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**DEPARTMENT OF JUSTICE**

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August 9, 2010 OAG—05—10

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, 3rd Fl.
Madison, WI 53703

Dear Mr. Kennedy:

## Questions Presented

¶1. In light of the recent United States Supreme Court decision in *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010), and on behalf of the Government Accountability Board, you have requested my opinion concerning the enforceability of Wis. Stat. ch. 11 generally, and the constitutionality of Wis. Stat. § 11.38(1)(a)1., specifically. In *Citizens United*, the United States Supreme Court invalidated a federal ban on corporate independent expenditures under the First Amendment to the United States Constitution.

## Short Answer

¶2. Having carefully reviewed the *Citizens United* decision and having compared the federal statute at issue in that case with Wis. Stat. § 11.38(1)(a)1., it is my opinion that the reasoning and conclusion of *Citizens United* are clearly applicable and that any ban on corporate independent expenditures under Wisconsin law violates the guarantees of freedom of speech and association under the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. The *Citizens United* decision, however, does not appear to have any direct and immediate impact on the validity of those portions of Wis. Stat. § 11.38 which do not involve corporate independent expenditures. In addition, I conclude that no other statutory provision bars corporate independent expenditures because corporations are not prevented by statute from registering and reporting information required by Wis. Stat. ch. 11. Finally, I conclude *Citizens United* does not directly invalidate Wisconsin's registration, reporting, and disclaimer requirements.

## The Role Of Attorney General Opinions In Addressing Constitutional Issues

¶3. In 65 Op. Att'y Gen. 145 (1976), this office was asked to determine the extent to which provisions of Wis. Stat. ch. 11 had been invalidated by *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the U.S. Supreme Court had held that certain provisions of the Federal Election

Campaign Act were unconstitutional. My predecessor concluded that, although most of Wis. Stat. ch. 11 was unaffected, some portions of that chapter—in particular, the limits on candidate expenditures—were unconstitutional under the *Buckley* decision, while other provisions required a narrow interpretation in order to avoid unconstitutionality. 65 Op. Att'y Gen. at 146.

¶4. In issuing that 1976 opinion, this office considered the alternative of awaiting (or even commencing) court litigation to specifically test the constitutionality of the various provisions in Wis. Stat. ch. 11 that had been thrown into doubt by *Buckley*. My predecessor rejected that option as unduly time-consuming, costly, and burdensome—both for persons subject to the state laws in question and for those charged with enforcing those laws. *Id.* at 146-47. I agree with my predecessor that where, as here, a decision of the U.S. Supreme Court directly impacts the validity of a state law, an opinion from this office on the scope of that impact is appropriate. *See also* 67 Op. Att'y Gen. 211 (1978) (concluding Wis. Stat. § 11.38 ban on corporate spending on referendum questions is unconstitutional in light of *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)); OAG 4-07 (concluding Wis. Stat. § 118.51(7)(a) prohibition on school transfers that would increase racial imbalance is unconstitutional in light of *Parents Inv. in Comm. Sch. v. Seattle School*, 551 U.S. 701 (2007)).

¶5. In addressing the constitutional validity of the state campaign financing law in light of *Citizens United*, I apply the standard used in my predecessor's prior opinion, which focused on whether "the reasoning and the conclusions reached" in the Supreme Court decision "are clearly applicable" to state law. 67 Op. Att'y Gen. at 214. This standard is demanding and narrow. In addition to its holding, *Citizens United* provides direction on, but ultimately leaves unanswered, significant questions regarding the appropriate scope of acceptable governmental regulation, through campaign financing regulations, of the exercise of fundamental First Amendment freedoms. It is beyond the scope of this opinion to answer each of these unanswered questions as applied to Wisconsin law. That *Citizens United* may not directly apply to portions of Wisconsin's campaign financing law is not to say that they are free of constitutional doubt. Regulations in this area, by their nature, affect First Amendment interests. *See Buckley*, 424 U.S. at 23 ("[C]ontribution and expenditure limitations both implicate fundamental First Amendment interests"). In a free society, these interests should not be disregarded in the lawmaking and regulatory process.

