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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, THOMAS BARLAND, MICHAEL BRENNAN, THOMAS CANE, GERALD C. NICHOL, DAVID G. DEININGER; and KEVIN KENNEDY,

Respondents,

MARY BELL, and WISCONSIN EDUCATION ASSOCIATION COUNCIL, ,

Intervenors.

Case No. 2010AP1937-OA

BRIEF AND APPENDIX OF INTERVENORS MARY BELL AND WISCONSIN EDUCATION ASSOCIATION COUNCIL

Robert H. Friebert
Matthew W. O'Neill
Jeremy P. Levinson
FRIEBERT, FINERTY & ST. JOHN, S.C.
330 East Kilbourn Avenue – Suite 1250
Milwaukee, WI 53202

Kurt Kobelt
General Counsel
Wisconsin Education Association Counsel
33 Nob Hill Drive
P. O. Box 8003
Madison, WI 53708-8003

Attorneys for Intervenors Mary Bell and WEAC

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ISSUES PRESENTED FOR REVIEW

1. Does Wis. Admin. Code GAB 1.28, as amended July 31, 2010, violate the First Amendment of the United States Constitution or Article I, Section 3 of the Wisconsin Constitution?

2. Whether the July 2010 amendments to GAB 1.28 were within the Government Accountability Board's authority under §§ 5.05(1)(f) and 227.11(2)(a), Wis. Stats., to "interpret and implement" the provisions of Chapter 11 "to effectuate the purpose of the statute"?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication of the Court's decision are appropriate, consistent with the Court's general practice.

INTRODUCTION

Three flaws permeate, and ultimately doom, Petitioners' facial constitutional challenge to Wis. Admin. Code § GAB 1.28 (hereafter "GAB 1.28").

First, Petitioners mistakenly invoke a "long standing principle of constitutional jurisprudence" that "issue advocacy may not be regulated." *Petitioner's Brief* ("*Pet. Br.*"), at 35. The Supreme Court has "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." *McConnell v. FEC*, 540 U.S. 93, 194 (2003). The point was re-emphasized last year in the context of disclosure and disclaimer requirements: "[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Citizens United v. FEC*, 130 S.Ct. 876, 915 (2010).

Second, Petitioners ignore that GAB 1.28 triggers *only* Chapter 11's disclosure and disclaimer requirements – the amount of speech is not limited in any respect. *McConnell* and *Citizens United* rejected First Amendment challenges to the same general registration, reporting and disclaimer requirements. Lower courts since *Citizens United* have uniformly rejected similar facial attacks. *See, e.g., Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 2010 WL 3768041 (D. Minn., Sept. 20, 2010) at *9 ("Such laws are permissible under *Citizens United*.").

Third, Petitioners incorrectly assert GAB 1.28 is subject to "strict scrutiny." *Pet. Br.* at 19. *Citizens United* confirmed that "[d]isclaimer and disclosure requirements" are subject to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." 130 S.Ct. at 914 (citations omitted). The Court held that "the informational interest alone is sufficient to justify" FECA's disclosure provisions. *Id.* at 915-16. The same "informational" interests underlie Wisconsin's campaign finance laws. *See* § 11.001(1), Wis. Stats. ("The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed.").

GAB 1.28 does exactly what was held to be constitutional in *Citizens United*: it requires ***disclosure*** and ***disclaimers*** for speech made just before an election that mentions a candidate and either uses the "magic words" (1.28(3)(a)) or is susceptible of no reasonable interpretation other than as an appeal to vote for or against the candidate (1.28(3)(b), the *WRTL II* test), so the electorate can make informed decisions and give proper weight to different speakers and messages. Far from the "bureaucrats bent on silencing speech" portrayed in Petitioners' brief, the non-partisan former judges making up the GAB acted carefully to ensure Wisconsin's compelling interest in a fully informed electorate is properly balanced against the First Amendment rights of speakers lobbing either compliments or criticisms at candidates shortly before an election.

Petitioners' challenge to the GAB's statutory authority is wholly without merit. Sections 5.05(1)(f) and 227.11(2)(a), Wis. Stats., enable the GAB to promulgate rules to "interpret and implement" Chapter 11 consistent with the bounds of the First Amendment. GAB 1.28 does just that.

FACTS

This is a facial challenge to the constitutionality of GAB 1.28. There is no record upon which the Court could rely to analyze the application of GAB 1.28 to any particular individual or organization. While the colorful description of the various groups challenging the law establishes standing, it provides no grounds for anything but a facial challenge. Because the Court enjoined enforcement of the Rule days after its approval, there is likewise no record of enforcement upon which the Court could rely to assess its impact.

The only relevant "facts" are those historical facts leading up to the passage of the July 2010 amendments to the Rule. Two things stand out. First, the Rule is and has been written since its inception to interpret the term "political purpose" in Chapter 11, fleshing out what acts are done "for the purpose of influencing" an election. Second, the Rule is and has been promulgated and amended in response to the evolving First Amendment jurisprudence of the United States

Supreme Court, careful to cleave the definition of "political purpose" to the allowable scope of regulation of speech relating to campaigns. This history is consistent with the overriding purpose of Chapter 11 to "make readily available to the voters complete information as to who is supporting or opposing which candidate or what cause and to what extent, whether directly or indirectly," because "our democratic system of government can be maintained only if the electorate is informed." § 11.001(1), Wis. Stats.

A. "Political purpose" includes all acts done "for the purpose of influencing" elections.

The statutory basis for GAB 1.28 is the term "political purpose," the legislative dividing line between regulated and unregulated activity. Section 11.01(16), Wis. Stats., currently provides in relevant part:

> An act is for "political purposes" when it is done ***for the purpose of influencing*** the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum. . . .
>
> (a) Acts which are for "political purposes" include but are not limited to:
>
> 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.

(Emphasis supplied.) This core concept of regulating acts undertaken "for the purpose of influencing" elections has been part of Wisconsin law even before the enactment of Chapter 11.

Prior to 1973, the regulation of campaign finance activity was set forth in Chapter 12, then-titled "Corrupt Practices Relating to Elections." The term "political

purposes" was defined to include "any act . . . done with the intent . . . to influence or tend to influence, directly or indirectly, voting at any election or primary . . . ." § 12.01(1), Wis. Stats. (1969-70). When Chapter 11 was created, the definition of "political purposes" continued to focus on acts influencing or tending to influence an election: "An act is for 'political purposes' when by its nature, intent or manner it directly or indirectly influences or tends to influence voting at any election." § 11.01(16), Wis. Stats. (1973-74).

The central importance of this "intent to influence" aspect of Chapter 11 is highlighted in § 11.002, Wis. Stats., the prefatory section instructing how the law's provisions should be construed:

> This chapter shall be construed to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process, consistent with the right of the public to have a full, complete and readily understandable accounting of those activities *intended to influence elections*.

(Emphasis supplied). As demonstrated below, the Elections Board and GAB rulemaking has consistently sought to implement this purpose by ensuring that the statutory term "political purposes" applies, to the extent constitutionally allowed, to ensure public disclosure of all "activities intended to influence elections."

