WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2001-02
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Campaigns & Elections (AC-CE)

File Naming Example:

Record of Comm. Proceedings ... RCP
- 05hr_AC-Ed_RCP_pt01a
- 05hr_AC-Ed_RCP_pt01b
- 05hr_AC-Ed_RCP_pt02

Published Documents

- *Committee Hearings ... CH* (Public Hearing Announcements)
- **

- *Committee Reports ... CR*
- **

- *Executive Sessions ... ES*
- **

- *Record of Comm. Proceedings ... RCP*
- **

Information Collected For Or Against Proposal

- *Appointments ... Appt*
- **

- *Clearinghouse Rules ... CRule*

**

- *Hearing Records ... HR* (bills and resolutions)
- **01hr_sb0104_AC-CE_pt01**

- *Miscellaneous ... Misc*
- **

DOYLE
GOVERNOR

December 10, 2001

Mr. Michael McCabe, Executive Director
Wisconsin Democracy Campaign
210 North Bassett Street, Suite 215
Madison, WI 53703

Dear Mr. McCabe:

I strongly support meaningful, comprehensive, and effective campaign finance reform. As Governor, one of my highest priorities will be to take state government off of the auction block. The excessive partisanship and politicization in the State Capitol, the scandals and abuses of the public trust, and the pay-to-play system that has become the norm in the Capitol during the last 15 years, must be ended. Under my administration, decisions made by state government would be made according to what is in the public interest, not campaign contributions.

I fully support the concepts at the heart of Senate Bill 104, now pending in the legislature. We need a reasonable cap on spending with enough public money to make candidates stick to it, limits on contributions, full disclosure, and regulation of ads that mention a candidate in the last 45 days.

It is tempting, and would be easy, to "pose for holy pictures" and support this bill, since most voters know only the title and not the content. You point out that 90% of voters supported campaign finance reform, and so do I.

However, I believe that SB 104 as written poses serious practical and constitutional questions. Requiring daily reporting of independent disbursements may well be unconstitutional. It would constitute a prior restraint on political speech, limit the ability of groups or individuals to engage in free speech, and force public disclosure of intended First Amendment activities before engaging in them.

There are other less significant problems as well, such as the inequity created by failing to recognize that one candidate may have a primary election while another does not, creating an uneven playing field.

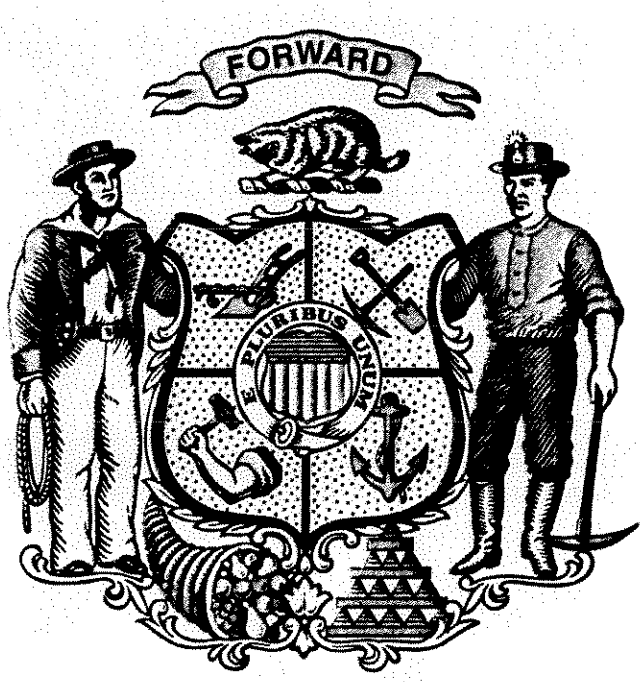
I believe that passing campaign finance reform that would likely be struck down in the courts, in whole or even in part, would squander the opportunity for true, lasting reform that has been building in Wisconsin. While I truly believe we need to pass campaign finance reform, we need to put our efforts behind passing a law that really works.

P.O. Box 2687 • Madison, Wisconsin 53701 • 608-284-2002 • campaign@doyle2002.com

I encourage your organization to work with the authors of the bill to address the flaws in this legislation so that we all can get behind comprehensive campaign finance reform that will make a true difference in cleaning up the mess in Madison.

Sincerely,

Jim Doyle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E PLURIBUS UNUM

Wisconsin Speaker Pro Tempore

Representative Stephen J. Freese

January 23, 2002

The Honorable Scott Jensen, Speaker
Assembly Committee on Organization
Members, Assembly Committee on Organizations
211 West, State Capitol
Madison, WI 53702

Dear Mr. Speaker;

It is my request that the Assembly Committee on Organization make a request of the state's Attorney General on the following matter. I ask that the Attorney General review Senate Bill 104 (SB 104) as it relates to the constitutionality of the following general criteria of the bill and the specifics of each as enumerated in the bill language: Filing of Campaign Finance Reports; Mass Media Activities; Disbursement Limitations; Treatment of legislative campaign committees; Contribution limitations; Other contribution restrictions; Wisconsin Elections Fund sources, grant eligibility requirements; Penalties for violations; Nonseverability

Thank you for your consideration of this request.

Sincerely,

STEPHEN J. FREESE
State Representative

/tg

Fifty-First Assembly District

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(608) 266-7502 • Toll-Free: (888) 534-0051 • Fax: (608) 261-9474 • Rep.Freese@legis.state.wi.us
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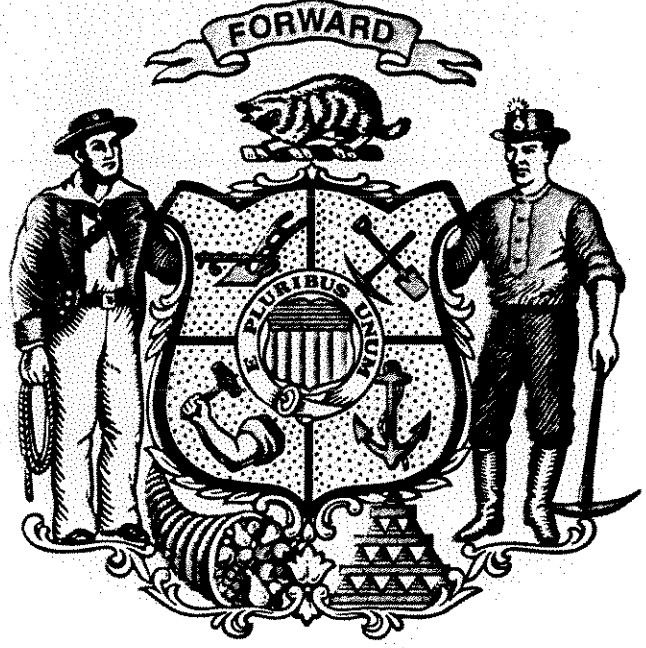
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ASSEMBLY COMMITTEE ON

Organization

January 24, 2002

The Honorable James Doyle, Attorney General
123 West Washington Avenue
Madison, Wisconsin 53703

Dear Attorney General Doyle,

The purpose of this letter is to request an opinion of the Attorney General. The Attorney General is directed to give opinions in writing "upon all questions of law submitted to him or her by the . . . assembly committee on organization." [s. 165.015(1), Stats.]

