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August 9, 2010

HAND DELIVERED

Clerk, Wisconsin Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

RECEIVED

AUG 09 2010

**CLERK OF SUPREME COURT
OF WISCONSIN**

Re:

Dear Sir or Madame:

Please find enclosed for filing with the Wisconsin Supreme Court an original and nine copies of the following:

- 1) Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief;
- 2) Memorandum in Support of Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief.

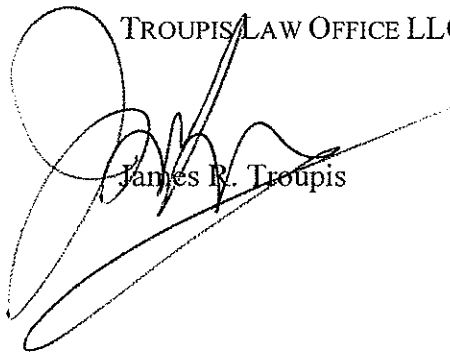
Also enclosed is a check for \$195.00 as payment of the Filing Fee.

Thank you.

Very truly yours,

TROUPIS LAW OFFICE LLC

James R. Troupis



Enclosures

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.: _____

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CLERK OF SUPREME COURT
OF WISCONSIN

**PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION
SEEKING DECLARATORY JUDGMENT AND OTHER RELIEF**

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Michael D. Dean
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Waukesha, WI 53186-4065

Dated: August 9, 2010

Petitioners, Wisconsin Prosperity Network, Inc., The MacIver Institute For Public Policy, 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. (hereafter “Petitioners”), by and through their attorneys, Troupis Law Office LLC and others, hereby petition the Wisconsin Supreme Court for leave to commence an original action, pursuant to Article I, § 3 of the Wisconsin Constitution, Amendment 1 of the United State Constitution, Wis. Stat. §809.70, and Wis. Stat. § 806.04.

PRELIMINARY STATEMENT

1. This is a petition for leave to commence an original action in the Wisconsin Supreme Court seeking an immediate ruling by this Court declaring that the revised administrative rule in Wis. Admin. Code § GAB 1.28 (“GAB 1.28”), effective on August 1, 2010, violates the Wisconsin Constitution Article I, Sec. 3; violates the First Amendment of the United State Constitution; or is otherwise unenforceable as *ultra vires*.

2. The impact of GAB 1.28 on the citizens of Wisconsin is immediate and irrevocable. It has affected and will dramatically affect the ongoing ability of individuals and organizations to participate in public debate at a time when such debate of public issues and policies is critical to the future of this State and our country. Issues of public policy are a central feature of open debate, particularly during an election year, and GAB 1.28 prohibits or otherwise burdens the very speech to which Article I, §3 and the First Amendment were intended to apply.

3. As noted in Petition of Heil, 230 Wi. 428, 284 N.W. 42 (1939), original jurisdiction is appropriate when “[A] state officer is about to perform an official act materially affecting the interests of the people at large, which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions.” Here, GAB 1.28, and the concomitant

application of Chapter 11 of the Wisconsin Statutes will require that non-profit groups, unincorporated associations and individuals completely halt participation in ongoing public affairs or be prosecuted. GAB 1.28 irrebuttably redefines common discussions on the internet, in letters and fliers, in reports and studies, as a communication for political purposes. Then, as newly minted “political communications,” the regulation requires the payment of a fee for the right to speak, requires filing of reports, requires disclaimers, requires additional advance reporting, requires after-the-fact oaths on what was said, and even requires notices to a government agency within 24 hours. The full force of government enforcement, fines and jail, follow if one fails to comply. The impact of this regulation is breathtakingly broad and bars every aspect of communication from a farmer who may paint a sign of protest on his barn to an organization publishing a comprehensive study on state finance. It will bar simple e-mail communication among individuals so long as they have paid more than \$25.00 for their internet connection, if that communication describes the public stand of a candidate, and it will prosecute groups meeting on a street corner if the cost of the soapbox exceeds \$25.00.

4. GAB 1.28 is not “narrowly tailored” to address a compelling government interest.

5. GAB 1.28 is an equally breathtaking attempt of an administrative body, the Government Accountability Board, to act as a legislative body by enacting a rule that has no legislative predicate and, in fact, redefines the explicit legislative definition of political speech. Compare GAB 1.28 with Wis. Stat. §11.01(16).

6. GAB 1.28 creates an irrebuttable presumption that certain speech is political speech. As the irrebuttable presumption only applies during certain time periods, it leads to often bizarre and, from the perspective of a free and open society, often horrific consequences. Grass roots speakers who wish to discuss issues at a time when the general public is paying attention

dare not connect that discussion to the performance of any public official without subjecting themselves to administrative requirements that, for many, will either be a substantial deterrent to speech or a trap for the unwary. 501(c)(3) organizations, such as several of the Petitioners here, will run the risk that a state law redefinition of what has always been regarded as educational speech to political speech will jeopardize their tax-exempt status. Under such circumstances, these organizations will have no choice but to remain silent.