B. After *Buckley*, the Elections Board created § ElBd 1.28 to interpret "political purpose" and the Legislature added "express advocacy" as one example of an act done for "political purposes."

On January 30, 1976, the Supreme Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976), the facial challenge to the 1973 Federal Election Communications Act ("FECA"). FECA's expenditure limitations and disclosure requirements applied to expenditures "relative to a clearly identified candidate." *Id.*, 424 U.S. at 39. The Court held that, in order to survive a vagueness challenge, this "relative to" language "must be construed to apply only to expenditures that

expressly advocate the election or defeat of a clearly identified candidate for federal office." *Id*. at 44. In a footnote, the Court added: "[t]his construction would restrict the application" of FECA's regulations "to communications containing express words of advocacy of election or defeat, such as 'vote for, 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. These terms have colloquially been referred to as the "magic words."

Notably, while the Court struck down FECA's *limitations* on independent expenditures, *see id*. at 39-58, it upheld FECA's *disclosure* provisions as applied to independent expenditures. *See id*. at 84 ("In summary, we find no constitutional infirmities in the recordkeeping, reporting and disclosure provisions of the Act.").

In response to *Buckley*, two things happened. First, the Elections Board engaged in emergency rulemaking and promulgated Wis. Admin. Code § ElBd 1.28, entitled "Scope of Regulated Activity; Election of Candidate." *See Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 663 n.12, 597 N.W.2d 721 (1999) ("*WMC*"). The rule provided that individuals other than candidates and organizations other than political committees were only subject to the "applicable disclosure-related and recordkeeping-related requirements of ch. 11" when they made "contributions for political purposes" or made "expenditures for the purpose of expressly advocating the election or defeat of an identified candidate." § ElBd 1.28 (Jan. 1977).

Second, in 1979, the legislature amended the definition of "political purposes" by adding subsection (a), specifying that "[a]cts which are for 'political purposes' include but are not limited to: 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum." *See* § 11.01(16)(a)1., Wis. Stats. (1979); *WMC*, 227 Wis. 2d at 662-63.

D. After *WMC*, the Elections Board amended § ElBd 1.28 to incorporate the *Buckley* "magic words" or their "functional equivalents."

In 1996 the Elections Board sought civil forfeitures against WMC for communications the Board deemed to be "express advocacy." The communications did not use the "magic words," but the Board took the position that contextual factors could be taken into account in determining whether a communication constituted express advocacy. WMC challenged the enforcement proceeding on First Amendment and due process grounds.

The Court agreed with WMC that the Elections Board did not provide adequate notice to WMC that its speech could be subject to regulation. The Court contrasted the Board's lack of rulemaking with the FEC's efforts:

> Unlike the Board, the FEC has promulgated and published its interpretation of the statutory term express advocacy, which includes a context-based test, as an administrative rule. By creating and attempting to apply its new, context-oriented interpretation of the statutory term express advocacy, the Board has, in effect, engaged in retroactive rulemaking.

Id., 227 Wis. 2d at 678-79. The Court declined to judicially define express advocacy, but instructed the Elections Board to go forth with rulemaking, consistent with the Supreme Court jurisprudence in place at the time:

> We stress that this holding places no restraints on the ability of the legislature and the Board to define further a constitutional standard of express advocacy to be prospectively applied. ***We encourage them to do so***, as we are well aware of the types of compelling state interests which may justify some very limited restrictions on First and Fourteenth Amendment rights . . .

Id. at 681-82 (*quoting Buckley*, 424 U.S. at 43) (emphasis supplied). *See also id.* at 680 (citing § 5.05(1)(f), Wis. Stats.,

and remarking: "The creation of such a standard is properly the role of the legislature and the Board, not this Court.").

Heeding the Court's encouragement, the Elections Board revised ElBd 1.28 in 2001 to include communications using the "magic words" from *Buckley* "or their functional equivalents with reference to the clearly identified candidate that expressly advocates the election or defeat of that candidate and that unambiguously relates to the campaign of that candidate." *See* § ElBd 1.28(3)(a) (2001).

E. After *McConnell, WRTL II*, and *Citizens United*, the GAB amended GAB 1.28 to remain consistent with Supreme Court jurisprudence.

The Rule remained in its 2001 iteration through July 2010. During that time frame, the Supreme Court decided three landmark cases redefining the First Amendment landscape in the context of campaign finance regulation.

In *McConnell*, the Supreme Court rejected a series of constitutional challenges to the Bipartisan Campaign Reform Act of 2002 ("BCRA"). One part of BCRA requires disclosures and disclaimers for any "electioneering communication," defined as a communication aired within 30 days of a primary or 60 days of a general election that uses the name and likeness of a candidate and is broadcast to a targeted audience. *McConnell* rejected a facial challenge to these provisions.

The Court began by "reject[ing] the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy . . . ." *McConnell*, 540 U.S. at 194. *See also id.* at 190 (rejecting plaintiffs' argument that "speakers possess an inviolable right to engage in [issue advocacy]"). Answering the argument that *Buckley* created a "constitutionally mandated line between express advocacy and so-called issue advocacy," the Court stated: "That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *Id.*

The Court had no trouble upholding the disclosure provisions. Relying upon the "important state interests" of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions," the Court noted:

> Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. . . . Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

Id., 540 U.S. at 196-97 (quoting with approval from the District Court's opinion). "Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of 'electioneering communications.'" *Id*. at 196.

In *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*"), the Court considered WRTL's challenge to BCRA's prohibition of communications funded by corporate entities as applied to broadcast advertisements directed at Senators Feingold and Kohl. Critical for purposes of this original action, a facial challenge to disclosure and disclaimer requirements, the issue in *WRTL II* was strictly limited to specific application of the outright ban on corporate speech contained in § 203 of BCRA, 2 U.S.C. § 441b. *See WRTL II*, 551 U.S. at 455-56, 481. The decision did not address BCRA's disclosure and disclaimer requirements.

The Court applied strict scrutiny to the ban on corporate electioneering communications. *WRTL II*, 551 U.S. at 464. The Court proceeded to adopt a test to delineate when corporate communications could be subject to BCRA's prohibition:

> In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no

> reasonable interpretation other than as an appeal to vote for or against a specific candidate.

WRTL II, 551 U.S. at 469-70. Explaining why WRTL's ads did not meet this test and thus could not be banned, the Court noted that:

> (1) "their content lacks indicia of express advocacy: the ads do not mention an election, candidacy, political party, or challenger"; and
>
> (2) "they do not take a position on a candidate's character, qualifications, or fitness for office."

Id. at 470.

In *Citizens United*, the Supreme Court once again considered the constitutionality of BCRA's prohibitions on corporate speech, and this time reversed the long-standing constitutional principle that had banned the use of corporate or union money to fund political speech. 130 S.Ct. at 913 ("[T]he government may not suppress political speech on the basis of the speaker's corporate identity.").

