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**STATE OF WISCONSIN
SUPREME COURT**

Case No. 2010AP1937-OA

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.

**BRIEF OF NON-PARTY INSTITUTE FOR JUSTICE
IN SUPPORT OF PETITIONERS**

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INTRODUCTION

On November 30, 2010, this Court took original jurisdiction over a challenge concerning the validity of Wisconsin Government Accountability Board Rule 1.28 (GAB 1.28 or “the Rule”). The Rule represents an unprecedented expansion of the government’s regulatory power into the political activity of private citizens. Among other things, the Rule requires all individuals or groups who spend more than \$25 on a “communication for a political purpose”—including even statements about a candidate’s record, character, or stance on issues—to comply with the onerous registration and reporting requirements of Chapter 11 of the Wisconsin Statutes. In short, it forces bloggers, people who comment on policy (including *amicus* Institute for Justice (“IJ”)), and grassroots organizations to follow rules similar to those that apply to political action committees (“PACs”).

The Board’s burdensome requirements chill the vital political speech of average citizens by making it too costly and time consuming to comply with its byzantine and confusing rules, and by imposing penalties for their violation, thereby creating powerful incentives to keep silent. But “[i]f the First Amendment has any force, it prohibits [the government] from fining

or jailing citizens, or associations of citizens, for simply engaging in political speech.” *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010). So long as this Rule is capable of being enforced, it represents a serious threat to the free exercise of fundamental First Amendment rights. This Court should strike the Rule down to clearly and irrevocably demonstrate that such governmental overreach cannot stand in this State.

ARGUMENT

I. GAB 1.28 UNCONSTITUTIONALLY BURDENS SPEECH.

A. The Requirements of GAB 1.28 are Even More Burdensome than the PAC Regulations the Supreme Court Found to be Unconstitutional in *Citizens United*.

In *Citizens United v. FEC*, the U.S. Supreme Court struck down a law that prohibited corporations from spending treasury funds on independent speech expressly advocating the election or defeat of candidates. While corporations were permitted to establish separate “PACs” which could then raise funds for express advocacy, the Court held this to be an unconstitutional alternative to spending funds directly on speech. *Citizens United*, 130 S. Ct. at 908 (“Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government’s interest in preventing *quid pro quo* corruption”).

“PACs,” the Court recognized, “are burdensome alternatives” which are “expensive to administer and subject to extensive regulations.” *Id.* at 897. “PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur . . . PACs have to comply with these regulations just to speak.” *Id.* (citations omitted). The requirements of these “detailed monthly reports” include identifying all contributors and all entities to which expenditures of over \$200 have been paid. *Id.* The Court further explained that “onerous restrictions [can] function as the equivalent of prior restraint by giving the [government] power analogous to licensing laws.” *Id.* at 895-96. Just as the government may not ban speech directly, held the Court, so it may not achieve the same result through indirect means such as requiring a corporation to speak through a heavily regulated PAC. *Id.* at 897-98.

GAB 1.28 applies to far more speech than the PAC-type burdens struck down in *Citizens United*. The provision at issue in *Citizens United* applied only to corporate express advocacy and broadcast communications that referred to a candidate near an election. *Id.* at 897. GAB 1.28, on the other hand, applies to any group (whether corporate or not) and even any *individual* who spends more than \$25 in communications for a “political

purpose.” GAB 1.28(3)(b). “Communication” does not just mean broadcast television or radio, as in *Citizens United*, but “e-mail, internet posting[s], and any other form of communication that may be utilized for a political purpose.” GAB 1.28(1)(b). “Political purpose” is defined so broadly it includes any statement that mentions a candidate’s character, public record, or stance on issues. GAB 1.28(3). Further, because the \$25 threshold is so low, the Rule will apply to virtually anyone who spends any money discussing topics of public import and the elected officials related to them.

As a practical matter, this means that GAB 1.28 applies to individuals who publish articles that criticize candidates for almost any reason. No Supreme Court case has ever upheld so broad a regulation of speech. *Cf. FEC v. Mass. Citizens for Life*, 479 U.S. 238, 265 (1986) (“Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation. In enacting the provision at issue in this case, Congress has chosen too blunt an instrument for such a delicate task.”)