Last week, I announced the state Assembly would soon consider comprehensive campaign finance reform. In addition, I encouraged the Senate to bring up Senate Bill (SB) 104 for consideration. However, I recently learned that in a December 10, 2001 letter to Michael McCabe, Executive Director of the Wisconsin Democracy Campaign (WDC), you declined to support SB 104, as proposed, citing "... serious practical and constitutional questions." Your advice and counsel on the bill's provisions that are of questionable constitutionality would be most appreciated.

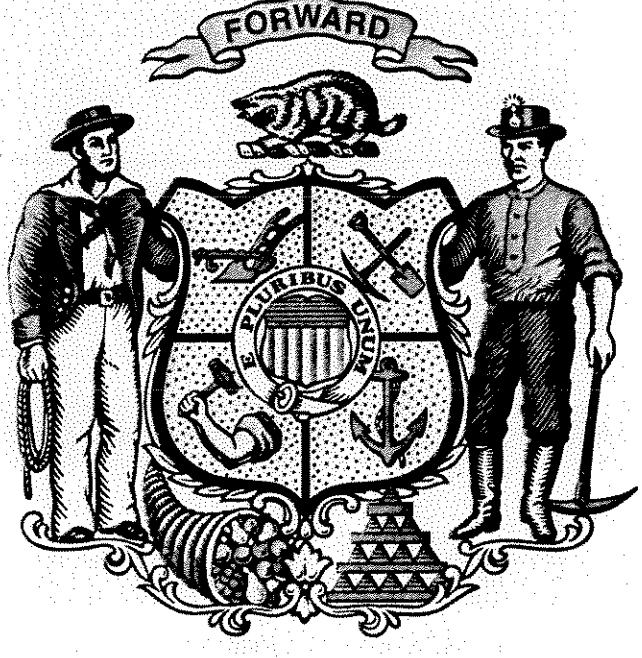
For that reason, on behalf of the Assembly Committee on Organization, I would respectfully ask for a formal legal opinion under s.165.015(1), Stats. concerning the constitutionality of Senate Bill (SB) 104. Specifically, I would like you to reference the provisions within the bill, as it is currently drafted, that you believe could not or may not withstand judicial or constitutional scrutiny. The committee requests the formal opinion come directly from you. I think you would agree your stature as the state's elected Attorney General would carry considerable weight in a court of law should a special interest group challenge any future campaign finance statutes.

At this juncture, there is considerable momentum in both houses on both sides of the aisle for campaign finance reform. Your thoughtful and reasoned legal analysis could be of great help as we work to adopt effective campaign finance reform. I thank you in advance for your help and support on this issue. If you have further questions, need additional clarification or seek more information, please contact me.

The Assembly Committee on Organization has approved this letter.

Sincerely yours,

Speaker Scott R. Jensen, Chair
Assembly Committee on Organization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WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2001 Senate Bill 104	Engrossed Version Consisting of Senate Substitute Amendment 1 and Senate Amendments 1, 2, 3, 5 and 6
Memo published: February 1, 2002	***Contact*: Ronald Sklansky, Senior Staff Attorney (266-1946)** **Robert J. Conlin, Senior Staff Attorney (266-2298)**

This memo summarizes the substantive provisions of Engrossed Senate Bill 104.

The engrossed bill does the following:

A. REGISTRATION AND REPORTING REQUIREMENTS

- ***Independent Disbursements.*** Provides that a special interest committee, other than a conduit, that intends to receive any contribution, make any disbursement, or incur any obligation for the purpose of independently advocating the election or defeat of a candidate for statewide or legislative office, or for the purpose of making certain communications, must report the name of each candidate who is supported or whose opponent is opposed and the total amount of contributions to be received, disbursements to be made, and obligations to be incurred for these purposes during the 21-day period ***following*** the date on which the report is due to be filed. [A communication to which the requirements apply is a communication made by means of one or more communications media during the period beginning on the 60th day preceding an election and ending on the date of that election and that includes a reference to a candidate to appear on the ballot at the election, a reference to an office to be filled at the election, or a reference to a political party.] The reports must be filed on the 63rd, 42nd and 21st days prior to the election. In addition, the committee also must report the amount and date of each contribution received, disbursement made, or obligation incurred regarding its independent activities during the 21-day period ***ending*** on the 39th and 18th days prior to the election.

  A violation of the reporting requirements may result in a forfeiture of not more than $500 per day for each day of the continued violation. Also, if a disbursement is made, or an obligation to make a disbursement is incurred, in an amount or value differing from the amount reported, then specified forfeitures must be paid. For example, if the actual amount or value

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differs from the reported figures by more than 5% but not more than 10% cumulatively, the violator must forfeit four times the amount or value of the difference. If the difference is more than 10% but not more than 15% cumulatively, the violator must forfeit six times the amount or value of the difference. If the difference is greater than these amounts, the violator must forfeit eight times the amount of the difference. [SECS. 47, 54g, 54r and 120m.]

"Issue Ad" Registration. Imposes registration and financial reporting requirements upon individuals or groups that make a communication during the period beginning on the 60th day preceding an election and ending on the date of the election that includes a reference to a candidate appearing on the ballot at that election, a reference to an office to be filled at that election, or a reference to a political party. [SEC. 13m. Generally, under current law, individuals who accept contributions, organizations which make or accept contributions, and individuals who or organizations which incur obligations or make disbursements for the purpose of influencing an election for state or local office are generally required to register with the appropriate filing officer and to file financial reports with that officer, regardless of whether they act in conjunction with or independently of any candidate who is supported or opposed.]

- ***Referenda Reports***. Requires an individual who accepts contributions, incurs obligations or makes disbursements with respect to a referendum, or a political group which similarly makes or accepts contributions, incurs obligations or makes disbursements, in excess of $100 to file a statement with the appropriate filing officer providing registration information such as the name of the individual or group, the name of the treasurer, the nature of the referenda, and other identifying information. [SECS. 15, 17 and 63.]

- ***Candidate's Identity***. Requires the registration statement of a personal campaign committee to identify the candidate on whose behalf the committee was formed and the office that the candidate seeks. [SEC. 21.]

- ***Phone, Fax or Email of a Candidate***. Requires the registration statement of a candidate or personal campaign committee to include the telephone number and fax number or email address, if any, at which the candidate may be contacted. [SEC. 23.]

- ***Exemption From Independent Disbursement Report--State Office***. Provides that an individual or committee required to file an oath of independent disbursements and who or which accepts contributions and makes disbursements for supporting or opposing one or more candidates for ***state office*** but who or which does not anticipate accepting contributions or making disbursements in excess of $1,000 in a calendar year and does not anticipate accepting a contribution exceeding $100 from a single source may make a statement to that effect on the registration statement and the individual or committee would not be subject to any filing requirements if the statement is true. The statement may be revoked and, if it is, filing requirements apply. If revocation is not timely made, it is considered a violation of false reporting statutes. In contrast to an independent expenditure, an independent disbursement refers to an expenditure that is made clearly for the purpose of opposing the election of a grant recipient, or for the purpose of supporting a certified opponent of that candidate, when none of the disbursements are made in cooperation with the grant recipient's opponent. [SEC. 31.]

- ***Exemption From Independent Disbursement Report--Local Office***. Provides that an individual or committee required to file an oath of independent disbursements and who or which accepts contributions and makes disbursements for supporting or opposing one or more candidates for ***local office*** but who or which does not anticipate accepting contributions or making disbursements in excess of $100 in a calendar year and does not anticipate accepting any contribution exceeding $100 from a single source may make a statement to that effect on the registration statement and the individual or committee would not be subject to any filing requirements if the statement is true. The statement may be revoked and, if it is, filing requirements apply. If the revocation is not timely made, it is considered a violation of the false reporting statutes. [SEC. 31.]

