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

CRG NETWORK,

Plaintiff,

-vs- Case No. 14-CV-719

THOMAS BARLAND, et al.

Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

The State of Wisconsin would have CRG lose its First Amendment right to associate with and express its support for its preferred candidates, not because of its own conduct or because its actions present a risk of corruption, but solely due to the actions of others. According to the Defendants, CRG may not support a candidate because *other people* have contributed what the state apparently has decided is "too much" or at least "enough" money to that candidate's campaign. Under Wis. Stat. § 11.26(9), if CRG is not among the first group of committees to support a candidate, it may not support that candidate at all.

What might justify such an odd state of affairs? The Defendants do not contend that additional support from CRG – a contribution that would be within base limits and fully reported – itself presents any danger. Rather, CRG's rights are forfeited because the State can imagine a circumvention scheme that no one accuses CRG of attempting and which could be addressed through the enforcement of existing law or the passage of more closely-drawn regulation.

The Supreme Court has grown increasingly impatient with these "prophlyaxis-upon-prophylaxis" justifications for restrictions on speech. As the *McCutcheon* Court noted, base contributions are themselves a prophylactic measure "because few, if any, contributions to candidates will involve quid pro quo arrangements." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014). The Court concluded that "[a]ggregate limits are then layered on top, ostensibly to prevent circumvention of base limits." *Id*. This "'prophylaxis-upon-prophylaxis approach,'" the Court concluded, "requires that we be particularly diligent in scrutinizing the law's fit." *Id*. At some point, the Court has warned, "[e]nough is enough." *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007).

This "particularly diligent" examination of the fit between the state's anti-circumvention goals and the burden placed on expressive and associational rights cannot be met by saying that passing legislation and promulgating regulations is "hard" – even a "daunting and time-consuming task." (Defendants' Br. p. 23.) Just this year, in finding certain key provisions of Wisconsin's campaign finance law to be unconstitutional, the Seventh Circuit cited the failure of the legislature – and GAB – to "update" the law in light of subsequent Supreme Court teaching to be a source of constitutional infirmity, not a factor weighing in favor of poorly crafted regulation. *Wisconsin Right to Life v. Barland*, 751 F.3d 804, 808, 842 (7th Cir. 2014). Legislative and regulatory sloth are entitled to no weight at all in the constitutional calculus.

Indeed, the *McCutcheon* Court itself noted a number of less intrusive legislative and regulatory measures that could be, but had not been, adopted in concluding that the aggregate contribution limits at issue there were not "closely drawn." *McCutcheon*, 134 S. Ct. at 1458-59. The legislature may bring an unconstitutional scheme into compliance or not, but choosing not to act does not create a permission slip to maintain an unconstitutional scheme.

I. FIRST AMENDMENT STANDARD TO BE APPLIED BY THIS COURT.

Campaign contributions are free speech and an exercise of the freedom of association. *McCutcheon*, 134 S. Ct. at 1448. In order to defend a law restricting contributions to candidates, the government must "'demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444, *quoting Buckley v. Valeo*, 424 U.S. 1, 25 (1976). This level of review is less severe than the "exacting standard" applied to independent political expenditures, but it is still "rigorous" – "if a law that restricts political speech does not 'avoid **unnecessary** abridgement' of First Amendment rights, it cannot survive "rigorous review.'" *Id*. at 1446, *quoting Buckley*, 424 at 25 (emphasis added, internal citation omitted). Where there is a "substantial mismatch between the [g]overnment's stated objective and the means selected to achieve it, [a regulation] fails even under the 'closely drawn' test." *Id.* at 1446. As noted earlier, when the proffered justification is anti-circumvention, this rigorous scrutiny must be "particularly diligent." *Id.* at 1458.

II. THE DEFENDANTS' BRIEF FAILS TO ACKNOWLEDGE THE CHANGE IN THE LAW REPRESENTED BY *McCUTCHEON*.

While the Defendants acknowledge the existence of the *McCutcheon* decision and agree that it sets forth the legal standard to be followed here, they fail to acknowledge the full impact of *McCutcheon* on aggregate limits. The Defendants rely heavily on *Gard v. Wisconsin State Elections Board*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990) as the only support for their most important arguments. (*See* Def. Br. at 8, 9, 10, 13, 18, 19, 22, 25 and 26.) But *Gard* is no longer good law, for reasons that are instructive here.

