IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CRG NETWORK,

Plaintiff,

v. Case No. 14-CV-719

THOMAS BARLAND, et al.,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

This case involves a facial constitutional challenge to the aggregate limitation in Wis. Stat. § 11.26(9) on political committee contributions to Wisconsin State Assembly candidates.

Plaintiff CRG Network ("CRG") is a political committee that tried—partially unsuccessfully—to make contributions to a handful of Assembly candidates. Some of CRG's contributions were returned to it because the candidates had already accepted contributions up to the $7,763 limit on accepting contributions from political committees. CRG has not alleged that it tried to make or intends to make contributions to candidates for offices

other than Assembly, such as Governor, Attorney General, Wisconsin State Senator, circuit court judge, et cetera.

CRG asserts that Wis. Stat. § 11.26(9) violates its federal constitutional rights under the First and Fourteenth Amendments. It has moved this Court to preliminarily enjoin Defendants from enforcing Wis. Stat. § 11.26(9), presumably to allow for more money contributions from political committees to Assembly candidates during the November 2014 election cycle. CRG relies primarily upon the U.S. Supreme Court's decision in *McCutcheon v. Federal Election Commission*, ___ U.S. ___, 134 S. Ct. 1434 (2014).

CRG is not likely to succeed on the merits of its constitutional challenge. The State of Wisconsin has important interests in preventing quid pro quo corruption or its appearance, and in preventing the circumvention of individual campaign contribution limitations. Wisconsin Stat. § 11.26(9) is closely drawn to serve these interests. *McCutcheon* is distinguishable because federal campaign finance law, unlike Wisconsin law, includes statutes and rules that discourage or prevent individuals from creating multiple political committees to circumvent individual contribution limitations. This Court should deny CRG's motion.

FACTUAL BACKGROUND

In its brief, CRG summarized the facts that give rise to its motion. (*See* Dkt. #8:2-3, *hereinafter* "CRG Br."). Only a short supplement is necessary to address a point that goes to standing and remedy.

CRG intends to make contributions of $250 to Dan Knodl, Robyn Vos, John Nygren, and Dale Kooyenga for their Assembly campaigns. (*See* Dkt. #10:¶¶ 6, 8.) CRG believes that "it is critical that conservatives keep control of the state assembly." (*Id.*, ¶ 11.) CRG makes no allegations and offers no evidence regarding its preferences, if any, for candidates in other offices. If Wis. Stat. § 11.26(9) were not in place, "CRG Network would make contributions of no more than $500 to Messers. Vos, Nygren, and Kooyenga." (*Id.*, ¶ 21.)

CRG does not allege in its complaint or offer any evidence in support of its motion to demonstrate that it intends to make contributions to Governor Scott Walker or a candidate for any office other than Assembly. CRG alleges facts and offers evidence only to demonstrate that it intends to make contributions to certain conservative candidates for Assembly who can no longer accept committee contributions because they have reached the limit in Wis. Stat. § 11.26(9).

PRELIMINARY INJUNCTION STANDARD

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation and internal quotation marks omitted; emphasis in original); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 870 (7th Cir. 2006) (citing *Mazurek*).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014).

Plaintiffs are not likely to prevail on the merits. Wisconsin Stat. § 11.26(9) is constitutional because it is closely drawn to serve the State's interests in preventing quid pro quo corruption or its appearance and in preventing the circumvention of individual campaign contribution limits.

ARGUMENT

I. Contribution Limitations Must Satisfy "Closely Drawn" Scrutiny.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court recognized that contribution limitations impose a "lesser restraint" on political speech than expenditure limitations. *McCutcheon*, 134 S. Ct. at 1444. Expenditure limitations "'necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" *Id.* (quoting *Buckley*, 424 U.S. at 19; brackets in *McCutcheon*). Expenditure limitations are reviewed under "exacting scrutiny." *Id.* Under exacting scrutiny, "the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." *Id.*

Contribution limitations, on the other hand, "'may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25). This is the "closely drawn" scrutiny test that must be applied here. Even when the Supreme Court is not applying strict scrutiny, it still requires "'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest

served . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57. (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); ellipses in *McCutcheon*).

II. Case Law Recognizes The State's Interests In: (1) Preventing Quid Pro Quo Corruption Or The Appearance Of Quid Pro Quo Corruption; and (2) Preventing The Circumvention Of Individual Contribution Limitations.

