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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.,

Case No.: 2010AP1937-OA

Petitioners

v.

GORDON MYSE, Chair of the Wisconsin Government Accountability Board; THOMAS BARLAND, its Vice Chair; each of its other members, MICHAEL BRENNAN, THOMAS CANE, GERALD C. NICHOL, and DAVID G. DEININGER; and KEVIN KENNEDY, its Director and General Counsel; each only in his official capacity,

Respondents,

and

MARY BELL and WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Intervenors-Respondents.

REPLY BRIEF OF PETITIONERS

Dated: March 8, 2011

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I. The GAB Lacked the Authority to Issue GAB 1.28.

The State[1], relying primarily *Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999) ("*WMC*"), argues that GAB 1.28 "permissibly interprets the statutory definition of acts for a 'political purpose' in Wis. Stat. § 11.01(16)(a), thereby providing prospective guidance as to the kinds of communications subject to applicable disclosure requirements in Wis. Stat. Ch. 11." (Respondents' Brief, p. 11).

Considering that the amendment to GAB 1.28 comes more than ten years after the *WMC* decision, the State's suggestion that "GAB 1.28 does no more than respond to the invitation in *WMC*" is counterfactual. (Respondents' Brief, p. 14). A "response" to *WMC* would presumably have occurred shortly after the Court's decision. Yet for ten years, the legislature and GAB's predecessor pointedly did not "respond to the invitation." To the contrary, changes that would have expanded that definition were rejected twelve times in the first two years after the *WMC* decision, and a total of 29 times between the *WMC* decision and the

[1] The State and WEAC often raise the same arguments. Rather than point to both for each area raised, Petitioners refer to the "State" or "Respondents" as inclusive of both, and "WEAC" or "Intervenors" when referring to a distinct argument of that party.

enactment of new GAB 1.28 during the summer of 2010. (Opening Brief, p. 25).

In the face of this history, the State suggests that the GAB has newly recognized (apparently in some sudden insight previously hidden from its predecessor) that the statutory language of § 11.01(16)(a) does not limit the term "political purpose" to actions that are express advocacy. Rather, it turns out that, after ten years, § 11.01(16)(a) allows for regulation of something more than express advocacy. (Respondents' Brief, p. 16). Given that the State also argues that amended GAB 1.28 does not extend to anything but "express advocacy," its choice to make such a suggestion is telling. That this is an attempted expansion of what had become the accepted scope of Chapter 11 seems clear. To suggest that the same statutory authority could now morph into a basis for expanding the regulation belies ten years of not only silence—but resistance—and certainly provides a powerful statement about what the legislature and prior administrators understood about the regulatory reach of GAB and its predecessor.

II. GAB 1.28 Violates the First Amendment to the United States Constitution.

A. GAB 1.28 Unconstitutionally Extends Regulation Into Areas Beyond Express Advocacy.

In a series of semantic leaps, the State argues that the repeated and consistent removal of the term "express" from GAB 1.28 and the inclusion of a broadened standard requiring only that speech "relate to a campaign" had no affect at all—express advocacy was the sole objective of amended GAB 1.28. The State apparently recognizes that if there is issue advocacy regulation, there is no justification for it. Yet even if one credits the State's assertion that this was not the GAB's intent, GAB 1.28 remains overbroad and ambiguous on its face. It is a stark violation of the requirement that the line between regulated express advocacy and unregulated issue advocacy be clear.

In attempting to avoid obvious constitutional problems, the State offers a variety of explanations for the removal of the word "express" from GAB 1.28. (Respondents' Brief, pp. 21-37). But the matter need not be so complicated. If it was never GAB's intention to address non-express advocacy, as the State now contends, then why was the term "express"

removed from the regulation? One will search the State's overlong brief and never find an answer to that very simple question.

