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, 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 C. DEININGER; and KEVIN KENNEDY, its Director and General Counsel; each only in his official capacity,

Respondents

Case No.: 2010 AP 1937-OA

BRIEF OF *AMICUS CURIAE,* CENTER FOR COMPETITIVE POLITICS

Mitchell R. Olson
Wisconsin Bar No. 1030756
Amicus Curiae Counsel for the Center for Competitive Politics
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
(608) 283-6724
molson@axley.com

INTRODUCTION AND SUMMARY OF ARGUMENT

Wisconsin's Government Accountability Board (G.A.B.) has amended Rule 1.28 to redefine the term "political purpose" in defiance of both the Wisconsin legislature and precedents of the U.S. Supreme Court.

Twenty-nine times in the last eleven years Wisconsin's legislature has declined to enact bills that would expand the definition of "political purpose." *See* Petitioners' Brief at 24-25. McCain-Feingold's federal restrictions on "electioneering communications," troublesome as they have proven to be in the Supreme Court of United States, were premised on congressional findings and academic studies that were themselves questionable; but at least Congress had them. The G.A.B. presumes to proceed in the absence of studies; in the absence of legislation.

And GAB 1.28 is overbroad. It does not conform to U.S. Supreme Court holdings in *FEC v. Wisconsin Right to Life, Inc.*, 551 US 449, 127 S. Ct. 2652 (2007) ("*WRTL II*"), or *Citizens United v. FEC,* 130 S. Ct. 876 (2010), and should be held facially infirm. New Rule GAB 1.28 is poorly-conceived, beyond the authority of the G.A.B. to enact, and unconstitutional. This Court should strike the new rule in its entirety.

ARGUMENT

I. The G.A.B. lacks the authority to make sweeping changes to the definition of "political purpose"

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. Law 107-155 (Mar. 27, 2002), Congress created a presumption that all advertising buys in excess of $10,000 in a calendar year, that mention candidates, target voters, and are run within 30 days of a primary, caucus, or convention or within 60 days of a general election, are designed to affect elections and must be disclosed. Congress presumed that all such ads

were the functional equivalent of express advocacy, and called this category of advertising "electioneering communications." 2 U.S.C. § 434(f)(3). Congress recognized that the presumption did not hold in all cases. It therefore permitted the Federal Election Commission to carve exceptions to the definition for certain ads that happened to run within the temporal windows but were not of an electioneering nature. 2 U.S.C. § 434(f)(3)(B).

The Supreme Court, in *McConnell v. FEC*, affirmed the definition of "electioneering communication" as a "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office; is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate...". *See* 2 U.S.C. § 434(f)(3)(A), as upheld in *McConnell v. FEC*, 540 U.S. 93, 189, 124 S. Ct. 619, 686-87 (2003).

In finding that "electioneering communications" needed disclosing, Congress relied on academic studies, engaged in debate, and made legislative findings. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 302-13 (D.D.C. 2003) (Statement of Facts and Findings, Judge LeCraft Henderson, concurring in part and dissenting in part). The G.A.B. has crafted a rule far beyond the findings of Congress, while Wisconsin's legislature has not seen fit to expand restrictions on core political speech.

It is well established that the G.A.B. may exercise only those powers granted to it by the legislature, and has no authority to craft rules that are first the province of the

legislature. *Mallo v. Wisconsin Department of Revenue*, 2002 WI 70, ¶13-15, 645 N.W.2d 853, 859-60 (2002). As stated by Messrs. Wittenwyler and Williamson in their written testimony to the G.A.B. during the rulemaking:

> While the Board may promulgate rules to interpret the statutes it administers or enforces, its rules may not conflict with state law or legislative intent, nor may they exceed the bounds of correct interpretation. *See Seidler v. O'Connell*, 612 N.W.2d 659, 676-77 (Wis. 2000). Accordingly, it is debatable, at best, whether the Board has the authority to promulgate a rule ... in the absence of any legislative direction.

Comments of Association of Wisconsin Lobbyists, *et al.*, p.10-11, March 17, 2008. The G.A.B. should have waited for the legislature to determine what actions it would prefer to take with regard to the scope of "political purpose" and the regulation of electioneering communications.

II. Even if the G.A.B. were acting pursuant to legislative authority, the scope of GAB 1.28 is far too broad under existing precedent.

