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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,

MARY BELL, and WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Intervenors.

CENTER FOR MEDIA AND DEMOCRACY'S BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND INTERVENORS

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Statement of Interest

The Center for Media and Democracy (CMD) is a national independent media, policy, and consumer watchdog group located in Madison, Wisconsin. CMD believes that the vitality of America's democracy and economy requires informed citizens and political transparency, and our mission, in part, is to scrutinize public relations "front groups" established by political, corporate, or other special interests.[1] Like petitioners Wisconsin Prosperity Network and MacIver Institute, CMD represents a broad spectrum of interests, monitors the actions of State and Federal government officials, and is incorporated under Section 501(c)(3) of the tax code.[2] During the 2010 elections CMD reported extensively on the anonymously-funded "independent expenditure" groups flooding the airwaves with "issue ads" and phonelines with "robo-calls" clearly intended to influence electoral outcomes. The secrecy marking the 2010 elections reminded us of James Madison's statement that "a popular government without popular information, or the means of acquiring it, is a prologue to a farce or a tragedy, or perhaps both." CMD strongly believes that the

[1] To that end, we publish the websites www.prwatch.org and www.sourcewatch.org.
[2] As a 501(c)(3), nonprofit, we must comply with IRS restrictions on political activity. CMD does not believe the revised GAB rules go any further than already-existing IRS restrictions on political activity based on our non-profit status, even if enforcement of these restrictions may be weak (see below).

revisions to Wis. Admin. Code § GAB 1.28 will give Wisconsin voters the tools necessary to make informed decisions about their most fundamental role in a democracy.

Argument

As noted by all parties, the Government Accountability Board (GAB) revised Rule 1.28 on July 31, 2010[3] and this Court enjoined enforcement on August 13. On December 20, 2010 the GAB issued an emergency rule striking the second sentence of 1.28(3)(b), providing that a speaker must comply with ch. 11's transparency requirements if the message "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[4]

Although CMD would not oppose a decision upholding the July 31, 2010 revision, we believe the Rule as revised on December 20, 2010 will adequately ensure transparency and informed decisionmaking. CMD's brief will show (I) how the disclosure requirements invoked by the revised GAB 1.28 are consistent with American jurisprudence, (II) how secret spending

[3] See, e.g. Interv. Br. at 12

[4] See, e.g. Interv. Br. at 14; see also GAB Proposed EmR Order 1.28, available at http://gab.wi.gov/sites/default/files/even/74/proposed_emr_order_1_28_pdf_12258.pdf

actually increased in the 2010 elections, demonstrating the need for expanded transparency rules (III) how, absent robust transparency laws, Wisconsin elections may be inconsistent with U.S. Supreme Court jurisprudence, (IV) that petitioners misinterpret *Citizens United* and GAB 1.28, and finally (V) that a legitimate question exists whether corporate entities are entitled to the full free speech protections in the Wisconsin Constitution.[5]

I. The Disclosure and Transparency Requirements Invoked by GAB 1.28 are Consistent With American Jurisprudence

Without the GAB 1.28 revisions, only speakers using the "magic words" constituting "express advocacy" for the election or defeat of a candidate must comply with ch. 11's transparency requirements.[6] Political communications that carefully avoid these "magic words" earn the label "issue advocacy," even if the message is an indisputable appeal to vote for or against a candidate. This allowed groups to disguise who was really

[5] The constitutionality of the GAB 1.28 revisions, and their compliance with the GAB's statutory authority, have been adequately described by respondents GAB and intervenors Wisconsin Education Association Council (WEAC).

[6] Prior to the revisions, GAB 1.28(3) limited the definition of communications for a "political purpose" as those that refer to a clearly identified candidate and include the terms "vote for," "elect," "support," "cast your ballot for," "Smith for Assembly," "vote against," "defeat," "reject," or their functional equivalent (the so-called "magic words").

behind the message by concealing their funding sources, leaving voters without the tools to properly weigh the credibility and bias of the speaker and message, and hindering their ability to make informed voting decisions.

