, GAB 1.28(3)(a) is more narrowly tailored than the standard of *Buckley*'s footnote 52 because, in addition to listing the same "express words of advocacy" found there, GAB 1.28(3)(a) also explicitly requires that those words be used in a way that "unambiguously relates to the campaign of" a clearly identified candidate.

Furthermore, even if this Court were to accept Petitioners' suggestion that deletion of the phrase "that expressly advocates the election or defeat of that candidate" from GAB 1.28(2)(c) (2008) rendered the rule overbroad or vague, the proper remedy would be not to facially invalidate

the rule, but to supply a narrowing interpretation requiring that the words of express advocacy listed in GAB 1.28(3)(a) must be used in a way that expressly advocates the election or defeat of a clearly identified candidate. Respondents believe that such a requirement is already contained in the language of the rule and that no such narrowing interpretation is needed. However, such an interpretation, although superfluous, would be harmless, since it would only confirm GAB's interpretation of the rule's plain meaning.

For the above reasons, the Court should conclude that GAB 1.28(3) applies only to express advocacy and its functional equivalent and, therefore, is not facially overbroad.

2. Even if GAB 1.28 were not limited to express advocacy and its functional equivalent, it still would be valid because it only triggers disclosure requirements, which may be applied to some non-express advocacy.

In spite of the fact that GAB 1.28(3)(a) and (b) apply only to express advocacy and its functional equivalent, Petitioners continue to insist that GAB 1.28 is overbroad because it seeks to regulate non-express or issue advocacy. That is wrong, not only because it misinterprets the scope of

GAB 1.28(3), as shown above, but also because the theory that non-express advocacy cannot be regulated is an anachronism that has been rejected in recent Supreme Court decisions.

Prior to *McConnell*, most federal circuits had ruled that regulating political advertising was permissible only for ads expressly advocating election or defeat of a clearly identified candidate.[8] In *McConnell*, however, the Supreme Court revised the older view by rejecting the notion that *Buckley* establishes "a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." *McConnell*, 540 U.S. at 190.

WRTL II subsequently clarified the significance of the distinction between express and non-express advocacy, holding that the prohibition on corporate independent expenditures in 2 U.S.C. § 441b was overbroad as

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[8]Some circuits concluded that express advocacy required magic words and treated other ads as non-express advocacy, exempt from regulation. *See, e.g., Virginia Soc. for Human Life v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001); *Chamber of Commerce of U.S. v. Moore*, 288 F.3d 187, 194-95 (5th Cir. 2002); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *Maine Right to Life v. Federal Election*, 98 F.3d 1, 1 (1st Cir. 1996). Others invalidated laws regulating non-express advocacy, but without ruling that express advocacy requires magic words. *See Citizens for Responsible Gov't v. Davidson*, 236 F.3d 1174, 1193-95 (10th Cir. 2000); *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000). Only one explicitly rejected the magic words test for express advocacy. *See Federal Election Com'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

applied to speech that was neither express advocacy nor its functional equivalent. *See WRTL II*, 550 U.S. at 457. The Court did not, however, say that the ads were *categorically* exempt from regulation. On the contrary, it expressly found that the application of the federal ban to those ads failed strict scrutiny because the government has no compelling interest in directly restricting or prohibiting political speech unless that speech is express advocacy or its functional equivalent. *Id.* at 476-77.

Whether a communication is express advocacy or its functional equivalent thus is not an issue at the threshold of every First Amendment analysis. It arises, rather, in the context of applying strict scrutiny to regulations that directly restrict or prohibit political speech. In that context, government is prohibited from directly restricting or prohibiting non-express advocacy—not because government has *no power at all* to regulate such speech, but because the Supreme Court has found that government simply has no interests sufficiently compelling to justify directly restricting or prohibiting it.

It does not follow that government is prohibited from imposing *lesser burdens*—such as disclosure requirements—on political speech that

is neither express advocacy nor its functional equivalent. Contrary to Petitioners' suggestions, *WRTL II* did not consider or answer that question.

The Court did answer the question, however, in *Citizens United*, holding that federal disclosure and disclaimer requirements *could* be applied not only to the movie at issue in that case (which the Court had found to be functionally equivalent to express advocacy), but also to certain television ads for that movie which themselves were neither express advocacy nor its functional equivalent. *Citizens United*, 130 S. Ct. at 915. The Court acknowledged the holding in *WRTL II*, but distinguished disclosure and disclaimer requirements on the ground that they "may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Id.* at 914 (internal quotation marks omitted). Accordingly, the Court rejected the argument (also advanced by Petitioners) that disclosure requirements must be limited to speech that is functionally equivalent to express advocacy. *Id.* at 915 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.").

