STATE OF WISCONSIN
SUPREME COURT

WISCONSIN PROSPERITY NETWORK, INC., THE MACIVER INSTITUTE FOR PUBLIC POLICY, INC., AMERICANS FOR PROSPERITY, REVEREND DAVID KING, CONCERNED CITIZENS OF IOWA COUNTY, INC., DANIEL O. CURRAN, ORIANNAH PAUL, THE SHEBOYGAN LIBERTY COALITION, KIMBERLY J. SIMAC, and NORTHWOODS PATRIOT GROUP, INC.,

Petitioners,

v.

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

Respondents,

MARY BELL, and WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Intervenors.

Case No. 2010AP1937-OA

BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND INTERVENORS

J. Adam Skaggs*
Mark Ladov*
Mimi Marziani*
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, New York 10013

Edwin J. Hughes
STAFFORD ROSENBAUM LLP
222 West Washington Avenue
Suite 900
P.O. Box 1784
Madison, Wisconsin 53701-1784

Counsel for Amicus Curiae

* *Pro Hac Vice* pending

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Brennan Center's Money and Politics project works to reduce the real and perceived influence of special interest money on our democratic values. Project staff defend federal, state, and local campaign finance, public finance, and campaign disclosure laws in courts around the country, and provide legal guidance to state and local campaign finance reformers through counseling, testimony, and public education.

SUMMARY OF THE ARGUMENT

The Brennan Center respectfully submits this *amicus* brief in support of Respondents and Intervenors. The Brennan Center fully endorses the arguments Respondents and Intervenors set forth, which accurately characterize the relevant legal precedent and the appropriate standard of review, and thoroughly rebut Petitioners' legal claims. As they make clear, the administrative disclosure rule challenged here, Wis. Admin. Code § GAB 1.28 ("GAB 1.28"), is plainly constitutional and fully comports with U.S. Supreme Court precedent, including the Court's near unanimous, 8-1 vote to uphold a challenged federal disclosure regime in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

Amicus submits this brief to highlight the First Amendment interests of voters in the disclosure rule challenged here, and to underline the severe harm to the public's and to Wisconsin's interests that will occur if political spenders are permitted to cloak their influence in secrecy.

When money is spent to influence the outcome of elections, vigilance is required to ensure that influence peddling does not corrupt our democracy. As importantly,

voters must be empowered to make informed decisions about the ways in which political spending may influence their candidates and laws. Accordingly, and because "[s]unlight is . . . the best of disinfectants,"[1] a clear and longstanding line of U.S. Supreme Court authority has held that substantial constitutional interests justify disclosure laws that shed light on the often hidden flow of money through our political system. *Amicus* respectfully urges this Court to act consistently with this unbroken chain of cases, and reject Petitioners' claims here.

ARGUMENT

The asserted constitutional rights of Petitioners are not the only constitutional interests this Court must consider. Because this is a case in which "constitutionally protected interests lie on both sides of the legal equation," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring), the Court must also give due regard to the public's interests in promoting accountability and empowering voters to make informed decisions. To facilitate the Court's balancing of these interests, *amicus* submits this brief to highlight the public and state interests in ensuring the transparency of money in Wisconsin politics.

I. Disclosure of Money in Politics Advances the Compelling Interest in Providing Voters Knowledge of Who Funds Political Campaigns

At least since the Supreme Court's seminal decision in *Buckley v. Valeo*, it has been widely recognized that disclosure of political spending not only "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," but also "provides the electorate with information

[1] L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933).

as to where political campaign money comes from . . . in order to aid the voters in evaluating those who seek public office." 424 U.S. 1, 66-68 (1976).[2] This considerable public interest in transparency and accountability justifies reasonable regulations, like GAB 1.28, that halt efforts to conceal the true sources of money in Wisconsin politics.[3]

