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

FRED M. YOUNG, JR.,

Plaintiff,

v. Case No. 13-C-635

TIMOTHY VOCKE, et al.,

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants Timothy Vocke, Gerald C. Nichol, Michael Brennan, Thomas Barland, Thomas Cane, and David G. Deininger (collectively, "Defendants"), by their undersigned counsel, hereby respectfully submit this brief in support of their motion to dismiss the Complaint filed by Plaintiff Fred M. Young, Jr. ("Plaintiff").

INTRODUCTION

Plaintiff filed this 42 U.S.C. § 1983 action to challenge the $10,000 annual aggregate contribution limitation in Wis. Stat. § 11.26(4). He asserts that the limitation violates his free speech and association rights under the First Amendment to the United States Constitution and seeks a declaration that the aggregate limitation on contributions to individual candidates is facially unconstitutional. He also requests an injunction

barring enforcement of the $10,000 annual aggregate contribution limitation in Wis. Stat. § 11.26(4). Plaintiff does not challenge the individual base limitations on contributions to candidates in Wis. Stat. § 11.26(1).

Plaintiff's Complaint must be dismissed. Plaintiff lacks Article III standing. He has not made allegations in his Complaint sufficient to demonstrate standing; therefore, the Court lacks subject matter jurisdiction. Accordingly, Plaintiff's Complaint must be dismissed.

RELEVANT FACTUAL ALLEGATIONS

I. THE PARTIES.

Plaintiff is an adult citizen of Wisconsin and resides in Racine. (Complaint, Dkt. #1, ¶ 1.)

Defendants are the individual members of the Wisconsin Government Accountability Board ("GAB"). (*Id.*, ¶ 2.) They are sued in their official capacities. (*Id.*)

II. THE CAUSE OF ACTION AND CLAIM FOR RELIEF.

This is a case arising under § 1983 and the First Amendment. (Complaint, Dkt. #1, ¶ 5.) Plaintiff challenges the annual aggregate limitation of $10,000 on contributions to individual candidates and committees subject to registration under Wis. Stat. § 11.05, as set forth in Wis. Stat. § 11.26(4). (*Id.*, ¶ 6.) He alleges a "pre-enforcement challenge" to

Wis. Stat. § 11.26(4) based upon his federal constitutional rights to free speech and free association. (*Id.*, ¶ 5.) In other words, Plaintiff does not allege in his Complaint that GAB sought *in the past* to enforce Wis. Stat. § 11.26(4) against him and that such conduct violated the First Amendment. Instead, he challenges Wis. Stat. § 11.26(4) prospectively, before GAB has threatened any enforcement action. His challenge is a facial challenge only to the constitutionality of state law. (*See id.*, ¶ 5; *see also id.* at 6 (requesting a declaration that "the aggregate limit on contributions to individual candidates is unconstitutional on its face.")

Plaintiff alleges that "[i]n Wisconsin, the aggregate [contribution] limit is $10,000 which is equal to the individual [contribution] limit for candidates for state-wide office." (*Id.*, ¶ 8.) This "[m]ean[s] that an individual can only give the maximum contribution to one candidate for state-wide office and once he or she does so, that individual cannot make any other contributions that year." (*Id.*)

Plaintiff alleges that "Wis. Stat. §11.26 sets forth certain limitations on contributions to candidates for state office by individuals and to political committees." (*Id.*, ¶ 16.) "Pursuant to Wis. Stat. §11.26(1), the limitation on a donation by an individual to a candidate for governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent, or justice is $10,000." (*Id.*, ¶ 17.) "The limitation on a donation by an individual

to a candidate for the state senate is $1,000 and to a candidate for state assembly is $500." (*Id.*) "Wis. Stat. §11.26(4) provides that the aggregate of all contributions regulated by §§11.26(1) and (2) plus any contributions to political committees, may not exceed $10,000 in a calendar year." (*Id.*, ¶ 18.)

Relying on *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), Plaintiff alleges that "for Wisconsin's aggregate [contribution] limit to be upheld it must be scrutinized to determine if it prevents actual quid pro quo corruption." (Complaint, Dkt. #1, ¶ 10.) Plaintiff alleges that "[b]ecause Wisconsin's aggregate [contribution] limit is extremely low relative to the limitations on contributions to individual candidates for state wide office, it cannot survive that scrutiny." (*Id.*, ¶ 11.) He alleges that "[t]he aggregate limit of $10,000 prevents [him] from meaningfully associating with all – or even many [sic] – of the candidates of his choice and does so even though it is not designed to prevent quid pro quo corruption because he could lawfully donate the statutorily permitted amounts to each of those candidates without any risk of such corruption." (*Id.*, ¶ 12.)