The Court came to exactly the opposite conclusion, however, in the context of disclosure. In robust language, the Court ***upheld*** the government's ability to "regulate corporate political speech through disclaimer and disclosure requirements . . . ." *Id.* at 886. In an analysis that cuts to the heart of the Petitioners' challenges to GAB 1.28, the Court rejected the argument that disclosure requirements must be confined to speech that is the functional equivalent of express advocacy:

> As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. ***We reject this contention***.

> The Court has explained that disclosure is a less-restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements of lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, ***we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy***.

Id. at 915 (citations omitted) (emphasis supplied).

Applying "exacting scrutiny" to the disclosure provisions, the Court focused on the "governmental interest in 'provid[ing] the electorate with information' about the sources of election related spending." *Id*., 130 S.Ct. at 914 (quoting *Buckley*, 424 U.S. at 66). This "informational interest" was deemed so important that "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id*. at 915. The Court concluded "the informational interest alone is sufficient to justify application" of the disclosure requirements to the ads. *Id*. at 915-16.

Echoing *McConnell*'s recognition of "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace," 540 U.S. at 197, the Court concluded its analysis of the constitutionality of disclosure requirements by stating:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. at 916.

During the same time frame these decisions were being handed down, the GAB was created to transform the Elections Board, comprised of individuals appointed primarily by political leaders, into a non-partisan board comprised of retired appellate judges. 2007 Wis. Act 1. The GAB was charged in its first year to review each Elections Board rule and "reaffirm," "amend" or "repeal" the rule. *Id*., § 209(2)(e).

Consistent with this charge, the GAB engaged in a deliberative process of rulemaking to consider changes to GAB 1.28. *See* Clearinghouse Rule 09-013, *Order of the Government Accountability Board* (*Intervenors' App.* 1-5) ("*I-App.*"). In so doing the GAB noted the constitutional landscape had evolved since the Rule was last amended. *Id*., ¶ 3 (*I-App.* 1-2). On July 31, 2010, the Board unanimously approved amendments to the Rule to track the Court's holdings. Consistent with *McConnell* and *Citizens United*, the GAB removed the *Buckley*-era language limiting the Rule to express advocacy. Consistent with the Court's as-applied test in *WRTL II*, the GAB adopted subsection (3)(b) expressly incorporating the "susceptible of no reasonable interpretation other than" test from the majority opinion.

F. GAB 1.28 as Amended on July 31, 2010

The full text of the July 2010 amended GAB 1.28 provides as follows (with the amendments marked):

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.

G. The three lawsuits challenging amended GAB 1.28.

Three lawsuits were immediately filed challenging the amended Rule. *See Wisconsin Club for Growth, Inc. v. Myse*, W.D. Wis. Case No. 2010-CV-427 (filed July 31, 2010); *Wisconsin Right to Life Committee, Inc. v. Myse*, E.D. Wis. Case No. 10-C-0669 (filed August 5, 2010); and this petition for original action (filed August 9, 2010).

In *Wisconsin Club for Growth*, the GAB stipulated to entry of an order "enjoining the application or enforcement of the second sentence of Wis. Admin. GAB 1.28(3)(b)." Judge Conley declined to enter an injunction, finding plaintiffs had not demonstrated a "reasonable probability" of success on the merits, because, among other things: "*Citizens United* ***expressly rejected plaintiffs' very argument here*** -- namely that *WRTL*'s distinct treatment of express advocacy (and its functional equivalent) as compared to issue advocacy should be extended to disclosure and disclaimer requirements." *Id.*, 10/12/10 Order, at 9-11 (Doc. No. 43) (emphasis supplied). Judge Conley stayed further proceedings pending completion of this original action. *Id*. at 16.

In this matter, the Court on August 13, 2010 granted a temporary injunction, holding "that to preserve the status quo, the respondents are enjoined from enforcing the amendments" pending further order of the Court. On November 30, 2010, the Court granted the petition and entered a schedule. On January 11, 2011, the Court rescheduled oral argument from March 9 to an unspecified date in September 2011.[1]

In *Wisconsin Right to Life*, Judge Clevert abstained from ruling and stayed all proceedings pending a ruling from this Court. E.D. Wis. Case No. 10-C-0669, 9/17/10 Order (Doc. No. 22).

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[1] On February 4, 2011, Intervenors filed a Motion to Lift Injunction or in the Alternative to Schedule Oral Argument for this Term. Given the compelling interests identified in § 11.001(1), Wis. Stats., this matter should be resolved in the current term.

H. The December 22, 2010 "emergency" amendment to GAB 1.28.

On December 20, 2010, the GAB issued a notice of a December 22, 2010 meeting to consider an "Emergency Rule" amending GAB 1.28 to strike the second sentence of subsection (3)(b). (*I-App.* 6-15). Intervenors objected to the proposed amendment, arguing the amended Rule was constitutional in its entirety and there was no "emergency" authorizing abbreviated rule-making under § 227.24(1)(a), Wis. Stats. (*I-App.* 16-18).

Despite these and other objections, the GAB unanimously approved the emergency amendment. GAB 1.28(3)(b) in its "emergency" form now provides:

> **(3)** A communication is for a "political purpose" if either of the following applies:. . .
>
> (b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

As the Court noted in the January 11, 2011 Order scheduling oral argument for next term, the "emergency" changes to the law "have a limited period of effectiveness" and do not "effect a permanent change" to GAB 1.28. Pursuant to § 227.24(1)(c), Wis. Stats., the emergency rule remains in effect until approximately May 21, 2011. The emergency rule may be extended by JCRAR for no longer than 120 days, or until September 18, 2011.

The net effect is that the "emergency" change does not moot any portion of this original action. If the Court agrees with Intervenors that GAB 1.28 is constitutional as approved in July 2010, the Rule will be back in force no later than September 2011.

ARGUMENT

All the GAB did in amending GAB 1.28 is to follow current constitutional jurisprudence. The cornerstone arguments of Petitioners' challenge – that the First Amendment bars any regulation beyond "express advocacy and its functional equivalents" and that strict scrutiny applies – have been "rejected" by the Supreme Court in the context of disclosure and disclaimer requirements. Because GAB 1.28 triggers only disclosure and disclaimer requirements and those requirements advance important state interests in a fully informed electorate, the amended rule survives this facial attack.

Petitioners' statutory challenge to the GAB's rule-making authority fails because the agency has ample statutory authority to interpret and implement Chapter 11, which is all the GAB has done. The legislature defines "political purposes" to include all acts "done for the purpose of influencing the election or nomination for election of any individual to state or local office." § 11.01(16), Wis. Stats. Section 5.05(1)(f), Wis. Stats., enables the GAB to "promulgate rules" for the purpose of "interpreting or implementing the laws regulating the conduct of elections or election campaigns." The amendments to GAB 1.28 "interpret and implement" Chapter 11 by defining further the acts which are "done for the purpose of influencing" an election, consistent with the constitutional jurisprudence established in *McConnell, WRTL II* and *Citizens United*.