7. The State of Wisconsin Constitution provides explicit protections for free speech above, and in addition to, those of the United States Constitution. While the new rule cannot pass federal constitutional scrutiny, it is even less defensible under Wisconsin's broader constitutional protection, which not only prohibits laws restricting the freedom of speech or of the press, but also affirmatively ensures that "[e]very person may freely speak, write and publish his sentiments on all subjects" Article I, sec. 3. This protection, like those of the federal constitution, prohibits not only direct, but indirect, burdens on the right to speak.

PARTIES

8. Wisconsin Prosperity Networks, Inc. is a Wisconsin not-for-profit corporation organized as a public interest educational organization under § 501(c)(3) of the Internal Revenue Code, with business offices located at 1025 N. 108th Street, West Allis, WI 53214. It was formed to advance and defend principles of individual freedom and responsibility, ordered liberty, open and limited government, and free enterprise throughout the state. As part of that mission, it seeks to create an infrastructure of ideas and individuals in support of those principles by facilitating and coordinating efforts of individuals, corporate members, donors, and other public-interest not-for-profit Wisconsin organizations characterized by similar purposes and principles. As a body coordinating the efforts of other similarly motivated organizations it raises

funds for itself and those other organizations, communicates by a website and other methods, organizes events at which public policy issues are presented and participates in ongoing efforts to advance its key objectives.

9. The John K. MacIver Institute for Public Policy, Inc. (“MacIver Institute”) is a Wisconsin non-profit corporation, fully qualified as tax exempt under § 501(c)(3) of the Internal Revenue Service Code, with business offices located at 44 East Mifflin Street, Suite 201, Madison, WI 53703. Named after one of Wisconsin’s most prominent architects of state-based initiatives, the MacIver Institute was established to advance the idea that individual freedom, limited government, and personal responsibility are essential principles for the development of effective public policies in Wisconsin. It seeks to accomplish its goals by conducting timely research and offering new policy proposals. In recent years, the MacIver Institute has spearheaded analysis of the State of Wisconsin Budget, the Milwaukee Schools, and a host of the State’s most important legislative initiatives. It communicates through a website, press releases, e-mails, and all forms of broadcast media.

10. Americans for Prosperity (“AFP”) is a national non-profit corporation, organized under §501(c)(4) of the Internal Revenue Code. AFP was established to educate and mobilize citizens interested in understanding and helping to solve America’s most pressing policy problems from a limited government and free market perspective. Its Wisconsin state chapter engages in educational programs, policy research, and issue advocacy on matters of interest to its members and activists. It communicates through websites, press releases, e-mails, e-newsletters, and all forms of broadcast media.

11. Reverend David King resides at 2407A North Pierce Street, Milwaukee, WI 53212, and is a well-known personality in the state. Personally and through his Milwaukee

Ministry (the Milwaukee God Squad, Inc., a non-stock, not-for-profit Wisconsin corporation), he regularly addresses concerns in Milwaukee's African American community. Rev. King's comments are covered by the press and most certainly include comments on public office holders and candidates, and the issues faced in urban areas 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. Rev. King raises funds from a variety of sources and relies, as well, on the volunteer activities of others in publishing his message over the internet, in fliers and other publications, in speeches and in every other way he can. His comments are his own.

12. Concerned Citizens of Iowa County, Inc. ("CCIC") is a Wisconsin not-for-profit corporation organized as a public interest social welfare organization under § 501(c)(4) of the Internal Revenue Code, with business offices located at 504 E. Madison Street, Spring Green, WI 53588. CCIC is dedicated to informing, educating and rallying citizens to embrace limited government, transparency in government, and fiscal responsibility. Located in a rural county, CCIC is particularly focused on issues affecting rural Wisconsin. It utilizes the internet, correspondence, meetings, pamphlets and other broadcast methods to speak out on issues, particular legislation, and public policies.

13. Daniel O. Curran resides at 709 Red Oak Trail, Dodgeville, WI 53533, and heads CCIC. He is a decorated combat veteran, and both individually and through CCIC he continues to defend and protect the Constitution by seeking to address matters of limited government, transparency in government, and fiscal responsibility. He is on the Board of CCIC and directs many of its advocacy activities.

14. Oriannah Paul resides at 6274 Wilson Lima Road, Oostburg, WI. When Congress passed the Stimulus package in 2009, Oriannah believed she could no longer ethically or morally sit back and do nothing because she believed the federal government was spending money it did not have for political purposes and special interests, and was imposing crushing debt and tax burdens on her children, grandchildren and future generations. She believes that such debt burden at the State or Federal level creates terrible social and political risk. As a result, she began as one of the early organizers of what has been dubbed the Tea Party Movement. She gives speeches, communicates on issues and policies regularly to groups large and small, and she travels to rally support against big government and those who would support it. She is one of the founders of the Sheboygan Liberty Coalition.

15. The Sheboygan Liberty Coalition is an unincorporated voluntary association of individuals, with business offices also located at 6274 Wilson Lima Road, Oostburg, WI. It is dedicated to reducing the size of government, controlling taxes and returning liberty to all. The Sheboygan Liberty Coalition operates out of Mrs. Paul's home, and communicates over the internet, in pamphlets, with signs, by speeches and rallies. The Sheboygan Liberty Coalition is one of the original organizations dubbed as the "Tea Parties" and it intends to pursue its objectives in every possible way in the upcoming election cycle, but does not coordinate its activities with any candidates. Its messages expressing support or opposition to legislation and public policy issues often relate to a specific candidate or to all candidates.