The rule is overbroad. Federal reporting requirements recently approved by the Supreme Court are triggered upon the spending of $10,000 for *broadcast* communications that mention a candidate. The G.A.B.'s rule, on the other hand, requires speakers not only to report but to register a committee when $25 is spent on *any* communication that mentions a candidate's record within the 30- and 60-day periods—including those on websites or in personal e-mail.

In *McConnell v. FEC,* 540 U.S. 93, 124 S. Ct. 619 (2003), the Supreme Court affirmed Congress's presumption of an electioneering nature only in advertising *broadcast* within 30- or 60-days of an election. It did not affirm a presumption of an electioneering nature for communications made in other media. Unless the Wisconsin

legislature wants to conduct studies[1] into the "electioneering" nature of non-express advocacy communications in other media, or of broadcast advertising beyond 30 or 60 days, neither the Wisconsin legislature nor the G.A.B. may venture beyond the findings of Congress or the Court's holding in *McConnell*. This means the G.A.B. may not place reporting requirements on, nor presume the electioneering nature of, communications made in non-broadcast media, including in direct mail pieces, newspaper advertising, phone banks, "robocalls," websites or e-mail.

III. Compelled disclosure of electioneering communications is constitutional to the extent the communications are "electioneering," but the disclosure of non-electoral speech cannot be compelled.

Some interest groups have recommended that the G.A.B. require the disclosure of donations for *all* ads run within 60 days of an election, even where the ads are not of an electioneering nature. Memorandum of Brennan Center for Justice to Jay Heck and Mike McCabe, December 5, 2007. Such proposals are mistaken, misguided, and ultimately unconstitutional. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S. Ct. 1389, 1404 (2002).

Article I, § 3 of the Wisconsin Constitution provides even more protection for speech than does the First Amendment. *See Jacobs v. Major,* 139 Wis.2d 492, 504, 534, 407 N.W.2d 832, 837, 850 (1987). Therefore it is important to examine the scope of

[1] The U.S. Congress relied upon the highly controversial "Buying Time" studies to makes it determinations about the electioneering nature of broadcast advertising run within 30 and 60 days of an election. See Craig B. Holman & Luke P. McLoughlin, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (Brennan Center 2001), and Jonathan S. Krasno & Daniel E. Seltz, BUYING TIME 1998: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS (Brennan Center 2000).

federal regulation in this area. Congress has no authority to regulate political speech beyond elections. U.S. CONST., Amend. I; *WRTL II,* 551 U.S. 449, 478-80, 127 S. Ct. 2652, 2672-73 (Court "did not suggest" that the corruption interest identified in *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652 (1990), "extended beyond campaign speech."); *Buckley v. Valeo,* 424 U.S. 1, 80, 96 S. Ct. 612, 664 ( ) (disclosure provision "[a]s narrowed ... does not reach all partisan discussion[;] it only requires disclosure of ... expenditures that expressly advocate a[n] election result."). The First Amendment provides the "broadest protection to ... political expression" to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley,* 424 U.S. at 14, 96 S. Ct. at 632 (quoting *Roth,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1308). This protection extends to "political association," individuals donating to advocates they believe in, "as well as to political expression." *Buckley,* 424 U.S. at 15, 96 S. Ct. at 632.

Accordingly, Congress's disclosure provisions for political speech have always been tied to elections. "The first federal disclosure law was enacted in 1910," reaching "political committees and ... organizations operating to influence congressional elections." *Buckley,* 424 U.S. at 61, 96 S. Ct. at 654-55 (internal citations omitted). The Federal Corrupt Practices Act of 1925 mandated disclosure for "political committees, defined as organizations that accept contributions or make expenditures 'for the purpose of influencing'" a Presidential campaign. *Buckley,* 424 U.S. at 62-3, 96 S. Ct. at 655. Both laws were replaced by provisions in the Federal Election Campaign Act of 1971, as amended, *id.,* and Congress added to them in BCRA, legislation dedicated to the regulation of campaigns for federal office. *See generally McConnell,* 540 U.S. 93.