As the State tries, repeatedly, to narrow the Rule to something that might be constitutionally permissible, its explanations become ever more complex. For example, the State acknowledges that the constitutionally permissible definition of express advocacy appears in GAB 1.28(1)(b). (Respondents' Brief, pp. 54-56). It then ignores the fact that the permissible definition does not appear in GAB 1.28(3)(a) and does not act to limit GAB 1.28(3)(a). While the State argues that GAB 1.28(3)(a) does not expand that definition, stating that it merely identifies the "magic words" that have long demarcated express advocacy. (Respondents' Brief, pp. 25-26), it fails to recognize that those "magic words" constitute a constitutionally permissible definition only when they are used to identify express advocacy. When used in any other context, without the limitation of "express advocacy"—as in GAB 1.28(b)—they are no more or less permissible as the object of regulation than any other words in the English language. In fact, GAB 1.28 was obviously amended so that it would not so limit the reach of Wisconsin's regulations. While the Supreme Court has made clear that messages may be regulated as express advocacy only if

they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *F.E.C. v. Wisconsin Right to Life*, 551 U.S. 449, 469-470 (2007) ("*WRTL II*"), GAB 1.28 ignores that limitation, extending regulation to messages that "use the explicit words of advocacy . . . (or synonyms) in a way that unambiguously relates to the campaign of a clearly identified candidate . . . ." (Respondents' Brief, pp. 45-46). That goes beyond what *WRTL II* permits.[2]

Respondents argue that "the alleged overbreadth of GAB 1.28(3)(a) is neither real nor substantial for the simple reason that Petitioners misread the rule." (Respondents' Brief, p. 24). But they are unable to explain that reading without writing a brief that is substantially longer than this Court

[2] The State appears to be attempting to save its newly minted standard by suggesting that "unambiguously relates" is no different than "susceptible of no reasonable interpretation other than to vote for or against a specific candidate." But that ignores the essential premise of the approved standard—it is unquestionably directed at voting for or against the candidate. In contrast, the essential premise of "unambiguously relates" is that the matter is of some importance, no matter how marginal, to the public. Everything of interest from a public policy standpoint will inevitably "unambiguously relate" to the election of a candidate as it is an issue of importance to the public on which candidates will speak. The further suggestion that simply adding "unambiguous" sufficiently avoids concerns fails to recognize first the premise of issue advocacy—at its best it will influence how people feel about people and policy. That does not make it express advocacy. Even more, it fails to recognize the complaint process in Wisconsin. Any private citizen can file a complaint. So long as it is not frivolous there is no consequence, and when judged by that frivolous standard, there is surely no doubt that complaints will be filed that, while they may not ultimately meet the GAB's newly minted "unambiguous" standard, will nonetheless take years to discern. That is plainly constitutionally unacceptable. *Citizens United*, 130 S.Ct. 876, 889 (2010) (noting that the First Amendment does not permit laws that require extensive interpretation to understand).

normally permits. We intend no criticism. It is no surprise that elaborate lawyering is required to explain why a rule that plainly moves beyond the accepted definition of express advocacy does not; and how that same rule, which clearly imposes substantial burdens on very small speakers, does no such thing. But consider what this means. Assuming, *arguendo*, that the State were right, the assertion itself is revealing. It means that the Petitioners cannot interpret the law without hiring attorneys, bringing a major lawsuit in the highest court of the State, and having that Court provide a ruling on the law after hearing from not only Petitioners, but the State's attorneys, a group of Intervenors, and numerous *amici*.

Not surprisingly, given this convoluted state of affairs, the State retreats again and again to the tried-and-true catch-all: this Court, it says, can use a "narrowing interpretation." (Respondents' Brief, p. 32-33). This is cold comfort. Citizens who wish to engage in political speech must now check not only GAB 1.28 in its latest iteration (itself created by an emergency rule), the further regulations of the GAB, and the particular

subparts of Chapter 11—they must now read Wisconsin Supreme Court case law as well.[3] If no controlling law yet exists, they must anticipate it.

The Supreme Court has squarely rejected such broad and ambiguous processes, as it should, in protecting the public's First Amendment rights. As noted in *Citizens United*, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. *Citizens United v. F.E.C.*, ____ U.S. ____, 130 S.Ct. 876, 889 (2010).