It is thus beyond dispute that, under *Citizens United*, the First Amendment does not categorically preclude application of disclosure and disclaimer requirements to communications that are neither express advocacy nor its functional equivalent. Petitioners ignore this controlling authority and instead incorrectly try to apply *WRTL II* in the area of disclosure requirements, where *Citizens United* held it does not apply. Petitioners' error is not material to the outcome of this case because GAB 1.28 does not apply to any communications other than express advocacy (by virtue of sub. (3)(a)) and the functional equivalent of express advocacy (by virtue of sub. (3)(b)). Nonetheless, Petitioners' persistence in mistaking the law regarding non-express advocacy demonstrates that their attack on GAB 1.28 fails even on its own terms.

C. GAB 1.28(3)(a) is not unconstitutionally vague or ambiguous.

Petitioners next argue that GAB 1.28(3)(a) is not only overbroad, but also fatally ambiguous and, therefore, unconstitutionally vague. This argument fails for the same reason that the overbreadth argument failed.

The void-for-vagueness doctrine generally demands that a penal statute must define the criminal offense "with sufficient definiteness that

ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Although vagueness challenges are generally brought where criminal sanctions may be imposed, *see Buckley,* 424 U.S. at 40-41, the Supreme Court has held that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity," *N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963).

Although clarity is required, however, a court cannot expect the parameters of the law to be delineated with mathematical precision or certainty. *See Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972). The proper inquiry is whether the statutory language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo,* 332 U.S. 1, 8 (1947). Likewise, in upholding a law restricting political speech and conduct of government employees, *Broadrick* acknowledged that "[w]ords inevitably contain germs of uncertainty" and that "there are limitations in the English language with respect to being both specific and

manageably brief," and upheld the restrictions on the ground that "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *Broadrick*, 413 U.S. at 608 (internal citation and quotation marks omitted); *see also Department of State Compliance and Rules Division v. Michigan Educ. Association-NEA*, 650 N.W.2d 120, 126-27 (Mich. App. 2002) ("When determining whether a statute is void for vagueness, the reviewing court need not set aside common sense, nor is the Legislature required to define every concept in minute detail. Rather, the statutory language need only be reasonably precise.").

Here, an ordinary person exercising ordinary common sense can reasonably understand from the language of GAB 1.28(3)(a) that the terms of express advocacy there enumerated (and synonyms) trigger regulation only when used in a way that unambiguously relates to the campaign of a clearly identified candidate. Conversely, Petitioners' view that GAB 1.28(3)(a) triggers regulation whenever an enumerated term is used in a communication that merely refers to a candidate—even if it only discusses issues without expressly advocating the candidate's election or

defeat—is contrary to the language of the provision and thus is neither commonsensical nor reasonable.

Furthermore, just as Petitioners' claim that GAB 1.28(3)(a) is facially overbroad is precluded by the analysis of the alleged overbreadth of the federal reporting requirement in *Buckley*, for the same reasons, their claim that GAB 1.28(3)(a) is facially vague is likewise precluded by *Buckley*'s analysis of the alleged vagueness of the same federal requirement. *See* section III-B-1, above.

For these reasons, the Court should conclude that GAB 1.28(3)(a) is not unconstitutionally vague or ambiguous.

D. The scope of GAB 1.28 does not exceed applicable constitutional limits.

1. GAB 1.28 is substantially related to several important governmental interests and thus satisfies exacting scrutiny.

Petitioners next argue that, even if GAB 1.28 applies only to express advocacy and its functional equivalent, it still is not supported by a sufficiently significant governmental interest to justify the burdens it imposes. When the proper standard of review is applied, however, GAB 1.28 easily survives.

Petitioners are potentially burdened only by *disclosure* requirements—*i.e.*, registration, filing, reporting, and disclaimer requirements. *See*, *e.g.*, Complaint, ¶ 65. Such requirements potentially apply by virtue of GAB 1.28(2)(c), which provides that anyone making a communication for a political purpose, as defined in GAB 1.28(3), is subject to the applicable requirements of Wis. Stat. ch. 11. There are no potentially applicable requirements, however, that prohibit or directly restrict speech. What is at issue, rather, is the applicability of a variety of disclosure requirements.

Disclosure requirements are subject to exacting scrutiny, rather than strict scrutiny. This means that they need not be narrowly tailored to advance a compelling governmental interest. What is required is a *substantial relation* between the disclosure requirement and a *sufficiently important* governmental interest. *See* section I, above.

The governmental interests at issue here are articulated in the legislative "Declaration of Policy" in Wis. Stat. § 11.001(1):

> The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources

> of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

Wis. Stat. § 11.001(1).

This declaration makes clear that government has a compelling interest in ensuring that the public is informed about political campaigns, including information about contributions and disbursements on behalf of candidates, the identity of those who support or oppose candidates, and the extent of support or opposition. The declaration emphasizes that informing the public about these matters helps protect candidates against the potential corrupting influence of over-dependence on large contributors. The various disclosure requirements in Wis. Stat. ch. 11 directly advance these informational and anti-corruption interests and also provide G.A.B. with information that facilitates enforcement activities, thereby promoting compliance with the law.