- ***24-Hour Reporting of Obligations***. Extends the 24-hour reporting requirement under current law for disbursements in excess of $20 made within the last 15 days prior to an election to include the reporting of incurred obligations over $20 in that time period. [SEC. 46.]

- ***24-Hour Reporting for Candidates not Accepting Public Financing***. Provides that any candidate for Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer, Superintendent, Representative or Senator who does not accept a grant from the Wisconsin Election Campaign Fund (Fund) and who makes a disbursement after accumulating cash or who makes disbursements exceeding a combined total of 75% of the disbursement limit for the applicable office, must file daily reports with the Elections Board and each candidate for that office, by email or fax, on each day beginning with that date or the seventh day after the primary election was held (or would have been held), whichever is later. Each report must contain information pertaining to each disbursement made by the candidate or committee and must be filed no later than 24 hours after the disbursement is made. If no email or fax number is available, the report must be filed at the address shown for the candidate. [SEC. 48.]

- ***Timely Reports***. Provides that a report is timely filed only by delivering it to the appropriate filing office or agency by the due date or by depositing the report with the U.S. Postal Service no later than the third day before the due date. [SEC. 57.]

B. CONTRIBUTIONS

- ***Individual Contribution Limits***. Retains the individual contribution limits under current law for certain offices as follows:

	Current	***Bill***
Governor	$10,000	$10,000
Lieutenant Governor	$10,000	$10,000
Attorney General	$10,000	$10,000
Secretary of State	$10,000	$10,000

	Current	*Bill*
Treasurer	$10,000	$10,000
Superintendent	$10,000	$10,000
Justice	$10,000	$10,000
Senator	$1,000	$1,000
Representative	$500	$500

- ***Committee Contribution Limits***. Modifies committee contribution limits for certain offices as follows:

	Current	*Bill*
Governor	$43,128	$45,000
Lieutenant Governor	$12,939	$15,000
Attorney General	$21,560	$25,000
Secretary of State	$8,625	$10,000
Treasurer	$8,625	$10,000
Superintendent	$8,625	$10,000
Justice	$8,625	$10,000
Senator	$1,000	$1,000
Representative	$500	$500

[SECS. 70 and 71.]

- ***Overall Individual Contribution Limits***. Retains the overall individual contribution limit at $10,000 per year. [SEC. 72.]

- ***Contributor Information***. Requires a campaign treasurer of a registrant that receives a contribution of money from an individual who has contributed over $100 to obtain information relating to the person's occupation and principal place of employment before depositing the contribution. If the treasurer does not obtain this information, the contribution must be returned. [SEC. 43.]

- ***Committee Contributions in General***. Provides, for the following state offices, that an individual who is a candidate may not receive or accept more than the following fixed dollar amounts from political party committees or all committees other than political party committees:

	Political Parties	*Other Committees*
Governor	$400,000	$485,190
Lieutenant Governor	$100,000	$145,564
Attorney General	$100,000	$242,550
Secretary of State	$50,000	$97,031
Treasurer	$50,000	$97,031
Superintendent	$50,000	$97,031
Justice	$50,000	$97,031
Senator	$24,000	$15,525
Representative	$12,000	$7,763

For all other state or local offices, the bill provides that a candidate may not receive and accept more than 20% of the value of the total disbursement level for the office for which he or she is a candidate during any primary or election campaign combined from all political party committees. Further, no such candidate may receive and accept more than 25% of the value of the total disbursement level combined from all committees other than political party committees subject to a filing requirement. [See SECS. 75b to 75e. Current law provides that a candidate may not receive more than 65% of the disbursement level from all political party committees and no more than 45% of the disbursement level combined from all committees other than political party committees.]

- ***Committee Contributions to Publicly Financed Candidates***. Prohibits a candidate or personal campaign committee who applies for a grant from the Fund from accepting a contribution from a committee other than a political party committee. [SECS. 65, 100 and 106.]

- ***Contributions to Incumbents During Legislative Session***. Prohibits contributions to any incumbent partisan state elective official for the purpose of promoting that official's nomination for reelection to the office held by the official during the period beginning on the first Monday in January of odd-numbered years and ending on the date of enactment of the biennial budget act. [SEC. 67.]

- ***Contributions to Political Parties***. Increases, for political parties, the amount they may receive in a biennium from all committees, excluding transfers between party committees of the party, from $150,000 to $450,000. [SEC. 73.]

- ***Political Party Limits***. Increases the maximum amount a political party may receive from a committee, exclusive of political party committees, and increases the amount a committee, other than a political party committee, can contribute to a political party in a calendar year from $6,000 to $18,000. [SEC. 73.]

- ***PAC to PAC Transfers***. Prohibits a committee from making a contribution to any other committee, except a political party committee, personal campaign or support committee. However, allows a committee affiliated with a labor organization to make a contribution to any other committee that is affiliated with the same labor organization. [SEC. 74.]

- ***Solicitation of Contributions***. Prohibits a state elective official and his or her personal campaign committee from soliciting a lobbyist or principal to arrange for another person to make a campaign contribution to that official or personal campaign committee or to another elective state official or the personal campaign of that official. [SEC. 124.]

- ***Pay-to-Play***. Prohibits a state or local elected official from, directly or by means of an agent, giving, or offering or promising to give, or withholding, or offering or promising to withhold, his or her vote or influence, or promising to take or refrain from taking official action with respect to any proposed or pending matter in consideration of or upon condition that any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to or for the benefit of a candidate, a political party, any other person who is subject to a registration requirement under the campaign finance law or any person making a communication that contains a reference to a clearly identified state or local elected official or to a candidate for such an office. The bill also provides for forfeitures for violations of the "pay-to-play" prohibition. [SECS. 124b to 124z.]

C. DISBURSEMENTS

- ***Disbursement Limits***. Revises the disbursement levels for the following offices:

	Current	*Bill*
Governor	$1,078,200	$2,000,000
Lieutenant Governor	$323,475	$500,000
Attorney General	$539,000	$700,000
Secretary of State	$215,625	$250,000
Treasurer	$215,625	$250,000
Superintendent	$215,625	$250,000

	Current	*Bill*
Justice	$215,625	$300,000
Senator	$34,500	$100,000
Representative	$17,250	$50,000

[SECS. 82, 83 and 84.]

- ***Competitive Primary***. Provides that the total disbursement limitation for a candidate whose name appears on the ballot at a primary election will be increased to 120% of the normal disbursement level for that office if all of the following conditions occur:

  1. The candidate receives less than twice as many votes at that election as another candidate who is within the same political party and who is running for the same office.

  2. The candidate has an opponent in the general or special election who received at least 6% of the votes cast in the primary.

  [SEC. 85.]

- ***Voluntary Limits***. Repeals the provision authorizing voluntary disbursement limitations for candidates who do not accept a grant from the Fund. [SECS. 87 and 105.]

- ***Limits Increased for Grants***. Provides that the disbursement limitation for a candidate who receives certain additional grants from the fund are increased by the amount of those grants. [SEC. 89.]