In *Gard*, the Wisconsin Supreme Court stated that § 11.26(9) was justified because "[e]ncouraging smaller contributions from a greater number of contributors is a legitimate

legislative goal." *Gard*, 156 Wis. 2d at 63. The court further concluded "that sec. 11.26(9)(a), Stats., is necessary as part of Wisconsin's Campaign Financing Law, in order to prevent the domination of any individual candidate's campaign by narrow special interest contributions." *Id.* at 65. Neither of these rationales survives *McCutcheon* (or, for that matter, a host of previous Supreme Court decisions).[1] Each was expressly rejected in *McCutcheon* as a justification for aggregate contribution limits. 134 S. Ct. at 1441-42 ("[W]e have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.").

Gard also justified the committee caps of § 11.26(9) by analogizing them to the aggregate limits on individual contributions that had been summarily upheld in *Buckley*. *Gard*, 156 Wis. 2d at 58-59. Yet when the U.S. Supreme Court revisited those aggregate individual limits in *McCutcheon* and gave them full consideration, the Court found them unconstitutional. Thus, the *Gard* court based its decision on justifications that no longer – if they ever did – permit the limitation of non-corrupting contributions and by analogizing to a form of regulation that is no longer permitted.[2]

The Defendants also mischaracterize how *McCutcheon* addressed an earlier approval of aggregate limits in *Buckley*. It is true that, in part II.A of its opinion, the Court noted that the

[1] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v.Wis. Right to Life*, 551 U.S. 449 (2007).

[2] The Defendants' refusal to acknowledge the effects of *McCutcheon* can also be seen in their discussion of *Seaton v. Wiener*, Civ. Case No. 14-1016 (D. Minn., May 19, 2014). In *Seaton*, the federal district court in Minnesota found Minnesota Statute § 10A.27(11) (a statue similar in effect to §11.26(9)) to be unconstitutional. The district court concluded that *McCutcheon* required enjoining the Minnesota statute because "limiting one donor to a contribution of only $500 while others who contributed before him were permitted to donate $1,000 would constitute a penalty for the 'robust exercise' of his First Amendment rights." *Id.*, *10. The Defendants limit this case to a footnote and express surprise that the district court did not give more consideration to *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1114-16 (8th Cir. 2005). *Kelley* did not rely on an anti-circumvention rationale, but on the state's supposed interest in combatting the influence of PACs and preventing them from unleashing a "flood of money." *Id.* at 1114-15. This rationale no longer justifies restrictions on contributions. It is no wonder the district court found it unhelpful.

federal regulatory scheme had changed since *Buckley*, 134 S. Ct. at 1446-47, and in part III.B explained how this had weakened the case for aggregate limits. *Id*. at 1452-56. But the Court also made clear that, even if nothing had changed, the aggregate limits were not closely drawn. After explaining how post-*Buckley* changes had addressed many of the government's circumvention concerns, the Court noted that, "Quite apart from the foregoing, the aggregate limits violate the First Amendment because they are not 'closely drawn' to avoid unnecessary abridgement of associational freedoms." *Id*. at 1457, *quoting Buckley*, 424 U.S. at 24.

The *McCutcheon* Court noted, moreover, that *Buckley* has upheld aggregate limits as an anticircumvention measure "without considering whether it was impossible to discern which donations might be used to circumvent the base limits." *Id*. at 1447.

III. SECTION 11.26(9) IS NOT "CLOSELY DRAWN" AND CONSTITUTES AN UNNECESSARY ABRIDGEMENT OF FIRST AMENDMENT RIGHTS.

The Defendants' argument is simple, straightforward and wrong. According to the Defendants, Wisconsin has a legitimate interest in preventing *quid pro quo* corruption. It protects that interest through the limits it places on the amounts that individual persons and political committees may contribute to candidates. Those limits are contained in Wis. Stats. § 11.26(1) and (2). The Defendants further contend that § 11.26(9) is necessary to protect against circumvention of these individual limits on individuals. According to the Defendants, without § 11.26(9), individuals could create numerous political committees, donate money to each of them and then have those committees in turn contribute the money to the individual's preferred candidate. (Def. Br. at 12-17)

This "anti-circumvention" rationale – which *McCutcheon* says is to be examined with particular diligence – is premised on two fundamental flaws. First, it assumes that the primary

purpose of the statute was to prevent circumvention. In fact, it was not. Second, it fails to take into account the constitutional requirement that such a statute be "closely drawn" and not constitute an "unnecessary abridgement of First Amendment rights." The Defendants acknowledge the existence of these constitutional requirements but then treat them as if they do not, in fact, exist.

