In the Supreme Court of Wisconsin

State of Wisconsin *ex rel.* Three Unnamed Petitioners, Two Unnamed Petitioners, and **Francis Schmitz,** ***Petitioners*** ***v.*** **Gregory Peterson *et al.*,** ***Respondents***	Case Nos.: 2013AP2504- 2508-W 2014AP296-OA 2014AP417- 421-W

Amicus Brief of Wisconsin Right to Life, Inc., in Support of Respondent Gregory Peterson

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Consistent with its mission to engage in education, charitable activity, and lobbying in Wisconsin, Amicus Wisconsin Right to Life, Inc. ("WRTL"), engages in political speech.

WRTL – *via* its counsel in *WRTL v. Barland,* 751 F.3d 804 (7th Cir.2014) ("*Barland-II*") (Sykes, J., joined by Posner & Flaum, JJ.) – files this brief in support of Respondent Gregory Peterson.

I. *Barland-II's* main holding is not at issue here.

Although one part of *Barland-II* is central to this appeal, *Barland-II's* main holding is *not* at issue here, and there is no need to revisit it.

Barland-II's main holding addresses law regulating[1] speech and is based on *Buckley v. Valeo,* 424 U.S. 1, 79 (1976), *followed in McConnell v. FEC,* 540 U.S. 93, 170n.64 (2003) (*overruled on other grounds, Citizens United v. FEC,* 558 U.S. 310, 336-66 (2010)), *and FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 252n.6, 262 (1986) ("*MCFL*").

[1] *I.e.,* requiring disclosure of, which differs from "limiting." *See Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1082&n.9 (D.Haw. 2010).

"Referring to organizations that are not under the control of any candidate(s) in their capacities as candidates, *Barland-II* holds that Wisconsin may trigger political-committee or political-committee-like burdens only for organizations that have the 'major purpose' of 'express advocacy.'" *WRTL v. Barland,* No.2:10-cv-00669-CNC, DECLARATORY J. & PERMANENT INJ. FOLLOWING *BARLAND-II* at 6-7, 2015-WL-658465 (E.D.Wis. Jan. 30, 2015, *as amended* Feb. 13, 2015) ("*Barland-II* DJ-PI")[2] (footnotes omitted) (citing *Barland-II,* 751 F.3d at 834, 839, 841, 842, 844).[3]

This holding "resolve[s] as-applied and facial overbreadth … as opposed to as applied and facial vagueness." *Id.* at 6 (citing *Barland-II,* 751 F.3d at 839).[4]

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[2] Copy in addendum and at http://gab.wi.gov.

[3] Other challenges to Wisconsin law did not raise this issue. *See Barland-II,* 751 F.3d at 827.

[4] "Overbreadth" applies to both as-applied and facial claims. *E.g., Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 785 (9th Cir.) ("*ARLC*"), *cert. denied,* 549 U.S. 886 (2006).

Amicus is unaware of any effort to trigger political-committee(-like) burdens here. Should any such effort arise, *Barland-II's* main holding would apply.

II. Wisconsin cannot proceed under unconstitutional law.

The John Doe proceedings in this appeal arise from allegations that an elected official's campaign committee coordinated fundraising, and speech about particular issues, with an independent organization. *O'Keefe v. Chisholm,* 769 F.3d 936, 937 (7th Cir.2014), *pet. for cert. filed,* No.14-872 (U.S. Jan. 21, 2015).

"A John Doe judge" must "conduct a hearing if the John Doe petition" alleges "objective, factual assertions" supporting "a reasonable belief that a crime has been committed." *In re Doe Petition*, 750 N.W.2d 873, 878n.3 (Wis. 2008) (citation omitted), *modified on other grounds,* 756 N.W.2d 34 (Wis. 2008).

However, a test can "be both objective and vague." *National Org. for Marriage, Inc. v. McKee,* 669 F.3d 34, 47 (1st Cir.), *cert. denied,* 133 S.Ct. 163 (2012). And there can be no

"crime" under a law that unconstitutionally restricts speech. *See State v. Princess Cinema of Milwaukee, Inc.,* 292 N.W.2d 807, 815 (Wis. 1980).

III. Wisconsin law is unconstitutional.

Indirect contributions can include particular speech coordinated with candidates. *Buckley,* 424 U.S. at 46-47, 78.

The instigators of the John Doe proceedings appear to believe that under Wisconsin law, *any* speech "coordinated" with "a candidate" is a contribution to the candidate's campaign, *Wisconsin Coal. for Voter Participation, Inc. v. Elections Bd.,* 605 N.W.2d 654, 660 (Wis. App.1999) ("*WCVP*"), because the con*duct* of coordination with a candidate suffices, regardless of the con*tent* of the speech. *See id.* at 658-62.

But as a matter of (a) Wisconsin law and (b) constitutional law, that cannot be right.