- ***Cost-of-Living Adjustment***. Creates a cost-of-living adjustment for the disbursement limitations, which is to be determined by rule by the Elections Board. The board must determine the percentage difference between the Consumer Price Index for the 12-month period ending on December 31 of each odd-numbered year and the Consumer Price Index for calendar year 2003. Each biennium the Elections Board is required to adjust the disbursement limitations by that percentage to reflect any difference, rounded to the nearest multiple of $25, which shall be in effect until a subsequent rule is promulgated. Such determinations by the Elections Board may be promulgated as emergency rules. [SECS. 81 and 90.]

D. PUBLIC FINANCING

- ***Grant Amounts***. Retains the grant amount available to a candidate at the current level of 45% of the disbursement level for a general election. An additional 10% of the disbursement level may be awarded for an eligible primary campaign. To receive the additional 10%, a candidate who accepts a grant must have won a contested primary and submitted nomination papers containing the following number of valid signatures for the office he or she seeks:

Office	*Number of Signatures*
Statewide office	Not less than 4,000 electors
Senator	Not less than 800 electors
Representative	Not less than 400 electors

[SECS. 112 and 116.]

- ***Extra Grant Based on Opposition***. Provides that in the case of a candidate who accepts a grant, and is opposed by one or more candidates who do not accept a grant and who make total disbursements exceeding the disbursement level for the office, the Elections Board must make an additional grant to the candidate in an amount equal to the total amount or value of the disbursements made by the opposing candidate or candidates exceeding the disbursement levels for that office. [SEC. 117m.]

- ***Extra Grant Based on Independent Disbursements***. Provides that if a candidate who accepts a grant has independent disbursements made against him or her or if the independent disbursements are made on behalf of the candidate's opponent, the Elections Board must make an additional grant to the candidate when the expenditures exceed 10% of the disbursement limit for the office. The amount of the additional grant must equal the total of the independent disbursements made. Again, the disbursements include a disbursement made for a communication made by one or more communications media during the period beginning on the 60th day preceding an election and ending on the date of the election and that includes a reference to a candidate, a reference to an office to be filled at that election, or a reference to a political party. [SECS. 13m, 47 and 117m.]

- ***Extra Grant Based on Contributions Received by Opposing Committee***. Provides that if a candidate who accepts a grant and is opposed by a candidate, and if a committee intends to receive or receives any contribution or contributions that are intended to be used or that are used to oppose the election of the candidate who accepts a grant or to support his or her opponent without cooperation or consultation with the opponent, then the Elections Board must make an additional grant to the candidate who accepts a grant in an amount equal to the total amount of contributions received by the committee for the purpose of advocating the election of the opponent or for opposing the election of the candidate who accepts a grant. [SEC. 117m. Due to the independent drafting of successive, successful amendments, technically the receipt of an additional grant under this provision will ***not*** increase the recipient's disbursement limit, thereby possibly impeding the recipient's ability to spend this additional grant.]

- ***Increased Checkoff***. Increases the income tax "checkoff" from $1 to $5 and allows the individual making such designation to indicate whether the amount shall be placed in the Fund's "general account" or "political party account." If a designation does not indicate which account, the "general account" will be credited. [SEC. 128.]

- ***Donations to the Fund***. Authorizes contributions that are required to be returned or donated to charitable organizations or to the common school fund to be transferred to the Fund. [For example, SECS. 9, 29 and 39.]

- ***Party Accounts***. Establishes a "general account" and a "political party account" under the Fund. [SECS. 97 to 99, 108, 109, 111 and 120.]

- ***Limits on Committee Contributions***. Requires applicants for a grant to file a sworn statement that he or she has not accepted and retained any contributions from committees, other than political party committees, and that he or she will not accept any, unless it is determined that he or she is ineligible for a grant. [SEC. 100.]

- ***Qualifying Fundraising***. Requires an applicant for a grant to have raised at least 3% of the disbursement level applicable to the office sought in contributions of $100 or less from individuals who reside in the state, and, for a legislative candidate, by individuals at least 50% of whom reside in a county having territory within the legislative district for which the candidate seeks office. [SEC. 101.]

- ***Applications***. Repeals the current authority for an eligible candidate to withdraw his or her public financing application. [SEC. 104.]

- ***Exceeding Disbursement Limit***. Repeals the current law provisions which allow a candidate who receives a grant to exceed the disbursement limit if his or her opponent does not accept a grant. [SEC. 105.]

- ***Return of Committee Contribution***. Requires a candidate applying for a grant to return any contributions from committees, other than the political party committees, before filing an application for the grant. [SEC. 106.]

- ***Designated Checkoff***. Allows individuals to designate their income tax checkoff for a political party and requires such designated funds to go to a "political party" account. Moneys from such an account are apportioned to eligible candidates representing the party who qualify for grants. [SEC. 128.]

- ***Supplemental Account***. Provides that if there are insufficient funds in the Fund, the State Treasurer is required to supplement the Fund from a sum sufficient GPR appropriation. [SEC. 111.]

- ***Electronic Transfer***. Requires the State Treasurer to electronically transfer any supplemental grants a candidate qualifies for to the candidate's campaign depository account if the Treasurer has the necessary account information. [SEC. 113.]

- ***Administration***. Requires the Elections Board to certify to the Department of Revenue (DOR) in each even-numbered year information relevant to eligible political parties and candidates for purposes of administering the Fund. [SEC. 120.]

E. OTHER

- ***Conduits***. Limits conduit transfers to amounts not to exceed committee contributions. [SECS. 68 and 69.]

- ***Legislative Campaign Committees***. Eliminates the special status of legislative campaign committees. [For example, SEC. 13.]

- ***Public Information***. Creates a public information account, which is funded by up to 5% of the Fund, to be used by the Elections Board to provide public information on the income tax "checkoff" and the purpose and effect of public campaign financing. The Elections Board is required to prepare an easily understood description of the purposes and effect of the checkoff and public financing. [SEC. 107.]

- ***Local Prosecutions***. Authorizes the District Attorney of any county which has territory within the jurisdiction or district within which a candidate seeks office to bring an action for violation of campaign finance laws alleged to have been committed by the candidate. [SEC. 121.]

- ***Tax Information***. Requires DOR to place public information materials concerning the tax checkoff prepared by the Elections Board in tax return instructions. [SEC. 129.]

- ***Declaratory Actions***. Authorizes any person who proposes to publish, disseminate or broadcast any communication, or any person who causes such publication, dissemination or broadcast, to commence a declaratory action to determine the application of the registration requirements under the campaign finance law to that person. [SEC. 130.]

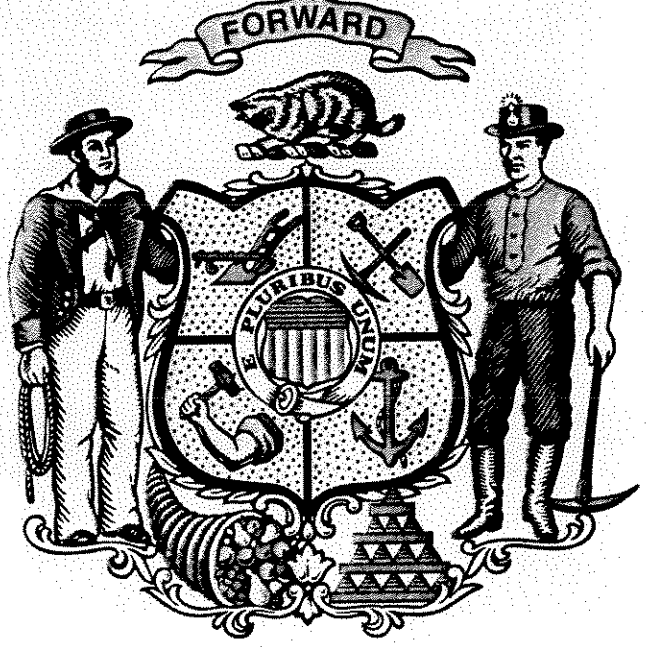
- ***Nonseverability***. Provides that if a court finds unconstitutional any part of the process by which supplemental grants are made in response to an opponent's expenditures, the entire act is void. Further, if a court finds unconstitutional any part of the process by which supplemental grants are made in response to independent disbursements, then that process is void in its entirety. [SEC. 131.]