A. Sec. 11.26(9) Is both Under- and Over-inclusive.

The Defendants argue that the aggregate limit is needed to prevent individual donors from making multiple maximum contributions to a candidate. If that's so,[3] it does a pretty poor job. If committees can readily channel direct or indirectly earmarked contributions to candidates, then the law still permits quite a bit of evasion. For example, an individual could set up 15 committees, give $500 to each of them and have all 15 of them give $500 to a candidate for State Assembly. The total would be $7,500 – just under the aggregate limit. So long as these 15 committees were the first ones to contribute to that candidate, § 11.26(9) would do nothing to prevent this conduct.

While the state need not regulate with air-tight efficiency, substantial under-inclusivity weakens the justification for a particular restriction. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). This is particularly so here since large donors are more likely to fund independent express advocacy. *See* pp. 11-12, *infra*.

[3] It is unlikely that anti-circumvention was a principal purpose of sec. 11.26(9). As noted above, the *Gard* court recognized that § 11.26(9) was premised on the type of "equalization" and "getting money out of politics" rationales that are no longer permitted. A contemporary commentary noted the same thing, Comment, *Campaign Finance in Wisconsin After Buckley*, 1976 WIS. LAW REVIEW 816, 855, although the authors identified anti-circumvention as a third rationale. But the authors noted, as an anti-circumvention measure, the statute was wildly underinclusive because the "manner of selection of committees to be barred from contributing has no really rational relation to the problem of evasion of contribution limits by use of committees, because the committees are barred arbitrarily on the basis of who contributed first." *Id.*

It is easy to see how the law is over-inclusive. It prohibits all contributions above a certain limit whether part of a circumvention scheme or not. Because the law is not closely drawn, this over-inclusivity alone dooms the law.

B. Section 11.26(9) Is Not "Closely Drawn."

As stated in *McCutcheon*, "[i]n the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456-57. Under the "closely drawn" standard, a restriction must be "narrowly tailored to achieve the desired objective." *Id*. In *McCutcheon*, the Supreme Court rejected an anti-circumvention rationale for aggregate individual limits because it was "poorly tailored to the Government's interest in preventing circumvention of the base limits" and because "it impermissibly restrict[ed] participation in the political process." *Id*.

Section 11.26(9) suffers from the same infirmities. In fact, the unsuccessful arguments made by the government in *McCutcheon* are remarkably similar to those advanced by the Defendants here. It argued that individual limits were required because donors might contribute to committees or other conduits and direct these funds to a preferred candidate. *Id.* at 1443, 1453. The Court concluded that these concerns could not justify a limitation on the number of lawful contributions that a person could make because there were other less restrictive ways to address the problem. *Id.* at 1458-59. They were, in other words, "unnecessary abridgements" of free speech and association.

In reaching this conclusion, the Supreme Court said that limiting political contributions is not a "modest restraint" and likened contributions to editorial endorsements. *Id.* at 1448 ("The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."). The burden placed on speakers such as CRG is much heavier. It is not simply limited in the number of candidates it may support

– a restriction that would at least leave it free to choose which it most preferred – but from any support of a candidate who already had "too many" supporters.[4] It is as if only the first newspapers to roll off the printing press could make an endorsement.

1. Wisconsin already has an anti-earmarking statute.

The after-the-fact justification for the statute now asserted by the Defendants is to prevent the proliferation of committees created to circumvent the individual limits in § 11.26(1). They spin scenarios of a wealthy donor (or small group of donors) setting up "tens, twenties, or hundreds" of sham committees to make individual donation of "tens of thousands of dollars" to a single candidate. As noted above, the same arguments were made in *McCutcheon* and found to flunk the "closely drawn" standard. In response, Defendants' sole argument is that Wisconsin has not – for no reason that the Defendants attempt to explain – enacted the simple provisions that would prevent this. They do not argue that Wisconsin could not enact these provisions, only that it has not and that this somehow excuses a law that is, like the limits in *McCutcheon*, not closely drawn.