Further, not only does GAB 1.28, in conjunction with Chapter 11 of Wisconsin Statutes, regulate more *speech* than 2 U.S.C. § 441b, but the *burdens* on speech are greater than those under federal law in that the threshold reporting requirement is *ten times* more stringent. Under Chapter 11, individuals and groups of more than two individuals (“committees”) must report contributions and disbursements of over \$20 and account for them in detail. Wis. Stat. § 11.06(1). By contrast, federal PACs only need report contributions and disbursements of over \$200. *Citizens United*, 130 S. Ct. at 897.¹

Because of the large volume of speech that GAB 1.28 regulates—nearly the entire universe of political speech outside of the institutional media²—and because of the burdens it places on speech, GAB 1.28 is

¹ Although the Court in *Citizens United* held PAC burdens to be unconstitutional, it *still* upheld a separate limited disclosure requirement. However, this provision, found at 2 U.S.C. § 434(f), is categorically different from the PAC-type requirements at issue here. Section 434(f) simply requires disclosure of independent expenditures as they are made along with the identities of those who fund them when a speaker spends more than \$10,000 on television or radio ads in a year. As the Court made clear in *Citizens United*, this was a narrow disclosure provision, while the PAC regulations constituted a direct burden on speech. *See Citizens United*, 130 S. Ct. 913-14. As stated above, GAB 1.28 is even more burdensome than the PAC burdens struck down in *Citizens United*. But even if the Rule were considered just a disclosure law, it would still be unconstitutionally overbroad, because it applies to issue advocacy, and would fail even intermediate scrutiny because it regulates far more speech than necessary to achieve any legitimate disclosure interests.

² Established press outlets are exempt under the narrow exception of Wis. Stat. § 11.30(4) (“This chapter shall not be construed to restrict fair coverage of bona fide news stories, interviews with candidates and other politically active individuals, editorial comment or

unconstitutional for the same reasons the PAC-type burdens were in *Citizens United*,

B. Reporting and Disclosure Laws Impose Significant Costs on Citizens and Grassroots Organizations that Wish to Exercise Their Rights to Free Speech.

As the Supreme Court made clear in *Citizens United* and other cases, the regulations that apply to PACs are burdensome. *See Citizens United*, 130 S. Ct. at 897; *Mass. Citizens for Life*, 479 U.S. at 253-54. The evidence amply supports this conclusion.

Social science research the Institute for Justice has conducted demonstrates the burdens of PAC-type regulations. For example, in *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, University of Missouri economist Jeffrey Milyo found that individuals had great difficulty following PAC-type regulations under the laws of Missouri, California, and Colorado.³ In a controlled experiment, Dr. Milyo asked 255 individuals to complete the disclosure forms from these states as though

endorsement. Such activities need not be reported as a contribution or disbursement.”). As Petitioners are not the institutional press, e.g. they are not in the business of running “fair coverage of bona fide news stories,” but do engage in political communications, they are covered by GAB 1.28.

³ Report, Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, (October 2007), available at http://www.ij.org/images/pdf_folder/CampaignFinanceRedTape.pdf.

they were a small grassroots organization.⁴ Not one of the individuals completed the forms without error. On average, participants completed only 41% of tasks correctly. Some of the open-ended comments participants made included “This is horrible!,” “worse than the IRS!,” and “Seriously, a person needs a lawyer to do this correctly.”⁵

Similarly, in a different study, *Locking Up Political Speech: How Electioneering Communications Laws Stifle Free Speech and Civic Engagement*,⁶ Duke University economist and political scientist Michael Munger surveyed more than 230 small nonprofit groups in Florida and found that complying with regulations such as those imposed under GAB 1.28 increased costs to such an extent that many groups would choose not to speak.

Thus, both the law under *Citizens United* and the facts show that GAB 1.28 will unconstitutionally chill speech.

⁴ Wisconsin has similar reporting requirements, as evidenced through the plethora of handbooks and forms on Respondent the GAB’s website. For example, there are 27 “campaign finance forms” on the GAB’s website. See Government Accountability Forms: Campaign Finance, State of Wisconsin Government Accountability Board, <http://gab.wi.gov/forms/campaign-finance> (last visited Mar. 4, 2011).

⁵ Milyo, *supra* note 3, at 1.

⁶ Report, Michael C. Munger, Ph.D., *Locking Up Political Speech: How Electioneering Communications Laws Stifle Free Speech and Civic Engagement* (June 2009), available at http://www.ij.org/images/pdf_folder/other_pubs/locking_up_political_speech.pdf.

The Tenth Circuit Court of Appeals recently confirmed what this research demonstrates: PAC-type regulations burden the speech of grassroots groups. *See Sampson v. Beuscher*, 625 F.3d 1247, 1249 (10th Cir. 2010).

In *Sampson*, a group of residents of a neighborhood outside Parker, Colorado opposed a ballot initiative to annex their neighborhood into a nearby town. They spoke to neighbors, put up lawn signs, sent out post cards and hosted an internet discussion group. *Id.* at 1252. As a result of these efforts, they were sued under Colorado’s campaign finance laws by another neighbor, who alleged that they opposed a ballot issue without registering as an issue committee and complying with disclosure laws. Under these laws, the neighbors were required to register with the state when they raised or spent \$200, open a separate bank account, and track and report every contribution or expenditure of as little as \$20. *Id.* at 1249-50.