The aggregate contribution limit in Wis. Stat. § 11.26(9) is constitutional because it furthers important State interests. The State's interests are: (1) preventing quid pro quo corruption or the appearance of quid pro quo corruption; and (2) preventing the circumvention of individual contribution limitations. These are both legally sufficient justifications for Wis. Stat. § 11.26(9).

Beginning with *Buckley*, the U.S. Supreme Court has held that laws limiting political contributions can be justified by the Government's interest in addressing both the "actuality" and the "appearance" of corruption. *Buckley*, 424 U.S. at 26; *McConnell v. FEC*, 540 U.S. 93, 143 (2003) ("Our cases have made clear that prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon*, 134 S. Ct. at 1450.

Prior to *McCutcheon*, the U.S. Supreme Court had also recognized that the Government has a related interest in preventing the circumvention of contribution limitations. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption[.]"). In *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), the Supreme Court addressed the anti-circumvention interest as it related to corporate political contributions:

> [R]ecent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for "circumvention of valid contribution limits". *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456, and n. 18, 121 S. Ct. 2351, 150 L.Ed.2d 461 (2001); *see Austin*, *supra*, at 664, 110 S. Ct. 1391. To the degree that a corporation could contribute to political candidates, the individuals who created it, who own it, or whom it employs, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163, 121 S. Ct. 2087, 150 L.Ed.2d 198 (2001), could exceed the bounds imposed on their own contributions by diverting money through the corporation, *cf. Colorado Republican*, 533 U.S., at 446-447, 121 S. Ct. 2351. As we said on the subject of limiting coordinated expenditures by political parties, experience demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced. *Id.*, at 457, 121 S. Ct. 2351.

Id. at 155.

The Supreme Court has not rejected the *Beaumont* anti-circumvention rationale or overruled *Beaumont*. In *McCutcheon*, the majority opinion did not address *Beaumont* at all. In *Citizens United*, the Supreme Court observed

that circumvention is a legitimate concern: "Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws." *Citizens United*, 558 U.S. at 364 (citing *McConnell*, 540 U.S. at 176-77).

The Second Circuit has recently observed that—even after *McCutcheon*—the Supreme Court has left open "anti-circumvention" as an independent reason to uphold an aggregate contribution limitation. The Second Circuit stated that, "The [Supreme] Court also allowed for the possibility that such regulation could be justified as preventing circumvention of contribution limits." *Va. Right to Life Comm., Inc. v. Sorrell*, No. 12-2904, 2014 WL 2958565, at *17 n. 20 (2d Cir. July 2, 2014); *see also Ognibene v. Parkes*, 671 F.3d 174, 194-95 (2d Cir. 2012) (identifying interests that could justify contribution limitations as: (1) an anti-corruption interest in avoiding quid pro quo corruption or the appearance of quid pro quo corruption; and (2) an "anti-circumvention interest in preventing the evasion of valid contribution limits").

A number of courts have recognized the same state interests that the Supreme Court has credited, while also upholding aggregate limitations on the amounts that political committees can contribute to candidates.

In *Gard v. Wisconsin State Elections Board*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990), the Wisconsin Supreme Court decided an original action challenging the constitutionality of the aggregate contribution limits in Wis.

Stat. § 11.26(9). The unanimous *Gard* court found that there is a "compelling state interest" in the limitations. *Gard*, 156 Wis. 2d at 58. The court explained, specifically addressing the anti-circumvention rationale:

> We conclude that respondents have demonstrated that there is a compelling state interest in placing an aggregate limit on the contributions that an individual candidate may receive from all committees. The purpose of sec. 11.26(9)(a), Stats., along with other restrictions on contributions to individual candidates, is to limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance of corruption. In *Buckley,* the Court recognized that, *although the ceiling imposed on an individual's total contributions did impose an ultimate restriction upon the number of candidates and committees with which an individual could associate by means of financial support, an aggregate limit was necessary in order to prevent evasion of the individual-candidate contribution limit by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to committees likely to contribute to that candidate, or huge contributions to the candidate's political party*. The Court concluded that this additional restriction imposed by the overall ceiling "is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." 424 U.S. at 38, 96 S. Ct. at 644. So, too, we conclude that the aggregate limit on committee contributions is necessary because of the ability of committees having the same interests to join together and make large contributions which could unduly dominate an individual candidate's campaign. All of the contribution limits set on PACs and party-related committees are necessary in order to prevent individual candidates from becoming unduly dependent upon large narrow interest contributions.