GAB 1.28 will become a weapon of political war, and normal processes of investigation and adjudication will make it impossible to obtain an authoritative determination within a campaign period about what forms of speech are "permitted," and so "[t]he censor's determination may in practice be final." *Citizens United*, 130 S. Ct. at 896 (quoting *Freeman v. State of Maryland*, 380 U.S. 51, 58 (1965)); *id*. at 895; (*see also* Opening Brief, pp. 37-38).

[3] These matters are further complicated by the fact that, should a citizen or citizens group look to the administrative regulations as set forth on the State of Wisconsin's website, they will find that, as of the timing of this brief, GAB 1.28 has not been updated to reflect this emergency rule, and *still reflects a rule that is not actually in place.* http://legis.wisconsin.gov/rsb/code/gab/gab001.pdf.

We have seen too much of this in recent years. GAB 1.28 will invite more of the same.

B. Even if GAB 1.28 is a Disclosure Statute, GAB 1.28 is Nonetheless Unconstitutional, Because It Applies to Issue Advocacy.

The State argues that it is perfectly acceptable for GAB 1.28 to apply to issue advocacy because it is a mere "disclosure" regulation. As more fully explained below, disclosure requirements are still subject to exacting scrutiny and those which substantially burden speech, as GAB 1.28 certainly does, are subject to strict scrutiny. Disclosure statutes relating to issue advocacy are unconstitutional—this is a long-standing proposition.

The State argues that it is perfectly acceptable for GAB 1.28 to apply to issue advocacy because it is a mere "disclosure" regulation. In so doing, it relies on Citizens United in which the U.S. Supreme Court held that disclosure requirements applicable to speakers who had spent large amounts of money on broadcast communications could be applied to speech that is not the functional equivalent of express advocacy. It is unclear precisely what the Court meant in the brief paragraph discussing the matter. It has long been the case that disclosure statutes relating to issue advocacy are unconstitutional. Indeed, in *Buckley v. Valeo*, this issue was

not even appealed from the lower courts to the Supreme Court. 424 U.S. 1, 10-11 (1976) (noting that the ruling of unconstitutionality of issue advocacy disclosure was not appealed). *Citizens United* does not hold otherwise; the speech in question there was express advocacy.

As noted below, disclosure requirements are *not* always permitted—particularly for independent speakers in non-candidate contexts. Even if there is no blanket prohibition against disclosure requirements for issue advocacy, the State's interest clearly becomes more attenuated for independent speakers who do not spend huge sums of money on broadcast communications and are not expressly advocating the election or defeat of a candidate. As a law reaches more extensively—to smaller independent speakers engaged in speech that does not expressly advocate—the state's interest in regulation so as to provide pertinent information or to combat apparent or actual corruption becomes weaker at the same time that the burden on these independent voices becomes greater. That disclosure was permitted to the substantial organized and expensive broadcast communications in *Citizens United* does not help the State here.

C. Even if GAB 1.28 Is Merely a "Disclosure" Statute, It Is Unconstitutional.

1. Regulations Substantially Burdening Political Speech Are Subject to Strict Scrutiny.

The Respondents suggest that amended GAB 1.28 need not be subjected to strict scrutiny because it is a mere "disclosure" provision, citing the approval of a disclosure provision applicable to parties engaged in mass broadcast, satellite and cable communications by the United States Supreme Court in *Citizens United*. 130 S.Ct. at 915. Respondents concede, however, that even disclosure provisions are subject to "exacting" scrutiny. So, even if it is correct to refer to GAB 1.28 as calling for "mere" disclosure,[4] there is no universal rule exempting whatever can be called a "disclosure" rule from strict scrutiny under the United States Constitution.[5] To the contrary, the United States Supreme Court has always recognized that substantial burdens on the exercise of free speech trigger strict scrutiny. *Citizens United*, 130 S.Ct. at 898; *Davis v. Federal Election Commission*, 554 U.S. 724, 740 (2008); *WRTL II*, 551 U.S. at 464 (2007); *Federal*

[4] In fact, it also potentially subjects plaintiffs to a fee as well as registration, accounting and reporting requirements. It is these requirements that, in the context of GAB 1.28's extraordinary scope, make it a severe burden on speech.