The Supreme Court has upheld the constitutionality of disclosure requirements on the ground that they advance these types of interests. *Buckley* recognized "that disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance" and found the federal disclosure requirements at issue there to be "a reasonable and minimally restrictive method of furthering First Amendment values by exposing the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 68, 82.

Buckley found three compelling governmental interests justifying reporting requirements: (1) enhancing voter knowledge about candidate allegiances and interests, thereby helping voters make informed choices; (2) deterring actual and apparent corruption by bringing sunlight to large campaign contributions and expenditures, including independent expenditures; and (3) promoting enforcement of and compliance with other campaign finance laws. *See id.* at 66-68, 80-82. The Court reiterated this view in *McConnell*, 540 U.S. at 196.

Most recently, in *Citizens United*, the Court reaffirmed that disclosure requirements can be justified "based on a governmental interest in 'provid[ing] the electorate with information' about the sources of

election-related spending." *Citizens United*, 130 S. Ct. at 914 (*quoting Buckley*, 414 U.S. at 66). Disclosures such as filing a registration statement or an oath for independent disbursements help the public understand who is making political speech or supporting candidates, thus educating citizens and allowing them to "'make informed choices in the political marketplace.'" *Id.* (*quoting McConnell*, 540 U.S. at 197). Accordingly, *Citizens United* affirmed the public's interest "in knowing who is speaking about a candidate shortly before an election," and concluded that "the informational interest alone" was sufficient to support federal disclosure requirements. *Id.*, 130 S. Ct. at 915-16.

The informational, anti-corruption, and enforcement-facilitating interests recognized in *Buckley*, *McConnell*, and *Citizens United* are also promoted by the disclosure requirements triggered by GAB 1.28. Such requirements, by their nature, are precisely tailored for educating the electorate. Nor do they limit the amount of contributions or expenditures, restrict anyone's fundraising, or impose burdensome structural requirements. The burdens imposed by these requirements are substantially similar to those upheld in *Buckley* and *Citizens United*.

For these reasons, the Court should conclude that the disclosure requirements triggered by GAB 1.28 do not violate Petitioners' First Amendment rights.

2. Petitioners have exaggerated the potential impact of GAB 1.28.

In applying exacting scrutiny here, it is necessary to evaluate the extent to which Petitioners' speech is actually burdened by GAB 1.28. In making that evaluation, the Court should note the degree to which Petitioners have exaggerated the impact of the rule and the statutes it triggers.[9]

First, the definition of political purpose in GAB 1.28(3) only triggers regulation for communications that use the explicit words of advocacy in sub. (3)(a) (or synonyms) in a way that unambiguously relates to the

[9]Contrary to Petitioners' suggestions, G.A.B. has not admitted that GAB 1.28 has the kind of impact they assert. Petitioners emphasize that G.A.B.'s responsive pleading admitted that the regulatory burdens under Wis. Stat. ch. 11 are not *de minimis*. The concept of "*de minimis*" derives from the traditional doctrine "*De minimis non curat lex*," meaning: the law does not concern itself about small or trifling matters too slight for legal consequence. *See State ex rel. Priegel v. Northern States Power Co.*, 242 Wis. 345, 356, 8 N.W.2d 350 (1943). The U.S. Supreme Court has held that burdens imposed by disclosure regulations are sufficient to warrant exacting scrutiny. Accordingly, those burdens are not so trifling as to have no legal consequence and hence are not *de minimis*. But it does not follow that the burdens are as oppressive as Petitioners assert.

campaign of a clearly identified candidate or communications susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Petitioners have not alleged or shown that they plan to engage in such express advocacy. On the contrary, the core of their position is that their communications discuss issues without expressly advocating the election or defeat of candidates. To the extent that is the case, Petitioners have not shown that GAB 1.28 will have any impact on them.

Second, even if Petitioners are understood as claiming that they may sometimes wish to engage in express advocacy or that their discussion of a candidate's stance on an issue may be deemed functionally equivalent to express advocacy, it does not follow that they are subject to the severe impact suggested in their submissions.

Petitioners appear to construe subsection GAB 1.28(2) to mean that they are automatically subject to *all* the regulatory requirements in Wis. Stat. ch. 11 if they engage in any acts of communication covered by the definition in sub. (3). But that is not what sub. (2) says. It says that someone making a communication for a political purpose is "subject to *the applicable requirements* of ch. 11, Stats." Wis. Admin. Code

§ GAB 1.28(2). At most, this only subjects Petitioners to requirements that are, in fact, "applicable requirements" under the circumstances. In other words, even if some issue advocacy might fall within the definition in GAB 1.28(3), Petitioners still are subject only to those statutory requirements which, by their own terms (including any statutory criteria or limitations), apply to them independently of GAB 1.28.