Id. at 58-59 (emphasis added). The *Gard* court also addressed the fact that Wisconsin campaign finance law includes no provision to prevent an individual from creating multiple political committees to evade individual contribution limits:

> Respondents, however, contend that sec. 11.26(9)(a), Stats., is all that stands between PACs and the candidate. As illustrated by the example of the legislative campaign committees, Respondents' statement is not far-fetched. Despite all of the contribution limits on PACs, without sec. 11.26(9)(a), PAC-dominated party-related committees would be able to contribute $150,000 of PAC money to an individual candidate. *Furthermore, we conclude that no provisions prevent narrow issue PACs from proliferating into several other committees. Therefore, there is potential for these narrow issue PACs with large aggregations of wealth to circumvent the PAC-candidate contribution limits if it were not for secs. 11.26(9)(a) and (b). See NRWC,* 459 U.S. at 210, 103 S. Ct. at 560-561. While overt "earmarking" and "laundering" are prohibited, these measures are not enough. In order to maintain the integrity of the political process and prevent corruption caused by large contributions to an individual candidate from a narrow special interest group, effective and comprehensive contribution limits are required.

Id. at 60 (emphasis added).

The Wisconsin Supreme Court declared that Wis. Stat. § 11.26(9) is constitutional, that it "places only a marginal restriction on the First and Fourteenth Amendment rights of committees and candidates," and that it is "necessary to serve the State's compelling interest in preventing narrow issue PACs from circumventing PAC-candidate contribution limits through contributions to party-related committees, thereby unduly influencing an individual candidate's campaign." *Gard*, 156 Wis. 2d at 72-73.

In addition to *Gard*, other courts have upheld aggregate contribution limitations like Wis. Stat. § 11.26(9). *See Minn. Citizens Concerned for Life,*

Inc. v. Kelley, 427 F.3d 1106, 1114-16 (8th Cir. 2005);[1] *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 649-51 (6th Cir. 1997).

This Court should hold that Wisconsin has two related interests in Wis. Stat. § 11.26(9): (1) an anti-corruption interest; and (2) an anti-circumvention interest.

III. Wisconsin's Aggregate Contribution Limitation In Wis. Stat. § 11.26(9) Is Constitutional Because It Is Closely Drawn To Serve The State's Anti-Corruption And Anti-Circumvention Interests.

Absent Wis. Stat. § 11.26(9), there is no substantial regulatory barrier in Wisconsin to the proliferation of committees and the funneling of money to candidates in circumvention of individual base contribution limits. Indeed, the federal anti-proliferation protections discussed in *McCutcheon* do not exist in Wisconsin. This means that Wis. Stat. § 11.26(9) is constitutional because it is closely drawn to prevent corruption in Wisconsin, or its appearance, and it properly does so by preventing the circumvention of individual base contribution limits.

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[1]CRG cites the recent *Seaton v. Wiener* case from the U.S. District Court for the District of Minnesota, which preliminarily enjoined the same statute that was upheld by the Eighth Circuit in *Kelley*. (CRG Br. at 11; *see also* Dkt. #9:2-15.) Peculiarly, the *Seaton* district court did not address why *Kelley* was or was not controlling. *Seaton* does not mention *Kelley*.

A. Individual Contribution Limitations May Be Circumvented Absent The Aggregate Limits In Wis. Stat. § 11.26(9).

The campaign finance law framework in Wisconsin makes circumvention a substantial concern. Absent Wis. Stat § 11.26(9), a motivated individual or committee could readily proliferate multiple committees and evade lawful individual base contribution limits, raising the appearance that well-funded committees can obtain quid pro quo results. The following illustrates how that could occur.

An individual or a political committee may not give more than $500 to an Assembly candidate. Wis. Stat. § 11.26(1)(c); Wis. Stat. § 11.26(2)(c). These kinds of "base limits" have been upheld by the U.S. Supreme Court. *See McCutcheon*, 134 S. Ct. at 1442 ("we have previously upheld [base limits] as serving the permissible objective of combating corruption"). Consistent with that precedent, CRG does not challenge Wisconsin's base contribution limits.