I. THE JULY 2010 AMENDMENTS TO GAB 1.28 COMPORT WITH *McCONNELL, WRTL II* AND *CITIZENS UNITED*.

A. *McConnell* and *Citizens United* rejected the contention that disclosure and disclaimer requirements must be "limited to speech that is the functional equivalent of express advocacy."

While navigating the First Amendment waters and the competing interests of free speech and an informed electorate, the Supreme Court has taken pains to differentiate between

regulations that limit or ban speech, on the one hand, and regulations that require disclosure of those engaged in the speech, on the other.

Buckley reached different conclusions regarding FECA's limits on independent expenditures and FECA's disclosure requirements for independent expenditures. The Coutr struck down the $1,000 limitation, even as narrowed to survive the vagueness challenge, as violating the First Amendment. *Buckley*, 424 U.S. at 51. With respect to the disclosure provisions, however, the Court concluded they were constitutional. *Id*. at 84.

In *McConnell*, the Supreme Court subjected the substantive limitations of Title I of BCRA, 2 U.S.C. § 441i (relating to "the use of soft money by political parties, officeholders, and candidates") to strict scrutiny, ultimately concluding the various limitations were "closely drawn" to further compelling governmental interests. 540 U.S. at 133-190. With respect to Title II of BCRA, which imposes disclosure and disclaimer requirements on "electioneering communications" but no limits thereon, the Court applied "exacting scrutiny' and held that "*Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of 'electioneering communications.'" *Id*. at 196.

Likewise, in *Citizens United* the Supreme Court separately analyzed the federal law's prohibitions on speech and the law's disclosure and disclaimer requirements. The Court struck down FECA's prohibition on the use of corporate funds for political speech, overruling *Austin*. 130 S.Ct. at 913. At the same time, the Court held the disclosure and disclaimer requirements applicable to such independent political speech were constitutional, despite the fact that they applied to communications that were not express advocacy or its functional equivalent. *Id*. at 913-16.

B. The GAB drafted the July 2010 amendments to bring the Rule into accord with *McConnell, WRTL II* and *Citizens United.*

The July 2010 amendments to GAB 1.28 were carefully crafted to ensure that the disclosure and disclaimer

requirements reached only those communications that are constitutionally subject to compelled disclosure, and to do so in a fashion that limits potential as-applied challenges similar to *WRTL II*. The contemporaneous analysis of the GAB that accompanied the amendment discussed the holdings of *McConnell*, *WRTL II* and *Citizens United*, and explained:

> The revised rule will more clearly specify those communications that may not reach the level of "magic words" express advocacy, yet are subject to regulation because they are the functional equivalent to express advocacy, for "political purposes," and susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate.

Clearinghouse Rule 09-013, *Order of the Government Accountability Board*, at 1-2 (*I-App.* 2).

C. Removal of the term "expressly advocating" is consistent with *McConnell* and *Citizens United.*

In § GAB 1.28(2) and (3)(a), the GAB removed the phrase "the purpose of expressly advocating the election or defeat of an identified candidate." This change is consistent with the holdings in *McConnell* and *Citizens United* that disclosure and disclaimer requirements need not be limited to "speech that is the functional equivalent of issue advocacy." *Citizens United*, 130 S.Ct. at 915; *McConnell*, 540 U.S. at 194.

D. GAB 1.28(3)(b) directly tracks *WRTL II*.

Under GAB 1.28(3)(b), a communication is for a political purpose if "the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This standard is taken directly from *WRTL II*, 551 U.S. at 469-70.

GAB 1.28(3)(b) goes on, in the disputed second sentence, to create a bright-line standard that a communication is susceptible of no other reasonable interpretation if it is made during the identified window

before a primary or general election, includes a reference to or depiction of the clearly identified "candidate," and does one of the following three things: (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. This part of the Rule is also likewise based upon the holding in *WRTL II*. There, the Court found the WRTL ads were not the functional equivalent of express advocacy because the ads did not "mention an election, candidacy, political party or challenger," and did not "take a position on a candidate's character, qualifications, or fitness for office."

For the moment, the GAB's "emergency" rulemaking has eliminated the second sentence of subsection (3)(b). Prior filings in this action and related federal challenges indicate the GAB does not intend to defend the legality of the second sentence. Intervenors believe this part of the amended Rule is both constitutional and a proper exercise of the GAB's rulemaking authority under §§ 5.05(1)(f) and 227.11(2)(a), Wis. Stats. The rulemaking authority is discussed below. The constitutional analysis is straightforward: the holding in *WRTL II* invites precisely such a bright-line test. Indeed, the FEC reacted to *WRTL II* in precisely the same manner, revising its own regulations to create a similar rule. *See* 11 C.F.R. § 114.15(c)(1).

Indeed, by including the second sentence the Rule provides more, rather than less guidance to speakers, consistent with the constitutional preference for "bright line" standards that are easy to understand and apply. *See, e.g.*, *McConnell*, 540 U.S. at 194 ("These components are both easily understood and objectively determinable. . . . Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.").

II. GAB 1.28 SURVIVES EXACTING SCRUTINY BECAUSE CHAPTER 11'S DISCLOSURE AND DISCLAIMER PROVISIONS SUSBSTANTIALLY RELATE TO THE INFORMATIONAL INTERESTS IDENTIFIED IN § 11.001(1), WIS. STATS.

A. Disclosure and Disclaimer Provisions are Subject to "Exacting," Not Strict Scrutiny.

Petitioners claim in blanket fashion that strict scrutiny applies to "regulations that burden political speech." *Pet. Br*. at 19 (citing *Citizens United*), and 29 (citing *WRTL II* and *MCFL*). Petitioners fail to acknowledge that the invocation of "strict scrutiny" in each of these cases was limited to to 2 U.S.C. § 441b, which "prohibits" corporate electioneering communications. *See Citizens United*, 130 S.Ct. at 898; *WRTL II*, 554 U.S. at 464; and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 (1986).

Citizens United confirmed a different standard applies to disclosure and disclaimer provisions:

> Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking[.]" The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.

130 S.Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, and *McConnell*, 540 U.S. at 201). *See also Doe v. Reed*, 130 S.Ct. 2811, 2818, 177 L. Ed. 2d 493 (2010) ("We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.'").

Chapter 11 does not limit the amount a committee or individual can spend independently of a candidate or candidate's committee. *See Gard v. State Elections Board*,

156 Wis. 2d 28, 63, 456 N.W.2d 809 (1990). Thus amended GAB 1.28 is subject to "exacting scrutiny," and must be upheld as long as it is substantially related to a sufficiently important governmental interest.

B. § 11.001(1), Wis. Stats., Declares that Wisconsin has a Compelling Interest in Full Disclosure of Who is Supporting or Opposing a Candidate.

The "sufficiently important governmental interest" at stake in this matter is set forth in the "Declaration of Policy" in § 11.001(1), Wis. Stats.:

> The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. …. One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has ***a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office***, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters ***complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly***.