Plaintiff alleges that the $10,000 annual aggregate contribution limitation in Wis. Stat. § 11.26(4) cannot be justified based upon "anti-corruption" or "anti-circumvention" rationales. (*Id.*, ¶ 25.) The

limitation "chills speech and infringes upon associational rights through a means that is not appropriately tailored." (*Id.*, ¶ 26.) The limitation is "unconstitutionally overbroad." (*Id.*)

Plaintiff alleges that he is "an individual who is concerned about public policy issues in the State of Wisconsin[]" and that he "wishes to exercise his First Amendment rights to associate and to speak by contributing directly to candidates for state office and to political committees." (*Id.*, ¶ 14.) He is "ready, willing and able to make financial contributions to candidates for state office in the State of Wisconsin this year and in the future, and he desires to pool his resources with people who hold the same or similar opinions as he does through political committees." (*Id.*, ¶ 15.)

Plaintiff makes certain key allegations about his intent to make contributions. He alleges:

> 19. Mr. Young is ready, willing, and able to make the maximum legal contribution to certain candidates for state-wide office, including a candidate or candidates for the offices listed in Wis. Stat. §11.26(1)(a) for which the limit is $10,000.
>
> 20. However, if Mr. Young makes a $10,000 contribution to any such candidate then because of Wis. Stat. §11.26(4) he will be unable to contribute to any other candidate for state office, including non-partisan office such as justice, judge, superintendent for public instruction or local office, and he will be prevented from donating to political committees.

(*Id.*, ¶¶ 19-20.) Plaintiff does not allege that he intends to make contributions to candidates or committees that would exceed the $10,000 annual aggregate

contribution limit in Wis. Stat. § 11.26(4) in one year. In other words, he alleges only that he is "ready, willing, and able" to make the $10,000 maximum legal contribution in Wis. Stat. § 11.26(1)(a), and no more.

III. THE RELIEF REQUESTED.

Plaintiff requests a "declaration that the aggregate limit on contributions to individual candidates is unconstitutional on its face." (Complaint, Dkt. #1 at 6.) He also requests "[a]n injunction barring enforcement of the aggregate [annual] contribution limit in Wis. Stat. §11.26(4)." (*Id.*)

LEGAL STANDARDS

I. RULE 12(b)(1) AND ARTICLE III STANDING.

Rule 12(b)(1) permits a party to file a motion to dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). It is a bedrock principle of federal law that Article III of the Constitution gives a federal court jurisdiction over a claim between a plaintiff and a defendant only if the claim presents a "case or controversy." *See Raines v. Byrd*, 521 U.S. 811, 818 (1997). The power of federal courts to declare laws invalid is based on their power and duty to resolve concrete disputes properly brought before them for decision. *See Younger v. Harris*, 401 U.S. 37, 52 (1971); *U.S. v. Raines*, 362 U.S. 17, 20 (1960). Federal courts have no power

to speculate on hypothetical or imaginary situations, but may only pass judgment on a statute where such action is necessary to correctly apply it to a concrete case. *See id.*; *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

"A plaintiff has standing to sue—that is, he can invoke the jurisdiction of the court—if he is tangibly, materially, injured by the conduct of the defendant that he claims is unlawful and if the relief he seeks would redress the injury in whole or in part and thus confer a material benefit on him." *Bruggeman v. Blagojevich*, 324 F.3d 906, 909 (7th Cir. 2003). To establish a case or controversy to confer subject matter jurisdiction to a district court over his claim, a plaintiff must meet three criteria:

> First, the plaintiff must have suffered an "injury in fact"–an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" . . . . Second, there must be a causal connection between the injury and the conduct complained of–the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and footnote omitted). If any one of these elements is absent, the court lacks jurisdiction over the plaintiff's claim. *See Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (*en banc*).

II. RULE 12(b)(6).

Rule 12(b)(6) permits a party to file a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Equal Emp't Opportunity Comm'n v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007). In deciding a Rule 12(b)(6) motion, the district court's task is to determine whether the complaint includes "'enough facts to state a claim to relief that is plausible on its face.'" *Khorrami v. Rolince*, 539 F.3d 782, 788 (7th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 1974 (2007)). The federal rules demand more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do[.]" *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement[.]" *Id.* at 557.

The Supreme Court has identified a two-step approach to analyze a complaint under Rule 12(b)(6). *McReynolds v. Merrill Lynch & Co., Inc.*, 694 F.3d 873, 885 (7th Cir. 2012). The first step in testing the sufficiency of a complaint is to identify any conclusory allegations. *Iqbal*, 556 U.S. at 678-79. Conclusory allegations are "not entitled to the assumption of truth[]";

therefore, they are not considered. *Id.* at 680 (citing *Twombly*, 550 U.S. at 555).

After ignoring the conclusory allegations, and assuming the veracity of the remaining well-pleaded factual allegations, the second step is to determine whether the complaint pleads "'a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556, 570) (rejecting the traditional Rule 12(b)(6) standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). A claim is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly,* 550 U.S. at 556); *see also Wilson v. Price*, 624 F.3d 389, 391-92 (7th Cir. 2010).

The standard for plausibility is not akin to a "probability requirement," but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Twombly*, 550 U.S. at 556 n.3; *McReynolds*, 694 F.3d at 885 ("the plausibility standard calls for a 'context-specific' inquiry that requires the court 'to draw on its judicial experience and common sense[]'" (quoting *Iqbal*, 556 U.S. at 679)).