A. Wisconsin law's "purpose of influencing" elections language is unconstitutionally vague. Unlike *Barland-II,* the Court should limit this language to *Buckley* express advocacy.

Under the Wisconsin statute, there is a content standard,[5] because the statute restricts what counts as a contribution. For example, not every "[]thing of value" counts. WIS. STAT. 11.01(6)(a)1., 3. Among the restrictions on what counts are that the "[]thing of value" must be "made for political purposes" or "for a political purpose." *Id.* This means it must be for the "purpose of influencing" elections. *Id.* 11.01(16).

However, "purpose of influencing" elections is unconstitutionally vague. *Buckley,* 424 U.S. at 77 (ellipsis omitted); *Barland-II,* 751 at 833, 843-44; *Barland-II* DJ-PI at 4.

Addressing *federal* law, *Buckley* resolves the vagueness of "purpose of influencing" elections, 424 U.S. at 77 (ellipsis omitted), by limiting it to *Buckley* express advocacy, *id.* at 78-80, *i.e.,* "communications that in express terms advocate the election

[5] By holding otherwise, *WCVP* expands the statute, which a *court* may not do. *See* WIS. CONST. art. IV, §1 ("The legislative power shall be vested in a senate and assembly").

or defeat of a clearly identified candidate" using terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44&n.52. To be *Buckley* express advocacy, speech need not include the specific *Buckley* words. Synonyms suffice. That is what "such as" means. *Id.* at 44n.52; *Elections Bd. v. Wisconsin Mfgrs. & Commerce,* 597 N.W.2d 721, 730-31 (Wis.1999) ("*WMC*"). Nevertheless, *Buckley* express advocacy requires "explicit words of advocacy[.]" *Buckley,* 424 U.S. at 43; *WMC,* 597 N.W.2d at 737 (quoting *Buckley,* 424 U.S. at 43); *see also WMC,* 597 N.W.2d at 730-31.

Barland-II's narrowing gloss is different.

Addressing *Wisconsin* law, *Barland-II attempts to* resolve the vagueness of "purpose of influencing" elections by limiting it – "as applied to political speakers other than candidates, their campaign committees, and political parties" – to "express advocacy or its functional equivalent as those terms were explained in *Buckley* and *FEC v.* [*WRTL,* 551 U.S. 449 (2007) ('*WRTL-II*').]" *Barland-II* DJ-PI at 4-5 (original brackets omitted)

(quoting 751 F.3d at 844). "As applied to such speakers, this law reaches no further than 'express advocacy and its functional equivalent as those terms were explained in *Buckley'* and *WRTL-II*." *Id.* at 5.

The "functional equivalent of express advocacy" – which *Citizens United* "re-labels … as the "'appeal[-]to[-]vote" test[,]'" *id.* at 5n.23 (quoting 558 U.S. at 335) – was different from express advocacy. It reached beyond *Buckley's* words and synonyms for them. It applied when there were *no* explicit words of advocacy and asked whether the *only reasonable interpretation of* Federal Election Campaign Act ("FECA") electioneering communications[6] was as an appeal to vote for or against a clearly identified candidate. *WRTL-II,* 551 U.S. at 469-70, 474n.7; *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 282 (4th Cir.2008) ("*NCRL-III*"); *Colorado Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1257-58 (Colo. 2012); *see Barland-II,* 751 F.3d at 819-21, 823.

[6] *Defined in McConnell,* 540 U.S. at 189-94.

Seventh Circuit narrowing glosses of Wisconsin law do not bind Wisconsin courts: "[A]n important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative." *Kucharek v. Hanaway,* 902 F.2d 513, 517 (7th Cir.1990) (Posner, J.[7]), *cert. denied,* 498 U.S. 1041 (1991). This principle applies to campaign-finance law. *See Barland-II,* 751 F.3d at 833 ("A federal court cannot 'make a binding interpretation of a state statute, endeavoring to trim its vague provisions'" (quoting *Center for Individual Freedom v. Madigan,* 697 F.3d 464, 500 (7th Cir.2012) (Posner, J., concurring/dissenting))); *Virginia Soc'y for Human Life, Inc. v. Caldwell,* 152 F.3d 268, 270 (4th Cir.1998) ("*VSHL-I*") (quoting *Kucharek,* 902 F.2d at 517).

This Court should disregard the appeal-to-vote-test part of *Barland-II's* narrowing gloss, first because *Barland-II* based it on a false premise about *WMC* and second because it is incorrect.

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[7] Who joined *Barland-II. Supra* 7.

●First, the premise is that *WMC* understood Wisconsin law to reach "express advocacy and its functional equivalent." 751 F.3d at 833 (citing 597 N.W.2d at 728-31).

However, this Court decided *WMC* in 1999. The "functional equivalent of express advocacy" first arose in U.S. Supreme Court case law four years later, *McConnell,* 540 U.S. at 206, and the Court defined it four years after that. *WRTL-II,* 551 U.S. at 469-70, 474n.7.