Such obfuscation is contrary to the core principle that transparency is essential to informed decisionmaking. Last year, a majority of the U.S. Supreme Court observed that "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." *Citizens United v. FEC,* 130 S. Ct. 876, 916 (2010). The Court rejected the contention that disclosure requirements are limited to speech that is the functional equivalent of express advocacy. *Id.* at 915. The Court noted that disclosure can be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election related spending,[7] and that it has upheld transparency requirements to allow voters to "make informed choices in the

[7] Id. at 914 (quoting *Buckley v. Valeo,* 424 U.S. 1, 66 (1976)).

political marketplace" in response to organizations running election-related ads "while hiding behind dubious and misleading names."[8]

Consistent with these judgments, Section 11.001(1) of the Wisconsin Statutes ("Declaration of Policy") clearly describes the governmental interest in disclosure: to "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 added)."[9] As will be discussed below in Part III, the governmental interest in disclosure has become even more important with highly-coordinated, secretly-funded groups running ads that are clearly valuable to a candidate.

The identity information disclosed under the revised GAB 1.28 rules helps voters assess the speaker's (or the funder's) motivations, credibility, bias, and interest in the electoral outcome. Post-election, the record of indirect campaign funding generated by compliance with disclosure requirements helps citizens assess whether policy decisions are guided by direct or

[8] Id. (citing *McConnell v. FEC,* 540 U.S. 93, 197 (2003)). The Court also stated disclosure requirements are subject to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. Id. at 914, citing *Buckley* at 64 (1976)) and *McConnell* at 231-32 (2003).
[9] *See also WEAC Br.* at 20-24.

indirect expenditures. Such sunlight can provide a disincentive for quid pro quo activity by elected officials. The transparency requirements invoked by the revised GAB 1.28 would give Wisconsin voters the tools to fulfill their civic duty.

II. Despite *Citizens United* Strongly Favoring Disclosure, Anonymous Spending Increased Significantly in the 2010 Elections, Demonstrating the Clear Need for Expanded Transparency Rules

Despite the U.S. Supreme Court strongly favoring disclosure, voters in the 2010 elections had difficulty "mak[ing] informed choices in the political marketplace."[10] Citizens only knew the origins of about half of the dollars spent on the 2010 elections.[11] This is down from 97 percent disclosure during the previous midterm election in 2006.[12] The revised GAB 1.28 could have mitigated some of this secrecy had it not been enjoined during the 2010 election period.

While the U.S. Supreme Court's *Citizens United* decision permitted unlimited spending, the subsequent *Speechnow.org v. Federal Election*

[10] Id. at 914, citing 540 U.S., at 197.
[11] Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Election Process, (Jan. 2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf www.**citizen**.org/documents/**Disclosure**-report-final.pdf
[12] Id.

Commission opinion[13] opened the door for that spending to be funneled anonymously through 501(c) nonprofit groups.[14] Although political action committees (PACs) must publicly disclose their donors and expenditures to the Federal Election Commission, groups organized under Section 501(c) of the Internal Revenue Service (IRS) code can make independent expenditures without disclosure.[15] The IRS prohibits 501(c) groups from engaging in express advocacy or making political activity their "primary purpose," but violations of those rules are not enforced: the *New York Time*s wrote in 2010 that "the agency has had little incentive to police the groups because the revenue-collecting potential is small, and because its main function is not to oversee the integrity of elections."[16] Of the nearly

[13] 599 F.3d 686 (D.C. Cir. 2010).

[14] Decided two months after *Citizens United,* the D.C. Circuit applied the *Citizens United* reasoning to find that contribution limits could not be constitutionally applied to an independent expenditure-only organization. While the D.C. Circuit also spoke in favor of disclosure (and rejected a claim that PAC registration and disclosure requirements were unconstitutional), the decision's major impact was allowing unlimited contributions to 501(c) organizations. The decision also paved the way for so-called "Super PACs," which can raise unlimited funds subject to disclosure requirements.