Rather, CRG challenges that an Assembly candidate may not accept in aggregate more than $7,763 from committees, including committees like CRG. *See* Wis. Stat § 11.26(9)(b). That is different than the aggregate limit invalidated by *McCutcheon*, which addressed an aggregate limit on contributors (thereby limiting the number of candidates the contributor could support); Wisconsin's law, in contrast, restricts aggregate *receipts* by a candidate. *See McCutcheon*, 134 S. Ct. at 1443. The goal is to prevent the

circumvention of the individual contribution limit via proliferation of committees.[2] *See Gard*, 156 Wis. 2d at 54.

Such circumvention could be readily accomplished if an individual or committee decided to create an unlimited number of additional committees with the same interests and same targeted candidate or candidates. Without the $7,763 aggregate limit on the amount that Assembly candidates can accept from committees, those committees could, in combination, exceed the $500 individual limit by an unlimited amount.

To illustrate, for committees making low total contributions, almost no effort is required to proliferate. Under Wisconsin law, a committee contributing less than $300 total does not even need to register with the Wisconsin Government Accountability Board (the "GAB"). Wis. Stat. § 11.05(1) (establishing a $300 registration threshold). Thus, a set of duplicated committees could each contribute $299 to an Assembly candidate (more than half of the $500 individual limit) without even registering with the GAB. Committees could duplicate in the tens, twenties, or hundreds,

[2]After *McCutcheon*, it is still lawful to restrict large sums of money flowing from an entity to one candidate. *See McCutcheon*, 134 S. Ct. at 1460-61 (distinguishing permissible limits addressed at "money beyond the base limits funneled in an identifiable way to a candidate" from impermissible limits addressed at "money within the base limits given widely to a candidate's party").

leading to contributions of tens of thousands of dollars, or more, to a single candidate.

For committees with somewhat higher total contributions, up to $999, the burden under Wisconsin law would still be very minimal. Committees with total disbursements of less than $1,000 are required to register under Wis. Stat. § 11.05, but they are not required to submit reports under Wis. Stat. § 11.06. *See* Wis. Stat. § 11.05(2r) (exempting from reporting committees making total disbursements under $1,000). Registration simply requires that the committee provide a name and mailing address for itself, its treasurer, and officers or members of a finance committee, if any; a statement of what type of committee it is; what referendum, if any, is supported or opposed; and information identifying where committee accounts are held. *See* Wis. Stat. § 11.05(3) (also listing some requirements that apply only to specific types of committees).

This simple list of registration information is not burdensome and could not reasonably be seen as a barrier to an individual or committee motivated to proliferate more committees. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 470, n.1 (7th Cir. 2012) (observing that every federal circuit court of appeals that has ruled on a facial challenge to campaign finance disclosure requirements has upheld the disclosure requirements). In turn, even where total contributions are $999, there is no substantial barrier to

duplicating committees. It would allow funneling the $500 maximum individual contribution amount to an Assembly candidate, which, in combination, could add up to tens of thousands of dollars, or more, to a single candidate.

For committees wishing to contribute more—up to $2,499 total—periodic reports must be submitted to the GAB, but those reports are not highly burdensome, especially when it comes to narrowly focused committees. *See Madigan*, 697 F.3d at 470, 477-78 (upholding disclosure requirements). Wisconsin Stat. § 11.06 requires semiannual reporting when total contributions are $1,000 or more. Wis. Stat. § 11.06 (report contents); Wis. Stat. § 11.20(4) (requiring semi-annual continuing reports). That reporting is of "contributions received, contributions or disbursements made, and obligations incurred," which means the committee indentifies contributors and when and how much they gave; does the same for disbursements; lists other sources of income and obligations, if applicable; and provides totals. Wis. Stat. § 11.06(1). This reporting would be straightforward, especially where a committee is funded by only a few donors and is narrowly focused only on a few candidates. Further, where the committee is duplicated, the report from one committee could also be duplicated with minimal effort.