By citing *WMC* pages 728-31, *Barland-II,* 751 F.3d at 833, appears to confuse "such as" in *Buckley* – which *WMC* correctly explains on pages 730-31[8] – with the appeal-to-vote test. They are *not* the same.[9]

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[8] *Supra* 12.

[9] *Supra* 11-13. The root of the confusion may be that Wisconsin law itself:

> ●Used "functional equivalents" without defining it before it meant the appeal-to-vote test in U.S. Supreme Court case law, *Barland-II,* 751 F.3d at 821-22 (quoting EL BD 1.28(2) (2001)), and
>
> ●Carried "functional equivalents" forward afterward, *id.* at 826 (quoting GAB 1.28(3)(a) (2010)), while separately including (an imperfect version of) the appeal-to-vote test. *Compare id.* (quoting GAB 1.28(3)(b) (2010)) *with supra* 13.

At most, *WMC* elsewhere quotes language similar to part of the appeal-to-vote test – language that the Ninth Circuit incorrectly used to expand *Buckley* express advocacy beyond explicit words of advocacy, 597 N.W.2d at 733 ("no other reasonable interpretation but as an exhortation to vote for or against a specific candidate" (quoting *FEC v. Furgatch,* 807 F.2d 857, 864 (9th Cir.) *cert. denied,* 484 U.S. 850 (1987))) – and then provides counterpoints. *See id.* at 733-34. Consistent with the counterpoints, the Ninth Circuit has abandoned this *Furgatch* language and held that express advocacy requires "explicit words of advocacy." *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir.2003) ("*CPLC-I*") (citing 807 F.2d at 864).

●Second, the appeal-to-vote test *cannot be* a form of express advocacy.

Notwithstanding *Barland-II,* EL BD 1.28(2) could not have "understood" "functional equivalent" in the *WRTL-II* "sense" of the words, 751 F.3d at 822, because EL BD 1.28 was promulgated in 2001, and *WRTL-II* was decided in 2007.

Rather, "as … explained in" and "consistent with the lead opinion in" *WRTL-II, Barland-II,* 751 F.3d at 834, 838, 844, the appeal-to-vote test applied only to FECA electioneering communications, 551 U.S. at 474n.7 ("this test is only triggered if the speech" is a FECA electioneering communication "in the first place"); *NCRL-III,* 525 F.3d at 282; *Colorado Ethics,* 269 P.3d at 1257-58; *see Barland-II,* 751 F.3d at 819-21, 823, which by definition are not expenditures/independent expenditures. 52 U.S.C. 30104(f)(3)(B)(ii).[10] Only expenditures/independent expenditures are express advocacy. *Buckley,* 424 U.S. at 44&n.52, 80.

After *Citizens United,* the appeal-to-vote test no longer affects whether government may ban, otherwise limit, or regulate speech. *See* 558 U.S. at 324-26, 365-66, **368-69** (holding that government may *not ban or otherwise limit* FECA electioneering communications even when they *are* the functional equivalent,

[10] Under the Constitution, "independent expenditure" means *Buckley* express advocacy, 424 U.S. at 44&n.52, 80, that is not coordinated with a candidate. *Id.* at 46-47, 78.

and holding that government may *regulate* FECA electioneering communications even when they are *not* the functional equivalent). *Citizens United* thereby "eliminated the context in which the appeal-to-vote test has had any significance" under the Constitution. *National Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 69 (1st Cir.2011), *cert. denied,* 132 S.Ct. 1635 (2012).

Barland-II believes *Citizens United* pages **3[68-]69** have appeal-to-vote-test *dictum,* 751 F.3d at 836, so the test remains in constitutional law. *Id.* at 838. *Barland-II* crucially believes *Citizens United:*

> ●(1) holds, on pages 324-2[6], that *all* the speech at issue – a FECA-electioneering-communication movie *and FECA-electioneering-communication ads for it – is* the functional equivalent, and
>
> ●(2) allows, on pages **3[68-]69,** *non*-political-committee reporting of FECA electioneering

communications even when they are *not* the functional equivalent.

Id. at 823, 824-25, 836. Point 2 is correct. *If* Point 1 were entirely correct, Point 2 would be *dictum.* But Point 1 is *in*correct: Only the movie was the functional equivalent, so Point 2 is not *dictum*. *Independence Inst. v. FEC,* ____F.Supp.3d____, No.14-1500(CKK), manuscript order at 9, 2014-WL-4959403 (D.D.C. Oct. 6, 2014) (holding correctly on *dictum,* and then addressing "disclosure" without acknowledging correct *Barland-II* holdings[11]).[12]

Furthermore, *Citizens United,* 558 U.S. at **368-69,** allows *disclosure – reporting, attributions, and disclaimers* – for FECA electioneering communications regardless of whether they are appeal-to-vote speech, *i.e.,* the functional equivalent. But no *disclosure* is at issue here. By calling particular speech

[11] *E.g., supra* 7-8.