[15] The U.S. Supreme Court's *FEC v. Wisconsin Right to Life* decision, 551 U.S. 449 (2007), allowed "independent" groups organized under 501(c) of the tax code to run "issue-oriented" political ads without disclosing their the individuals and corporations who fund their efforts. 501(c)(4) groups, such as American Action Network (discussed in Part II and III) or petitioners Americans for Prosperity are commonly called "social welfare" groups that may engage in political activities as long as it is not their "primary purpose." Similar restrictions apply to 501(c)(5) labor and agricultural groups, or 501(c)(6) organizations like the Chamber of Commerce.

[16] *See* Michael Luo and Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010 ("lawyers, campaign finance watchdogs and former I.R.S.

$300 million spent by outside groups in the 2010 campaigns on advertisements, robo-calls, and other electioneering activities, nearly half of the money came from newly-formed and secretly-funded 501(c) groups.[17] This impact was particularly pronounced in Wisconsin, which saw the greatest number of television ads run in the Senate race, nearly one ad every two minutes.[18] In this environment and under these rules, it is difficult for voters to "evaluate the arguments to which they are being subjected."[19]

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officials say the agency has had little incentive to police the groups because the revenue-collecting potential is small, and because its main function is not to oversee the integrity of elections. The I.R.S. division with oversight of tax-exempt organizations "is understaffed, underfunded and operating under a tax system designed to collect taxes, not as a regulatory mechanism," said Marcus S. Owens, a lawyer who once led that unit and now works for Caplin & Drysdale, a law firm popular with liberals seeking to set up nonprofit groups.") available at http://www.nytimes.com/2010/09/21/us/politics/21money.html?hp; *see also* Jesse Zwick, *The IRS, 501(c)(4) Groups, and the 2010 Elections*, WASH. INDEP., Sept. 21, 2010, available at http://washingtonindependent.com/98156/the-irs-501c4-groups-and-the-2010-elections

[17] Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Election Process, (Jan. 2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf

[18] Mark Guarino, *Which Election 2010 Race Has the Most TV Ads? Not the One You'd Expect,* C.S. MONITOR, Oct. 21, 2010, available at http://www.csmonitor.com/USA/Elections/Senate/2010/1021/Which-Election-2010-race-has-run-the-most-TV-ads-Not-the-one-you-d-expect.

[19] *Citizens United* at 915, citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792, n. 32. (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.")

For example, the DC-based American Action Network (AAN), a 501(c)(4) nonprofit, spent $910,000 in Wisconsin on "issue advocacy" ads opposing former Senator Russ Feingold.[20] One ad ended with the message "Russ Feingold: can we really afford him anymore?"[21] Another criticized his vote for a "jobless stimulus" and a "healthcare plan that hurts seniors," with the message "Russ Feingold and our money. What a mess."[22] Despite the obvious appeal to vote against Russ Feingold, AAN escaped ch.11 disclosure requirements under the GAB rules in place at the time, leaving voters without the tools to assess the source of the message or motivations of the speaker.[23] A different outcome is likely under the revised Rule.[24]

III. Absent Robust Disclosure Laws, Wisconsin Elections Are Inconsistent With *Citizens United* and *Buckley*

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[20] Center for Responsive Politics, American Action Network recipients 2010 (last accessed Mar. 6, 2011), http://www.opensecrets.org/outsidespending/recips.php?cmte=American+Action+Network&cycle=2010

[21] American Action Network TV Ad "Small Change," YouTube.com, added Aug.23, 2010, available at http://www.youtube.com/watch?v=52p-PrI5a7U&feature=related

[22] American Action Network Wisconsin Ad, "Bucket," YouTube.com, added Sep. 28, 2010, available at http://www.youtube.com/watch?v=HUYY-tBsE7A&feature=player_embedded

[23] There is significant room for debate about whether President Obama's health care plan actually "hurt seniors," or whether the stimulus bill was "jobless." Knowing why such claims are being made is almost impossible when those behind the message are anonymous.

[24] AAN's message would likely be found "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *see* GAB Proposed EmR Order 1.28, and be required to comply with the applicable ch. 11 transparency requirements.

The secrecy characterizing the 2010 elections is contrary to the U.S. Supreme Court's embrace of disclosure. The larger picture of Wisconsin's political landscape further contradicts the reasoning underpinning *Citizens United* and its progenitor, *Buckley v. Valeo*.[25] The GAB 1.28 revisions are not only consistent with these decisions but perhaps necessary to maintain their integrity.