The Defendants are wrong about Wisconsin law. As they acknowledge, Wisconsin already has an "anti-earmarking" statute. (Def. Br. at 22.) It provides that "[n]o person may, directly or indirectly, furnish funds or property to another person for the purpose of making a contribution in other than the person's own name." Wis. Stat. § 11.24(1). Thus, an individual may not (directly or indirectly) furnish funds to another person (a committee) and have that person then contribute those funds to a candidate. The hypothetical situation the Defendants are arguing could occur in the absence of § 11.26(9) would still be illegal. An individual cannot give

[4] In an Assembly race, as few as fifteen prior supporters will result in CRG's silence. The numbers for candidates for Attorney General (24), Senate (32) and Governor (48) present a substantial risk that donors will be excluded.

money to "tens, twenties, or hundreds" of committees and direct those committees to contribute the money to a designated candidate.

If the state believes that this is not good enough – if it thinks that this law does not reach setting up and giving money to multiple affiliated committees – it could pass an anti-proliferation law such as 2 U. S. C. §441a(a)(5) which provides that "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person … shall be considered to have been made by a single political committee." While it is not evident that this adds much to a statute that prohibits persons from having others give for them, it is certainly more closely drawn than a wholesale prohibition on support from those who are "too late."

The Defendants suggest that § 11.24(1) is not effective because it only prevents "overt" earmarking. (Def. Br. at 22.) It is not clear what that means. The statute does not use that term, and applies to both direct and indirect conduct.[5] In any event, all of the examples given by the Defendants seem quite "direct." The Defendants go to great lengths to suggest that this type of "earmarking" or "proliferation" could go undetected because Wisconsin permits "micro-committees" which may not have to report their donors or even register. But, if this is a problem (and it is pure speculation to think so), the remedy is simple: enforce the anti-earmarking statute. If an individual – or small group – sets up 50 committees, gives money to each, and the committees each give the same amount to a candidate, the government should have little difficulty in proving a violation of § 11.24(1). Section 11.26(9) is not needed to solve this problem.

[5] Indeed, one of the post-Buckley steps relied upon by the *McCutcheon* Court was an FEC rule that prevented a PAC donor from designating that his donation be passed on to a designated candidate, whether that designation be "direct or indirect, express or implied, oral or written." *McCutcheon*, 134 S.Ct. at 1447, *quoting* 11 CFR § 110.6(b)(1).

Perhaps the Defendants are concerned with a more subtle form of "indirect" earmarking under § 11.24(1) in which a donor gives money to a number of larger committees that he does not control with some undetectable understanding that his donation will be directed to a preferred candidate. It is unlikely that a sufficient number of willing committees could be found, *see McCutcheon*, 134 S. Ct at 1453, and the need for the independent cooperation of many other actors would reduce the risk of quid pro quo corruption. *Id.* at 1452 ("[T]he chain of attribution grows longer and any credit must be shared among various actors along the way.").

In any event, there are a number of other prophylactic measures that Wisconsin could employ. Some were present in *McCutcheon*. In addition to a more specific anti-proliferation rule, the State could limit the ability of individuals who have supported a candidate to contribute to a single committee or to a committee that he knows will give a substantial portion of his donation to that candidate. All are less restrictive than a ban on contributions for persons in the position of CRG. Their availability precludes a finding that the aggregate limit here is "closely drawn."

Other more closely drawn measures identified by *McCutcheon* were alternatives that Congress and the FEC could have, but had not, adopted, such as prohibiting donors who have given the maximum amount to a candidate from contributing to PACs who have indicated that they will support those candidates. *Id*. at 1459. Despite being only potential responses, they nevertheless precluded a finding that the aggregate limit there was closely drawn.

The Defendants say that there is no guarantee that the legislature would adopt more closely-drawn measures (Def. Br. at 23), but, as noted above, that is beside the point. As the foregoing discussion demonstrates, the *McCutcheon* Court based its finding that the aggregate limits were not closely drawn because of measures that Congress **could** enact. *Id.* at 1458 ("Importantly, there are multiple alternatives that would serve the Government's anti-

circumvention interest, while avoiding 'unnecessary abridgement of First Amendment rights.'"). There was no guarantee that any of these would be enacted.