- ***Board Staff***. Increases the full-time equivalent staff positions at the Elections Board to add one campaign finance investigator and one auditor and provide $76,100 in fiscal year 2001-02 and $85,100 for fiscal year 2002-03 for salary, fringe and support benefits. [SEC. 132.]

On January 29, 2002, Senate Substitute Amendment 1 to Senate Bill 104, and Senate Amendments 1, 2, 3, 5 and 6 to the substitute amendment, were adopted and engrossed by the Senate on a voice vote.

The bill was printed engrossed at the direction of the Senate Chief Clerk on January 30, 2002.

RS:RJC:tlu:ksm:jal:rv;rv;tlu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MILWAUKEE
APPLETON
GREEN BAY

February 4, 2002

VIA HAND-DELIVERY
Hon. Gary George
Wisconsin State Senate
118 South, State Capitol
Madison, WI 53702

Dear Senator George:

The Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform, which you chair, has reviewed several proposals advanced during this legislative session to modify the state's campaign finance laws. While we are well aware that one of those proposals, Senate Bill (S.B.) 104, is scheduled for a final vote in the Senate on Tuesday, February 5, 2002, it is important nevertheless to raise, again, a number of constitutional concerns with the legislation.

However well-intentioned, S.B. 104 includes a series of provisions that will not survive constitutional challenge. The adoption of the bill, as written, will frustrate the cause of campaign finance reform. Far from improving the political system, it offers a false hope that only promises to end unhappily in litigation.

We write to you on behalf of six organizations – the Wisconsin Builders Association, Wisconsin Education Association Council, Wisconsin Manufacturers & Commerce, Wisconsin Newspaper Association, Wisconsin Realtors Association, and Wisconsin Right to Life. They share your commitment to this state, to a fair and open political process, and to public service. They favor making significant improvements to the state's campaign finance law consistent with the First Amendment. Yet they will continue to oppose S.B. 104 and any other legislation that ignores basic constitutional principles.

I. ISSUE ADVOCACY REGULATION

S.B. 104, if enacted, would regulate virtually *all* political communication that takes place in the 60 days prior to an election if it contains a "reference" to a candidate, the office to be filled at that election, or a political party. The regulation would rise to a flat prohibition on political speech for many organizations, applying as it does even to political communication that does not expressly advocate the election or defeat of a clearly identified candidate.[1] *See* Section 13m (p. 20, line 1). As you know well, the U.S. Supreme Court has concluded that some forms of political communication must remain unregulated and, as a result, federal and state courts repeatedly and consistently have rejected any attempted regulation in this area.

Express Advocacy

The U.S. Supreme Court established the express advocacy concept 25 years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the landmark decision that concluded that government can regulate only those funds used for political communications expressly advocating a candidate's election or defeat. That is, the Court held in *Buckley,* the First and Fourteenth Amendments preclude any regulation of political speech that does *not* "in express terms advocate the election or defeat of a clearly identified candidate . . . ." *Id.* at 44. While the concept of "express advocacy" appears in the Wisconsin Statutes, *see* § 11.01(16)(a)1., Stats., the term is not defined there – *Buckley* and the state and federal court decisions applying it provide that definition.

In subjecting only express advocacy (including independent expenditures by political committees under section 11.06(7), Stats.[2]) to regulation, the U.S. Supreme Court in *Buckley* concluded, in effect, that many forms of political communication will remain unregulated – not partially regulated but in no way regulated. Communication that does *not* expressly advocate the election or defeat of a clearly identified candidate – generally called "issue advocacy" – is not subject to *any* government regulation. By definition, issue advocacy avoids any explicit reference to a candidate's election or defeat and, instead, provides information on a political issue or policy question associated with a candidate. The distinction between issue advocacy and express advocacy can be elusive, more easily stated in theory than made in practice. Yet it is a critical distinction with significant constitutional implications.

Corporate Speech

Corporations are prohibited by Wisconsin law from spending *any* money (whether as "contributions" or "disbursements" as defined in section 11.01, Stats.) on express advocacy and, except through registered PACs, contributing to organizations engaged in express advocacy. *See* § 11.38, Stats. Under state and federal law, moreover, corporations cannot make independent expenditures. These statutory prohibitions are broad:

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[1] The language in this section of S.B. 104 is virtually identical to the language in S.B. 2, considered by your committee earlier this year. *See* S.B. 2, Section 2.

[2] The ability of individuals and groups (but not corporations) to make unlimited (although reportable) independent expenditures on express advocacy, the Supreme Court has held, helps justify the stricter regulation of contributions to candidates and committees that, in turn and by definition, engage in express advocacy. *See Buckley,* 424 U.S. at 28-29.

> No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any [state] political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

§ 11.38(1)(a)1., Stats.

> It is unlawful for any . . . corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any [federal] political office....

2 U.S.C. § 441b(a). (Unlike Wisconsin and federal law, about 25 states permit corporate contributions and disbursements for political purposes.)

While corporations are prohibited from engaging in express advocacy, "directly or indirectly," the First Amendment does not permit government to prohibit all corporate speech on public issues and candidates.[3] "The mere fact that the [respondent] is a corporation does not remove its speech from the ambit of the First Amendment." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990).

In *Austin* as well as in *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978) (corporate spending on referendum), the Supreme Court has recognized the right of corporations to engage in political speech, and the protection afforded political speech does not lessen merely because the speaker is a corporation.

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id. at 777. The Supreme Court upheld a Michigan statute in *Austin* that prohibited corporations from using corporate funds for independent expenditures to elect or defeat any candidate in elections for state office – that is, to engage in express advocacy. Nevertheless, the Court

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[3] In addition to for-profit corporations, of course, the universe of "corporations" includes a wide range of nonprofit organizations with diverse political points of view. S.B. 104 would apply to entities organized in the corporate form – regardless of their purpose or source of funding. While the Supreme Court has developed a limited exception that permits certain ideological corporations to engage directly in express advocacy (*see FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)), most of the nonprofit corporations and trade associations in Wisconsin would not qualify for this exception under the Supreme Court's standards. To make campaign contributions for express advocacy or engage directly in express advocacy through independent expenditures, accordingly, nonprofit corporations generally turn to the only method permitted by state and federal law: they establish a PAC. Yet this ability does not diminish their constitutional right to engage in issue advocacy, nor can government compel a corporation to speak only through a PAC.

reaffirmed the First Amendment's protection for corporate political communication.

Regulation of Issue Advocacy Under S.B. 104

The organizations that have authorized this letter are the very "corporation[s], association[s], and union[s]" whose rights the Supreme Court recognized in *Belotti*. The "inherent worth" of their point of view "for informing the public" does not depend on organizational form. It depends, instead, on the positions adopted by their membership and the persuasive force of their ideas.