In overturning limits on corporate expenditures, the *Citizens United* majority referred to *Buckley*, noting that "the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures."[26] " The Court said independent expenditure limits do not serve an anti-corruption governmental interest because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments."[27]

[25] 424 U.S. 1 (1976).
[26] 130 S. Ct. at 785-86.
[27] *Id*. at 908, citing *Buckley*, 424 U.S., at 47-48.

The reasoning in the 1976 *Buckley* decision and the 2010 *Citizens United* opinion assumed (1) lack of coordination and (2) the expenditure's limited value to the candidate. However, the unregulated political landscape in Wisconsin 2010 and 2011 undermines the analysis. The independent "issue advocacy" expenditures at which GAB 1.28 are aimed have become coordinated, and politicians have become indebted to the groups and individuals making these so-called "independent expenditures." Absent greater transparency, policy decisions can be affected by the incentive of favorable independent expenditures, or the threat of attacks by anonymous political advertisements. The revised GAB 1.28 could help alleviate these problems by expanding transparency and preventing deceptive anonymous messages from tainting election outcomes.[28]

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[28] Weak disclosure rules can also have unexpected consequences. In Washington State, a Democratic political consulting firm set up fake front groups, the Cut Taxes PAC and Conservative PAC, to support a weak Republican candidate in order to squeeze the Democratic incumbent out of runoff primary elections in favor of a more progressive candidate. The constructed PAC groups sent mailers and made "robo-calls" in support of the Republican candidate, and obscured the true sources of the money and the true interests behind it. The ploy was successful, and the unwitting target of the "conservative" front groups funded by Democratic strategists did not advance beyond the primaries. The Washington State Public Disclosure Commission (that state's equivalent to Wisconsin's Government Accountability Board) is investigating the group, and the state legislature has recognized the need for stronger disclosure requirements. *See* Report of Investigation, in Re: Compliance with RCW 42.17 Moxie Media, Conservative PAC, Cut Taxes PAC, State of Washington Public Disclosure Commission Report, PDC Case No: 11-015, available at http://www.pdc.wa.gov/home/commission/meetingshearings/ViewAgenda.aspx?agendain

A. Independent Expenditures Have Become Increasingly Coordinated in the Absence of Disclosure

Many of the "independent" groups operating in the last election cycle were not independent at all--instead, they were tightly coordinated and interconnected. While there is no proof of direct coordination with political candidates, the groups spending the most coordinated with party committees, who *are* permitted to coordinate with candidates. *See* 11 C.F.R. § 109.34;[29] *see also* 11 C.F.R. § 109.30.[30]

For example, the previously-mentioned American Action Network (AAN) was advised during the elections by then-Republican Governor Association (RGA) chair Haley Barbour. The RGA spent $5 million on ads in Wisconsin supporting then-candidate Scott Walker or attacking his opponent.[31] Top RGA fundraiser Fred Malek was AAN's Chairman.[32]

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[29] "When may a political party committee make coordinated party expenditures?
A political party committee authorized to make coordinated party expenditures may make such expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated party expenditures shall be subject to the coordinated party expenditure limitations of this subpart, whether or not the candidate on whose behalf they are made receives the party's nomination."

[30] "Political party committees may also make coordinated party expenditures in connection with the general election campaign of a candidate, subject to the limits and other provisions in this subpart."

[31] RGA website, RGA Congratulates Governor-Elect Scott Walker (Nov. 2, 2010) (last visited March 6, 2011), http://www.rga.org/homepage/rga-congratulates-governor-elect-

AAN shares office space in DC with two "independent expenditure" organizations that ran ads supporting Republicans, Karl Rove's American Crossroads (spending $21.5 million[33]) and Crossroads GPS (spending almost $17 million without disclosing donors[34]).[35] The groups began by meeting at Rove's home, giving themselves the nickname the "Weaver Terrace group" for the Washington street on which Rove lives.[36] For the 2012 elections, Mr. Rove's American Crossroads and Crossroads GPS have announced plans to raise $120 million on "independent expenditure" ads

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scott-walker/ (noting that "the Republican Governors Association was a key investor in Scott Walker's victory spending a total of $5 million on the race.")