16. Kimberly J. Simac, a mother, an author of children's books and horse trainer, resides at 3860 Kula Vista Drive, Eagle River, Vilas County, Wisconsin. In 2005 she became concerned that politicians, media, and opinion makers were attempting to discredit American troops and the military effort in the Middle East, just as had happened in the Vietnam War. That

concern inspired her to write a children's book to support the troops, *American Soldier, Proud and Free* (<http://www.amazon.com/American-Soldier-Proud-Kimberly-Simac/dp/0976393123>). She then organized fundraising efforts to donate copies of the book to area schools, but a number of public schools refused to accept the book because it contained the words "God" and "pray." She became increasingly concerned about whether children were being taught to respect America's values and history. In 2009, she began showing educational films in community settings to create awareness, and that evolved into a group of concerned citizens in Vilas and surrounding counties who identified with the Tea Party movement. She has and will continue to advocate for her ideas with books, films and in working with patriotic groups. Those efforts must necessarily involve focused discussion of public policy issues and concerns at all times, including the upcoming elections and candidates in those elections.

17. The Northwoods Patriots Group, Inc. is a Wisconsin not-for-profit corporation organized as a public interest social welfare organization under § 501(c)(4) of the Internal Revenue Code, with business offices also located at 3860 Kula Vista Drive, Eagle River, WI. Mrs. Simac serves as one of its directors, and is one of its founding members. This organization is, in part, a continuation of Mrs. Simac's individual activities and reflects her concerns. As a §501(c)(4) advocacy group, it has promoted, and will continue to promote, matters of patriotism and seeks, through that advocacy, to support members of the military and to insure that Judeo-Christian morality and sentiments are acknowledged and taught. Through its website and advocacy, it promotes that message, supports particular legislation and public policies and, like other similar groups, is considered one of the Tea Party organizations.

18. All Petitioners currently engage in communications that identify state legislation, policies and positions on public issues; identify public officials, including current candidates for

office, who sponsor, support, or are identified with the legislation, policies and positions; and, to one degree or another, indicate support or criticism of, or oppositions to, such legislation, policies and positions.

STATEMENT OF ISSUES PRESENTED BY THIS PETITION

19. Whether GAB 1.28 violates the Wisconsin Constitution, Article I, Section 3.
20. Whether GAB 1.28 violates the First Amendment of the United States Constitution.
21. Whether GAB 1.28 is *ultra vires* as an administrative rule not otherwise authorized by Wisconsin Statutes.
22. Whether GAB 1.28 is *ultra vires* as an administrative rule contrary to Wisconsin Statutes .
23. Whether this Court should enter a Declaratory Relief consistent with its conclusions, or should otherwise act to enjoin the Government Accountability Board and others from enforcing GAB 1.28 during the pendency of this action.

STATEMENT OF FACTS

24. On July 31, 2010 the Wisconsin Government Accountability Board published a regulation defining certain speech previously understood to be issue advocacy, not subject to regulation by the State of Wisconsin, as communication for a political purpose.

25. That new regulation, as published, reads as follows:

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. "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.

26. GAB 1.28 became effective August 1, 2010, and will affect, accordingly, the Fall 2010 primary and general elections in the State of Wisconsin. The Wisconsin primary election is September 14, 2010, and communications on or after August 16, 2010, will be subject to the new definitions of GAB 1.28 and concomitant obligations of Wisconsin Statutes, Chapter 11.

27. GAB 1.28 creates an irrebuttable presumption that certain communications are “susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate” that have previously been considered speech not subject to regulation in Wisconsin. GAB 1.28 captures within the obligations and regulations of Wisconsin Statutes Chapter 11 speech not previously subject to Chapter 11.

28. The obligations of Wisconsin Chapter 11 and the regulations enacted to carry out the purposes of Chapter 11 are not *di minimis*, as they include, but are not limited to, the following that apply to the Petitioners:

- a. An obligation to 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.

29. None of the provisions of Chapter 11 were enacted or amended as part of the enactment of GAB 1.28 and other emergency rules, but rather existed prior to the publication of GAB 1.28. Those provisions, having been enacted prior to the amendments to GAB 1.28, cannot have been narrowly tailored to any otherwise unique aspect of the amended provisions.

30. On no fewer than 29 separate occasions, legislation has been introduced to broaden the meaning of “political purpose” as provided by Wis. Stat. § 11.01(16), and on none of those occasions did the Legislature of the State of Wisconsin choose to broaden the language. *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; and 2009 Assembly Bill 812.

31. Communications the Petitioners have made in the past, and which they would, absent the legislation, make on or after August 16, 2010, would be considered as speech for political purposes based on a reasonable application of GAB 1.28.

GROUND SUPPORTING ORIGINAL JURISDICTION

32. The Government Accountability Board, having published GAB 1.28, presumptively intends to take action to enforce its provisions.

33. GAB 1.28 is contrary to the Wisconsin Constitution, Art. I, §3, and is *ultra vires* as contrary to Wis. Stat. §11.01(16) (Wis. Stat. §227.10(2) (“No agency may promulgate a rule which conflicts with state law.”) and is not otherwise authorized by statute.