The state may *not* regulate corporate issue advocacy under its campaign finance laws. "No regulation" means no regulation and no compelled disclosure of the source of funds or the detailed expenditure of funds. This constitutional principle, however, has two important exceptions – found in the Internal Revenue Code[4] and in the regulations of the Federal Communications Commission[5] Moreover, a corporation has no constitutional right to express itself in cooperation or collusion with a candidate or party committee.[6]

As drafted, S.B. 104 would impermissibly expand the political communication subject to regulation and, through section 11.38, Stats., prohibit the very kind of "issue advocacy" protected by the First Amendment and engaged in by corporations in Wisconsin. The legislation would broaden the statutory definition of "political purposes" to include all communications "beginning on the 60th day preceding an election and ending on the date of that election and that includes a reference to a candidate..., a reference to an office to be filled at that election, or a reference to a political party." *See* S.B. 104, Section 13m (p. 20, line 1).

Under this proposal, issue advocacy that contained any reference to a candidate – or even any reference to a political party – would be regulated (regardless of whether it met the constitutional

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[4] While issue advocacy activity, as unregulated political communication, is beyond the jurisdiction of both the Federal Election Commission and the State Elections Board, the funding of issue advocacy is subject to the Internal Revenue Code and the oversight of the Internal Revenue Service. *See* "Election Year Issues," *Internal Revenue Service CPE Exempt Organizations Text* (2001). For example, under I.R.C. section 527, some groups engaged in issue advocacy are required to periodically disclose their contributions and expenditures.

[5] While broadcast issue advocacy advertisements are not subject to many political broadcasting rules, nor do they receive the benefit of the "lowest unit rate," issue advocacy advertisements must include a "paid for by" sponsorship identification, and these ads also trigger certain FCC disclosure requirements. 47 C.F.R. § 73.1212.

[6] Contributions by corporations to unregistered and unregulated groups engaged in issue advocacy are constitutionally protected. *See Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (Wis. 1999). That protection evaporates, however, if there is significant coordination or cooperation between an issue advocacy group or an independent expenditure organization (engaged in express advocacy) and any candidate or political party committee. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999); *Wisconsin Coalition for Voter Participation, Inc. v. State of Wisconsin Elections Board*, 231 Wis. 2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999); *Elections Board letter to Susan Armacost and William S. Reid* (June 21, 2000); *see also FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*), 533 U.S. 431 121 S.Ct. 2351 (2001) (coordinated communications will be treated as contributions to candidates and, to prevent attempts to circumvent campaign finance laws and disguise contributions, coordinated communications remain subject to contribution limits and source restrictions; political communication will remain unregulated only as long as it remains "without any candidate's approval (or wink or nod)") *Id.* at 2359).

standard of "express advocacy"). Necessarily, a substantial amount of protected corporate speech would be banned under section 11.38, Stats. Under the proposal, corporate expenditures on political communication within 60 days of an election would be considered a "contribution" or "disbursement" for a "political purpose." *See* §§ 11.01(6), 11.01(7), 11.01(16), Stats. Corporations are flatly prohibited, of course, from making "contributions" or "disbursements." *See* § 11.38, Stats. And the penalty for violating that prohibition is serious: "Whoever intentionally violates . . . [sec.] 11.38 . . . may be fined not more than $10,000 or imprisoned for not more than 4 years and 6 months or both" – a penalty that can make corporate spending on express advocacy a felony. *See* § 11.61(1)(b), Stats.

S.B. 104's sweeping pre-election regulation of issue advocacy containing "a reference to *a political party*" would be unprecedented. For corporations, of course, that regulation would be a prohibition. No other legislative proposal or law has *ever* attempted to regulate issue advocacy this way.[7] On its face, it directly contradicts the scope of regulated speech established in *Buckley* by the Supreme Court: political communication that expressly advocates the election or defeat of a clearly identified *candidate*. Nowhere in *Buckley* or in any of the long line of subsequent decisions – including the Wisconsin Supreme Court's decision in *Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650 – is there the slightest suggestion that express advocacy can ever include a political communication that merely refers to a "political party."

The complementary attempt in S.B. 104 to establish a fixed rule based on the timing or the context, as opposed to the text, of a political communication is not a novel idea. There have been similar efforts to regulate issue advocacy by other states as well as by the Federal Election Commission. In the 25 years since *Buckley*, more than a dozen courts have reviewed statutory and administrative attempts – some involving time limits like S.B. 104[8] – to regulate speech discussing political issues and candidates by modifying the *Buckley* definition of express advocacy. *All of these attempts have failed.*[9] In the absence of speech that expressly advocates the election or defeat of a clearly identified candidate, the courts have consistently held, the First Amendment prohibits *any* regulation of political communication.[10]

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[7] A similar provision on "political party" references was in S.B. 2, as originally drafted and considered by your committee, but that provision was deleted before the Senate adopted the bill.

[8] *See, e.g., West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954 (S.D. W. Va. 1996) (enjoining enforcement of a "60-day voter guide law"); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998) (striking down an administrative rule prohibiting corporate communications employing a candidate's name or likeness within 45 days of an election); and, *Vermont Right to Life v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000) (rejecting a state disclosure requirement on "mass media activities" within 30 days of an election).

[9] Only in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), has a court accepted any expanded definition of express advocacy. The FEC's attempt to codify that decision, however – in an administrative rule, *see* 11 C.F.R. § 100.22(b) – has been found unconstitutional. *See Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997); *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001). Even in *Furgatch*, moreover, the court acknowledged that there can be no express advocacy without "a clear plea for action" at an election. 807 F.2d at 864. S.B. 104 does not make a similar demand on speech it purports to regulate and prohibit. Instead, it would impose a blanket prohibition on *all* corporate speech (regardless of the content) that includes any reference to a candidate or political party within 60 days of an election.

[10] The most recent decision flatly rejecting efforts to regulate issue advocacy, *Virginia Society for Human Life*, 263 F.3d 379, summarizes the long series of judicial decisions requiring a "bright line" between regulated express

The issue advocacy provisions of S.B. 104 are unconstitutional.[11] While other provisions of the bill may be open to constitutional debate, these are not. If the bill becomes law, many if not all of the organizations endorsing this letter will file an action in the federal district court asking that the legislation be declared unconstitutional. It impermissibly infringes on their right to speak for their members.

II. PUBLIC FINANCING

S.B. 104 modifies and expands the public financing available to candidates under the Wisconsin Election Campaign Fund – through increased grant amounts and supplemental grants based on the activities of other candidates and independent expenditure organizations. Unlike the present law, the bill also guarantees the availability of public financing for eligible candidates by providing funding from state general purpose revenue. *See* S.B. 104, Section 126 (p. 71, line 11).

The generic concept of public financing of political campaigns is constitutional. Of that, there is no doubt. Yet constitutional problems will inevitably arise over any provisions of a public financing system that "burden[ ] the exercise of political speech... [and are not] narrowly tailored to serve a compelling state interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 657. Moreover, the public financing benefits available to candidates cannot be "impermissibly coercive." *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 466 (1st Cir. 2000). That is, candidates participating in any state or federal public financing program cannot receive such favorable treatment that nonparticipation in the ostensibly "voluntary" program becomes wholly unattractive. There has to be, in other words, a real choice: not participating must remain a feasible option for every candidate.