[32] *See* Jackie Calmes, *G.O.P. Group to Promote Conservative Ideas*, N.Y. TIMES, Feb. 3, 2010, available at http://www.nytimes.com/2010/02/04/us/politics/04conservative.html

[33] Sunlight Foundation Reporting Group, American Crossroads 2010 Election Spending (last visited March 6, 2011), http://reporting.sunlightfoundation.com/independent-expenditures/committee/american-crossroads

[34] Sunlight Foundation Reporting Group, Crossroads GPS 2010 Election Spending (last visited March 6, 2011), http://reporting.sunlightfoundation.com/independent-expenditures/committee/crossroads-grassroots-policy-strategies

[35] Michael Crowley, *The New GOP Money Stampede*, TIME, (Sep. 16, 2010), available at http://www.time.com/time/politics/article/0,8599,2019509,00.html

[36] According to TIME, coordination between the organizations can be as simple as picking up the phone and calling a friend: "Mississippi Governor Haley Barbour, the current chairman of the RGA, is an adviser to the AAN. The RGA, in turn, is on pace to spend even more than American Crossroads this year — at least $65 million and perhaps far more — in an effort that will be coordinated with Law's group. A key RGA fundraiser is Fred Malek, a top GOP moneyman who is also on the board of the AAN. (Gillespie has joined Malek on at least one fundraising trip to New York for their respective outfits.) To make things really easy, Gillespie, Malek, Barbour, Law, Coleman and several other Republican fundraisers gather regularly to coordinate strategy. The attendees, who first convened at Karl Rove's home, even have a nickname for themselves: the Weaver Terrace group, named for the Washington street on which Rove lives.")

with an eye towards Wisconsin.[37]

This coordination between "independent expenditure" organizations and political party leadership (who coordinate directly with candidates) makes it difficult to say these expenditures are not "coordinated." This highly disciplined messaging also undermines *Buckley's* statement that restrictions on independent expenditures "represent substantial . . . restraints on the quantity and diversity of political speech."[38]

B. A Prank Call to the Governor's Office Demonstrates the Value of Independent Expenditures to Candidates and Elected Officials

While close coordination demonstrates that some "independent expenditures" are not "independent" at all, even more questions are raised by recent events demonstrating the value of independent expenditures to candidates and officials. This combination is contrary to the reasoning in

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[37] Associated Press, Rove Groups Plan $120 Million Campaign in 2012 (Mar. 1, 2011), available at http://www.nytimes.com/aponline/2011/03/01/us/politics/AP-US-Campaign-Money.html?scp=4&sq=wisconsin&st=nyt ("With eyes on Wisconsin and Republican Gov. Scott Walker's showdown there with Democrats over union rights, the conservative committees hope to attract donors and attention early.")

[38] 424 U.S. at 19.

Citizens United and *Buckley*.[39]

In late February, 2011, a prank phone call to Wisconsin's governor demonstrated the value of so-called "independent expenditures." After Democratic Senators opposed to Governor Scott Walker's "budget repair bill" complained that the governor is "just hard-lined -- will not talk, will not communicate, will not return phone calls,"[40] Walker accepted a call he believed was from New York billionaire David Koch, a prominent contributor to conservative organizations and causes (including plaintiffs in this case, Americans for Prosperity and Wisconsin Prosperity Network), and whose PAC contributed $43,000 to Walker's campaign.[41] Koch also gave $1 million to the Republican Governor's Association, which

[39] "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Citizens United* at 908, citing *Buckley*, 424 U.S., at 47-48.