Petitioners identify certain requirements and assert, in conclusory fashion, that GAB 1.28 will make those requirements apply to them, but they have not provided any facts showing that the requirements actually will apply to them or—if some may sometimes apply—that any burden on their speech will be as severe as they assert.

a. Registration requirement under Wis. Stat. § 11.05.

First, Petitioners claim burden from the registration requirement in Wis. Stat. § 11.05.[10] Wisconsin Stat. § 11.05(11), however, exempts from registration those who "make[] only those disbursements . . . which are

[10]To facilitate clarity of cross-references, these requirements will be discussed in a different order than in the list at page 40 of the Brief of Petitioners.

exempted from reporting under s. 11.06(2)." In turn, Wis. Stat. § 11.06(2) exempts independent political disbursements from reporting unless the purpose of the disbursement is "to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum." In other words, disbursements not for express advocacy need not be reported under § 11.06(2) and, therefore, organizations that do not make disbursements for express advocacy are exempt from registration under § 11.05(11). Because Petitioners have not shown that they make disbursements for express advocacy, they also have not shown that they are subject to the registration requirement.[11]

b. One hundred dollar filing fee under Wis. Admin. Code § GAB 1.91(5).

Second, Petitioners claim burden from the $100 filing fee under Wis. Admin. Code § GAB 1.91(5). That provision, however, only applies to an organization "required to register with the Board." Again, Wis. Stat. § 11.05(11) exempts from registration those who do *not* make

[11]Also, GAB 1.28 did not create the requirement that individuals and entities register if they make aggregate disbursements for a political purpose exceeding $25 in a calendar year. That is a statutory requirement of Wis. Stat. § 11.05(1) and (2), which pre-dates the 2010 amendments to GAB 1.28.

disbursements for express advocacy. Because persons and organizations not making such disbursements are exempt from registration, they also are not organizations subject to GAB 1.91(5).

Furthermore, GAB 1.91(5) says that the filing fee shall be paid "as provided in s. 11.055, Stats." Under § 11.055(3), however, the filing fee does not apply to a registrant in any year in which the registrant does not make disbursements exceeding $2,500. Petitioners have not shown that any of them has spent or plans to spend more than $2,500 in a year on express advocacy and thus have not shown that they are subject to the $100 filing fee. Moreover, if any Petitioner is so financially limited that the $100 fee would be a great fiscal burden, then that Petitioner presumably lacks sufficient funds to spend over $2,500 on express advocacy. Conversely, those who can afford to spend that much on express advocacy should not be severely burdened by a $100 filing fee. In any event, given the $2,500 floor in § 11.055(3), Petitioners are wrong to suggest that everyone who makes disbursements over $25 will have to pay a $100 filing fee.

c. Depository and treasurer requirements under Wis. Admin. Code § GAB 1.91(3).

Third, Petitioners claim burden from Wis. Admin. Code § GAB 1.91(3), which requires establishment of a designated depository account for expenditures for a political purpose and selection of a treasurer for that account. This section could apply to Petitioners, but only if they spend over $25 in a year on express advocacy or its functional equivalent.[12] The depository account requirement, however, is not an unmitigated burden. On the contrary, it permits persons and organizations to limit disclosures to monies specifically used for express advocacy and protects them from having to disclose financial records or information about monies used for other personal or organizational activities. Moreover, any burden from having to select a treasurer is mitigated for individuals by Wis. Stat. § 11.10(3), which says that "[e]very individual under s. 11.06(7) shall be deemed his or her own treasurer."

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[12]Petitioners wrongly suggest that every requirement triggered by the $25 floor in Wis. Stat. § 11.05(1)-(2) would apply to anyone who does any advocacy via the internet because an internet connection costs over $25 annually. Under § 11.01(16), however, overhead costs are deemed to be for a political purpose only for an entity organized primarily to influence elections and only for overhead items used principally for that purpose. For individuals and entities primarily engaged in non-express advocacy, the $25 floor would not be triggered by the overall expense of an overhead item like an annual internet connection, but rather would be triggered only if the portion of such an expense related to express advocacy or its functional equivalent itself exceeds $25.

d. Reporting requirements under Wis. Stat. §§ 11.12(5) and 11.20.

Fourth, Petitioners claim burden from the requirement to file periodic expenditure reports—including 24-hour reports during the 15 days before an election—under Wis. Stat. §§ 11.12(5) and 11.20. The filing requirements in § 11.20, however, apply to "reports required by s. 11.06." Wis. Stat. § 11.20(1). Again, § 11.06(2) requires reporting only of disbursements for express advocacy. Because Petitioners have not shown that they make such disbursements, they also have not shown that they make disbursements subject to reporting and, therefore, have not shown they are subject to filing under § 11.20.