34. GAB 1.28 is contrary to the First Amendment to the United States Constitution guaranteeing freedom of speech and freedom of association.

35. GAB 1.28 acts, in effect, as a prior restraint on speech as it requires payment of a fee and filing of reports.

36. GAB 1.28 necessarily inhibits freedom of speech and freedom of association by redefining certain speech presumptively as political speech. It will force, for example, qualified 501(c)(3) organizations to put at risk their tax exempt status if they choose to speak on issues during the periods noted in the statute as such organizations are barred from participation in political speech by the Internal Revenue Service Code and Regulations. For the first time in State history, it will force those who wish to contribute to educational, policy, and issue-oriented groups who seek to discuss the issues of the day with reference to those public officials and candidates for public office whose actions and failures to act are inextricably bound up with those issues, to do so at the price of compliance with a host of regulations, reports, fees and costs.

37. There is a long and unfortunate history of attempts by government to force public disclosure of those who belong to or support advocacy organizations. Those attempts have been made in order to deter speech and public participation, and include, most notably, efforts in Alabama to expose supporters of the NAACP in the 1950s in order to prevent them from speaking out against racial discrimination. The obligation of disclosure contained in GAB 1.28 cannot be constitutionally justified in the case of mere issue advocacy, educational speech, or policy initiatives.

38. Given its breadth, GAB 1.28 will capture almost any speech that names any person running for political office in the context of discussion of a policy issue, and as such will

necessarily inhibit otherwise protected speech by requiring prior registration, payment of fees, reporting and other actions.

39. The rule may, for example, apply to 1) private communications by e-mail discussing public policy issues of candidates and the efforts of citizen bloggers 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, 5) academic and scholarly work published or distributed during this period and 6) the disgruntled landowner who paints a sign on his barn.

40. GAB 1.28 was not narrowly tailored to achieve a legitimate interest as it unquestionably casts a net across all manner of speech on public policy issues.

STATEMENT OF RELIEF SOUGHT

41. Petitioners respectfully request that this matter be accepted as a matter of original jurisdiction in this Court.

42. Petitioners respectfully request that GAB 1.28 be declared unconstitutional under either or both of the Wisconsin and United States Constitutions

43. Petitioners respectfully request that GAB 1.28 be declared *ultra vires* and otherwise unenforceable.

44. In the alternative, the Petitioners respectfully requested that enforcement of GAB 1.28 be enjoined for a period of time sufficient for this Court to schedule appropriate briefing and oral argument on the merits.

CONCLUSION

Petitioners respectfully requested that this Petition for Original Jurisdiction be granted, and that the Court enter such other and further relief as may be just.

Dated this 9th day of August, 2010.

Respectfully submitted,

WISCONSIN PROSPERITY NETWORK, INC.
et al., Petitioners

By: 

~~James R. Troupis, SBN 1005341~~

Christ T. Troupis (Admission *Pro Hac* pending)

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STATE OF WISCONSIN
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Dated: August 9, 2010

This is a seminal moment in the history of our free and open society premised and protected by free speech. Whatever the motives may have been for the Government Accountability Board's amendment to GAB 1.28 (Wis. Admin. Code § GAB 1.28, effective August 1, 2010), passed at the last possible moment prior to a critical election, the result is dramatic and catastrophic for free speech in the State of Wisconsin. A farmer painting his message of discontent on the side of his barn and the nationally recognized think-tank dedicated to analysis of public policy are equally silenced by GAB 1.28. The neighborhood group exchanging e-mails about a local issue on which a state legislator may have voted, the tea party group rallying on the State Capitol ground and a group of veterans protesting the war in Iraq are equally subject to fines and jail if they do not register, pay a \$100 fee and report all of their activities.

In a very real sense, what is before this Court is the future of our State. A free and open democratic society can only survive if its citizens are unafraid to express their views without fear of government reprisal. It is not the role of State Government to regulate speech, no matter the motives, absent a compelling government interest. Even then, such regulation must be narrowly tailored. GAB 1.28 does not come within hailing distance of meeting that standard. If it is allowed to stand it will change the course of public debate, public policy, and freedom in a way never before thought possible.

It is critical that this Court exercise its Original Jurisdiction to address GAB 1.28.

I. FACTUAL BACKGROUND

A. GAB 1.28, as Amended

1. Timing

On July 31, 2010 the Government Accountability Board published a sweeping change to the rules that will apply in Wisconsin elections. Given that this change occurred on the very eve of an election, effective review is only possible if undertaken by this Court. Whether the timing was purposeful and intended to cause great difficulty for effective review or not, the publication of this sweeping change at the last possible moment means that there is no time to bring this matter effectively at any other level of our State Courts.¹ Any delay in a decision will cause irreparable harm. *See* Wis. Stat. §§ 11.60 and 11.61; Wis. Admin. Code § GAB 1.91. Indeed, for some organizations, registering and thus conceding that their activities are now considered “political” would automatically result in revocation of their important tax status as 501(c)(3) organizations. Such penalties for exercising a right to speak cannot be countenanced.