GAB 1.28, like other disclosure laws, improves the ability of Wisconsin voters to evaluate candidates and issues during an election season. As explained by the *Buckley* Court, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." 424 U.S. at 14-15. Disclosure of campaign spending "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches," and helps "facilitate predictions of future performance in office." *Id.* at 66-67. Voters are also entitled to evaluate whether they generally agree with the viewpoints of political spenders. This is necessary "so that the people will be able to evaluate the arguments to which they are being subjected." *Citizens United*, 130 S. Ct. at 915 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978)); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("[T]here is no risk that the . . . voters will be in doubt as to the identity of

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[2] Besides promoting the public's informational and anti-corruption interests, the challenged rule also furthers Wisconsin's important interest in gathering the data necessary to enforce numerous other campaign finance laws. *See Buckley*, 424 U.S. at 66-68.

[3] Contrary to Petitioners' suggestion that strict scrutiny applies to disclosure rules like GAB 1.28, the Supreme Court recently affirmed that "First Amendment challenges to disclosure requirements in the electoral context . . . [are] reviewed . . . under what has been termed 'exacting scrutiny.' That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010).

those whose money supports or opposes a given ballot measure since contributors must make their identities known.").

Wisconsin voters have an interest in GAB 1.28 identical to the voters' informational interest in federal disclosure rules that the U.S. Supreme Court has repeatedly upheld. In *McConnell v. FEC*, eight Justices concluded that governmental interests—including "providing the electorate with information"—were sufficiently strong to support disclosure of funding of a newly created category of campaign spending, electioneering communications. 540 U.S. 93, 196 (2003). Relying on the extensive factual record that had been developed below, the *McConnell* Court detailed the abuse that was targeted by the challenged disclosure regime. As the Court explained, organizations had regularly funded advertisements designed to influence elections while concealing their identities from the public. The Court quoted the District Court's wry observation that "Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public," and said arguments against disclosure ignored "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (2003)). As in *Citizens United*, the *McConnell* Court upheld the disclosure requirements by an 8-1 vote, both because disclosure does not limit speech and because it "inform[s] the public about various candidates' supporters before election day." *Id.* at 201.

Similarly, in *Bellotti*, the Supreme Court declared that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." 435 U.S. at 791-92 (footnotes omitted); *see also Human Life of*

Wash., Inc. v. Brumsickle, 624 F.3d 990, 1008 (9th Cir. 2010), *cert denied*, 2011 WL 588952 (accord). Accordingly, while striking down a Massachusetts law that prohibited corporate expenditures in ballot referendum campaigns, the *Bellotti* Court simultaneously emphasized that "[i]dentification 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." 435 U.S. at 792 n.32.

The public's interest in political transparency and accountability is stymied when the funders of campaign speech hide behind benign sounding names to disguise their true identities and agendas. A notable example of this occurred recently in Washington State, where the U.S. Chamber of Commerce contributed $1.5 million to the innocuously-named "Voters Education Committee," which in turn paid for television advertisements attacking a candidate for state attorney general—without registering as a political committee or disclosing information about its contributions or expenditures. *Voters Educ. Comm. v. Wash. State Public Disclosure Comm'n*, 166 P.3d 1174, 1177 (2007). Concluding that the failure to register and disclose violated state law, the court approved the challenged disclosure regime, observing that "these disclosure requirements do not restrict political speech—they merely ensure that the public receives accurate information about who is doing the speaking." *Id.* at 1189.

Voters are plainly eager for the information they obtain when disclosure rules like GAB 1.28 shine light on political money that would otherwise remain camouflaged. For example, the Center for Responsive Politics runs a website (www.opensecrets.org) that aggregates and presents publicly-disclosed campaign finance data in a format that is easy to use for both the public and the press. In 2007, this website counted over 15 million visitors. *See* Opensecrets.org, http://www.opensecrets.org/about/tour.php.