[5] Of course, a doctrine that permits disclosure requirements under First Amendment analysis does not bind this Court in its interpretation of Article I, § 18 of the Wisconsin Constitution.

Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 256 (1986).

Citizens United upheld disclosure requirements in the context of parties spending large sums of money on mass media. It is plain that the burden on sophisticated parties who spend large sums of money to communicate with the public is relatively low, *i.e.*, the burden is not substantial, while the public interest is high. A different case is presented by a cascading series of registration, accounting, reporting, and disclosure obligations on persons who spend as little as twenty five dollars on communication. The burden—for these grass roots speakers—may well be substantial, while the State's informational interest in knowing who, for example, has painted his barn to call on passers-by to vote for a favored candidate or who has printed her own run of pamphlets to call on her neighbors to defeat the Governor is quite different.

Indeed *Buckley*, in upholding certain disclosure requirements for minor political parties, noted that a case in which the threat to free speech was greater and the interests furthered by disclosure were less substantial might well be decided differently. 424 U.S. at 71-72. There is not, as Respondents suggest, a requirement that regulation "prohibit or directly

restrict speech." (Respondents' Brief, p. 41). Indirect or administrative burdens—even disclosure—may constitute a sufficiently substantial burden to trigger strict scrutiny. *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990), *overruled on other grounds*, *Citizens United*, 130 S.Ct. at 896-914.

So, for example, in *Davis*, the Court applied strict scrutiny to the "Millionaire's Amendment." 554 U.S. at 728-29. There, the liberalized limits for contributions were to remain in place until the self-financed advantage had been eliminated. *Id*. This neither prohibited nor directly restricted the speech of the self-financing candidate. Yet in the Court's view, the statute constituted a substantial burden and so was subjected to strict scrutiny. *Id*. at 739.

That a substantial burden may adhere in administrative requirements was recognized in *WRTL II*. Responding to requirements that the speech at issue could be undertaken if the speaker would simply form and comply with the requirements applicable to a Political Action Committee, Chief Justice Roberts observed that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." *WRTL II*, 551 U.S. at 476, n.9. In *Citizens United* itself, compliance with PAC requirements was found to

constitute a substantial burden on speech. "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days," as well as comply with periodic reporting requirements. *Citizens United*, 130 S.Ct. at 897; *see also Austin*, 494 U.S. at 658, *overruled on other grounds*, *Citizens United*, 130 S.Ct. at 896-914 ("Although these [administrative] requirements do not stifle corporate speech entirely, they do burden expressive activity. . . . Thus, they must be justified by a compelling state interest"). Many of those same requirements must be met under Chapter 11.

For purposes of this case, it is significant that the regulations invalidated in *WRTL II* and *Citizens United* applied to persons engaged in expensive broadcast, cable and satellite communications. This suggests a *lesser* burden and a *greater* public interest than involved with the extraordinarily broad GAB 1.28. People running campaign ads, by necessity, have substantial resources and sophistication. GAB 1.28, in

contrast, applies to almost anyone who seeks to be heard. Campaign ads, involving the use of substantial resources and having a potentially significant impact on the public discourse and response of public officials, are far more likely to implicate legitimate state concerns than many of the communications to which GAB 1.28 applies.

2. Even if GAB 1.28 Is Subject to Mere "Exacting Scrutiny," There Is No Safe Haven for Disclosure Laws.

Whether or not one applies strict scrutiny or "exacting scrutiny," there is no safe haven for whatever can be called a disclosure rule. Indeed, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court struck down a prohibition of anonymous political communications:

> The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.