Similarly, Congress has mandated disclosure of direct, paid lobbying of officials. In *United States v. Harriss,* 347 U.S. 612, 74 S. Ct. 808 (1954), the Supreme Court "upheld limited disclosure requirements for lobbyists," because [t]he activities of lobbyists, who have *direct* access to elected representatives, if undisclosed, may well present the appearance of corruption." *McIntyre v. Ohio Elections Com'n,* 514 U.S. 334, 357 n.20, 115 S. Ct. 1511, 1524 (1995) (emphasis added). The Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.* (requiring lobbyists to make detailed disclosures about their direct lobbying efforts), operates to cure the same appearance. The regulated lobbying activities do not include attempts to advocate issues with fellow citizens. Rather they are '"representations made directly to the Congress, its members, or its committees' ... and do[] not reach ... attempts 'to saturate the thinking of the community.'" *United States v. Rumely,* 345 U.S. 41, 47, 73 S.Ct. 543, 546 (1953) (internal citations omitted).

In this case, there can be no doubt that G.A.B. 1.28, as amended, will sweep beyond express advocacy into issue advocacy. Thus, too much of the activity captured will be insufficiently related to elections to be regulated. In the absence of constitutional authority, congressional power is non-existent. *See generally United States v. Morrison,* 529 U.S. 598, 608, 120 S. Ct. 1740, 1748 (2000) ("Congress' regulatory authority is not without effective bounds"). This is the premise of our Constitution, only the more evident in political speech because of the First Amendment's proscriptions. "*McConnell's* analysis was grounded in the evidentiary record before the Court," *WRTL II,* 551 U.S. 449, 466, 127 S. Ct. 2652, 2664, which was based largely upon "two key studies," *id.*, flawed as they were, finding that ads run near elections are tied to elections.

See McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 307, 308 (D.D.C. 2003) (opinion of J. Henderson). Congress did not attempt to tie the ads to, say, interstate commerce and thus its authority to regulate advertising under the interstate commerce clause. *See* U.S. CONST., art. I, § 8, cl. 3.

There must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed." *Buckley,* 424 U.S. at 64-65, 96 S. Ct. at 656. Mandatory disclosure of speech beyond express advocacy lacks a "relevant correlation" or "substantial relation" to elections and, thus, to government interests recognized by this Court.

The first interest is the "informational interest." *Buckley,* 424 U.S. at 81, 96 S. Ct. at 664. Disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office...." *Buckley,* 424 U.S. at 66-67, 96 S. Ct. at 657. Much of the communications captured by amended G.A.B. 1.28 are not campaign speech. Therefore, compelling Plaintiffs to disclose the funding of those ads will not provide the public with information as to "where political campaign money comes from," or with information on "how [money] is spent by [a] candidate." *Id.*

The second interest is to "deter actual corruption and [its] appearance ... by exposing large contributions and expenditures to the light of publicity." *Buckley,* 424 U.S. at 67, 96 S. Ct. at 657. But the terms "contributions" and "expenditures" discussed in *Buckley* derive from FECA. Each subsumes the phrase "made ... for the purpose of influencing an election," *see* 2 U.S.C. §§ 431(8) & (9), and not for some other purpose.

That "critical phrase" was narrowed in *Buckley's* discussion of the disclosure requirements at § 434(e) to express advocacy, which ensured that its reach was unambiguously campaign related. *Buckley,* 424 U.S. at 80-81, 96 S. Ct. at 663-64. Candidates and officeholders are not corrupted by issue campaigns because issue advocacy increases the probability of citizen-to-lawmaker contact, the very goal of a democratic republic. No matter how a citizen first hears about an issue—be it in an ad, a *New York Times* editorial or a conversation with a neighbor—once the citizen engages he does so for reasons of his own and calls his representative directly to express his opinion.

The third interest in disclosure is to "gather[] the data necessary to detect violations of the contribution limitations." *Buckley*, 424 U.S. at 67, 96 S. Ct. at 658. In upholding the disclosure of electioneering communications against facial challenge in *McConnell*, however, Justice Kennedy stated that "BCRA § 201 ... does not substantially relate to a valid interest in gathering data about compliance with contribution limits [*Buckley's* third interest] or in deterring corruption [*Buckley's* second interest]." *McConnell,* 540 U.S. 93, 321, 124 S. Ct. 619, 761 (Kennedy, J. concurring in part and in dissenting in part). Justice Kennedy's holding is all the more accurate when the electioneering communications in question are protected issue advocacy. Thus, requiring the names, addresses and dollar commitments of citizens engaged in issue advocacy does not substantially relate to any of the informational, anticorruption, or compliance interests upheld as compelling in *Buckley.* There is no government interest recognized by the U.S. Supreme Court that is furthered by mandatory disclosure of issue advocacy.