Moreover, even if some Petitioners might have to register under § 11.05, they still would not be subject to additional reporting requirements as along as they do not accept a contribution of over $100 from a single source and do not accept contributions, incur obligations, or make disbursements exceeding an aggregate of $1,000 in a calendar year. *See* Wis. Stat. § 11.05(2r). Petitioners have not shown that they exceed that $1,000 threshold and their factual allegations suggest that they are unlikely to spend that much in a year on express advocacy, as opposed to issue advocacy.

In addition, Wis. Stat. § 11.20(3)(c) provides that "[a] *registered* committee . . . making or accepting contributions, making disbursements or incurring obligations in support of or in opposition to one or more candidates for office . . . shall file a preprimary and preelection report." Because Petitioners have not shown that they are subject to registration under § 11.05, they also have not established that they are a registered committee subject to reporting under § 11.20(3)(c).

Furthermore, because Petitioners have not shown that they are required to report under § 11.20(3), they also have not shown that they are subject to 24-hour reporting in the 15 days before an election. The latter requirement applies only when a report under § 11.20(3) has been submitted, and only to contributions. *See* Wis. Stat. § 11.12(5) (requiring reporting of a contribution of $500 or more within 15 days of a primary or election "such that it is not included in the preprimary or preelection report submitted under s. 11.20(3) . . ."). Also, Petitioners have not shown that they meet the $500 contribution requirement that would trigger 24-hour reporting under § 11.12(5).

e. "Oath for Independent Disbursements" requirement in Wis. Stat. § 11.06(7).

Fifth, Petitioners claim burden from the "Oath for Independent Disbursements" requirement in Wis. Stat. § 11.06(7). That requirement, however, applies only to an individual or committee wishing to make disbursements "which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election." Again, Petitioners claim interest in discussing issues and have not shown that they desire to make disbursements for the purpose of advocating the election or defeat of candidates. Therefore, they have not shown they are subject to the oath requirement in § 11.06(7).

In addition, the oath under § 11.06(7) must be filed "with the registration statement under s. 11.05." Therefore, only those required to register under § 11.05 are subject to the oath requirement. Petitioners have not shown that they are subject to registration and so they also have not shown that they are subject to the oath requirement under § 11.06(7).

f. Disclaimer requirements under Wis. Stat. § 11.30.

Finally, Petitioners claim burden from Wis. Stat. § 11.30, which imposes disclaimer requirements on certain communications. Under § 11.30(2)(a), however, the disclaimer requirements "do[] not apply to communications for which reporting is not required under s. 11.06(2)." Again, communications not for express advocacy need not be reported under § 11.06(2) and, therefore, are not subject to the disclaimer requirements of § 11.30(2). Because Petitioners have not shown that they engage in express advocacy, they also have not shown that they are subject to those disclaimer requirements.

g. Definition of "communication" in GAB 1.28(1)(b).

Petitioners also claim that the definition of "communication" in GAB 1.28(1)(b) expands the scope of GAB 1.28 in a way that burdens them. That definition, however, does not impose or trigger any regulations or restrictions on speech.

Subsection (1)(b) defines "communication" to mean "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." Subsection (3) then provides that a communication is for a political purpose if it either uses explicit words of advocacy in a way that unambiguously relates to the campaign of a clearly identified candidate or is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. GAB 1.28(3)(a)-(b). When these provisions are construed together, it is apparent that the definition in sub. (1)(b) only clarifies that a communication may be for a political purpose, within the meaning of sub. (3), without regard to its form or medium. Such a definition does not expand the scope of communications reached by the rule.

Furthermore, even if GAB 1.28 did not include the definition of "communication" in sub. (1)(b), the use of that word in the remainder of the rule would be construed according to its common and approved meaning as ascertained by reference to a recognized dictionary. *See* Wis. Stat. § 990.01(1); *Milwaukee County v. ILHR Dept.*, 80 Wis. 2d 445, 450, 259 N.W.2d 118 (1977). The common and approved meaning of the general word "communication," however, would obviously apply to all the

forms and media of communication enumerated in sub. (1)(b). It follows that the addition of sub. (1)(b) has not expanded the scope of the rule.

Similarly, even before the 2010 version of GAB 1.28 was promulgated, the common and approved meaning of "communication" applied to that word as used throughout Wis. Stat. ch. 11 and, in particular, in § 11.01(16)(a)1., which provides that a communication expressly advocating election or defeat of a clearly identified candidate is for "political purposes." By virtue of that provision, even before GAB 1.28(1)(b) existed, any form of communication expressly advocating election or defeat of a clearly identified candidate was already subject to regulation under Wis. Stat. ch. 11 as an act for political purposes, as long as it met the other criteria for regulation, such as the $25 threshold in § 11.05(1)-(2). For example, contrary to Petitioners' suggestions, a blog posting (or a barn sign or tee-shirt) relating to a candidate—if it constituted express advocacy under § 11.01(16)(a)1.—was already subject to regulation by virtue of the statutes alone—assuming the person or entity making the communication spent more than $25 in a year *on express advocacy*. This again demonstrates that GAB 1.28(1)(b) has not expanded the scope of regulation under Wis. Stat. ch. 11.