Id. at 348-349. Apparently applying "exacting scrutiny" (the requirement imposed no great administrative burdens), the Court noted, among other things, that the ban could not be upheld because it applied "not only to the activities of candidates and their organized supporters, but also to

individuals acting independently and using only their own modest resources" and extended to all communications "no matter what the character or strength of the author's interest in anonymity." *Id*. at 352-353.

Similarly, in *Buckley v. American Constitutional Foundation*, 525 U.S. 182 (1999), again apparently applying exacting scrutiny (compliance was not particularly burdensome), the Court held that a Colorado statute requiring that "proponents of an initiative report names and addresses of all paid circulators and amount paid to each circulator" violated the First Amendment. *Id*. at 186-87. The Court also held that requirements for these circulators to be registered voters and wear identification badges. *Id*. at 200, 204. Two of the three are certainly mere "disclosure" requirements. Although certain disclosure requirements pertaining to initiative campaigns served substantial state interests, the state had gone too far "without sufficient cause." *Id*. at 200.

It is, therefore, apparent that *Citizens United* is of little help with respect to the constitutionality of GAB 1.28. The requirements at issue there only required disclosure of the source of funds in *television advertisements* (GAB 1.28 requires it in all communications) and called for the filing of disclosure reports only by any person who spends *more than*

$10,000 on electioneering communications within a calendar year—and electioneering communications, as noted above, were limited to broadcast, cable and satellite communications (the scope of GAB 1.28, as noted below, is much broader). *Citizens United,* 130 S.Ct. at 913-914.

3. Whether or Not it Is Called a "Disclosure Regulation," GAB 1.28 Substantially Burdens Political Speech.

Conceding that their early, unvarnished view was that these were not *de minimis* regulations, the State now claims—in essence—that GAB 1.28 is "not so bad." It is once again instructive that it takes more than 20 pages to "explain" (or, more accurately, "explain away") the applicable rules. The admonitions of Chief Justice Roberts in *WRTL II* and Justice Kennedy in *Citizens United* regarding such onerous restrictions are apt.

Under the State's interpretation, an ordinary citizen (*i.e.*, a grass roots speaker who has not yet and cannot ever "lawyer up") must know not only that GAB 1.28 exists, but must also know and be able to construe the GAB's new test for express advocacy—one that abandons the clear "no interpretation other" standard of *WRTL II* (limited to communications that clearly call for a candidate's election or defeat) for its own new "magic words" or "synonyms" that "clearly relate" to a candidate's campaign. This

legal legerdemain is required not only to know whether a message is regulated but to know which of Chapter 11's many requirements apply.

Notwithstanding these gymnastics, GAB 1.28 applies to grass roots speakers for whom its requirements will be facially burdensome and with respect to whom the State's informational interests are, at best, weak. As Respondents concede—and Chapter 11 itself states—that interest is directed towards combating undue influence:

> 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.

Wis. Stat. § 11.001(1). Respondents themselves observe that "[t]he declaration emphasizes that informing the public about these matters helps protect candidates against the potential corrupting influence of over-dependence on large contributors." (Respondents' Brief, p. 42).

This interest is not served by the broad scope of GAB 1.28 and its application to speakers who simply do not implicate the State's legitimate concerns, while it imposes a substantial burden on their speech. GAB 1.28, by its terms, applies to anyone who spends more than twenty-five dollars to

speak during an election. This means that a variety of the obligations of Chapter 11—requiring registration, fees, accounting, reporting and disclosure—may apply to anyone who tries to do something more than send a letter to the editor or walk out to the street corner and raise a small voice against the din (at least as long as it does not involve holding a sign created with much more than crayons and images cut and pasted from magazines). Of course, this causes one to blanche and the Respondent's response essentially reduces to a claim that this is not so. Not all of these requirements apply. Given sharp reading—or a good lawyer—the little guy will muddle through.

But even assuming that a set of regulations potentially applicable to anyone who wants to spend more on political speech than the average price of a Brewers ticket or a haircut can be justified because a careful parsing of the law will reveal that such a person need not do *everything* that the Greater Wisconsin Committee or Citizens to Elect Scott Walker must do, are the Respondents right in their reading of the lay of the legal land? It turns out that they are not.