Reporting is not burdensome given today's technology. In addition to the options of reporting by U.S. mail or facsimile, electronic means of reporting

are also available to registrants. The Wisconsin Campaign Finance Information System ("CFIS"), *see http://cfis.wi.gov/* (last visited Aug. 19, 2014), allows for the electronic filing of the required information via the Internet in a matter of minutes. This system is mandatory for registrants "for whom the board serves as filing officer and who or which accepts contributions in a total amount or value of $20,000[.]" Wis. Stat. § 11.21(16). However, the CFIS system is available to all registrants, including CRG. CFIS's website includes a frequently asked questions section that describes how to file campaign finance reports online. *See http://cfis.wi.gov/Public/Registration.aspx?page=Faqs* (last visited Aug. 19, 2014). The CFIS electronic filing system is quite simple, even providing drop-down menus and pre-populated fields to speed the process.

Finally, for committees wishing to disburse $2,500 total or more to candidates, the committee would also pay a $100 fee to the GAB. *See* Wis. Stat. § 11.055 (requiring a $100 fee, but only where the registrant makes disbursements of at least $2,500 in that year). However, even when it applies, that amount would have little deterrent effect on a well-funded and properly-motivated proliferation of committees. An example might go as follows: a small but wealthy set of donors establish fifty committees, each of which gives $500 to the same ten Assembly candidates that the donors have selected to carry out the donors' preferred legislation. In that scenario, each

committee disburses $5,000 ($500 each to ten candidates), which comes with an added transaction cost of $10 per candidate (the $100 fee divided by ten candidates). Each of the ten candidates ends up with $25,000 from that duplicated set of committees. The cost to the donors is $250,000 in disbursements plus $5,000 in fees, for a total of $255,000.

This all shows that, absent the Wis. Stat. § 11.26(9) aggregate limit, there is nothing substantial stopping the proliferation of a special interest committee and the funneling of large sums to a particular candidate from what is, in reality, a single entity or a single donor. CRG's assertions to the contrary—that it is "completely impractical" to proliferate committees—do not address the various exemptions noted above. (*See* Dkt. #10:¶¶ 14-18). For example, CRG omits that the fee obligation does not exist for committees that make disbursements of less than $2,500 per year, and that the reporting requirement does not trigger for total contributions below $1,000. Wis. Stat. § 11.055(3). The most narrowly targeted committees—those targeting only one or two Assembly candidates—would face almost no burdens to proliferate because their contribution totals could be less than $1,000 or, if they chose, less than $300. In light of this, CRG does not explain why it would be far-fetched for a well-funded and motivated committee to proliferate and funnel money. It would not be.

Indeed, the Wisconsin Supreme Court in *Gard* confirmed that "no [Wisconsin] provisions prevent narrow issue PACs from proliferating into several other committees." *Gard*, 156 Wis. 2d at 60 (explaining that an "earmarking" law in Wisconsin would not prevent it); *see* Wis. Stat. § 11.24(1). Rather, *Gard* correctly recognized that only Wis. Stat. § 11.26(9) prevents that from happening. *Gard*, 156 Wis. 2d at 55 (explaining the purpose "to prevent PACs from having undue influence on any one candidate by circumventing the individual contribution limits through proliferation of committees").

Important to note, the *Gard* decision relied on the Wisconsin Legislature's express concerns with circumvention and, in turn, the appearance of corruption. As *Gard* recounted, in the early 1970s, the Wisconsin Legislature commissioned a study of campaign finance in Wisconsin. *Gard*, 156 Wis. 2d at 37. The committee's findings were published in a 105-page report, which included the finding that the then-current laws were inadequate to curb corruption in campaign financing. *Id.* at 37. The specific concern was with "large concentrations of money from an unrepresentative pool of contributors which would have a corrupting influence on candidates." *Id.* at 49 (citing the *Governor's Study Committee on Political Finance: Final Report*, p. 49).

Introducing an aggregate limit combated that concern by preventing "'evasion'" that would allow "'large gifts and special interest gifts'" that

"'circumvent[ed] contribution limits through multiple committee giving and laundering.'" *Gard*, 156 Wis. 2d at 53 (quoting the *Governor's Study Committee on Political Finance: Final Report*, p. 50). The law's drafting notes also echoed the focus on the fact that "a single special interest group could proliferate into many, thereby evading the individual contribution limits." *Id.* at 54.