(Emphasis supplied). *See also* § 11.002 (noting "the right of the public to have a full, complete and readily understandable accounting of those activities intended to influence elections.").

As discussed below, these interests plainly relate to the disclosure and disclaimer requirements of Chapter 11 that are implicated by the revisions to GAB 1.28.

C. Chapter 11's Disclosure And Disclaimer Requirements are Substantially Related to the Interests Identified in § 11.001(1), Wis. Stats..

Registration

Section 11.05 requires registration if a committee or individual "incurs obligations or makes disbursements in a calendar year in an aggregate amount in excess of $25." § 11.05(1), (2). "Disbursement" is broadly defined to include any "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . . made for political purposes." § 11.01(7)(a)1., 3. Because GAB 1.28 delineates when communications are for a "political purpose," individuals or groups engaging in such communications will need to register.

This requirement is central to the goal of providing information to the public about who is supporting or opposing an identified candidate. *See Citizens United*, 130 S.Ct. at 915-16; *Minnesota Citizens Concerned for Life*, 2010 WL 3768041, at * 10 ("There can be little doubt that reporting requirements assist the electorate to make informed decisions in the political marketplace, help shareholders determine whether corporate political speech advances the corporation's interests, and allow citizens to determine whether elected officials are 'in the pocket' of outside interests.").

Registration Fee When Annual Disbursements Exceed $2,500

Section 11.055 requires registrants to pay an annual $100 filing fee. Petitioners argue this fee could be a significant disincentive for "grassroots" speakers to hold forward their opinions. *See Pet. Br.* at 10, 40. The argument fails because the fee "does not apply" unless a registrant makes "disbursements exceeding a total of $2,500." If an individual or group is spending over $2,500 on a

communication, a $100 filing fee is not a significant disincentive.[2]

Periodic Reports

Section 11.06 requires periodic reports disclosing all contributions received or made, disbursements made, obligations incurred and, for independent disbursements, a schedule showing candidates supported or opposed by the disbursement. As with the registration requirement, this reporting is substantially related to the informational interests identified in § 11.001(1).

Oath for Independent Disbursements

Section 11.06(7) requires any individual or committee intending to make a disbursement of over $25 "to advocate the election or defeat of any clearly identified candidate" to file a statement under oath "affirming that the committee or individual does not act in cooperation or consultation with" or "at the request or suggestion of" any "candidate or agent or authorized committee of a candidate who is supported" by the disbursement.

These reports are particularly critical to ensuring the voting public is informed in a timely fashion about who is supporting or opposing which candidates. *See McConnell*, 540 U.S. at 200 ("Given the relatively short timeframes in which the electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant.").

Disclaimers

Section 11.30(2) requires that the "source of every printed advertisement, billboard, handbill, sample ballot,

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[2] Petitioners also contend that these grassroots organizations and persons must "[c]reate a separate depository account for all expenditures related to the communications," citing GAB 1.91(3). *Pet. Br.* at 10, 40. Petitioners mislead to the extent they imply the "depository account" requirement would apply to individuals; the Rule applies only to corporate entities. *See* GAB 1.91(1)(f).

television or radio advertisement or other communication which is paid for by or through any contribution, disbursement or incurred obligation shall clearly appear thereon," and states that in the case of a committee, the disclaimer must include the words "Paid for by" followed by the name of the committee and its treasurer. In the case of an independent disbursement, the disclaimer must also include the phrase, "Not authorized by any candidate or candidate's agent or committee."

These requirements ensure that those viewing or receiving communications that are unambiguously related to a campaign are aware of who is behind the communication. As the Supreme Court observed, "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916. *See also McConnell*, 540 U.S. at 231 (FECA's disclaimer requirement "bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing.").

* * *

As a whole, the disclosure and disclaimer requirements of Chapter 11 substantially advance the "compelling" interests identified in § 11.001(1). *See Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) ("Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment."). The Court added that the informational interest "repeatedly has been recognized as a sufficiently important, if not compelling, governmental interest." *Id*. The court was right: every lower court to consider a challenge to disclosure requirements since *Citizens United* has concluded the informational interest satisfies the exacting scrutiny analysis. *See Yamada v. Kuramoto*, 2010 WL 4603936 (D. Hawai'i, Oct. 29, 2010), at *11-15; *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 2010 WL 3768041 (D. Minn., Sept. 20, 2010) at *10; *Iowa Right to Life Committee, Inc. v. Smithson*, 2010 WL 4277715 (S.D. Iowa October 20,

2010), at *13-17; *National Organization for Marriage v. McKee*, 723 F.Supp.2d 245, 263 (D. Me. 2010); *Speechnow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010).

III. PETITIONERS' CONSTITUTIONAL CHALLENGES LACK MERIT.

Petitioners advance several overlapping arguments in their brief that GAB 1.28 violates the First Amendment. For the reasons set forth below, each fails.

A. Disclosure and Disclaimer Requirements can Apply to Non-Express Advocacy.

Petitioners complain the Rule impermissibly "expands GAB regulation to non-express advocacy." *Pet. Br.* at 32-37. As established above, the Supreme Court "rejected" this argument. *McConnell* 540 U.S. at 194; *Citizens United* 130 S.Ct. at 915. Lower courts have without exception understood and abided by this holding. *See, e.g., Brumsickle*, 624 F.3d at 1016 ("[T]he position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *Center for Individual Freedom v. Madigan*, 2010 WL 3404973 (N.D. Ill., August 26, 2010) at *4 ("[I]n *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent. … Similarly, the express advocacy rule does not apply to registration requirements, including related reporting, recordkeeping and disclosure requirements."); *National Organization for Marriage*, 723 F. Supp. 2d at 267 ("*Citizens United* . . . holds that attribution and disclaimer requirements survive exacting scrutiny analysis.").[3]

[3] Likewise, Petitioners' contention that the reference to "express advocacy" in § 11.01(16)(a)1, Wis. Stats., renders Chapter 11 forever "limited to explicit express advocacy," *Pet. Br.* at 24 and 26, has been rejected. In *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999), the Court noted the "include but are not limited to" language of subsection (a), and held: "Contrary to plaintiffs' assertions, then, the term 'political purposes' is not restricted by the cases, the statutes or the code to acts of express advocacy." *Id.* at 680, ¶¶ 14-15 & n.7.

B. GAB 1.28 is Neither Overbroad nor Impermissibly Vague.

Petitioners' overbreadth argument appears to be that because *WRTL II* "makes clear that issue advocacy cannot be regulated," and the Rule is "no longer limited to express advocacy," the Rule is overbroad. *Pet. Br*. at 35-36. Because the premise is demonstrably incorrect – issue advocacy *can* be regulated in the context of disclosure and disclaimer requirements – the challenge must fail.