[12] *Available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1500-24.

coordinated, it becomes a *contribution* and is subject to speech *limits*. *FEC v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 437-65 (2001) ("*Colorado Republican-II*").

Moreover:

- Under *WRTL-II,* the appeal-to-vote test is vague as to speech *other than* FECA electioneering communications. *See* 551 U.S. at 474n.7 (answering a charge that "our test" is "impermissibly vague" partly by saying "this test is only triggered if the speech" is a FECA electioneering communication "in the first place"). Elsewhere the test "might ... create an unwieldy standard that would be difficult to apply" and unconstitutionally chill political speech. *Colorado Ethics,* 269 P.3d at 1258 (citing *WRTL-II,* 551 U.S. at 468-69), and

> ●After *Citizens United,* what remains from *WRTL-II* regarding the test is the conclusion that the test is unconstitutionally vague, even *vis-à-vis* FECA electioneering communications. 551 U.S. at 492-94 (Scalia, J., concurring).

Because the appeal-to-vote test is vague, *id.,* the *Barland-II* safe harbor for when speech is *not* appeal-to-vote speech, *i.e.,* is *not* the functional equivalent, *see* 751 F.3d at 820-21 (quoting *WRTL-II,* 551 U.S. at 470), does *not* resolve the vagueness of the appeal-to-vote test. Outside the safe harbor, no one can know where the boundaries are.

Such vagueness provides no security for free speech. *See Buckley,* 424 U.S. at 41-43. "First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal." *Citizens United,* 558 U.S. at 336 (brackets and internal quotation marks omitted) (quoting *WRTL-II,* 551

U.S. at 469). Complex laws regulating political speech are in effect prior restraints. *Id.* at 335. "Prolix laws chill speech for the same reason that vague laws chill speech[,]" *id.* at 324, and "First Amendment freedoms need breathing space to survive." *Id.* at 329 (quoting *WRTL-II,* 551 U.S. at 468-49). "The First Amendment does not permit laws that force speakers to retain a campaign[-]finance attorney … or seek declaratory rulings before discussing the most salient political issues of our day." *Id.* at 324.

Therefore, this "state supreme court [should] bring [Wisconsin's vague law] into conformity with the federal Constitution." *Barland-II,* 751 F.3d at 833. The Court should limit "purpose of influencing" elections to *Buckley* express advocacy, as other courts have done or acknowledged with other language *post-McConnell. E.g., Center for Individual Freedom v. Carmouche,* 449 F.3d 655, 663-66 (5th Cir.2006), *cert. denied,* 549 U.S. 1112 (2007); *ACLU of Nev. v. Heller,* 378 F.3d 978, 985-87

(9th Cir.2004); *Anderson v. Spear,* 356 F.3d 651, 663-66 (6th Cir.), *cert. denied,* 543 U.S. 956 (2004).

Including the appeal-to-vote test in a narrowing gloss would *expand* it beyond *Buckley* express advocacy. This Court should reject all such entreaties, especially – but not only – given what has happened in Wisconsin: Public information about the John Doe proceedings amply illustrates what those who civilly enforce and criminally prosecute Wisconsin campaign-finance law are capable of doing. *E.g., O'Keefe,* 769 F.3d at 937-38. It is frightening to imagine what they would do with a vague standard such as the appeal-to-vote test.

Alternatively, if the Court incorporates the appeal-to-vote-test into a narrowing gloss, the Court should limit the appeal-to-vote test part of the narrowing gloss to FECA electioneering communications.[13]

[13] *Supra* 13, 17.

B. The absence of a content standard for what constitutes coordinated speech, and therefore a contribution, is unconstitutional.

WCVP has *no* content standard for coordinated speech.[14]

While there must be coordination with candidates, *WCVP,* 605 N.W.2d at 658-62, that goes to con*duct,* not con*tent.*

The First Amendment requires a con*tent* standard as well. *See McCutcheon v. FEC,* 134 S.Ct. 1434, 1452 (2014) ("the absence of prearrangement and coordination *of an expenditure* with the candidate or his agent undermines the value of the expenditure to the candidate" (emphasis added) (brackets and ellipsis omitted) (quoting *Citizens United,* 558 U.S. at 357 (quoting, in turn, *Buckley,* 424 U.S. at 47))); *Colorado Republican-II,* 533 U.S. at 437-65 (focusing repeatedly on "expenditures" and "spending"). *Clifton v. FEC,* for example, holds that "coordination" implies "collaboration beyond" merely asking for candidates' positions on issues. 114 F.3d 1309, 1311 (1st Cir.1997) (citing *Buckley,* 424 U.S. at 46-47).