This concern was not merely an abstract worry, but was supported by the historical fact of "an enormous growth in the campaign financing role played by PACs and an increasing dependence by candidates upon such money," leading to an appearance of "'legislative quid pro quos.'" *Gard*, 156 Wis. 2d at 55 (quoting a Congressional report). In Wisconsin, that took the form of a rise in PAC contributions of 50 percent over only four years. *Id.* at 56. There was further evidence that "a handful of large PAC contributors dominate the field of contributors to these committees." *Id.* at 61. It followed that, without the Wis. Stat. § 11.26(9) limits, "PAC-dominated committees could contribute an unlimited amount of this money to any individual candidate, thereby resulting in a 'special interest' candidate." *Id.* at 57.

In sum, absent Wis. Stat. § 11.26(9), there is no barrier in Wisconsin to committees proliferating in order to make large special interest contributions to a particular candidate, leading to either actual corruption or the appearance of corruption. *See Gard*, 156 Wis. 2d at 58.

B. Wisconsin Law Does Not Have The Same Anti-Circumvention Protections As The Federal Law Addressed By *McCutcheon*.

Key to the result in *McCutcheon* was the fact that the federal statutory scheme had robust safeguards preventing proliferation, apart from an aggregate limit. *McCutcheon*, 134 S. Ct. at 1446-47. There are no parallel protections in Wisconsin, meaning *McCutcheon*'s result should not control.

McCutcheon's result was heavily based on the specific characteristics of the federal Bipartisan Campaign Reform Act of 2002 ("BCRA"). Indeed, the Court made note of its "distinct legal backdrop." *McCutcheon*, 134 S. Ct. at 1446 (distinguishing *Buckley*'s upholding of aggregate limits in the Federal Election Campaign Act ("FECA"), and explaining that "BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop").

Importantly, the *McCutcheon* Court explained that BCRA and the related federal rules contain "targeted anti-circumvention measures": "Most notably, statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive regulatory scheme." *McCutcheon*, 134 S. Ct. at 1446. In particular, post-*Buckley* amendments created an anti-proliferation rule "prohibiting donors from creating or controlling multiple affiliated political committees." *Id.* at 1446-47 (citing 2 U.S.C.

§ 441a(a)(5); 11 C.F.R. § 100.5(g)(4)). Thus, in *McCutcheon*, it was undisputed that the federal anti-proliferation rule "'forecloses what w*ould otherwise be a particularly easy and effective means of circumventing the limits on contributions* to any particular political committee.'" *Id.* at 1447 (quoting the appellee's brief; emphasis added).

Thus, unlike in Wisconsin, it was a given that federal law had "eliminate[d] a donor's ability to create and use his own political committees to direct funds in excess of the individual base limits," meaning *Buckley* circumvention was no longer a risk. *McCutcheon*, 134 S. Ct. at 1447. To further illustrate, the federal anti-proliferation rules prohibit donors, either alone or in collaboration with other donors, from creating multiple PACs supporting particular candidates. *Id.* at 1454 (citing 2 U.S.C. § 441a(a)(5)). Such an effort would additionally run afoul of Federal Election Commission ("FEC") prohibitions on PAC affiliation, which considers overlapping membership and patterns of contribution. *Id.* at 1454 (citing 11 C.F.R. § 100.5(g)(4)(ii)).

In addition, *McCutcheon* found important that the FEC had defined prohibited federal earmarking broadly to include "any designation, 'whether direct or indirect, express or implied, oral or written.'" *McCutcheon*, 134 S. Ct. at 1454 (quoting 11 C.F.R. § 110.6(b)(1)). Further, the federal regulations prohibited an individual who contributed to a particular

candidate from also contributing to a single-candidate committee for that candidate. *Id.* (citing 11 C.F.R. § 110.1(h)(1)).[3]

In Wisconsin, there is no similar set of laws preventing donors from creating multiple committees to contribute in excess of the base limits, as already outlined above, and as recognized by the Wisconsin Supreme Court. *See Gard*, 156 Wis. 2d at 60 ("no [Wisconsin] provisions prevent narrow issue PACs from proliferating into several other committees"). Nor does Wisconsin's anti-earmarking law have the breadth of the federal laws or rules, meaning it would not prevent that proliferation. *See id.* (noting that Wisconsin only prohibits "overt" earmarking). That means the federal law changes found to be critical in *McCutcheon* are absent in Wisconsin law. Wisconsin still faces the very real risk of circumvention that the *Buckley* Court recognized was possible prior to the federal anti-proliferation laws.