Moreover, both subsections of GAB 1.28(3) are properly circumscribed to comport with any overbreadth challenge. Subsection (a) applies to communications that reference a clearly-identified complaint, use the "magic words" or their "functional equivalents," and "unambiguously relate to the campaign" of the clearly-referenced candidate. The pre-amended GAB 1.28, which Petitioners do not challenge, was exactly the same except that the phrase "expressly advocates the election or defeat of that candidate" was included. In light of the resounding holdings of *McConnell* and *Citizens United* that "express advocacy" has no constitutional significance with respect to disclosure and disclaimer requirements, the removal of this phrase does not transform subsection (a) into an overly broad standard.

Subsection (b), in both its July 2010 and emergency forms, does nothing more than adopt the *WRTL II* standard that Petitioners advocate throughout their brief. Petitioners so admit: "GAB 1.28(3)(b) incorporated the *WRTL II* standard." *Pet. Br*. at 33.

Petitioners' fanciful invocation of "future government bureaucrats or organizations bent on disrupting the political process and silencing speech," who will be busy "scouring blogs, e-mails and public rallies "in search of political claims," *Pet. Br.* at 36, is not helpful to a serious constitutional analysis. To wit, such "bogeyman" speculation cannot satisfy the "heavy burden" of proving a law to be facially overbroad, a burden *McConnell* held not satisfied in rejecting identical arguments against FECA's disclaimer and disclosure provisions. *See McConnell*, 540 U.S. at 207. As the Supreme Court noted, "speculation about possible

vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted).

With respect to the vagueness challenge, Petitioners cite only to Justice Scalia's concurring opinion in *WRTL II*, which criticized the test *adopted* by the majority as impermissibly vague. *Pet. Br.* at 38, citing *WRTL II*, 551 U.S. at 492-93 (Scalia, J., concurring). The GAB's decision to adopt the standard approved by the *WRTL II* majority can hardly be stricken for failing to satisfy a vagueness standard advocated in a concurring opinion. Given that the two standards set forth in amended GAB 1.28(3) are specifically modeled after the tests established in *Buckley* (subsection (3)(a)) and *WRTL II* (subsection (3)(b)), the contention of unconstitutional vagueness rings hollow.

Indeed, the Rule as amended in July 2010 is the least vague iteration of all. Under that Rule, speakers will know with certainty that a communication made within 30 days of a primary or 60 days of a general election, that refers to a clearly-identified candidate, will be subject to disclosure and disclaimer requirements if it (1) refers to the candidate's "qualities, character or fitness," (2) "supports or condemns" the candidate's "position or stance on the issues," or (3) "supports or condemns that candidate's public record." As with the definition of "electioneering communications," "[t]hese components are both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194. *See id.* at 170 n.64 (rejecting vagueness challenge to FECA definition of "federal election activity," finding that terms "promote," "oppose," "attack" and "support" "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'").

C. Petitioners' Objection to the $25 Threshold of Chapter 11 is Misstated Here – The Legislature, Not the GAB, Set the Threshold.

At pages 39-46, Petitioners argue that the "scope" of GAB 1.28 is unconstitutional because it is not "narrowly

tailored to achieve a compelling interest." This is the wrong standard, of course, as disclosure and disclaimer requirements are subject only to exacting scrutiny.

Even if strict scrutiny applied, however, this challenge is not aimed at GAB 1.28 but at the $25 threshold established in § 11.05(1), Wis. Stats. Petitioners contrast the communications subject to regulation under GAB 1.28 with communications subject to the analogous federal disclosure requirement, where the threshold is $10,000. *Pet. Br.* at 40-42. Nothing in the Rule sets this threshold, however; that level was established by the legislature in 1973. The contention that GAB 1.28 is constitutionally infirm because of a legislatively-established threshold must fail. *Buckley* rejected a similar challenge, acknowledging the threshold for "recordkeeping, reporting and disclosure provisions" is "necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." 424 U.S. at 83, 84. Courts have recently upheld $100 thresholds against similar challenges. *See Human Life of Washington*, 624 F.3d at 998; *Minnesota Citizens Concerned for Life*, 2010 WL 3768041, at *3.[4]

Petitioners similarly complain the various reporting requirements imposed by § 11.05, Wis. Stats., would impose administrative costs that many "individuals, small groups and issue-oriented organizations" cannot bear. *Pet. Br.* at 42. These requirements were also established by the legislature, not the GAB. The $100 registration fee of § 11.055(1), which Petitioners' deride as a "speaker's fee," *Pet. Br.* at 55, applies only to where disbursements exceeding $2,500, a legislative threshold that accommodates rather than exacerbates Petitioners' concerns. And while statutory reporting and recordkeeping requirements can indeed become so burdensome as to be unconstitutional, *see MCFL*, 479 U.S. at 254-55, Petitioners here, in their facial challenge to a rule that has never been implemented or applied to anyone, cannot

[4] For the record, Intervenors agree with Petitioners that the $25 threshold established 38 years ago is outdated and should be changed, but the impact of inflation and the evolving First Amendment jurisprudence concerning allowable disclosure of speech made at the time of an election that criticizes or praises a candidate do not combine to render that legislative determination unconstitutional.

come close to meeting their burden to demonstrate that such burdens outweigh the "compelling" interests set forth in § 11.001(1). A similar challenge to the contribution limits in § 11.26(9), Wis. Stats., was rejected under a strict scrutiny analysis, because "[t]here is potential for corruption with all committees, regardless of whether they are rich, poor, single-issue or diverse." *Gard*, 156 Wis. 2d at 67.

Petitioners are left to ascribing wrongful motives to the non-partisan GAB, raising the specter of a "GAB bent on 'cleaning up' elections" or "future government bureaucrats bent on disrupting the political process and silencing speech." *Pet. Br.* at 36, 42. Scare tactics do not substitute for evidence, however, particularly where the challenging party bears a heavy burden and the law is presumed to be constitutional. *See State v. Dreske*, 88 Wis. 2d 60, 66, 276 N.W.2d 324 (1979) (rejecting constitutional challenge to criminal penalty provisions of Chapter 11).

D. There is No Unconstitutionally Favored Category of Speakers in GAB 1.28.

Petitioners contend GAB 1.28(1)(b) creates a "favored category" of speakers and thus violates the First Amendment. *Pet. Br.* at 46-49. The argument fails for several reasons.

First, nothing in the Rule creates any favored category. Subsection (1)(b) merely defines "communication," a term not defined in Chapter 11, to include "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." The "favored category" referred to is the long-time statutory exemption from the disclaimer requirement otherwise applicable to independent expenditures for "fair coverage of bona fide news stories, interviews with candidates and other politically active individuals, editorial comment or endorsement." *See* § 11.30(4), Wis. Stats. Petitioners are not challenging any of Chapter 11's provisions in this original action. Even if they were, however, it is not apparent, facially at least, why the "blog endorsement" example posited by Petitioners would not fall within the statutory exemption. Nothing in the statutory language (much

less the Rule's definition of "communications") purports to limit its scope to "old-line media."

Second, subsection (1)(b) does not alter the existing scope of "communications" covered by the disclaimer requirements of Chapter 11. Consistent with the Board's authority to "interpret and implement" the provisions of Chapter 11, it merely clarifies that the term "other communication" in § 11.30(2)(a), Wis. Stats., includes telephone calls, e-mails and internet postings.