Absent a ruling from the Wisconsin Supreme Court, or an order by this Court staying enforcement by injunction or other order of this new regulation, pending comprehensive analysis and briefing, it is indisputable that previously free speech will be reduced or eliminated entirely. The citizens of this State have conducted effective elections for decades without these new, last-minute, rules. Holding the status quo as it was on July 31, 2010, while this matter is addressed, will cause no harm, while failing to do so will irretrievably affect rights of free speech. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).

¹ Groups from every side of the political spectrum have filed actions attempting to bar enforcement during this election cycle of this extraordinary expansion of regulatory authority and the effective ban it will place on previously thought free and open debate. *See Wisconsin Club for Growth, Inc. v. Myse*, No. 10-cv-427 (W.D. Wis., filed July 31, 2010); *Wisconsin Right to Life Committee, Inc. v. Myse*, No. 10-C-0660 (E.D. Wis., 2010).

2. The Provisions of GAB 1.28

The amendments to GAB 1.28 are shown in the actual published rule:

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. "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.

3. The Interplay of Chapter 11 and GAB 1.28

By irrebuttably defining certain issue-oriented, educational and policy-based speech as "political communications" the Government Accountability Board has required any person participating in that issue-oriented, educational and policy-based speech to be subject to regulation, primarily under Wisconsin Statutes Chapter 11 and its regulatory progeny. As the

Legislature made no change to Chapter 11 as part of the sweeping amendment to GAB 1.28 (indeed, the Legislature, as noted below, has refused to make any change to provisions related to this new regulation), there was no attempt to tailor anything, except to create ever broader, more complex, and more costly new rules, to the now dramatically broadened definition of regulated speech in Wisconsin.

Even a cursory review of the provisions of Chapter 11 and the emergency rules that are now to be enforced against independent organizations, social networks and independent citizens discloses just how sweeping government control of public debate is about to become. Under these provisions, 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.

Of course other provisions apply as well, but as to the impact of the GAB 1.28 and the importance of the immediate exercise of Original Jurisdiction, there can be no dispute that these regulatory structures are substantial in their cost, both monetary and otherwise. Compliance is complex, difficult and costly.

B. The Impact of GAB1.28 on these Petitioners as Generally Applicable Examples

While a virtually limitless number of individuals and organizations will be affected by this new regulation (and many of those would gladly join in these proceedings if asked by this Court to express their sentiments), the Petitioners now before the Court provide a representative example of the immediate and irreparable impact of GAB 1.28.

1. Wisconsin Prosperity Network, Inc. & 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, fully 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, each also may represent a broad spectrum of interests, and play an important role in overseeing actions by State and local government officials and publishing those results and commentary on their websites, in publications, through the broadcast media and in news release. 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, by the fiat of amended Rule 1.28, communications for a political purpose. 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 is a candidate for office this Fall. As such, if the MacIver Institute archives that article so that others may read it after August 16, they will have “a clearly identified candidate” and they will fall within “2. Supports or condemns that candidate’s position or stance on issues” or “3. Supports or condemns that candidate’s public record.” The MacIver Institute will be subject to Chapter 11 and, as it would have presumptively engaged in a “political purpose,” it could be subject to further action by the Internal Revenue Service and the State if it does not shut down its

website. It cannot accede to the newly minted definition of amended GAB 1.28, so it will have little choice but to cease what it has freely and openly done since its inception.

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 regularly covered by the press and most certainly 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 many inside and outside the Milwaukee area, a requirement that he now register, pay a fee, continually report and have attorneys or others review all of his statements in advance, in effect bars him from speaking at all over the next several months. He cannot risk jail and he cannot be expected to find the financial resources and expertise needed to comply with the broad array of regulations contained in Chapter 11.

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 prohibit 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 a 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 a host of both traditional and non-traditional methods of communication.

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

As described in the Petition, Mr. Curran, Mrs. Paul and Mrs. Simac have all only recently taken up the mantle 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 and none of them are or will coordinate their activities with candidates. Yet, they will certainly 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 areas 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 must disband or be subject to prosecution for they will certainly speak out and they will spend their own money to do so about issues and candidates for office during the coming months.

II. Grant of Original Jurisdiction Is Essential

There is little doubt that this action poses a matter well within the types of matters this Court regularly undertakes as Original Jurisdiction. As noted in *Petition of Heil* (and recognized by the Court’s internal operating procedures, Wis. Stat. § 809.70), there are a number of requirements a matter must meet before it will be considered. First, of course, is that it must be a matter of statewide importance, of the type this Court would normally take on appeal. *Petition of Heil*, 230 Wis. 428 (1938). Second, one of the specified grounds articulated in Heil must be met. Finally, the Court may, but need not, look to similar matters it has taken as Original Jurisdiction in the past.

As to statewide importance, there is little doubt the validity and enforcement of amended GAB 1.28 meets that criteria. The Government Accountability Board clearly understood that with an impending election, the enactment of this regulation was, in its view, essential and would have immediate statewide impact. It was published at the last possible moment to have an impact on the upcoming elections, and it will affect every campaign for office. By defining whole new categories of speech and speakers as “political communication,” the regulation was meant to, and will, require substantial changes in process and in compliance by thousands of individuals and organizations.