> Put another way, the state exacts a fair price [spending limits] from complying candidates in exchange for receipt of the [public financing] benefits. While we agree... [that the] statutory scheme is not in exact balance – we suspect that very few campaign financing schemes ever achieve perfect equipoise – we disagree with [the] claim that the law is unfairly coercive. Where, as here, a non-

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advocacy and the full range of *unregulated* political communication. *See also Maine Right to Life Comm.*, 98 F.3d 1; *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *West Virginians for Life, Inc.*, 919 F. Supp. 954; *Right to Life of Michigan*, 23 F. Supp. 2d 766; *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Vermont Right to Life*, 221 F.3d 376; *Washington State Republican Party v. Washington State Public Disclosure Comm.*, 4 P.3d 808 (Wash. 2000); and, *Citizens for Responsible Government State PAC v. Davidson*, Case Nos. 99-1570 (10th Cir. 2000).

[11] Not only are the provisions on issue advocacy unconstitutional, application of the new disclosure requirements would be difficult – if not impossible – when read together with current campaign finance statutes. That is, section 11.06(2), Stats., exempts from disclosure any disbursements on issue advocacy by a "group which is not primarily organized for political purposes," and S.B. 104 recognizes this exception. Yet the critical phrase "primarily organized" is not defined and would require a separate analysis of each group that engages in issue advocacy to determine, on a case-by-case basis, whether a group may qualify for this exemption.

complying candidate suffers no more than "a countervailing denial," the statute does not go too far.

Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993)(upholding Rhode Island's public funding for gubernatorial candidates).

In *Daggett*, the U.S. Court of Appeals questioned whether "the Maine Clean Election Act [was] unconstitutional because it is impermissibly coercive – that is, [does] it provide[ ] so many incentives to participate and so many detriments to foregoing participation that it leaves a candidate with no reasonable alternative but to seek qualification as a publicly funded candidate." 205 F.3d at 466. The court upheld the program.

While the court addressed the constitutionality of each aspect of the state public financing law, the court also considered "the elements of the system... as a whole," asking whether it "create[d] a situation where it is so beneficial to join up and so detrimental to eschew public funding that it creates coercion and renders a candidate's choice to pursue public funding essentially involuntary." *Id.* The conclusion: "Maine's public financing scheme provides a roughly proportionate mix of benefits and detriments to candidates seeking public funding" and, accordingly, the court held that the Act "does not burden the First Amendment rights of candidates or contributors." *Id.* at 472.

Public Financing Under S.B. 104

Any review of public financing legislation proposed in this state, including S.B. 104, must ask the same questions. The answers will determine the proposal's constitutionality. At least two provisions of S.B. 104's public financing framework raise significant constitutional questions. Are the provisions impermissibly coercive?

Nonparticipant Reporting Requirements

Non-participating candidates are subject to specific reporting requirements beyond those imposed on participating candidates. These non-participating candidates "shall file daily reports with the [Elections B]oard and with each [opposing] candidate whose name is certified to be on the ballot...by electronic mail or facsimile" beginning on the earlier of a date that a candidate meets certain minimum fundraising levels or a week after the primary election. *See* S.B. 104, Section 48 (p. 34, line 9).

While recordkeeping and reporting requirements have been upheld as reasonable regulation, s*ee Buckley*, 424 U.S. at 81-84, *daily* reporting requirements that apply *only* to nonparticipating candidates are likely to be viewed as impermissibly coercive, especially as part of any overall constitutional analysis that any court would make.

Matching Grants for Nonparticipant and Independent Expenditure Activity

A participating candidate will receive an additional public financing grant equal to the amount of any disbursements made by a non-participating candidate that exceed the statutory disbursement

limitation of a participating candidate. *See* S.B. 104, Section 117m (p. 62, line 17). A participating candidate is also eligible for additional supplements equal to the total amount of any independent expenditure disbursements – that is, express advocacy by a party or group under section 11.06(7), Stats. [12] *See* S.B. 104, Section 117m (p. 63, line 1). Moreover, a participating candidate also may receive a grant equal to the total amount of contributions that a committee "intends to receive" or "intends to be used" on independent expenditure activities. *See* S.B. 104, Section 117m (p. 62, line 3). Under the bill, there does not appear to be *any limit* on the total amount of matching grants available to a participating candidate.

In 1994, the U.S. Court of Appeals invalidated Minnesota's similar campaign finance statute, finding it unconstitutional in *Day v. Holahan*, 34 F.3d 1356 (1994). The state law had increased a participating candidate's expenditure limit based on independent expenditures made against the candidate or for the opponent and, under some circumstances, the state provided funds to match these independent expenditures. The court found that constitutionally impermissible.

> To the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure "against" her (or in favor of her opponent) is impaired.

Id. at 1360.

More recently, however, in *Daggett*, 205 F.3d at 464-65 n. 25, the U.S. Court of Appeals for the First Circuit found that the "continuing vitality of *Day* is open to question" given the Eighth Circuit's decision in a subsequent case. In that decision, *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), the court held that a provision under which a candidate's expenditures could trigger a publicly-financed opponent's release from an expenditure limitation did not burden the opponent's First Amendment rights; yet, in *Day*, the fact that a non-candidate's spending could trigger matching funds was found an unconstitutional burden on the non-candidate's First Amendment rights.

In *Rosenstiel*, the appellants had challenged a provision of Minnesota's public financing program that triggered the waiver of an expenditure limitation when a nonparticipating candidate raised or spent money in excess of a statutory threshold. In upholding the statute,[13] which did not involve independent expenditures, the Court stated:

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[12] The matching grants for participating candidates do *not* appear to be available in response to any contributions or disbursements made on issue advocacy communications. That is, the additional grants are triggered by amounts intended to be received, received, or used "to oppose the election" of a candidate and "advocating the election" of a candidate. Issue advocacy, by definition, does not expressly discuss or take a position on the election of any candidate. *See* S.B. 104, Section 117m (p. 62, line 16) (on matching grants). While this aspect of the proposal remains unclear, it does require registration and reporting for most groups that engage in issue advocacy. *See* S.B. 104, Section 47 (p. 33, line 5). That is constitutionally impermissible.

[13] The Court vaguely distinguished its earlier decision only by saying "the circumstances surrounding the enactment of the contribution refund make *Day* inapposite." 101 F.3d at 1555.

> [Minnesota] has created a public financing scheme for certain elected offices which is available to candidates who meet certain threshold qualifications. This scheme presents candidates with an additional, optional campaign funding choice, the participation in which is voluntary. Under this choice-increasing framework, candidates will presumably select the option that they feel is most advantageous to their candidacy. Given this backdrop, it appears to us that the State's scheme promotes, rather than detracts from, cherished First Amendment values.

101 F.3d at 1552.

In *Daggett*, the Court rejected the argument that responsive speech (the matching grant) impairs the speech of the initial speaker (the person or organization making an independent expenditure). "[M]erely because the Fund provides funds to match both campaign donations and independent expenditures made on behalf of the candidate does not mean that the statute equates the two." 205 F.3d at 465. Based on these cases, there is an apparent conflict between the federal courts, on the constitutionality of matching grants, that has yet to be resolved.

More important, however, is the apparent lack of any overall cap on the amount of supplemental grants a participating candidate could receive.[14] Without such a limit, S.B. 104 may well impermissibly burden a nonparticipating candidate's First Amendment rights – making it impossible, practically, for a candidate not to participate in the public financing program.