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[14] *Supra* 10.

Without a content standard, *any* speech – not just *Buckley* express advocacy – coordinated with someone who happens to be a candidate would be a contribution to the candidate's campaign and be subject to constitutional contribution limits. *See Colorado Republican-II,* 533 U.S. at 437-65. But that would foreclose all coordinated speech whose value exceeds a constitutional contribution limit. That cannot be right. No republican government can work well with such restrictions. "Democracy is premised on responsiveness." *Citizens United,* 558 U.S. at 359 (citing *McConnell,* 540 U.S. at 297 (Kennedy, J., concurring/dissenting)).

Besides, limiting coordinated speech regardless of content would reach beyond contributions that can cause "*quid[-]pro[-]quo* corruption" or its "appearance[,]" *McCutcheon,* 134 S.Ct. at 1441, 1450-51, with *quid-pro-quo* corruption meaning only "a direct exchange of an official act for money." *Id.* at 1441 (citing *McCormick v. United States,* 500 U.S. 257, 266 (1991)). Absent a *McCutcheon* "exchange" or its "appearance[,]" *id.* – especially one

involving "large"/"massive" contributions to candidates, *id.* at 1450-53 – contribution limits are unconstitutional.

Notwithstanding *WCVP,* 605 N.W.2d at 660, the Wisconsin statute has a content standard: The contribution definition turns on whether a "[]thing of value" is "made for political purposes" or "for a political purpose." This means for the "purpose of influencing" elections, which is vague.[15] Rather than adopting *Barland-II's* express-advocacy/appeal-to-vote-test narrowing gloss for this vague language, the Court should limit it to *Buckley* express advocacy. *See* Bopp & Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures:" Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?,* 1 ELECTION LAW JOURNAL 209 (2002).[16]

IV. Conclusion

The Court should limit Wisconsin's vague law to *Buckley* express advocacy and hold that for coordinated speech to count as

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[15] *Supra* 11.

[16] *Supra* 22.

a contribution, a speaker must coordinate *Buckley* express advocacy with a candidate.

Amicus is aware of no *Buckley* express advocacy coordinated with a candidate in the John Doe proceedings. Amicus is not even aware of such an allegation. *See O'Keefe,* 769 F.3d at 937-38.

The Court should dismiss the John Doe proceedings.

Respectfully submitted,

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March 10, 2015

Form and Length Certificate

I certify that this brief conforms to the rules in Section 809.19(8)(b) and (c) for a brief with proportional serif font. This brief has 3000 words. *See* WIS. STAT. 809.19(8)(b), (c), (d). The text of the electronic and paper copies of this brief, including the addendum, are identical. *See id.* 809.19(12)(f); *cf. id.* 809.19(13)(f).

Randy Elf

Randy Elf

March 10, 2015

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I certify that today the Lex Group will send 22 copies to the clerk's office *via* commercial carrier for overnight delivery. *See* WIS. STAT. 809.80(4). Per the suggestion of the clerk's office, I further certify that the Lex Group will serve copies on counsel for the parties, as indicated on the Court's docket sheets. *Cf. id.* 809.19(8)(a)1.

Randy Elf

Randy Elf

March 10, 2015

Addendum

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WISCONSIN RIGHT TO LIFE, INC., and
WISCONSIN RIGHT TO LIFE STATE
POLITICAL ACTION COMMITTEE,

Plaintiffs

V. Case No. 10-C-0669

THOMAS BARLAND, in his official capacity
as chair and member of the Wisconsin
Government Accountability Board;
HAROLD FROEHLICH, in his official capacity as
vice chair and member of the Wisconsin
Government Accountability Board;
JOHN FRANKE, ELSA LAMELAS,
GERALD NICHOL, and TIMOTHY VOCKE, in their
official capacities as members of the Wisconsin
Government Accountability Board; and
JOHN CHISHOLM, in his official capacity
as Milwaukee County District Attorney,

Defendants.

DECLARATORY JUDGMENT AND PERMANENT INJUNCTION
FOLLOWING THE SEVENTH CIRCUIT REMAND IN
WISCONSIN RIGHT TO LIFE, INC. V. BARLAND ("*BARLAND-II*")[1]

Plaintiffs Wisconsin Right to Life, Inc. ("WRTL") and Wisconsin Right to Life State Political Action Committee ("WRTL-SPAC") filed this action challenging the constitutionality of Wisconsin law.

Defendants are Thomas Barland, in his official capacity as chair and member of the Wisconsin Government Accountability Board ("GAB"); Harold Froehlich, in his official capacity as vice chair and member of GAB; John Franke, Elsa Lamelas, Gerald Nichol,

[1] 751 F.3d 804, Nos.12-2915/12-3046/12-3158 (7th Cir. May 14, 2014).

and Timothy Vocke, in their official capacities as members of GAB; and John Chisholm, in his official capacity as Milwaukee County District Attorney.