Heil and its progeny provided a number of grounds for undertaking a case as a matter of original jurisdiction. Where, as here, the validity and enforceability of the regulation are facially challenged on constitutional grounds, the lower courts will ultimately look to this Court for a determination. As noted in *Heil*, it is appropriate to grant Original Jurisdiction when:

[A] state officer is about to perform an official act materially affecting the interests of the people at large, which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions.

Petition of Heil, 230 Wis. 428, 284N.W. 42 (1939). The Petition describes with precision that amended GAB 1.28 is contrary to law and violates constitutional provisions, and as such is an appropriate matter for Original Jurisdiction.

Finally, the Court has often looked to its own precedent to discern a basis for granting Original Jurisdiction. Here, because the Petition describes a matter directly affecting a fundamental constitutional right, the variety and extent of prior precedent is enormous. *See, e.g., Norquist v. Zeuske*, 211 Wis. 2d 241, 244-46, 564 N.W.2d 748 (1997) (Uniformity Clause challenge to freeze on agricultural property taxes); *Libertarian Party of Wisconsin v. State*, 199 Wis.2d 790, 796, 546 N.W.2d 424 (1996) (multiple constitutional challenges to the Stadium Act); *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996)

(Establishment Clause challenge to Milwaukee Parental Choice Program); *Hartford v. Kirley*, 172 Wis. 2d 191, 195, 493 N.W.2d 45 (1992) (challenge to TIF districts as unconstitutional public debt); *Gard v. State Elections Bd.*, 156 Wis. 2d 28, 35, 456 N.W.2d 809 (1990) (First Amendment challenge to campaign finance laws).

III. GAB 1.28 Violates the Wisconsin Constitution Art I, §3 and the First Amendment to the United States Constitution

While the provisions of the Wisconsin Constitution protecting free speech and association parallel those of the First Amendment to the United State Constitution, Wisconsin’s guarantee is both broader and more explicit. The Wisconsin guarantee 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. In contrast, the United States Constitution is considerably less precise in providing, “Congress shall make no law...abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. Am. 1.

A. The First Amendment

Any regulation of protected speech, and the speech here is in that category, must be narrowly tailored to address a compelling government interest. *Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976). There is certainly no doubt that GAB 1.28 must meet that standard as, by its own terms, it presumptively defines certain issue advocacy, educational and policy-based speech within the category of political speech when made within certain arbitrary time periods. Wis. Admin. Code § GAB 1.28(3). It clearly burdens speech falling within its ambit in that it requires *everyone* – not just well heeled “special interests” or sophisticated political operations – to comply with its administrative requirements. This will either deter grass roots participation, or

serve as a trap for unwary community volunteers whose reward for civic concern will be threats of prosecution and public obloquy.²

In order to even address the second half of the standard—compelling interest—one must first provide a basis in the law for recategorizing the speech defined by GAB 1.28 as “communication for a political purpose.” Absent a finding that all of the speech now presumed subject to Chapter 11 regulation is, in fact, campaign speech, the recategorization must fail because it cannot pass the first requirement of being “narrowly tailored.” See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (“Government may not suppress lawful speech as the means to suppress unlawful speech.... The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”); *Buckley*, 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963) (“The test is whether the language [of the regulation] affords ‘the precision of regulation that must be the touchstone in an area so closely touching our most precious freedoms.’”)). This Court need go no further.³

² 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://sharkandshepherd.blogspot.com/2010/03/laffaire-asa-not-what-it-seemed-to-be.html>) (last visited on August 8, 2010).

³ There is a crusader aspect (*i.e.*, who cares that innocents must die for the cause) to this Government Accountability Board gambit. In the name of seeking disclosure of million-dollar broadcast advertising campaigns based on issues that have offended the Board’s sense of fair play as skirting the boundaries of express advocacy, it has created a rule of unending censorship, styled as a regulation, that captures every aspect of fair, honest, and essential policy debate. Moreover, even those aspects of the rule that seek disclosure, and it is much more than that, would, standing alone, be unconstitutional. Mandated disclosure of an advocacy organization’s members or donors burdens the First Amendment rights and would not be allowed. See, *McIntyre V. Ohio Elections Commission*, 514 U.S. 334, 349 (1995) (“Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document’s content that the author is free to include or exclude.”). While there is some authority for a general obligation of disclosure with respect to express advocacy, see, *Citizens United v. FEC*, 558 U.S. 50 (2010), there is no such authority with respect to issue advocacy.

It is hard to imagine how the Government Accountability Board could have ignored the breadth of the coverage of this newly minted definition. There are a limitless number of examples of pure public discourse that have been presumed outside of regulatable “campaign speech” that are now being criminalized. The law covers any communication, and the operative term is “any.” “‘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.” Wis. Admin Code § 1.28(1)(b) (emphasis added). Then, it creates an irrebuttable presumption that communications within 30/60 days of an election that include “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” are “communication for a political purpose.” Wis. Admin. Code §1.28(3)(b).

Simply stating the proposition with the words of the regulation illustrates its absurdity when measured against any interpretation of the obligation to be “narrowly tailored.” How does one irrebuttably presume that everything described by this provision is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* There is no request for a vote in any respect, and no court of which Petitioners are aware has ever accepted the proposition that speech not using the terms noted in subsection (3)(a) can be “presumed” to be communications for political purpose. On the contrary, when going beyond those explicit terms, Courts have uniformly required a factual inquiry and clear indicia of an intent to advocate for the election or defeat of a candidate. To irrebuttably presume that all manner of speech is unequivocally intended for political purposes when it occurs within

30/60 days is nonsense. Such speech on issues before the legislature, before city government and in front of a limitless number of public bodies does not change its character merely because of proximity to an election. All discourse on political issues would end.