For all of the above reasons, the Court should conclude that Petitioners' exaggerated assertions about the impact of GAB 1.28 do not support a claim that the rule is facially invalid. If any regulatory requirements were to prove especially burdensome in the future, the rule could be challenged as applied.

3. Individuals, small groups, and organizations engaging in grass roots advocacy are not categorically exempt from disclosure regulations.

Petitioners also suggest that, even if GAB 1.28 applies only to express advocacy and its functional equivalent, it still is overbroad by virtue of the range of individuals and groups covered. According to Petitioners, "it is both unnecessary and constitutionally impermissible to now move the grass roots into the regulator's sights." Brief of Petitioners at 39. In support, they rely in part on *Federal Election Com'n v. Mass. Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), where the Supreme Court held that a non-commercial, non-profit corporation whose major purpose was to advance a pro-life agenda could not be subjected to the federal ban on corporate independent expenditures and associated structural

requirements that went beyond the general federal disclosure requirements for independent spending.

MCFL did not, however, hold that the plaintiff organization could not be required to comply with generally applicable disclosure requirements in 2 U.S.C. § 434(c). On the contrary, the Court noted that the organization could be subjected to those requirements. *MCFL*, 479 U.S. at 262. It is true that the structural requirements also included some reporting requirements, but only four Justices viewed the latter as contributing to the burden on the organization's speech rights. *Id.* at 254-55. In contrast, Justice O'Connor concluded that the significant burden came not from any disclosure requirements, but from organizational restraints that would significantly reduce the sources of funding available to such groups. *Id.* at 265-66 (O'Connor, J., concurring). She emphasized that, under *Buckley*, disclosure requirements—even as applied to organizations like the one in *MCFL*—serve important informational interests and generally provide "'a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic process of our federal election system to public view.'" *Id.* at 265 (O'Connor, J., concurring) (*quoting Buckley*, 424 U.S. at 82).

Here, Petitioners have not shown that the disclosure requirements triggered by GAB 1.28 are as onerous as the structural requirements in *MCFL*, nor have they alleged or shown that those disclosure requirements will destroy their fundraising ability, as was true in *MCFL*.[13] Contrary to Petitioners' suggestions, therefore, there is no categorical exemption from disclosure requirements for individuals and small groups that engage in "grass roots" advocacy. In any event, even if the Court were to find that the depository and treasurer requirements in Wis. Admin. Code § GAB 1.91(3) are somehow comparable to the structural requirements in *MCFL*, the appropriate response would not be to invalidate GAB 1.28 in its entirety. If G.A.B. should overreach in applying GAB 1.91(3), an as-applied challenge to its action could be brought, as in *MCFL* itself.

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[13] *See also Colorado Right To Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1144 (10th Cir. 2007) (upholding against facial challenge a requirement that nonprofit organizations disclose electioneering disbursements over a $1,000 threshold); *Alaska Right to Life Committee v. Miles,* 441 F.3d 773, 791 (9th Cir. 2006), *cert. denied* 549 U.S. 886 (2006) (upholding registration and reporting requirements for non-PAC groups, even if they are small nonprofit organizations of the type contemplated in *MCFL*); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1317-21 (S.D. Ala. 2000) (holding that groups whose major purpose is not electioneering may nevertheless be required to disclose "express advocacy"); *Osterberg v. Peca*, 12 S.W.3d 31, 42-44 (Tex. 2000) (holding that a married couple need not file as a political committee but must comply with reporting requirements).

E. GAB 1.28 does not impermissibly discriminate in favor of traditional media.

Petitioners claim that GAB 1.28 impermissibly discriminates in favor of traditional media—such as newspapers, television, and radio—because the definition of "communication" in GAB 1.28(1)(b) refers to "printed advertisement," and "television or radio advertisement," but does not refer to other kinds of print, television, or radio communication. Petitioners apparently reason from this that the definition discriminates against advertisements in those media by subjecting them to regulation while allegedly excluding from regulation other forms of communication in those media.

This argument fails because it misreads GAB 1.28(1)(b), which says that "'communication' means . . . any other form of communication that may be utilized for a political purpose." In other words, the definition includes not only the specific types of communication listed in sub. (1)(b), but also any other type of communication, if utilized for a political purpose—which, under sub. (3), means for express advocacy or its functional equivalent. It follows that a print, radio, or television communication that is not an advertisement but engages in express advocacy is just as subject to regulation under GAB 1.28 as an

advertisement in those media. The claim of discrimination, therefore, is simply wrong.

Anticipating this problem with their position, Petitioners argue that GAB 1.28(1)(b) nonetheless discriminates when read in conjunction with Wis. Stat. § 11.30(4) which, among other things, says: "This chapter shall not be construed to restrict fair coverage of bona fide news stories, interviews with candidates and other politically active individuals, editorial comment or endorsement." That provision, according to Petitioners, exempts "old-line media" from regulation while, in their view, GAB 1.28(1)(b) extends regulation to "virtually every form of communication by ordinary citizens." Brief of Petitioners at 48.