Constitutional rights do not wait for – are not contingent upon – such guarantees, and courts do not condition First Amendment rights on the sufferance of the government. Given their admission that there is a narrow and direct way to solve the circumvention problem that they say the State has identified, they cannot plausibly ask this court to uphold a statute that is not narrowly drawn because they believe the legislature may not pass a constitutionally valid replacement.

The Seventh Circuit considered a similar question of "fit" in the campaign finance area in *Wisconsin Right to Life, Inc. v. Barland*, 751 F. 3d 804 (7th Cir. 2014). In that case, the Seventh Circuit struck down a Wisconsin rule that imposed registration and reporting duties on political committees that did some express advocacy but did not have such advocacy as their major purpose. The Seventh Circuit concluded that the rule broadly regulated a substantial amount of First Amendment speech that should be narrowly regulated and that a simpler more direct rule was necessary to meet the requirement that the rules must be "closely drawn." *Id.* at 840-42. The same is true here.

As the *McCutcheon* Court noted, the creation of multiple committees to avoid contribution limits is unlikely. A donor who might set up "tens, twenties and hundreds" of committees at the risk of being prosecuted for earmarking can simply spend unlimited funds for independent expenditures on behalf of her preferred candidate. 134 S. Ct. at 1454. In fact, the only groups likely to be prevented from doing what they want – and exercising their rights – are grassroots organizations like CRG who may not have the resources for independent expenditure

efforts. Indeed, aggregate limits are likely to move resources away from candidates and reported contributions to undisclosed independent expenditures. *Id.* at 1460.

IV. CRG HAS STANDING TO CHALLENGE §11.26(9).

As a last-ditch argument to save part of § 11.26(9), the Defendants argue that CRG has standing to challenge only the statute as it relates to candidates for the Wisconsin Assembly. (Def. Br. at 26-28.) The Defendants base this argument on the fact that CRG's contributions to candidates that were rejected under § 11.26(9) were all made to candidates for the Assembly. The Defendants argue that these facts mean that CRG lacks standing to challenge that statute as it relates to contributions to candidates for the State Senate, Governor or other state offices. The Defendants' standing argument is without merit.

First, the language of § 11.26(9) does not support the Defendants' argument. The statute states as follows:

> (a) No individual who is a candidate for state or local office may receive and accept more than 65 percent of the value of the total disbursement level determined under s.11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees, including any transfer from any personal campaign committee to another personal campaign committee.
>
> (b) No individual who is a candidate for state or local office may receive and accept more than 45 percent of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees other than political party and legislative campaign committees subject to a filing requirement, not including any transfer from any personal campaign committee to another personal campaign committee.

The above language is the subject of a facial challenge by CRG. CRG contends that the 65% limit in subsection (a) and the 45% limit in subsection (b) are unconstitutional. It is not possible to somehow parse those words to mean that CRG is only harmed by some part of those

words that apply to the candidates for State Assembly. The statute, on its face, applies to all state offices, and CRG is challenging the entire statute.

Like any other plaintiff in federal court, to establish standing for its complaint in this case, CRG must have (1) suffered a distinct and palpable injury; (2) that is fairly traceable to the act of which it complains; and (3) for which the court can provide a remedy that is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

Here, CRG meets all three criteria. It has suffered a distinct and palpable injury – the abridgment of its First Amendment rights of speech and association. Second, the injury is directly traceable to the act of which it complains – the existence and enforcement of § 11.26(9). Third, this Court can provide a remedy that will redress the injury – an injunction striking down § 11.26(9). Nothing more is required for standing. The Defendants cite no cases that support the notion that CRG has only a crimped right to challenge the statute as it applies to candidates for the State Assembly.

CONCLUSION

The limitations § 11.26(9) places on contributions that may be made by disparate committees to a single candidate violate the First Amendment's rights of speech and association. The application of § 11.26(9) directly harms CRG s rights, those harms are irreparable, and the

public interest weighs in favor of enjoining the statute. Therefore, this Court should issue a preliminary order enjoining the Defendants from enforcing § 11.26(9).

Submitted this 2nd day of September, 2014.

Respectfully submitted,
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