This is not to say the Government Accountability Board might not be able to fashion some type of definition that could address their apparent concerns about issue advocacy. But, that is not before this Court. What is before this Court is the creation of an irrebuttable presumption converting what at all other times is a policy discussion—issue advocacy, educational speech and policy debate—into “communication...susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” merely because of an election’s proximity. Burdens of proof exist for a reason, and certainly in the area of free speech, elimination of those burdens cannot meet the obligation of being “narrowly tailored.”

Recent Supreme Court decisions have not changed the basic proposition, they have reinforced it. For example, in *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007), the Court reaffirmed that only express advocacy in the context of political campaigns would be considered subject to potential regulation (albeit, even then, “narrowly tailored for a compelling governmental interest”). Any regulation of speech that may be interpreted as something other than an appeal to vote for or against a candidate is simply forbidden. As the Court noted:

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.

Id. at 474 (emphasis added). The Government Accountability Board has done what the Supreme Court explicitly said it could not do by suppressing speech on issues simply because they are

“pertinent in an election.” The irrebuttable presumption and the 30/60-day limitation reveals in stark terms how far the Government Accountability Board has strayed from an acceptable regulatory structure.

The distinction drawn in *Buckley v. Valeo*, 424 U.S. 1 (1976) between political communications that expressly advocate a candidate’s election or defeat and speech that does not “in express terms advocate the election or defeat of a clearly identified candidate...” remains today as the operative legal principal. *Id.* at 44; *see also Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999). The Government Accountability Board cannot write out the obligation to demonstrate such express terms.

The U.S. Supreme Court, perhaps anticipating the gambit tried today by Wisconsin’s Government Accountability Board, noted the very high bar that must be passed to consider something the “functional equivalent of express advocacy” (the apparent pin-hole the Government Accountability Board now wishes to convert to a chasm):

[W]hen it comes to defining what speech qualifies as the functional equivalent of express advocacy...we give the benefit of the doubt to speech, not censorship. The First Amendment’s command that “Congress shall make no law...abridging the freedom of speech” demands at least that.

WRTL at 482. Here the creation of a presumption that certain educational, policy, and issue speech made 30/60 days before an election is the “functional equivalent of express advocacy,” and is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a

specific candidate” (GAB § 1.28(3)(c)), clearly gives the benefit of the doubt to censor. As such, it cannot satisfy the Constitutional obligations of the First Amendment.⁴

B. Wisconsin Constitution Art. I, §3

Wisconsin’s protection of free speech followed that of the United States Constitution. As such, the drafters were aware of the existing provisions of the First Amendment, and so the use of somewhat different language is important. Unlike the broad mandate of the Federal Constitution, Wisconsin chose to squarely lay responsibility for a speaker’s words with the speaker. “Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right...*” In addition, unlike the prohibitory mandate of the Federal Constitution (“shall make no law...”), Wisconsin’s Article I, §3 statement is an affirmative grant of the right to the people (“Every person may freely speak, write and publish his sentiments...”). Then, in addition to that positive right, Article I, §3 adds the prohibitory language as well (“no laws shall be passed to restrain or abridge the liberty of speech or of the press.”).

So, it is clear from the language that more is provided for citizens of Wisconsin than might otherwise be available under the First Amendment. *Jacobs v. Major*, 139 Wis.2d 492, 534, 407 N.W.2d 832, 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.) See *McCauley v. Tropic of Cancer*, 20 Wis.2d 134, 139, 121 N.W.2d 545 (1963). (“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

⁴ In any event, the *WMC* decision remains good law in Wisconsin. GAB 1.28 is directly contrary to that decision. As this Court noted there, “We are satisfied that for a political communication or advertisement to constitute express advocacy under *Buckley* and *MCFL*, it must contain explicit language advocating the election or defeat of a candidate who is clearly identified.” *WMC* at ¶ 24. While as this Court acknowledged “magic words” are not required, explicit language advocating election or defeat are required, and GAB 1.28 contains no such restriction.

to frame the state constitutional right of free speech more broadly and more definitely than the first amendment.”) (Footnote omitted.) At the very least, the first clause—the positive grant—must mean something in addition to or different from the prohibitory clause, as it would otherwise be a mere redundancy. *Jacobs v. Major*, 139 Wis.2d 492, 504, 407 N.W.2d 832, 837 (1987) (“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.”). The actual language certainly grants something more in Wisconsin than the mere assurance of a prohibition of certain types of government action.

Here, amended GAB 1.28 not only restrains the liberty of speech, in the same manner as described by United States Supreme Court, it also runs afoul of the positive rights granted to every person in this State to “freely speak, write and publish his sentiments...” First, by requiring registration and compliance with a host of regulations by educational, policy and issue oriented speakers, the new rule is surely inhibits that free flow of speech about personal sentiments that Article I §3 would appear to cover. Second, by requiring the payment of a fee—\$100—the regulation again runs contrary to the right to “freely speak....”