To begin, Respondents argue that many of the regulations do not apply because they are applicable only to express advocacy. We can close

our eyes to this, they say, because none of the Petitioners here intend to engage in express advocacy. This is, of course, untrue. The Petitioners here have alleged—although given the fuzziness of the State's interpretation of the Rule's expanded definition it is hard to be sure—that they may engage in communications that fall within GAB 1.28's revised definition of "express advocacy." And, if their communications can be constitutionally treated as such, that does not exempt the State's requirements from sharp scrutiny.

Beyond that, the Respondent's description of the impact of GAB 1.28 is not accurate. For example, Petitioners allege that even those who will spend as little as $25—barely enough to cover dinner for two at Applebee's (assuming that the diners do not order drinks)—must register. They must comply with the statute's depository account and treasury requirements—although if they can avoid spending the spectacular sum of $1,000.00 (ten percent of the maximum individual contribution in a statewide race for an office other than the judiciary), an individual can be presumed to be his or her own treasurer. If expenditures exceed as little as $1,000.00, a speaker will be subject to reporting requirements and—if they spend as little as $500.00 immediately preceding an election—to immediate

reporting requirements. All speakers must comply with the disclaimer requirements.

Respondents claim that operation of a blog—for which all persons will certainly exceed the twenty-five dollar threshold for internet service alone—will not trigger the application of GAB 1.28 because "overhead" does not count, citing Wis. Stat. § 11.01(16). But the latter provision is not an exclusion of whatever can be called "overhead," but an inclusion of it for organizations "organized primarily 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, or for the purpose of influencing a particular vote at a referendum." Wis. Stat. § 11.01(16). For the latter groups, overhead becomes a political expenditure whether or not it finances a communication that may or may not be regarded as express advocacy. This says absolutely nothing about the treatment of an internet account that is clearly used for a communication that might come within the ambit of GAB 1.28.

Respondents are correct in pointing out that the $100 registration fee need not be paid unless the registrant (for she must register) will spend

more than $2,500.00 on political communications, and assert that another $100.00 is easily afforded by anyone who can spend that princely sum of $2,500.00. But by then, given all the other regulations and rules, $100 is certainly not the sum of a speaker's real cost.

D. GAB 1.28 Creates a Favored Category of Speakers in Violation of the U.S. Constitution.

Respondents argue that GAB 1.28 does not create a favored category of speakers; instead, "the alleged discrimination would be caused by § 11.30(4)." (Respondents' Brief, p. 61). However, the problem arises not out of Wis. Stat. § 11.30(4), but because of the interplay of the statutes arising out of the implementation of GAB 1.28 and the attendant consequences throughout Chapter 11. (*See* Opening Brief, pp. 47-49).

Anticipating this argument, Respondents make two suggestions. Respondents first argue that "where one claims that an exemption from an otherwise generally applicable regulation constitutes unlawful discrimination, it is illogical to blame the discrimination on the provision that makes the regulation generally applicable, rather than on the provision that provides the exemption." (Respondents' Brief, p. 62). Yet, there is nothing illogical about this—there was no problem with § 11.30(4) until GAB 1.28 was enacted. Like many of the problems with GAB 1.28, the

problem lies not with the now applicable statute or regulation itself, but through its interaction with GAB 1.28 and its expansion of the otherwise unobjectionable law. (*See* Opening Brief, pp. 9-11 (noting various problems arising with other statutes because of their interaction with GAB 1.28)).