This argument fails for the simple reason that the alleged discrimination would be caused by § 11.30(4), not by GAB 1.28(1)(b). Petitioners have not challenged the facial validity of the news and editorial exemption in § 11.30(4). Nor should they be allowed to add such a claim at this late date.

Petitioners may reply that the problem still arises from GAB 1.28 because the discrimination did not exist until that provision allegedly expanded the scope of regulation to all other forms of communication.

That argument fails for two reasons. First, where one claims that an exemption from an otherwise generally applicable regulation constitutes unlawful discrimination, it is illogical to blame the discrimination on the provision that makes the regulation generally applicable, rather than on the provision that provides the exemption.

Second, it is simply untrue to suggest that GAB 1.28(1)(b) has expanded the scope of communications subject to regulation under Wis. Stat. ch. 11. As discussed earlier, even before GAB 1.28(1)(b) existed, all forms of communication were already subject to regulation by force of the statutes alone, if the communication constituted express advocacy. *See* section III-D-2-g, above. Any alleged discrimination caused by the exemption in § 11.30(4) thus pre-existed the creation of GAB 1.28(1)(b).

In any event, Petitioners have not shown that the alleged discrimination is unconstitutional. They base their argument on comments in *Citizens United* about a federal statute exempting media corporations from the ban on corporate independent expenditures at issue in that case. The Court noted that, although Congress had exempted media corporations from that prohibition, a consistent application of the anti-distortion rationale that supposedly justified prohibiting corporate speech would

actually allow Congress, if it wished, to also prohibit media corporations from spending money on political speech. The Court found such a potential outcome to be dangerous and unacceptable. *Citizens United*, 130 S. Ct. at 905. For this and other reasons, the Court invalidated the federal ban on corporate independent expenditures. The discussion of the federal media exemption thus was geared less toward considering that exemption itself than toward the propriety of the anti-distortion rationale for banning corporate speech.

Nor did *Citizens United* hold that it is unconstitutional to exempt some media communications from regulations like disclosure requirements that do not purport to ban or restrict speech. On the contrary, in *McConnell*, the Court rejected claims similar to Petitioners' claim. The plaintiffs there attacked a segregated fund requirement for electioneering communications as underinclusive because it did not apply to advertising in print media or on the Internet and as unconstitutionally discriminating in favor of media companies. *McConnell*, 540 U.S. at 208-09. The Court rejected both claims and found that the exemption for news items and commentary was a "narrow exception" that is "wholly consistent with First Amendment principles." *Id.* at 208. The Court also noted that numerous

other federal statutes draw a similar distinction. *See id.* at 208-09. By Petitioners' logic, all such statutes—federal and state—would be invalid. No legal authority warranting such a result has been cited.

F. GAB 1.28(3)(b) does not violate the First Amendment.

Petitioners have acknowledged that the existing version of GAB 1.28(3)(b) incorporates the *WRTL II* standard for communications functionally equivalent to express advocacy. *See* Brief of Petitioners at 33. On that basis, they recognize that their initial claims directed against the language that has subsequently been repealed from that provision are now moot. *See* Brief of Petitioners at 49 ("the revocation of that provision would appear to moot the issue"). G.A.B. agrees with Petitioners on this question of mootness.

If the Court were to find that claims against the repealed language are not moot, then Petitioners incorporate the arguments they previously articulated against that language. G.A.B. has already represented to the Court that it does not intend to defend the validity of the second sentence of GAB 1.28(3)(b). For the reasons discussed in section III-B-2 above, however, G.A.B. rejects any contention that the First Amendment

categorically precludes application of disclosure requirements to all non-express advocacy.

IV. GAB 1.28 DOES NOT VIOLATE ARTICLE I, § 3 OF THE WISCONSIN CONSTITUTION.

Petitioners' final claim is that, even if the Court finds that GAB 1.28 does not violate the First Amendment, it still should find that it violates the free speech protections in Article I, § 3 of the Wisconsin Constitution. To support that claim, Petitioners rely primarily on the Wisconsin Court of Appeals decision in *Jacobs v. Major*, 132 Wis. 2d 82, 390 N.W.2d 86 (Ct. App. 1986), and on the dissenting portion of a concurring and dissenting opinion by Justice Abrahamson when the same case was before this Court. *See Jacobs v. Major*, 139 Wis. 2d 492, 531-41, 407 N.W.2d 832 (1987) (Abrahamson, J., concurring in part and dissenting in part). The authorities cited by Petitioners, however, do not support their argument.