The court enters the following declaratory judgment and permanent injunction pursuant to *Barland-II*.

* * *

Defendants shall immediately and conspicuously post, on the homepage of GAB's website, valid hyperlinks to file-stamped copies of *Barland-II*[2] and this order, both of which the public shall be able to access free of charge. Defendants shall do the same for *Wisconsin Right to Life State Political Action Committee v. Barland* ("*Barland-I*"),[3] the Seventh Circuit's previous opinion in this action. Valid hyperlinks shall remain conspicuously on GAB's homepage for four years[4] after official publication of legislation and GAB rules – whichever is later – bringing Wisconsin law into compliance with *Barland-I* and *Barland-II*.

* * *

First, Wisconsin bans corporations such as WRTL from making disbursements.[5] The court grants declaratory judgment and permanently enjoins Defendants from administering or civilly enforcing Wisconsin's corporate-disbursement ban against any

[2] Thus, for the public's convenience, this order includes both F.3d cites and slip-op. cites.

[3] 664 F.3d 139, No.11-2623 (7th Cir. Dec. 12, 2011).

[4] Two state-election cycles and one gubernatorial-election cycle.

[5] WIS. STAT. § 11.38(1)(a)1.; *Barland-II,* 751 F.3d at 816, slip op. at 22.

person,[6] or criminally investigating or prosecuting (or referring for investigation or prosecution)[7] any person under this ban, because the ban is facially unconstitutional.[8]

Second, Wisconsin law triggers what *Citizens United v. FEC*[9] recognizes are political-committee and political-committee-like burdens for WRTL when it engages in its speech. These burdens are (1) registration,[10] (2) recordkeeping,[11] and (3) periodic[12] reporting,[13] and Wisconsin triggers them in multiple ways.

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[6] Including "person" as defined in WIS. STAT. § 990.01(26). Throughout this order, "person" includes a combination of two or more persons.

[7] *See, e.g., O'Keefe v. Chisholm,* 769 F.3d 936, 937 (7th Cir. 2014) (dismissing "a judicially supervised criminal investigation into the question whether certain persons have violated the state's campaign-finance laws"); *id.* ("The ongoing criminal investigation is being supervised by a judge, in lieu of a grand jury. Wis. Stat. § 968.26. Prosecutors in Wisconsin can ask the state's courts to conduct these inquiries, which go by the name 'John Doe proceedings' because they may begin without any particular target. The District Attorney for Milwaukee County[, a Defendant in this action,] made such a request"); *id.* at 938 ("Wisconsin's Government Accountability Board, [whose members are Defendants in this action and] which supervises campaigns and conducts elections, likewise called for an investigation. District Attorneys in four other counties made similar requests.").

[8] *Barland-II,* 751 F.3d at 831, 843, slip op. at 55, 83. To be clear: The ban in WIS. STAT. § 11.38(1)(a)1. on direct and indirect *contributions* that corporations make is not at issue in *Barland-II,* so the court issues no holding on, and expresses no opinion on, the constitutionality of this ban.

[9] 558 U.S. 310, 337-38 (2010).

[10] WIS. STAT. §§ 11.05 (registration), 11.10(3) (treasurer), 11.12(1) (same), 11.14 (bank account), 11.16(1), (3) (treasurer and bank account), 11.19 (termination); WIS. ADMIN. CODE §§ GAB 1.28(2) ("the applicable requirements of Ch. 11, Stats."), GAB 1.91(3) (bank account, treasurer, and registration), GAB 1.91(4), (6) (registration), GAB-1.91(8) (citing WIS. STAT. § 11.19 (termination)).

[11] WIS. STAT. § 11.12(3); GAB 1.28(2) ("the applicable requirements of Ch. 11, Stats."), GAB 1.91(8) (citing WIS. STAT. § 11.12, which includes recordkeeping requirements in § 11.12(3)).

[12] *FEC v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 255 (1986) ("*MCFL*").

[13] WIS. STAT. §§ 11.06, 11.12(4), 11.20; GAB 1.28(2) ("the applicable requirements of Ch. 11, Stats."); GAB 1.91(8) (citing a subset of political-committee reporting requirements).

One way is through Wisconsin's **statutory political-purposes definition,**[14] which turns on what is for the "purpose of influencing" elections.[15] This definition is part of Wisconsin's statutory contribution and disbursement definitions.[16] These statutory contribution and disbursement definitions are part of Wisconsin's statutory committee-or-political-committee definition.[17] This committee-or-political-committee definition "triggers" political-committee burdens.[18]

Meanwhile, Wisconsin's **regulatory political-committee definition**[19] also turns on what is "to influence elections" and "triggers" political-committee burdens.[20]

Because they turn on what *influences* elections, Wisconsin's **statutory political-purposes definition** and Wisconsin's **regulatory political-committee definition** are unconstitutionally vague under *Buckley v. Valeo*.[21]

Therefore, to resolve this vagueness "[a]s applied to political speakers other than candidates, their campaign committees, and political parties, the [statutory political-purposes and regulatory political-committee] definitions are limited to express advocacy

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[14] WIS. STAT. § 11.01(16); *Barland-II,* 751 F.3d at 815, slip op. at 20.