[40] Amanda Terkel, Wisconsin Democratic Senators: We're Staying in Illinois Until Gov. Walker Agrees to Negotiate, HUFF. POST, (Feb. 20, 2011), http://www.huffingtonpost.com/2011/02/20/wisconsin-democratic-senators-illinois_n_825748.html

[41] Center for Responsive Politics, Koch Industries Expenditure Detail (last visited March 6, 2011), http://www.opensecrets.org/pacs/expenddetail.php?cycle=2010&cmte=C00236489&name=Friends+of+Scott+Walker

subsequently spent $5 million in support of Walker's campaign.[42] The caller was actually a blogger who recorded the conversation.[43]

While it may be unsettling that Walker accepted a phone call from an out-of-state "issue advocacy" funder while refusing to speak with his own state's elected representatives, the *Citizens United* majority acknowledged "[t]hat speakers may have influence over or access to elected officials does not mean that those officials are corrupt."[44] However, Governor Walker's request for support in the form of independent expenditures was particularly revealing. In response to the phony "David Koch" asking "what else could we do for you down there?" Walker replied:

> "Well the biggest thing would be-and your guy on the ground [Americans for Prosperity president Tim Phillips] . . . per your question [], the more groups that are encouraging people not just to show up but to call lawmakers and tell them to hang firm with the governor, the better. Because the more they get that reassurance, the easier it is for them to vote yes."

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[42] Center for Responsive Politics, Republican Governors Assn: Top Contributors, 2010 Cycle (last visited Mar. 6, 2011) http://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=113655877 RGA website, RGA Congratulates Governor-Elect Scott Walker (Nov. 2, 2010) (last visited March 6, 2011), http://www.rga.org/homepage/rga-congratulates-governor-elect-scott-walker/ (noting that "the Republican Governors Association was a key investor in Scott Walker's victory spending a total of $5 million on the race.")

[43] *See* WIS. STATE JOURN., Transcript of Prank Koch-Walker Conversation, (Feb. 23, 2011), available at http://host.madison.com/wsj/article_531276b6-3f6a-11e0-b288-001cc4c002e0.html

[44] 130 S. Ct. at 884.

This is a clear appeal to "David Koch" that the groups he funds (including Americans for Prosperity) make "independent expenditures" for "issue ads" or robo-calls requesting citizens call their legislator. The governor clearly recognized that independent expenditures sway public opinion and are valuable to an elected official. Indeed, Governor Walker appeared to believe that "issue ads" are so powerful that it is more important to speak with a man who could make significant independent expenditures favoring his budget bill than to converse with legislators who disagreed with him, but could allow his proposed legislation to proceed to a vote.

While the "issue ads" Walker requested would not have invoked GAB 1.28 rules and ch. 11 filing requirements because they would not have been run near an election, Governor Walker continued:

> The other thing is more long-term, and that is, after this, um, you know the coming days and weeks and months ahead, particularly in some of these, uh, more swing areas, a lot of these guys are gonna need, they don't necessarily need ads for them, but they're gonna need a message out reinforcing why this was a good thing to do for the economy and a good thing to do for the state. So to the extent that that message is out over and over again, that's obviously a good thing."

Here, Walker is explicitly requesting that Mr. Koch and his "issue advocacy" groups make "independent" campaign expenditures for

Republicans. These expenditures, if made, would likely fall under the revised GAB 1.28 Rule and have to comply with ch. 11's registration and disclosure requirements; the message would escape disclosure under the existing rule. The transparency made possible under the GAB revisions could help citizens and journalists connect-the-dots between those making expenditures and any political favoritism or quid pro quo; perhaps more importantly, Walker may not have made such a request if the rules requiring expanded transparency were in place.

The value of independent expenditures is clear from this recorded conversation, and demonstrates how easily an organization can affect policy decisions by offering the incentive (or threat) of anonymously-funded political ads. The message could be communicated via a phone call, or by one of Wisconsin's 640 registered lobbyists communicating the message to one of the State's 132 legislators.[45]

[45] National Institute on Money in State Politics, Wisconsin Lobbyists in 2009, (last visited Mar. 6, 2011), http://www.followthemoney.org/database/StateGlance/state_lobbyists.phtml?s=WI&y=2009

IV. Petitioners Misinterpret Citizens United and GAB 1.28

The GAB 1.28 revisions can help Wisconsin elections remain consistent with U.S. Supreme Court jurisprudence and give citizens the tools to make informed voting decisions. Contrary to assertions of petitioners (and as described in briefs from respondents and intervenors), the GAB revisions are consistent with the U.S. Supreme Court's *Citizens United* decision, which strongly favored disclosure and rejected the contention that disclosure be limited to express advocacy.[46] Additionally, petitioners misinterpret what *Citizens United* said about PAC regulations, and err in their interpretation of what GAB 1.28 requires of regulated entities.