CRG does not deny the difference between Wisconsin law and federal law. Rather, CRG seems to argue that it matters that Wisconsin could theoretically create an anti-proliferation rule or statute. (CRG Br. at 14.) However, the GAB's authority to promulgate rules is limited by statute. *See*

[3]*McCutcheon* explains that federal laws and rules prevent a federal donor from circumventing base limits by contributing to PACs that support only a particular candidate, or to PACs that will route "'a substantial portion'" of their contributions to a particular candidate. *McCutcheon*, 134 S. Ct. at 1453 (citing 11 C.F.R. § 110.1(h)(1), § 102.14(a) and quoting 11 C.F.R. § 110.1(h)(2)).

Wis. Stat. § 5.05(1)(f) (providing that the GAB may promulgate rules to interpret or implement "the laws regulating the conduct of elections"); Wis. Stat. § 227.11(2)(a) (an agency "may promulgate rules interpreting the provisions of any statute enforced or administered by the agency . . . but a rule is not valid if the rule exceeds the bounds of correct interpretation."). CRG points to no statute providing authority for anti-proliferation rulemaking. Just pointing out that a statute or rule is theoretically possible is not the same thing as that law actually existing. Indeed, passing laws or regulations is often a daunting and time-consuming task, and there is no guarantee that Wisconsin will ever have an anti-proliferation law. *See generally Barland*, 751 F.3d at 810-30, 841-42 (discussing the delay and difficulties related to amending Wisconsin's campaign finance laws and with promulgating rules); *see also* Wis. Stat. § 227.135(2) (an agency must present a proposed rule scope statement to the Governor for approval prior to proceeding with promulgating a rule; the Governor has no time limit to approve or deny the scope statement); Wis. Stat. § 227.185 (an agency must submit a proposed rule in "final draft form" to the Governor for his approval; the Governor has no time limit to approve or deny the rule).

CRG comes forward with no authority for *requiring* the Wisconsin Legislature or the GAB to create an anti-proliferation law merely because a federal statute exists along those lines. That line of argument misses the

point. The question is whether Wis. Stat. §11.26(9) is closely drawn, in light of current conditions in Wisconsin. Indeed, *McCutcheon* implicitly recognized that a constitutional analysis should take into account the overall framework *then in place*. *See McCutcheon*, 134 S. Ct. at 1446 (discussing why the result in *Buckley* was different in part because the federal regulatory framework was different when *Buckley* was decided).

It is up to the legislature to decide among possible approaches to a problem, so long as the chosen approach passes constitutional muster. *See McCutcheon*, 134 S. Ct. at 1444 (discussing "'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective'" (citation omitted)); *American Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1111 (9th Cir. 2004) (in the context of regulating commercial speech, noting that "[t]he [Supreme] Court has generally said it is up to the legislature to choose between narrowly tailored means of regulating"). Wisconsin law passes constitutional muster for the reasons discussed.

C. Wisconsin Stat. § 11.26(9) Is Closely Drawn To Serve The State's Anti-Corruption And Anti-Circumvention Interests.

In sum, Wis. Stat. § 11.26(9) is a permissible way to prevent corruption, or the appearance of corruption, especially given the relatively easy path to circumvention in Wisconsin. Important to reiterate, if Wis. Stat. § 11.26(9) were enjoined, there is no substantial barrier to creating and, if necessary, registering multiple duplicate committees to funnel money to individual candidates from what is actually a single interest. An entity that is already motivated to circumvent limits would likewise be adequately motivated to take the steps outlined above. Indeed, the more narrowly focused the committee (for example, contributing to only one or two candidates), the less likely it is that the committee will trigger reporting requirements and, even if it does, the easier that reporting will be.

This Court should not enjoin Wis. Stat. § 11.26(9) because it is closely tailored to the particular ill—committees that proliferate to circumvent limits on direct contributions to candidates. The law leaves other avenues for expression open. For example, it does not prevent independent expenditures. *See Gard*, 156 Wis. 2d at 53-54; Wis. Stat. § 11.06(7m).

It also does not dictate to the candidate from which groups he or she will receive support, and in what amounts. *See Gard*, 156 Wis. 2d at 53. That is because a candidate may return all or part of a contribution at any time. *See* Wis. Stat. § 11.06(8) (a contribution may be returned "at any time").