Respondents next argue that "it is simply untrue to suggest that GAB 1.28(1)(b) has expanded the scope of communications subject to regulation under Wis. Stat. Ch. 11" and that "all forms of communication were already subject to regulation by force of the statutes alone." (Respondents' Brief, p. 62). However, Respondents miss the point of Petitioners' arguments. The interaction of GAB 1.28 and § 11.30(4) creates a situation where certain types of media—the old-line/mainstream media—are allowed to endorse and editorialize about candidates and elections, while another type of media—the new media found online in blogs and individual websites (the Petitioners here)—are subject to all the onerous restrictions of GAB 1.28, even if they are merely endorsing and editorializing. (Opening Brief, p. 48). In other words, it is not that the

media exemption is a problem; it is that the media exemption is a limited media exemption that discriminates in favor of a certain type of media.[6]

Indeed, the very portion of *McConnell v. F.E.C.*, 540 U.S. 93 (2003), that the State cites for support relies on *Austin*, which was overruled by the Supreme Court in *Citizens United* on this exact point. (Respondents' Brief, pp. 63-64). As the *Citizens United* Court said:

> Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or certain speakers. . . .Today, 30-second television ads may be the most effective way to convey a political message. . . . Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. . . . The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

Citizens United, 130 S.Ct. at 912-13; *see also id*. at 905-06 (further discussion of the same issue). As the Supreme Court alluded to in *Citizens United*, there has been a sea change in how people gain information about candidates and elections. Instead of obtaining information from the television news and newspapers, individuals increasingly rely on the new media that the interaction of GAB 1.28 and § 11.30(4) subjects to just the sort of discrimination the *Citizens United* Court worried about.

[6] For example, Petitioner The MacIver Institute regularly editorializes regarding candidates and elections; however, unlike a traditional newspaper, The MacIver Institute would be subject to the restrictions of GAB 1.28.

III. GAB 1.28 Violates Article 1, Section 3 of the Wisconsin Constitution.

Respondents argue that, with regard to the freedom of speech, the scope of Article 1, Section 3 of the Wisconsin Constitution is exactly the same as that of the U.S. Constitution. (Respondents' Brief, p. 67). Respondents say that this Court's decision in *Jacobs v. Major* rejected an argument that the Wisconsin Constitution's First Amendment provided greater protection than the U.S. Constitution. 139 Wis.2d 492, 407 N.W.2d 832 (1987). The *Jacobs* Court did find that, as to the particular issue before it, the Wisconsin Constitution provided the same level of protection as the U.S. Constitution; however, this bald statement of its holding requires one to ignore the *Jacobs* analysis of the substance of Wisconsin's speech guarantee, and the negative and affirmative rights provided by Article 1, Section 3. (Opening Brief, pp. 51-52).

Respondents' assertions that "Petitioners have not provided any analysis." (Respondents' Brief, p. 67) is simply wrong. Petitioners engaged in an extensive analysis of just that, noting in particular the Wisconsin Constitution's broad protections extended to all speakers, yet the onerous restrictions now imposed upon all political speakers through GAB 1.28 squarely violate that principle. (Opening Brief, pp. 54-56).

Moreover, with the regulation of non-express advocacy provided by GAB 1.28, the State has directly violated the Wisconsin Constitution's direct admonition that "no laws shall be passed" that abridge the right to speak. Wis. Const., Art. I, §3. (*See also* Opening Brief, p. 51). Allowing such a broad regulation not only impinges on a particular person's or group's right to speak (*i.e.*, Wisconsin's positive protections of speech), but impinges on the availability of political speech for those who merely seek to learn about an upcoming election or candidates (Wisconsin's over-arching goal evidenced by both the positive and negative constitutional provisions). If this Court finds that GAB 1.28 passes constitutional muster, the next law regarding political speech will chip away even more of this precision Wisconsin right. Such a situation cannot be allowed.

While this Court has not expressly ruled on the interplay of the Wisconsin Constitution and campaign finance regulations, such as are at issue here, it is time it did just that. The political speech rights of the Wisconsin citizens should be properly acknowledged as broader than those guaranteed under the First Amendment.

CONCLUSION

Petitioners respectfully request that this Court declare GAB 1.28 unconstitutional, and grant Petitioners the relief requested.

Dated this 8th day of March, 2011.

Respectfully submitted,

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COMPLIANCE CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,981 words.

Dated this 8th day of March, 2011.

Signed: _____
James R. Troupis
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