Indeed, the Supreme Court in *Citizens United* praised the transformative power of Internet technology for voters seeking information about political expenditures. *See* 130 S. Ct. at 905-06 ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

Traditional and new media, scholarly researchers, and many publicly-minded non-profit organizations have also made widespread use of the data generated by longstanding public disclosure requirements. The campaign finance data from the Center for Responsive Politics alone has been used in thousands of news and opinion articles.[4] These reports have been disseminated widely both before and after elections, revealing the depth and nature of support for particular candidates, parties, and causes, and underlining the fact that campaign finance disclosures are essential for the press to perform its function as the watchdog of government. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("[T]he basic assumption of our political system [is] that the press will often serve as an important restraint on government . . . and an informed public is the essence of working democracy."). Such a role is not possible if important facts concerning funding and influence are hidden from the press and public.

In short, only with disclosure of campaign financing is it possible to have a fully-educated citizenry able to make informed decisions about political messages and cast their ballots accordingly. As the Ninth Circuit recently observed in *Brumsickle*:

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[4] A search performed on March 7, 2011, in the Westlaw ALLNEWS database generated the maximum-allowable result of over 10,000 instances in which the Center's campaign finance data has been used in news and opinion articles.

> Campaign finance disclosure requirements . . . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.

624 F.3d at 1008. *Amicus* urges this Court to similarly recognize the informational interests of voters at stake in this matter.

II. Wisconsin Has the Constitutional Authority to Provide Voters with Information about Spending on Express Advocacy and Other Political Communications

As demonstrated above, a long and unbroken line of U.S. Supreme Court authority has recognized that voters' substantial interest in knowing the sources of campaign spending justify robust disclosure of money in politics. Petitioners' attempt to distinguish this clear line of precedent by claiming that GAB 1.28 unconstitutionally regulates so-called "issue advocacy" fails for two simple reasons. First, GAB 1.28 does not reach so-called "issue advocacy." But even if it did, GAB 1.28 would still be permissible under the First Amendment: because of voters' informational interest in robust disclosure, the Supreme Court has found that disclosure may be constitutionally applied to a broad range of political communications, including pure issue advocacy, even where restrictions on such speech would be impermissible

A. *GAB 1.28 Does Not Reach "Issue Advocacy"*

The plain language of GAB 1.28 shows that Wisconsin only requires disclosure for two categories of communications. The first category includes communications that expressly advocate for or against a candidate. *See* GAB 1.28(3)(a). These communications are defined by the type of "magic words" (such as "vote for" or "vote against") set forth in *Buckley*. *See McConnell*, 540 U.S. at 126 (citing *Buckley*, 424 U.S. at 44, n. 52). The second category includes communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." GAB 1.28(3)(b). In other words, the rule plainly covers only express advocacy and its functional equivalent.

Wisconsin's decision to expand GAB 1.28 beyond *Buckley*'s "magic words" requirement reflects a careful effort to address the problem of sham issue ads. Such ads avoid the use of *Buckley*'s "magic words," but are easily understood by voters as an appeal to vote for or against a specific candidate. By requiring disclosure for these communications, Wisconsin narrows an otherwise enormous loophole in its disclosure regime, and works to ensure that its voters receive adequate information about electoral advertising.

During the course of this litigation, the Government Accountability Board ("GAB") has indicated a willingness to amend GAB 1.28 by deleting a list of criteria found in the second sentence of GAB 1.28(3)(b). *See* GAB Resp. Br. at 5-6. But the rule withstands constitutional scrutiny whether or not such a change is made. The criteria in question create a presumption that a communication made within a certain time period and including certain substance is the functional equivalent of express advocacy. These criteria simply track the objective requirements set forth in federal law and U.S. Supreme Court precedent for finding that a communication is the functional equivalent of express advocacy. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007); 2 U.S.C. §

434(f)(3). In other words, the second sentence of GAB 1.28 merely clarifies some of the criteria that the GAB could use to determine whether a communication that lacks the *Buckley* "magic words" is nonetheless intended to influence voters to support or oppose an electoral candidate.