In *Jacobs*, this Court *rejected* a claim that Wis. Const. art. I, § 3, should be construed as providing greater protection than the First Amendment. Specifically, the Court held that Wis. Const. art. I, § 3, does *not* provide greater protection for speech on private property than is provided by the First Amendment. *Jacobs*, 139 Wis. 2d at 530. In reaching

that conclusion, this Court *reversed* the contrary portion of the Court of Appeals decision on which Petitioners rely. *Id.* Similarly, the Court also *disagreed* with the contrary views expressed in the concurring/dissenting opinion on which Petitioners also rely. *Id.* at 510-11, 524 n.13, 528. In short, Petitioners ask the Court to follow the position it specifically *rejected* in *Jacobs*.

Nor do the analyses in the Court of Appeals decision and the concurrence/dissent in *Jacobs* provide any direct support for Petitioners' position. The issue in *Jacobs* was whether Wis. Const. art. I, § 3, protects against alleged infringements of speech rights not involving governmental action. In contrast, the issue here is the *substantive scope* of the free speech protections provided against governmental action. The Court of Appeals and the concurrence/dissent in *Jacobs* argued that the linguistic differences between the state and federal constitutions supported the view that the state provision was meant to protect against private action, as well as state action. Even if that were true, however—and this Court held otherwise—it still would not follow that the linguistic differences between the two constitutions support a holding that the *substantive scope* of Wis. Const. art. I, § 3, is greater than the scope of speech protections under the First

Amendment. Petitioners have not provided any analysis of why the particular linguistic differences between the two constitutions support the view that the substantive scope of Wis. Const. art. I, § 3, is greater than that of the First Amendment.

Furthermore, this Court has held in numerous other cases that, notwithstanding the linguistic differences, the scope of Wis. Const. art. I, § 3, is *not* greater than that of the First Amendment. *See State v. A.S.*, 2001 WI 48, 243 Wis. 2d 173, ¶ 18 n.2, 626 N.W.2d 712 ("Despite differences in language, Article I, Section 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment of the United States Constitution."); *State v. Douglas D.*, 2000 WI 47, 243 Wis. 2d 204, ¶ 2 n.2, 626 N.W.2d 725 ("Despite the differences in language between these provisions, we have found no differences in the freedoms that they guarantee."); *County of Kenosha v. C & S Management, Inc*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999) ("Wisconsin courts consistently have held that Article I, § 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment of the United States Constitution.") (citing cases); *State v. Migliorino*, 150 Wis. 2d 513, 530, 442 N.W.2d 36 (1989); *Denny v. Mertz*,

106 Wis. 2d 636, 655-56 n.27, 318 N.W.2d 141 (1982). This authority weighs heavily against Petitioners' state constitutional argument.

It is undeniable that this Court can and sometimes has found greater liberties in the state constitution than are provided under the federal constitution. The cases cited by Petitioners on this point are nonetheless distinguishable. Although the Court stated the general principle in *State v. Doe*, it nonetheless did not construe the Wisconsin Constitution that way in that case. *See State v. Doe*, 78 Wis. 2d 161, 171-75, 254 N.W.2d 210 (1977). In *State v. Knapp*, the Court found that Wis. Const. art. I, § 8, affords greater protection against self-incrimination in criminal cases than is provided by the Fifth Amendment. *State v. Knapp*, 2005 WI 27, 285 Wis. 2d 86, ¶ 83, 700 N.W.2d 899. That decision, however, is far afield from the speech rights at issue here.

The closest authority cited by Petitioners is *State v. Miller*, where the Court held that Wis. Const. art. I, § 18, requires strict scrutiny of regulations alleged to violate the right to free exercise of religion, even under circumstances where strict scrutiny is not mandated by the Free Exercise Clause of the First Amendment. *State v. Miller*, 202 Wis. 2d 56, 66-67, 549 N.W.2d 235 (1996). That decision, however, is also

distinguishable because it was a response to an earlier decision in which the U.S. Supreme Court had significantly scaled back the amount of protection that had traditionally been afforded under the federal Free Exercise Clause. *Id.* at 68 (discussing *Employment Div., Dept. of Human Res. v. Smith,* 494 U.S. 872 (1990)). In contrast, in the area of campaign finance law, the U.S. Supreme Court has been very protective of speech rights, the most recent example being *Citizens United*. The present case, therefore, does not present the kind of need for additional state protection of rights that was found in *State v. Miller*.

For these reasons, the Court should hold that GAB 1.28 does not violate Article I, § 3 of the Wisconsin Constitution.

CONCLUSION

For all of the reasons stated herein, G.A.B. respectfully asks the Court to deny all of the relief request by Petitioners and to affirm the validity of GAB 1.28 in all respects.

Dated this 23rd day of February 2011.

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WORD CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font with the exception that this brief exceeds the length limit. The length of this brief is 13,788 words. A Motion for Leave to Exceed Length Limit is being simultaneously filed, asking the Court to accept this brief for filing in its present form.

Dated this 23rd day of February 2011.

Thomas C. Bellavia
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of February 2011.

Thomas C. Bellavia
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