Wisconsin Stat. § 11.06(4)(b) allows a candidate 15 days to decide whether to return a new contribution (or to donate it to charity), before running afoul of the statutory limits. Likewise, the candidate would have the 15 days to return a previous contribution and accept the new one, or to do some combination of the two (*i.e.*, keeping a portion of each contribution). This provides a reasonable measure of flexibility to the candidate, and would allow a candidate to accept contributions from as many, or as few, committees as the candidate wishes. Indeed, it is always the case that "no committees are ever guaranteed that a candidate will accept their entire contribution," regardless of Wis. Stat. § 11.26(9). *See Gard*, 156 Wis. 2d at 72.

Given the ability of committees to proliferate and funnel money to individual candidates in Wisconsin, the effect of Wis. Stat. § 11.26(9) is to "limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance of corruption." *Gard*, 156 Wis. 2d at 58. That function and effect is constitutional. *See McCutcheon*, 134 S. Ct. at 1444.

IV. CRG Does Not Have Standing To Seek An Injunction Of Wis. Stat. § 11.26(9) Limits For Non-Assembly Candidates.

CRG's complaint and submissions discuss only efforts to give money to Wisconsin Assembly candidates. (Dkt. #1:¶¶ 2, 8, 17; Dkt. #10:¶¶ 5-8, 11).

Nowhere does CRG even mention contributing to candidates such as the Governor, the Secretary of State, or other candidates subject to Wis. Stat. § 11.26(9) aggregate limits. Therefore, CRG lacks standing to seek an injunction as to the other limits because it alleges no injury related to them.

A plaintiff bears the burden to show it meets the Article III constitutional minimums for standing. *See Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1073-74 (7th Cir. 2013). Standing requires that three elements all be met: "(1) injury in fact, which must be concrete and particularized, and actual and imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) redressability." *Id.* A failure to meet these standing elements may not be overlooked:

> "Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation."

Perry v. Vill. of Arlington Heights, 186 F.3d 826, 829 (7th Cir. 1999) (citation omitted).

CRG meets none of these elements as to non-Assembly candidates. To illustrate, in addition to a $7,763 limit for Assembly candidates, Wis. Stat. § 11.26(9), by cross-reference to Wis. Stat. § 11.31, provides limits for candidates for Governor, Lieutenant Governor, Secretary of State, State Treasurer, Attorney General, State Superintendant, Supreme Court Justice,

as well as State Senators, other types of judges, and local candidates. *See* Wis. Stat. § 11.31(a)-(h). CRG does not demonstrate standing as to any of these other candidates because it makes no allegation with regard to contributing to them.

Further, it is not automatically true that someone who suffers injury because of the lower $7,763 Assembly limit will also suffer injury based on a limit that is double that amount, such as the $15,525 limit for State Senator. That is even more true when it comes to the much larger limits applicable to, for example, candidates for Governor ($485,190), Lieutenant Governor ($145,564), Attorney General ($242,550), or the Secretary of State ($97,031).

It is entirely unaddressed in the pleadings and submissions whether there is a likelihood that CRG will ever make such a contribution, much less that it will run up against those other limits. Thus, CRG does not meet its burden to support an injury as to the non-Assembly aggregate limits, and enjoining those limits will therefore redress no alleged harm. *See Scherr*, 703 F.3d at 1073-74 (requiring injury in fact, causation, and redressability).

V. The Balance Of Harms Tips In the State's Favor.

The balance of harms tips in the defendants' favor because of the State's legitimate and weighty interests in preventing electoral corruption or the appearance of corruption and in preventing the circumvention of individual contribution limitations. "'[A]ny time a State is enjoined by a court from

effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Md. v. King*, ___ U.S. ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006) (same); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same).

CONCLUSION

For the reasons argued in this brief, the Court should deny CRG's motion. If the Court grants CRG's motion, it should do so only to preliminarily enjoin the aggregate limitation on political committee contributions to Assembly candidates in Wis. Stat. § 11.26(9), as no other limitation has been challenged in this case.

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Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

/s/ Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050
Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7477 (Kawski)
(608) 267-2238 (Russomanno)
(608) 267-2223 (Fax)
kawskicp@doj.state.wi.us
russomannoad@doj.state.wi.us

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