Accordingly, whether this Court looks to the full text of GAB 1.28 or the truncated version temporarily enacted by emergency rule, the rule does not require disclosure for communications other than express advocacy and its functional equivalent. This it plainly can do under the First Amendment.

B. *Voters' Informational Interests Justify Disclosure of Both Express and Issue Advocacy*

Furthermore, Wisconsin could go much further than the cautious approach GAB 1.28 represents, and could constitutionally apply similar disclosure requirements to a broader range of election-related communications than GAB 1.28 currently reaches. *Citizens United* squarely forecloses Petitioners' claim, *see* Pet. Br. at 35, that "issue advocacy may not be regulated" through disclosure requirements. *See* 130 S. Ct. at 915. ("Citizens United claims that . . . the disclosure requirements [at issue] must be confined to speech that is the functional equivalent of express advocacy. We reject this contention.")

Citizens United explained that disclosure of financing for both express and issue advocacy was consistent with 30 years of constitutional jurisprudence:

> The Court has explained that disclosure is a less-restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three

> Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements of lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

130 S. Ct. at 915.

Following *Citizens United*, lower courts have uniformly found that disclosure requirements may be applied to issue advocacy. In the *Brumsickle* case, for instance, the Ninth Circuit held that issue advocacy could be constitutionally subject to disclosure after noting that the *Citizens United* "Court affirmed and reiterated the importance of disclosure requirements—even requirements that apply to issue advocacy—to the government's interest in informing the electorate." 624 F.3d at 1013; *see also id.* at 1016 ("[After *Citizens United*], the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.").

Several federal district courts have also held that issue advocacy may be subject to disclosure rules. Finding that "*Citizens United* rejected the idea that 'disclosure requirements must be limited to speech that is the functional equivalent of express advocacy,'" a Maine district court ruled that that state's disclosure law was "justified by the governmental interest in providing information to the electorate and permitting the electorate to make informed choices." *Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 245, 262, 266 (D. Me. 2010) (citations omitted). District courts in Hawaii, Illinois, and South Carolina have all reached the same conclusion. *See Yamada v. Kuramoto*, 2010 WL

4603936, *18 (D. Haw. Oct. 7, 2010) ("disclosure requirements can apply to issue advocacy"); *Center for Individual Freedom v. Madigan*, 2010 WL 3404973, *4 (N.D. Ill. Aug. 26, 2010) (expressly rejecting "the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent"); *S.C. Citizens for Life v. Krawcheck*, 2010 WL 3582377, *18 (D.S.C. Sept. 13, 2010) ("South Carolina may be constitutionally permitted to require some level of disclosure . . . based on the dissemination of a communication that 'promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a voter for or against a candidate . . . .'").

CONCLUSION

For the foregoing reasons, the Brennan Center respectfully urges the Court to declare that GAB 1.28, as amended in July 2010, is constitutional.

Respectfully submitted this 8th day of March, 2011.

/s/Edwin J. Hughes

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Edwin J. Hughes
STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
P.O. Box 1784
Madison, Wisconsin 53701-1784

J. Adam Skaggs*
Mark Ladov*
Mimi Marziani*
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, New York 10013

Counsel for Amicus Curiae

* *Pro Hac Vice* pending

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,957 words.

Dated this 8th day of March, 2011.

/s/Edwin J. Hughes

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Edwin J. Hughes

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of March, 2011, pursuant to § 809.80(3)(b) and (4), Wis. Stats., the original and twenty-one (21) copies of the Brief of The Brennan Center for Justice at NYU School of Law were served upon the Wisconsin Supreme Court via hand delivery. Three (3) copies of the same were served upon counsel of record via mail.

Dated this 8th day of March, 2011.

/s/Edwin J. Hughes

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Edwin J. Hughes

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 8th day of March, 2011.

/s/Edwin J. Hughes

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Edwin J. Hughes