E. The Court Should Decline Petitioners' Invitation to Extend Art. I, § 3 of the Wisconsin Constitution to Bar Disclosure and Disclaimer Requirements Otherwise Allowed by the First Amendment.

Petitioners' final constitutional argument is that even if the amended rule is consistent with the First Amendment, the Court should find it violates Article I, Section 3 of the Wisconsin Constitution. *Pet. Br.* at 50-56. Intervenors agree with Petitioners that the rights and privileges of the Wisconsin Constitution can extend beyond the scope of similar rights and privileges of the United States Constitution. *See State v. Doe*, 78 Wis. 2d 161, 172, 254 N.W.2d 210 (1977) ("This court has demonstrated that it will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded."). Intervenors also agree that the text of Article I, § 3 is different from the First Amendment, including both an affirmative right ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right"), and a prohibition ("no laws shall be passed to restrain or abridge the liberty of speech").

However, this case does not present a circumstance warranting extension of Article I, § 3 to prohibit the types of disclosure and disclaimer requirements the Supreme Court has concluded the First Amendment allows.

First, in the context at hand – the allowable scope of regulations on speech in the context of political campaigns – the Court has traditionally followed the Supreme Court's First Amendment jurisprudence. *See WMC*, 227 Wis. 2d at 882 (holding that "any definition of express advocacy must comport with the requirements of *Buckley* and *MCFL*"); *Gard*, 156 Wis. 2d 43-46 (analyzing constitutionality of Chapter 11 contribution limitations based upon Supreme Court's jurisprudence).

Second, the free speech interests of the Petitioners herein, and other potential speakers who could be subjected to disclosure and disclaimer requirements implicated by GAB 1.28, must be weighed against the related and countervailing First Amendment rights of the public to information about who and what groups are supporting which candidates. These rights were identified by the legislature in § 11.001(1) as "compelling," and recognized by the Supreme Court as constitutional in nature. *See Citizens United*, 540 U.S. at 197 (noting "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.").

Third, if the Court were to interpret the Wisconsin Constitution as prohibiting disclosure and disclaimer requirements for anything other than express advocacy, the Court would be engaging in the type of policy making it specifically eschewed in *WMC*, 227 Wis. 2d at 680 ("[W]e decline the Board's invitation to craft a new standard of express advocacy for the State of Wisconsin."). *See also Jacobs v. Major*, 139 Wis. 2d 492, 520, 407 N.W.2d 832 (1987) ("Our constitution defines and limits the powers of state government; it is not a license for the judiciary to convert what the judiciary perceives to be desirable social policies into constitutional law."). The parallel interests in free speech and a fully-informed electorate are amply set forth in § 11.001(1), a declaration that accompanied the creation and adoption of Chapter 11 in 1973. *See Gard*, 156 Wis. 2d at 38-39. Amended GAB 1.28 (in both its July 2010 form or in its current "emergency" form) does not attempt to recalibrate this balance, but only to maintain the scope of "political purpose" as consistent with the controlling First Amendment jurisprudence of the Supreme Court. This

ensures not only that the public can freely speak – the Rule places no limits on independent speech – but also that he electorate remains fully "informed" as to "who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly." § 11.001(1), Wis. Stats.

IV. THE GAB HAD STATUTORY AUTHORITY UNDER §§ 5.05(1)(f) AND 227.11(2)(a), WIS. STATS., TO PROMULGATE THE AMENDMENTS TO GAB 1.28.

A. Standard of Review.

"[W]hether an administrative agency exceeded the scope of its powers in promulgating a rule" is "a purely legal question, subject to de novo review." *Wisconsin Citizens Concerned for Cranes and Doves v. WDNR*, 2004 WI 40, ¶ 10, 270 Wis. 2d 318, 331-32, 677 N.W.2d 612. The inquiry is focused on whether the rule comports with the elements of the enabling statutes, or whether the rule "conflicts with an unambiguous statute or a clear expression of legislative intent." *Id*. 334-35, ¶ 14. Neither party bears any burden with respect to this purely legal issue. *Id*. at 331-32, ¶ 10.

B. The Amendments to GAB 1.28 Carry Out the Legislature's Intent by More Clearly Delineating a Long-Existing Statutory Standard to Reflect the Supreme Court's Clarification of the Constitutional Limitation on which the Statute has Always Been Based.

In amending GAB 1.28, the GAB properly carried out its statutory responsibility and remained well within the authority conferred on it by the Legislature. The Board has both the duty and the authority to promulgate administrative rules to implement Chapter 11, Stats. § 5.05(1)(f). For decades, the relevant provisions of Chapter 11 and related administrative rules have carefully cleaved to the Constitutional limits of regulation articulated by *Buckley*.[5] The amendments to GAB 1.28 do no more that provide

[5] *See WMC*, 227 Wis. 2d at 662-63, and 681 n.26 ("These statutory and code sections parrot the language used in *Buckley*.").

further clarity to reflect the Supreme Court's recent clarification of the constitutional standard on which the statute has been based for decades.

For years the constitutional and statutory boundary was understood to have been established by *Buckley* as prohibiting regulation of so-called "issue advocacy" while permitting it for "express advocacy." The only debate was whether the constitution required the literal presence of "magic words" in a communication or whether other characteristics could render it communication express advocacy amenable to regulation. *See WMC*, 227 Wis. 2d at 668-670, ¶¶ 22-24. Chapter 11 and its implementing regulations sought to go as far as *Buckley* permitted but no further. *See* § 11.01(16)(a)1; § ElBd 1.28 (2001).

As discussed above, *McConnell* and *Citizens United* clarified the issue, unambiguously confirming that *Buckley* permits regulation of both "issue" and "express" advocacy through registration, disclosure, and disclaimer requirements. And *WRTL II* set forth a bright-line standard for regulations that may go further and prohibit speech. If there was disagreement over this aspect of the *Buckley* standard that has long been Chapter 11's relevant statutory threshold for regulation, that disagreement has been decisively resolved. GAB carried out a core administrative function when it clarified 1.28 to foreclose any ambiguity on this point.

C. The Amendments are Consistent and Coextensive with the Underlying Substantive Statute, and Effectuate the Legislature's Clearly Articulated Intent and Policy Choices.

GAB's responsibility and authority to establish rules to "interpret and implement" Chapter 11 is beyond doubt. Section 5.05(1) provides in relevant part:

> The government accountability board shall have the responsibility for the administration of chs. 5 to 12 , other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19. Pursuant to such responsibility, the board may:

. . .

> [(1)(f)] Promulgate 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.

This language confers authority as broadly as it can be conferred on an administrative agency. Other than specifying the statutes for which GAB is responsible, and directing it to promulgate rules for "proper administration," § 5.05(1) refrains from further limiting or qualifying GAB's authority and responsibility.