There is a clearly stated public policy concerning freedom of speech in Wisconsin’s Constitution that is broader in scope than the First Amendment. There is a long history of diverse and open debate for which Wisconsin citizens are rightly proud. It is time for this Court to itself breath clear life into protecting and encouraging speech of all types at all times, and Art. I, §3 provides that opportunity.

IV. The Government Accountability Board Had No Authority to Enact GAB 1.28

That this case must be brought at all is a bit perplexing. While the Government Accountability Board has rulemaking authority, it is explicitly limited to “[p]romulgating[ing] 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). The Board acts administratively, not legislatively. Yet here it wrote a sweeping new rule, enacting the very thing the State Legislature has refused. On no fewer than 29 occasions since this Court’s *WMC* decision, the legislature has had an opportunity to change the definition of “political purpose” and each time has declined the opportunity. *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; and 2009 Assembly Bill 812.

Moreover, with the creation of the Government Accountability Board, its first task was the review of all regulations. 2007 Wisconsin Act 1 §§ 209 (2)(e) and (3)(e). It completed that task and reaffirmed GAB 1.28 without amendment at the time. 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)

(affirming GAB 1.28). It is difficult then to square the Board's insistence now that it has the authority to change the regulations by dramatically altering what constitutes "political purposes" when the legislature has explicitly defined the term, Wis. Stat. §11.01(16); the term has never been changed to require a new regulatory structure; and the Board itself previously reaffirmed the regulation related to the statute. The Government Accountability Board simply had no authority to enact amended GAB 1.28 and it is *ultra vires*.

Moreover, the definition now purportedly created by GAB 1.28 is facially contrary to Wis. Stat. § 11.01(16). Subsection 16(a)1 could not be more explicit in requiring "[a]cts which are for political purposes include...[t]he making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate." The language is unambiguous. *See Seider v. O'Connell*, 200 WI 76, ¶31 ("The analysis of statutory ambiguity begins with the language of the statute itself"; a statute's literal meaning is to be given effect.) Subsection 16 is directed exclusively at regulating express advocacy. Amended GAB 1.28, in contrast, now seeks to redefine "political purpose" broadly with the expressed intention of regulating issue advocacy. That cannot be tolerated as "[N]o agency may promulgate a rule which conflicts with state law." Wis. Stat. § 227.10(2). *See also Oneida County*, 180 Wis. 2d at 127 (Department of Natural Resources' rule invalid, exceeding scope of legislative authority).

Moreover, amended GAB 1.28 presumes the conclusion that issue advocacy, educational speech, and policy-oriented comments that name someone who happens to be a candidate are solely for "influencing the election." How can that be? Are the motives of speakers always and universally changed because they are speaking within a certain time period relative to an election? Is there no ability of a legislative body, Mayor or Governor to be influenced by explanations and studies because it is within a time period close to an election? Simply stating

the proposition illustrates the nonsense of speech being irrebuttably presumed for certain purposes simply by the time when it is made. Nothing in subsection (16) contemplated or authorized such a rule. The statutory provisions on which the Government Accountability Board must rely have remained unchanged since *Buckley* and *WMC*. Nothing legislatively has changed that would authorize this “legislation by rulemaking.” Wisconsin’s campaign finance laws have never regulated issue advocacy, and while the Government Accountability Board may not agree with that legislative decision, the Board is not the Legislature, and it may not make public policy. The Government Accountability Board has, in effect, created regulations on speech that the legislature has been unable or unwilling to enact. That it cannot do, and this Court should so find.

CONCLUSION

We are at a watershed moment for the First Amendment when an administrative body takes upon itself the role of converting speech that has been free and open to something that will be regulated in every respect. Whatever the goal may have been, and however laudable it may have seemed to that government agency to control the unfettered debate of our citizens, our State Constitution and the First Amendment bar such actions. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (the First Amendment expresses “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open”).

As an initial matter, the Petitioners have requested that this Court take this case as one of Original Jurisdiction. As to the substantive claim, the Petitioners respectfully request that amended GAB 128 be held unenforceable either until full briefing on the merits is concluded, or immediately and permanently. The Petitioners are prepared to provide comprehensive briefs on

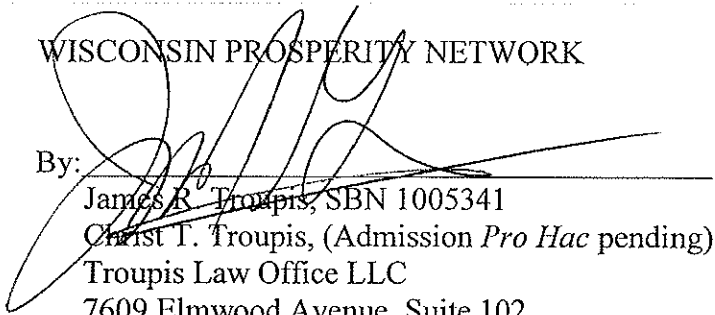
the merits on an expedited schedule and to appear at oral argument at any time to address the substantive merits or to address the importance of granting Original Jurisdiction.

Dated this 9th day of August, 2010.

Respectfully submitted,

WISCONSIN PROSPERITY NETWORK

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