III. INDEPENDENT EXPENDITURES AND ISSUE ADVOCACY: PRE-REPORTING AND DISCLOSURE

The bill provides that any committee that engages, or intends to engage, in independent expenditure activity or issue advocacy "beginning on the 60th day preceding an election and ending on the date of that election and that includes a reference to a candidate..., a reference to an office to be filled at that election, or a reference to a political party" must file reports prior to an election disclosing "the total amount of contributions to be received, disbursements to be made, and obligations to be incurred" for the purpose of making an independent expenditure or issue advocacy communication. *See* S.B. 104, Section 47 (p. 33, line 5). These additional reports must be filed on the 63rd, 42nd, and 21st day prior to the applicable election and cover, prospectively, the 21-day period following the date on which the report is due to be filed. *See* S.B. 104, Section 54g (p. 38, line 5). There are significant practical and definitional problems in identifying and reporting contributions and expenditures "to be made," but those problems are overshadowed by the constitutional flaws in these provisions.

"[P]rior restraints on speech...are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Any prior restraint on speech, especially political speech, is highly suspect. And requiring advance notice is a form of prior restraint. There is a substantial presumption against its constitutionality, and

[14] There also is a question about the effect of an independent expenditure that addressed more than one participating candidate. Would all candidates be eligible for a supplemental grant in an amount equal to the independent expenditure? Would the supplemental grant be split between the candidates? The bill, as drafted, does not answer these questions.

the burden for justifying any such restraint is so great that it is virtually impossible to defend any prior restraint on speech. *See Carroll v. Princess Anne*, 393 U.S. 175 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

In reviewing several campaign finance provisions, including one similar to that in S.B. 104, a federal court found that the statute "violate[s] the First and Fourteenth Amendments." *See Florida Right to Life, Inc. v. Mortham*, 1999 WL 33204523 (M.D. Fla. Dec. 15, 1999), *aff'd in part, Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001), and *rev'd in part, Florida Right to Life v. Lamar*, 273 F.3d 1318 (11th Cir. 2001). Like S.B. 104, the Florida statute required an individual or organization making an independent expenditure to provide notice to every candidate in the race "within 24 hours after obligating any funds for such [independent] expenditure." *Id.*, p. 2.

> "The requirement of giving advance notice to the government of one's intent to speak inherently inhibits free speech." Over fifty years ago, the United States Supreme Court stated that advance notice and registration requirements are "quite incompatible with the requirements of the First Amendment." Moreover, "[a]dvance notice is impossible where the [speech] results from spontaneous group desire, and, even where there is sufficient time to give the requisite notice, the requirement necessarily destroys the feeling of security from official restraint[s] and deters" speakers from engaging in protected activity.
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> ...
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> Defendants still have not cited, and the Court has been unable to locate, any case upholding a disclosure requirement prior to publication. Moreover, a prior disclosure requirement is not necessary to satisfy the state's interests, as articulated by the *Buckley* Court.

Id. at 2-3 (citations omitted).

The pre-reporting requirements of S.B. 104 – for political speech "to be made" – is integral to the bill's provision for supplemental public financing grants. While the supplemental grants themselves may be constitutional, the triggering mechanism is clearly not. Prior restraint is impermissible.

By contrast, we call to your attention the additional grants provided for in the "Impartial Justice" legislation (S.B. 115) considered by your committee last year. Under that bill, candidates for the Supreme Court would receive additional grants based on the amounts *spent* on communications by independent expenditure and issue advocacy groups that, in fact, had occurred – not based on contributions or potential future disbursements "to be made" by groups. *See* S.B. 115, Section 18 (p. 21, lines 1-11).[15]

[15] S.B. 115 is also significantly different from S.B. 104 in that it did not change the definition of "political purpose" to include issue advocacy communications 60 days before an election (and, as a result, it did not prohibit corporate speech). Moreover, it limited the total amount of matching grants that would be provided to a participating candidate. *See* S.B. 115, p. 9, lines 6-14 ("independent expenditure" for purposes of match defined separately from

IV. SEVERABILITY

The proponents of S.B. 104 have offered it as comprehensive campaign finance reform legislation. The organizations endorsing this letter agree with that approach: in this area of the law, reform cannot be piecemeal. That means, however, if any provision of the legislation is found unconstitutional, the remainder of the law will be adversely affected.

Several of the provisions in S.B. 104, discussed above, are unconstitutional. Given the certainty of a challenge to these provisions, their "severability" is a critical factor in evaluating the legislation. Depending on the specific provisions of S.B. 104 found unconstitutional, the proposal states, the remainder of the law may or may not stand. *See* S.B. 104, Section 131 (p. 73, line 9). This awkward severability/nonseverability provision will trouble any court considering a challenge to the bill. Given the likelihood of confusion, a nonseverability provision should be added to the bill providing that if *any* significant part of the act is found invalid by a court, the *entire* act is void.

CONCLUSION

The engrossed version of the bill, which we received only late last week, is 74 pages long. Even its drafters probably would concede that it is not, at least not yet, a polished legislative product. For example, the proposal's effort to regulate issue advocacy – putting aside for the moment the massive constitutional flaws in it – would benefit from a more focused and direct approach to make the sponsors' intent clear and to avoid confusion with independent expenditures. The purpose of this letter is not to critique or to correct any drafting problems but to emphasize, as we have in the past in testimony before your committee, the very real collision between the basic concepts in the bill and the First Amendment rights of speech and association so important to everyone in this state.

In addition to the aspects of S.B. 104 that this letter discusses, there are a number of other provisions that, with additional review, also might not bear scrutiny – the limit on conduit contributions (Section 36 (p. 28, line 19)), for example, the prohibition of committee to committee transfers (Section 65 (p.43, line 3)), and the restrictions on nonresident contributions[16] (Section 101 (p. 55, line 18)). There also are a number of areas where incumbents are treated differently, which may well raise equal protection problems. *See, e.g.*, S.B. 104, Section 67 (p. 43, line 8) (no contributions to elected officials during budget process).

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definition of "political purpose"); p. 21, lines 6-9 (no match to exceed three times the amount of the initial public financing benefit).

[16] *See Landell v. Sorrell,* Case No. 2:99-CV-146 (D.Vt. 2000) (striking down Vermont's attempt to limit out-of-state contributions to 25 percent of a candidate's total contributions); *Van Natta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998) (striking Oregon's constitutional amendment that restricted out-of-district contributions to state candidates); *but see Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000) (upholding sliding limitations, based on the office sought, limiting contributions to candidates by nonresidents).

The organizations that have commissioned this letter are remarkably diverse – in their memberships, in their philosophy, and in their politics. They differ, on public policy grounds, on a number of provisions in the bill. They are united, however, on a fundamental constitutional principle. No less than individuals, no less than PACs or political parties, no less than candidates or public officials, they have a right to express – as freely and effectively as they can – the concerted point of view of their own members on public issues and candidates for public office. And they have the right to do that without prior restraint.

S.B. 104 infringes on those rights. Please let us know if you have any questions about the matters addressed in this letter. We look forward to discussing them with you.

Sincerely,

LAFOLLETTE GODFREY & KAHN

Brady C. Williamson
Mike B. Wittenwyler

For the:

Wisconsin Builders Association;
Wisconsin Education Association Council;
Wisconsin Manufacturers & Commerce;
Wisconsin Newspaper Association;
Wisconsin Realtors Association; and,
Wisconsin Right to Life.

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