Because the legislature expressly authorized and directed the GAB to promulgate rules regarding the subject matter of 1.28, the amendments can only be deemed to be beyond GAB's authority if it is established that the Rule contradicts the text of a statute or undermines established legislative intent and policy choices. *See State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶ 43, 303 Wis. 2d 570, 594, 735 N.W.2d 131.

The statutes themselves promptly confirm that neither showing is possible. The amendments provide enhanced specificity to the standard by which a communication will be deemed to be made for a "political purpose" and therefore subject to certain of Chapter 11's disclosure and disclaimer requirements, as well as incidental obligations necessary to meet these requirements.

Petitioners' argument that the Rule expands regulation beyond the legislature's chosen scope fails because the legislature expressly declared its intent to extend Chapter 11's disclosure provisions "consistent with" the public's compelling interest in full disclosure of political communications intended to influence election. Quoted more fully above, § 11.001(1) sets forth the legislature's goals and explains the public's "compelling interest" in the fullest disclosure regarding funds used to influence elections and the sources of those funds. Likewise, § 11.002 directs that Chapter 11:

> be construed to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process, ***consistent with the right of the public to have a full, complete and readily understandable accounting of those activities intended to influence elections.***

(Emphasis supplied). As directed by this statute, the amendments to GAB 1.28 refine the balance between the restraint required by the Constitution and the public's interest in a "full" and "complete" accounting of "activities intended to influence elections." In further describing the standard the rule implements, the amendments carefully adopt the Supreme Court's clarifications of the standard on which § 11.01(16) and related statutes were originally founded. This is precisely what the legislature intended and exactly what an administrative agency is tasked with doing.

D. The Amendments Reflect Exactly what the Court "Encourage[d]" in *WMC*, an Opinion the Petitioners Profoundly Distort and Embellish.

As discussed above in detail, in *WMC* the Court deemed the Elections Board's application of a new interpretation of the "express advocacy" standard to violate principles of due process. The Court carefully and clearly reasoned that because the standard had not been promulgated or formalized, its application amounted to impermissible retroactive rule-making and denied the subjects of regulation fair notice. *WMC*, 227 Wis. 2d at 676-680. Throughout the opinion, the Court reiterated that further definition of the scope of regulation would be entirely appropriate, if properly promulgated by statute or by rule. The Court expressly encouraged such further definition. *Id.* at 681-82.

On pages 22 and 23 of their brief, Petitioners attempt to reinvent *WMC* as imposing substantive limits on the scope of an otherwise properly promulgated rule. This is unvarnished distortion. As *WMC*'s text makes clear, the Court's concern was that the standard being applied by the Board had not been properly promulgated either by rule or statute. Here, Petitioners' complaint is that the standard has

been formally promulgated through GAB's rules-making process, something the Court specifically encouraged.

E. Petitioners' Reliance on Failed Legislative Proposals is Entirely Misplaced.

Petitioners rely substantially on proposals that did not become law to support the argument that the amendments to GAB 1.28 undermine the legislature's intent. This argument fails for two reasons.

First, the "non-passage of a bill is not reliable evidence of legislative intent," *Lindsey v. Lindsey*, 140 Wis. 2d 684, 694 n.8, 412 N.W.2d 132 (Ct. App.1987), because legislative proposals fail for any number of reasons. The legislature's failure to pass a bill does not evidence the legislature's policy judgment regarding any particular aspect of the failed bill. Also, it should be noted that a number of these failed bills were greeted with concerns over the ambiguities in the applicable constitutional standard that have since been resolved by the Supreme Court. Petitioners' citation to *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 52, 281 Wis. 2d 300, 330, 697 N.W.2d 417 is unhelpful. *Romanshek* dealt with a different issue, *i.e.*, that that "a construction given to a statute by the court becomes a part thereof, unless the legislature subsequently amends the statute to effect a change." *Id*. This concept has no application in the present case, because the Court expressly "decline[d]" to construe the statute, deferring to the Board. *WMC*, 227 Wis. 2d at 680, ¶ 33 (citing § 5.05(1)(f), Wis. Stats.).

Second, Petitioners omit the fact that the legislature did enact a provision structured in the same manner as the amended GAB 1.28. *See* 2001 Wis. Act 109 § 1ucj. A single, separate provision of the Act was deemed unconstitutional, and because the act had a non-severability provision, the court was compelled to strike down all of the Act's related provisions including § 1ucj. *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1093 (W.D. Wis. 2002). Thus Petitioners' argument based on failed bills is also meritless because its premise is historically inaccurate.

CONCLUSION

GAB 1.28 imposes only disclosure and disclaimer requirements on certain explicitly defined communications made at or near the time of an election. The amendments to the Rule were carefully drafted to track the evolving First Amendment jurisprudence in *McConnell*, *WRTL*, and *Citizens United*, and substantially relate to the important state interests set forth in §§ 11.001(1) and 11.002, Wis. Stats. The amendments are also well within the GAB's authority to "interpret and implement" the definition of "political purposes" in § 11.01(16), Wis. Stats.

Intervenors respectfully request that the Court declare the Rule to be constitutional as amended in July 2010, and dissolve the August 13, 2010 injunction.

Respectfully submitted this _____ of February, 2011.

Robert H. Friebert, State Bar No. 1009206
Matthew W. O'Neill, State Bar No. 1019269
Jeremy P. Levinson, State Bar No. 1026359
FRIEBERT, FINERTY & ST. JOHN, S.C.
330 East Kilbourn Avenue – Suite 1250
Milwaukee, WI 53202
(414) 271-0130

Kurt Kobelt
General Counsel
Wisconsin Education Association Counsel
33 Nob Hill Drive
P. O. Box 8003
Madison, WI 53708-8003
(608) 298-2358

Attorneys for Proposed Intervenors Mary Bell and Wisconsin Education Association Council

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of the brief is 10,842 words.

Dated this _____ day of February, 2011.

_____
Matthew W. O'Neill
State Bar No. 1019269

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of February, 2011, pursuant to § 809.80(3)(b) and (4), Wis. Stats., the original and twenty-one (21) copies of the Brief of Intervenors Mary Bell and Wisconsin Education Association Council were served upon the Wisconsin Supreme Court via first-class mail. Three (3) copies of the same were served upon counsel of record via first-class mail.

Dated this _____ day of February, 2011.

_____
Matthew W. O'Neill
State Bar No. 1019269

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated at Milwaukee, Wisconsin this _____ day of February, 2011.

_____
Matthew W. O'Neill
State Bar No. 1019269

CERTIFICATION OF APPENDIX AND COMPLIANCE WITH RULE 809.19(13)

I hereby certify that in conjunction with this brief, Intervenors are filing an Intervenors' Appendix that contains public records essential to a complete understanding of the issues raised in this original action.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.
I hereby certify that there is no appendix filed with this brief because this is an original action and there are no matters to include in an appendix.

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19(13). I further certify that this electronic appendix is identical in content and format to the printed form of the appendix filed as of this date.

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

Dated this _____ day of February, 2011.

_____
Matthew W. O'Neill
State Bar No. 1019269

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