Many may believe increased disclosure is permissible after *Doe v. Reed,* 130 S. Ct. 2811 (2010). But there the Court determined that the "State's interest in preserving

the integrity of the electoral process suffices to defeat the argument that [a petition signature disclosure provision] is unconstitutional with respect to referendum petitions in general." *Id.* at 2819. GAB Rule 1.28's sweep into issue advocacy does not advance the state's interest in preserving the integrity of the electoral process and is not tailored solely to disclosure in elections, let alone to the gathering and disclosure of signatures to a referendum petition.

Others believe the G.A.B. may compel the disclosure of most any speech after the Court's opinion in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). But GAB Rule 1.28 is clearly problematic under *Citizens*. The Court reaffirmed that laws burdening speech are subject to strict scrutiny, *id.* at 898, and the G.A.B. rule is no mere reporting requirement. With the adoption of GAB 1.28, issue advocacy communications will be subject to regulation under Wis. Stats. Chap. 11. In practical terms, this means that speakers will be required to establish a separate depository account and transfer funds from their general treasury to these depository accounts. Wis. Admin. Code § GAB 1.91(3). They must then register with the G.A.B. and file an oath of independence prior to making any communications subject to GAB 1.28. Wis. Stat. §§ 11.05; 11.06(7). They will also be required to pay a $100 filing fee to the G.A.B. Wis. Admin Code § GAB 1.91(5). In addition, speakers will be subject to periodic reporting requirements, including 24-hour reports during the 15 days prior to elections. Wis. Stat. §§ 11.12(5), 11.20. Requiring speakers to register the equivalent of a political action committee ("PAC") to engage in independent issue advocacy or independent campaign activity is unconstitutional. As the Supreme Court held in *Citizens United v. FEC,* 130 S. Ct. 876, 897 (2010), "PACs are

burdensome alternatives; they are burdensome to administer and subject to extensive regulations."

In *McConnell v. Federal Election Commission*, the Supreme Court held that "[b]ecause the important state interests identified in *Buckley [v. Valeo*, 424 U.S. 1 (1976)] ... apply in full to BCRA, *Buckley* amply supports application of BCRA § 304's disclosure requirements to the entire range of "electioneering communications." *McConnell,* 540 U.S. 93, 196, 124 S. Ct. 619, 690. But this statement presumes that the *entire range* of communications is of an electoral nature and not issue advocacy. The Court's acceptance of congressional findings, in *McConnell* and in its discussion of disclosure in *Citizens United*, permitted the Court to infer that most every ad buy over $10,000 targeted at candidates over broadcast media in the 60 days preceding an election is presumptively of an electioneering nature. The G.A.B. has no basis for presuming an electioneering nature in a broader swath of First Amendment activity.

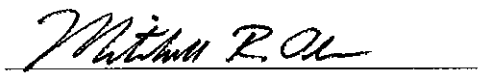
CONCLUSION

The G.A.B. has proceeded to amend GAB Rule 1.28 without the benefit of legislative authority. Rule GAB 1.28 compels speakers to register with the G.A.B. before speaking and severely burdens their rights of speech and association. The G.A.B. now presumes that a large of swath of issue advocacy carries a "political purpose" and must be disclosed. Any regulation of issue advocacy masquerading as the regulation of electioneering would undermine the system of information exchange in the State of Wisconsin and impinge on the ability of citizens to exercise their First Amendment rights of speech and association. Petitioners' request to invalidate new GAB 1.28 should be granted.

Respectfully submitted,

CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314

Dated this 8th day of March, 2011.



Mitchell R. Olson
Wisconsin Bar No. 1030756
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
(608) 283-6724
molson@axley.com

FORM AND LENGTH 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 Times New Roman font. The length of this brief is 2,900 words.

ELECTRONIC FILING CERTIFICATION

I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed with the Court.

Dated this 8th day of March, 2011.

Mitchell R. Olson
Wisconsin Bar No. 1030756
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
(608) 283-6724
molson@axley.com