Petitioners would have us believe *Citizens United* struck down PAC regulations, and because some ch. 11 transparency requirements triggered by GAB 1.28 resemble PAC regulations, the Rule is unconstitutional. *Pet. Br.* at 44-46.[47] However, the *Citizens United* Court did not invalidate PAC

[46] *Citizens United v. FEC,* 130 S. Ct. 876, 915 (2010) ("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. . . We reject this contention.") see also Id. at 914, citing *Buckley,* 424 U.S., at 64, *McConnell* at 201 ("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")

[47] Petitioners write "the [*Citizens United*] Court recognized that imposing PAC regulations acted as "burdensome alternatives," "expensive to administer and subject to

registration and disclosure laws, much less find them unconstitutional.[48] The Court only addressed PACs to reject an argument that, because corporations could voluntarily set up a PAC to make political expenditures, a ban on corporate spending should be constitutional.[49] The availability of an alternative form to allow the corporation to "speak," the Court held, "does not alleviate the First Amendment problems" with the statute, as "[a] PAC is a separate association from the corporation." *Id*. at 897. The Court did not say the regulations governing PACs are an undue burden on speech, but only that requiring a corporation to filter its expenditures through the PAC does not remedy the direct prohibition on corporate spending. *Id*.

The GAB is not requiring any association or corporation to filter its speech or campaign expenditures through a separate form, but only that those making clear appeals for a vote comply with the disclosure requirements

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extensive regulations." *Citizens United*, 130 S.Ct. at 897. GAB 1.28 regulates more speech, more aggressively than the regulation already struck down in Citizens United . . . Extending these PAC type restrictions to citizen speech, as GAB 1.28 now does, will have precisely the chilling effect the Supreme Court found improper in Citizens United." *Pet. Br*. at 44-46.

[48] In fact, the *Citizens United* suit did not involve a challenge to federal law PAC requirements.

[49] 130 S. Ct. at 897-99. ("Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. See McConnell, 540 U.S., at 330-333, (opinion of Kennedy, J.). A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak.")

favored by the *Citizens United* majority.[50] Nothing in GAB 1.28 requires any organization to adopt a separate form, or establish a separate entity, to speak or make campaign expenditures; any association or entity can continue to do so on its own behalf.[51]

V. Finally, a Legitimate Question Exists Whether Corporate Entities are Entitled to the Full Free Speech Protections Provided by the Wisconsin Constitution

Finally, petitioners also argue that, even if the revised GAB 1.28 Rule does not violate the First Amendment, the Court should find it violates the free speech protections provided by the Wisconsin Constitution. *Pet. Br.* at 50-56. The text of Section 3 in the Wisconsin Constitution's Declaration of Rights (Article I) certainly suggests broader free speech protections than the First Amendment,[52] yet the surrounding text suggests those protections are to be enjoyed only by natural persons, not entities granted "personhood" by the state.

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[50] The Wis. Stat. ch. 11 requirements cited by petitioners would not apply nearly as broadly as they assert, particularly in regards to "citizen speech" of individuals. See *Resp. Br.* at 45-57.

[51] *See* Wis. Stat. ch. 11; *see also WEAC Br.* at 21-23

[52] Wis. Const. art. I, § 3: "Every person may freely speak, write and publish his sentiments on all subjects, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

Section 1 in Wisconsin's Declaration of Rights, Article I, states that "[a]ll people are born equally free and independent," suggesting that all rights contained in the Article, including free speech rights, are available only to those who come into existence through "birth."[53] A corporation enters into existence as a legal person when Articles of Incorporation are filed with the appropriate state entity; this may be described as the moment when the corporation is "founded," "established," or "incorporated," but is not commonly known as the moment a corporation is "born."[54] The corporation's founders may open a bottle of champagne to toast the occasion, and perhaps even pass around cigars, but it seems unlikely that anyone would throw a baby shower.