"To survive a motion to dismiss, the complaint 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678). Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements are insufficient under Federal Rule of Civil Procedure 8. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Dismissal is proper if it "appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Wilson*, 624 F.3d at 392 (citation and internal quotation marks omitted); *see also Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997) (stating that a court must dismiss a claim under Rule 12(b)(6) if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'").

ARGUMENT

I. THE COURT IS WITHOUT SUBJECT MATTER JURISDICTION WHEN PLAINTIFF LACKS STANDING.

Plaintiff lacks standing; therefore, the Court is without subject matter jurisdiction. The focus here is on the injury-in-fact requirement of Article III standing, which is absent. *See Lujan*, 504 U.S. at 560-61. This case must be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This is a pre-enforcement challenge to Wis. Stat. § 11.26(4). (Complaint, Dkt. #1, ¶ 5.) Pre-enforcement challenges to campaign finance statutes that restrict speech can be leveled consistent with Article III, but such challenges must be based upon allegations sufficient to demonstrate standing. *See*, *e.g.*, *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 147 (7th Cir. 2011). "To satisfy the injury-in-fact requirement in a preenforcement action, the plaintiff must show 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 590-91 (7th Cir. 2012) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)); *see also Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012) (citing *Alvarez*).

The allegations in Plaintiff's Complaint do not demonstrate standing because they do not allege that Plaintiff intends to engage in a course of conduct that would violate the annual aggregate contribution limitation in Wis. Stat. § 11.26(4). *See Alvarez*, 679 F.3d at 590-91. There is no injury-in-fact when there is not a credible threat that Plaintiff will be prosecuted by GAB for violating Wis. Stat. § 11.26(4) due to the conduct alleged in the Complaint. Plaintiff has not alleged that he intends to make

contributions to candidates or committees that would exceed the $10,000 annual aggregate contribution limitation in Wis. Stat. § 11.26(4).

The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1147 (2013), slip op. at 10 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); emphases and brackets in *Clapper*). There is no *certainly impending* or even *possible* future injury to Plaintiff based upon GAB's enforcement of Wis. Stat. § 11.26(4) because Plaintiff has failed to allege in his Complaint that he intends to violate the law by making contributions to candidates and/or committees in an amount in excess of $10,000 in one year.

Two paragraphs in the Complaint are key to the analysis:

> 19. Mr. Young is ready, willing, and able to make the maximum legal contribution to certain candidates for state-wide office, including a candidate or candidates for the offices listed in Wis. Stat. §11.26(1)(a) for which the limit is $10,000.
>
> 20. However, if Mr. Young makes a $10,000 contribution to any such candidate then because of Wis. Stat. §11.26(4) he will be unable to contribute to any other candidate for state office, including non-partisan office such as justice, judge, superintendent for public instruction or local office, and he will be prevented from donating to political committees.

(Complaint, Dkt. #1, ¶¶ 19-20.) Nowhere in paragraphs 19 and 20—nor in any other paragraph of the Complaint—does Plaintiff allege that he intends

to make contributions to candidates or committees, in the aggregate, *in excess of* $10,000 in a year. He alleges only that he is "ready, willing, and able" to make the maximum $10,000 contribution "to certain candidates for state-wide office, including a candidate or candidates for the offices listed in Wis. Stat. §11.26(1)(a) for which the limit is $10,000." (*Id.*, ¶ 19.) That allegation is not enough to demonstrate an injury-in-fact because making *up to* and *including* a $10,000 contribution to a candidate is legal. Wis. Stat. § 11.26(4) ("No individual may make any contribution or contributions to all candidates for state . . . offices . . . to the extent of *more than* a total of $10,000 in any calendar year."). Exceeding the $10,000 aggregate contribution limitation in a year is illegal. *Id.* Plaintiff has not alleged that he intends to engage in any prohibited conduct.

Even if paragraphs 19 and 20 of the Complaint could be construed to allege that the contribution amount proposed will exceed $10,000 in one year, there remains the question whether being "ready, willing, and able" to make illegal contributions is the same as or equivalent to *intending* to make illegal contributions. (*See* Complaint, Dkt. #1, ¶ 19.) One may be "ready" to jump in a lake but does not intend to do so. One may be "willing" to steal a loaf of bread but does not intend to do so. One may be "able" to buy a yacht but does not intend to do so. An allegation that one is "ready, willing, and able" to make certain illegal contributions is not the same as or equivalent to an

allegation that the person *intends* to make certain illegal contributions. Plaintiff's Complaint fails to allege a threatened injury for this additional reason, and Plaintiff, therefore, lacks standing. *Alvarez*, 679 F.3d at 590-91 (plaintiff must demonstrate an intention to engage in proscribed conduct). Accordingly, this Court lacks subject matter jurisdiction when Plaintiff lacks standing. The Complaint must be dismissed.

CONCLUSION

For the reasons argued herein, Defendants respectfully request that the Court enter an order dismissing the Complaint with prejudice.

Dated this 9th day of August, 2013.

Respectfully submitted,

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