The Tenth Circuit found that these provisions imposed “substantial” burdens on the plaintiffs. *Id.* at 1259. “The average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado’s constitution, the Campaign

Act, and the Secretary of State’s Rules Concerning Campaign and Political Finance.” *Id.* Quoting *Citizens United*, the court stated “Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application.” *Id.* at 1260 (quoting *Citizens United*, 130 S. Ct. at 889). Finding that these burdens outweighed the state’s interest in disclosure, the Tenth Circuit held that the laws violated the plaintiffs First Amendment rights. *See id.* at 1261.

GAB 1.28 imposes similar burdens on individuals and groups who so much as criticize a candidate or discuss his character or qualifications and spend more than \$25 doing so. Indeed, GAB 1.28 would apply to the speech of amicus the Institute for Justice and many other policy organizations that regularly speak out about politicians. Last October, the Institute published a study on regulatory barriers to entrepreneurship in the City of Milwaukee.⁷ The study contained one sentence criticizing Mayor Tom Barrett’s administration for failing to support small and emerging businesses. Because Barrett was a gubernatorial candidate and the study was released within 60 days of the general election, it was a “communication for

⁷ See Report, Jason A. Adkins, *Unhappy Days for Milwaukee Entrepreneurs Brew City Regulations Make it Hard for Businesses to Achieve the High Life* (Oct. 2010), available at http://www.ij.org/images/pdf_folder/city_studies/ij-milwaukee_citystudy.pdf.

a political purpose” under GAB 1.28(3)(b). If this Court had not enjoined the Rule, the Institute for Justice would have had to comply with the registration and reporting requirements of Chapter 11.⁸ This extension of PAC-type burdens to citizen speech will have precisely the sort of chilling effect the Supreme Court sought to prevent in *Citizens United* and the Tenth Circuit ruled unconstitutional in *Sampson*.

II. PETITIONERS’ CHALLENGE TO THE UNREBUTTABLE PRESUMPTIONS OF THE SECOND SENTENCE OF GAB 1.28(3)(b) IS NOT MOOT.

Although Respondents, but not Intervenors, have contended the Board would not enforce one portion of the Rule (the second sentence of GAB 1.28(3)(b)), violations of Wisconsin’s Statutes Chapter 11 may be enforced by a local district attorney. Wis. Stat. § 11.60(4). So any stipulation by the Board to the effect it will not enforce GAB 1.28 does not protect Petitioners, or *amicus*, or anyone else, from prosecution.

Further, a recent rule change by the Board also does not moot the challenge to the second sentence of Section (3)(b). On December 22, 2010 the GAB temporarily removed the second sentence of GAB 1.28(3)(b) under an emergency procedure. *See* Wis. Stat. § 227.24 (emergency rules

⁸ *Amicus* would not have qualified for the limited reporting exemption in Chapter 11 because it spent significant resources producing and promoting the study. *See* Wis. Stat. § 11.05(2r) (exception limited to total annual disbursements of \$1,000 or less).

allowed without notice and a hearing); Mem. from State of Wis. GAB, Emergency Rule Amending ch. GAB § 1.28, Wis. Adm. Code. (Dec. 22, 2010), http://gab.wi.gov/sites/default/files/event/74/board_memorandum_emr_gab_1_28_pdf_43198.pdf. This “emergency rule,” however, expires after 150 days and thereafter can be extended, but for no longer than 120 days total. Wis. Stat. § 227.24(2)(a). This means the change cannot last any longer than on or about September 18, 2011. Petitioners’ claims extend to speech they wish to engage in far beyond September 2011. Therefore, Petitioners’ challenge to the second sentence of GAB 1.28(3)(b) is not moot as it has a practical effect upon an existing controversy. *City of Racine v. J-T Enter. of America, Inc.*, 64 Wis. 2d 691, 700, 221 N.W.2d 869, 874 (1974).

CONCLUSION

“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.” *Citizens United*, 130 S. Ct. at 898. GAB 1.28 is an unprecedented expansion of campaign finance laws, imposing burdens on citizen speech that the U.S. Supreme Court has consistently rejected. This Court should strike down GAB 1.28.

Respectfully submitted this 7th day of March, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. In preparation of this brief, I used Microsoft Word Version 2003, and this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count, excluding only the caption, signature text and certificates of counsel. I further certify that the brief contains 2,380 words.

Lee U. McGrath, Wis. Bar No. 1077218

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that, per the telephone instructions of a staff member of the Clerk of the Court, upon receipt of the Order of the Court granting leave to file the Brief of Non-party Institute for Justice in Support of Petitioners, I will submit an electronic copy of this brief which complies with the requirements of § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed on March 7, 2011. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on counsel for all parties by U.S. Priority Mail, postage pre-paid.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the Brief of Non-party
Institute for Justice in Support of Petitioners were served via U.S. Priority

mail, postage prepaid, on this 7th day of March, 2011 to counsel of record
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