These considerations are highly relevant in light of *Federal Communications Commission v. AT&T Inc.,* 562 U.S. ___ (2011) (slip op).

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[53] Id. Art. 1, § 1: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

[54] "Legal personhood" is a judicially-granted privilege that allows a corporation to sue and be sued for purposes of efficiency and to achieve certain governmental interests; it is not a matter of natural or constitutional rights. Additionally, the purpose of incorporating, as opposed to freely associating with others in an unincorporated group, is to gain certain powers and privileges that are the domain of the state. In this sense, corporations have always been understood properly to belong in the public, not the private domain.

In that decision, decided Mar. 1, 2011, the U.S. Supreme Court strongly suggested that common-usage construction of terms is relevant in determining the scope of corporate rights. At issue in *AT&T* was whether corporations are entitled to "personal privacy" for purposes of exemption from Freedom of Information Act requirements. The Justices acknowledged that corporations have many rights as "legal persons," and that they may even possess "privacy" rights in Fourth Amendment and Double Jeopardy contexts, *Id*. at 8-9, but they did not possess "personal privacy rights." Chief Justice Roberts wrote:

> "Person" is a defined term in the statute; "personal" is not. When a statute does not define a term, we typically "give the phrase its ordinary meaning." Johnson v. United States, 559 U. S. ___ (2010) (slip op., at 4).
>
> "Personal" ordinarily refers to individuals. We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities. This is not to say that corporations do not have correspondence, influence, or tragedies of their own, only that we do not use the word "personal" to describe them. *Id*. at 5.

While "person" in a legal setting can refer to artificial entities, "personal" does not have a corresponding legal meaning, and corporate persons do not posses "personal privacy" as a matter of common usage nor as a matter of law. Here, Wisconsin's Constitution specifies that the "people" referred to

in Article 1 are those who are "born;" giving the phrase "born" its ordinary meaning would clearly suggest that only those who come into existence through birth are entitled to the protections of the Declaration of Rights.

While Section 3 of Article 1 uses the phrase "person" in discussing free speech protections, "[w]hen interpreting a statute . . . we construe language . . . in light of the terms surrounding it." *FCC v. AT&T* at 7, *citing Leocal v. Ashcroft*, 543 U. S. 1, 9 (2004). Art. I Sect. 3 makes singular the "people" referred to in Art. 1 Sect. 1, and applies it to "[e]very person;" Sect. 3 also uses the personal pronoun "his" ("every person may freely speak, write and publish *his* sentiments on all subjects"), rather than the impersonal pronoun "it" commonly used to refer to legal persons. The United States bill of rights, in contrast, uses no personal pronouns ("Congress shall make no law . . . abridging the freedom of speech") permitting an interpretation that includes all legal persons.

Following this logic, the Court could easily find that the rights in Wisconsin's Declaration of Rights (Article I), including the right to free speech, apply to "all people [who are] born," but not those whose existence begins by their "incorporation.

Conclusion

The revised GAB 1.28 and the transparency measures it invokes will provide Wisconsin citizens with basic information necessary to make informed voting decisions. The revised Rule does not prohibit groups or individuals from speaking, or require that they create an alternative entity to speak, but simply that they are up-front about their identity and comply with transparency requirements if the speech is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." As Justice Scalia said in his *Doe v. Reed*[55] concurrence (decided after *Citizens United)*:

> "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."[56]

Accordingly, we respectfully request that this Court uphold revisions to GAB 1.28, and dissolve the August 13, 2010 injunction.

[55] 130 S. Ct. 2811 (2010)
[56] Id. at 2837.

Respectfully submitted this 8th day of March, 2011.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), Wis. Stats., for a brief produced with a proportional serif font and 1.5 inch margins on all sides; per our motion to exceed the word limit in § 809.19(8)(b), Wis. Stats., the length of the brief is 3,686 words.

Dated this 8th day of March, 2011.

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