[15] WIS. STAT. § 11.01(16); *Barland-II,* 751 F.3d at 815, 833, slip op. at 20, 59.

[16] WIS. STAT. § 11.01(6), (7); *Barland-II,* 751 F.3d at 815, slip op. at 19.

[17] WIS. STAT. § 11.01(4); *Barland-II,* 751 F.3d at 812, slip op. at 12-13.

[18] *Barland-II,* 751 F.3d at 812, 815, 832, slip op. at 13, 19, 59.

[19] GAB 1.28(1)(a); *Barland-II,* 751 F.3d at 826, slip op. at 43.

[20] *Barland-II,* 751 F.3d at 826, slip op. at 43.

[21] 424 U.S. 1, 77 (1976). *Barland-II,* 751 F.3d at 833, 843-44, slip op. at 60, 83.

and its functional equivalent as those terms were explained in *Buckley*" and *FEC v. Wisconsin Right to Life, Inc.*[22] As applied to such speakers, this law reaches *no further than* "express advocacy and its functional equivalent as those terms were explained in *Buckley*" and *WRTL-II*.[23]

The court therefore grants declaratory judgment and permanently enjoins Defendants from administering or civilly enforcing Wisconsin's **statutory political-purposes definition** and Wisconsin's **regulatory political-committee definition** against any person, or criminally investigating or prosecuting (or referring for investigation or prosecution) any person under this law, in any way inconsistent with the previous paragraph.

Third, another way in which Wisconsin triggers political-committee-like burdens is through GAB 1.28(3)(b).

The second of two sentences in GAB 1.28(3)(b) turns on what "[s]upports or condemns" candidates' positions on issues, stances on issues, and public records.[24] Because "[s]upports or condemns" is unconstitutionally vague,[25] the court grants declaratory judgment and permanently enjoins Defendants from administering or civilly enforcing **the second of two sentences in GAB 1.28(3)(b)** against any person, or

[22] 551 U.S. 449 (2007) ("*WRTL-II*"). *Barland-II,* 751 F.3d at 844, slip op. at 83.

[23] *Citizens United v. FEC* re-labels "the functional equivalent of express advocacy" as the "'appeal to vote' test." 558 U.S. 310, 335 (2010) (quoting *WRTL-II,* 551 U.S. at 470).

[24] *Barland-II,* 751 F.3d at 826, slip op. at 45.

[25] *Id.* at 837-38, 843-44, slip op. at 70-71, 83.

criminally investigating or prosecuting (or referring for investigation or prosecution) any person under this sentence.

However, the court holds **the first of two sentences in GAB 1.28(3)(b)**[26] is not unconstitutionally vague.[27]

Fourth, Wisconsin triggers political-committee and political-committee-like burdens not only through the statutory committee-or-political-committee definition[28] and GAB 1.28[29] but also through GAB 1.91.[30]

To resolve as-applied and facial overbreadth[31] challenges – as opposed to as-applied and facial vagueness challenges – *Buckley* holds that government may trigger political-committee or political-committee-like burdens only for "organizations" that (a) are "under the control of a candidate" or candidates in their capacities as candidates, or (b) have the "the major purpose" of express advocacy under *Buckley*.[32]

Referring to organizations that are *not* under the control of any candidate(s) in their capacities as candidates, *Barland-II* holds that Wisconsin may trigger political-committee

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[26] *Id.* at 826, slip op. at 45.

[27] *Id.* at 838, slip op. at 71.

[28] WIS. STAT. § 11.01(4); *Barland-II,* 751 F.3d at 812, slip op. at 12-13.

[29] *Barland-II,* 751 F.3d at 826, slip op. at 43-45.

[30] *Id.* at 839-40, 844-46, slip op. at 74, 84-86.

[31] *Id.* at 839, slip op. at 72.

[32] 424 U.S. at 79, *followed in MCFL,* 479 U.S. at 252 n.6, 262, *and McConnell v. FEC,* 540 U.S. 93, 170 n.64 (2003).

or political-committee-like burdens[33] only for organizations that have the "major purpose" of "express advocacy."[34]

The court therefore grants declaratory judgment and permanently enjoins Defendants from administering or civilly enforcing **the statutory committee-or-political-committee definition, GAB 1.28,** and **GAB 1.91** against any person, or criminally investigating or prosecuting (or referring for investigation or prosecution) under these laws any person, in any way inconsistent with the previous two paragraphs.

Fifth, WRTL-SPAC – not WRTL – challenges Wisconsin's regulatory attribution and disclaimer requirements[35] as applied to WRTL-SPAC's thirty-second radio ads, saying the requirements take up most of the thirty seconds and distract the listeners from WRTL-SPAC's message. The court holds that Wisconsin's **regulatory attribution and disclaimer requirements** are overbroad as applied to radio speech of thirty seconds or fewer.[36] The court grants declaratory judgment and permanently enjoins Defendants from administering or civilly enforcing these requirements against any person, or criminally investigating or prosecuting (or referring for investigation or prosecution) any person under these requirements, for radio speech of thirty seconds or fewer.

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[33] Wisconsin has no *non*-political-committee reporting requirements. *See Barland-II,* 751 F.3d at 841-42, slip op. at 77-80.

[34] *Id.* at 834, 839, 841, 842, 844, slip op. at 62, 72-73, 77, 79-80, 84.

[35] WIS. ADMIN. CODE § GAB 1.42(5) ("GAB 1.42"); *Barland-II,* 751 F.3d at 816, slip op. at 21. *Barland-II* correctly understands the difference between an "attribution" and a "disclaimer[.]" 751 F.3d at 815-16, slip op. at 21.

[36] *Id.* at 832, 843, slip op. at 57-59, 83.

Sixth, WRTL-SPAC's purely official-capacity challenge to Wisconsin's **twenty-four-hour reporting requirements**[37] is moot, because Wisconsin amended the law in 2014, after the Seventh Circuit oral argument in *Barland-II* and before the Seventh Circuit opinion in *Barland-II,* and changed twenty-four-hour reporting to forty-eight-hour reporting.[38]

Seventh, the court upholds Wisconsin's **oath-for-independent-disbursements requirement,**[39] which WRTL-SPAC also challenged.

Eighth, WRTL and WRTL-SPAC challenged Wisconsin's limit on what organizations spend to solicit contributions to their own political committees[40] as applied to WRTL and WRTL-SPAC, because WRTL-SPAC engages in only independent spending for political speech. However, *Barland-II* strikes the limit facially.[41] The court grants declaratory judgment and permanently enjoins Defendants from administering or civilly enforcing Wisconsin's **limit on what organizations spend to solicit contributions to their own political committees**[42] against any person, or criminally investigating or prosecuting (or referring for investigation or prosecution) any person under this law.

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[37] WIS. STAT. § 11.12(5)-(6); *Barland-II,* 751 F.3d at 842-43, slip op. at 80-81.

[38] *Barland-II,* 751 F.3d at 842-43, slip op. at 80-81.

[39] WIS. STAT. § 11.06(7); GAB 1.42(1); *Barland-II,* 751 F.3d at 843, slip op. at 82.

[40] WIS. STAT. § 11.38(1)(a)3.; *Barland-II,* 751 F.3d at 816, slip op. at 22.

[41] *Barland-II,* 751 F.3d at 831, 844, slip op. at 56-57, 83.

[42] Although WRTL and WRTL-SPAC also challenged a corresponding provision, WIS. STAT. § 11.38(1)(b), *Barland-II* addresses only § 11.38(1)(a)3. 751 F.3d at 831, slip op. at 56-57. Because § 11.38(1)(a)3 limits what organizations spend to solicit contributions for their own political committees, and because § 11.38(1)(b), *inter alia,* bans political committees from accepting what § 11.38(1)(a)3 disallows, the facial holding on § 11.38(1)(a)3 provides the necessary relief here. *Cf. id.*

SO ORDERED this 30th day of January 2015.

BY THE COURT

/s/ C.N. Clevert, Jr.
C.N. CLEVERT, JR.
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WISCONSIN RIGHT TO LIFE, INC., and
WISCONSIN RIGHT TO LIFE STATE
POLITICAL ACTION COMMITTEE,

Plaintiffs

V. Case No. 10-C-0669

THOMAS BARLAND, in his official capacity
as chair and member of the Wisconsin
Government Accountability Board;
HAROLD FROEHLICH, in his official capacity as
vice chair and member of the Wisconsin
Government Accountability Board;
JOHN FRANKE, ELSA LAMELAS,
GERALD NICHOL, and TIMOTHY VOCKE, in their
official capacities as members of the Wisconsin
Government Accountability Board; and
JOHN CHISHOLM, in his official capacity
as Milwaukee County District Attorney,

Defendants.

ORDER CORRECTING TYPOGRAPHICAL ERROR

IT IS ORDERED that the word "dismissing" in the first parenthetical of footnote 7 of the declaratory judgment and permanent injunction issued January 30, 2015 (Doc. 132) is amended to read "discussing."

Dated at Milwaukee, Wisconsin, this 13th day of February, 2015.

BY THE COURT

/s/ C. N. Clevert, Jr.
C. N. CLEVERT, JR.
U. S. DISTRICT JUDGE