## The Impact of *Citizens United* on Wis. Stat. § 11.38

¶6. The *Citizens United* case involved a non-profit corporation that had produced and sought to distribute a 90-minute film about then-Senator Hillary Clinton at a time when she was a candidate in the Democratic Party's 2008 Presidential primary elections. *Citizens United*, 130 S. Ct. at 887. A question arose as to whether the corporation's plan to distribute the film through a video-on-demand system was prohibited by 2 U.S.C. § 441b which, among other things, made it unlawful for any corporation to make expenditures: (1) for communications expressly advocating the election or defeat of a candidate for federal office; or (2) for "electioneering communications," defined as "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a

primary or 60 days of a general election." *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(3)(A)). The corporation sought declaratory and injunctive relief against the Federal Election Commission on that question. *Id.* at 888.

¶7. If the film was not "express advocacy or its functional equivalent," decisions prior to *Citizens United* held that 2 U.S.C. § 441b's prohibitions on corporate speech could not be constitutionally applied. *Federal Elections Com'n v. Wisconsin Right to Life*, 551 U.S. 449, 481 (2007) (Opinion of Roberts, C.J.).[1] The *Citizens United* Court determined that the film was the functional equivalent of express advocacy and that the case, therefore, could not be resolved without examining the constitutionality of the prohibitions on corporate expenditures contained in 2 U.S.C. § 441b. *Citizens United*, 130 S. Ct. at 890-92.

¶8. The United States Supreme Court determined that the federal prohibition on corporate independent expenditures was a ban on core political speech protected by the First Amendment and, as such, subject to strict constitutional scrutiny. *Id.* at 898. The Court then considered and rejected each of the various governmental interests that had been offered in support of the ban, concluding that no sufficient interest justified the prohibition of political speech on the basis of the speaker's corporate identity. *Id.* at 913. Accordingly the Court held that the restrictions on corporate independent expenditures in 2 U.S.C. § 441b were invalid and could not be applied to the film in question. *Citizens United*, 130 S. Ct. at 913.

¶9. You have asked what impact the *Citizens United* holding has on the validity of Wis. Stat. § 11.38(1)(a)1. which provides:

> No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

¶10. That provision, on its face, sets forth a general prohibition against any independent "disbursement" by a foreign corporation, a domestic corporation (normally organized as a business corporation under Wis. Stat. ch. 180 or as a nonstock corporation under Wis. Stat. ch. 181), or an association organized as a cooperative under Wis. Stat. ch. 185 or 193. The term "disbursement" in turn, has been given a broad statutory definition that includes:

> A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the

[1]In *Wisconsin Right to Life*, it was undisputed that a corporation's advertisements, which clearly identified a candidate and were targeted to the relevant electorate during the pertinent time period, were within the scope of a federal statutory ban on certain electioneering communications. *Wisconsin Right to Life*, 551 U.S. at 464. The controlling opinion of the Court held that the First Amendment did not allow the ads to be banned because the ads were not "express advocacy" or its functional equivalent and the government had not identified any interest sufficiently compelling to justify burdening that speech. *Wisconsin Right to Life*, 551 U.S. at 481.

> ordinary course of business, made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value.

Wis. Stat. § 11.01(7)(a)1. In addition, the phrase "for political purposes," is statutorily defined, in part, as follows:

> An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum.

Wis. Stat. § 11.01(16).

¶11. Under the above definitions, it is clear that Wis. Stat. § 11.38(1)(a)1., prohibits, among other things, any monetary expenditure by a corporation that is made for the purpose of influencing the election or nomination of a candidate for state or local office.

¶12. Wisconsin's prohibition on corporate expenditures for political purposes thus appears to be closely analogous, in legally material respects, to the federal prohibition on corporate independent expenditures that was invalidated in *Citizens United*. First, the two provisions are substantively similar in the types of speech to which they apply. The Wisconsin law prohibits corporate expenditures for the purpose of influencing the election or nomination of a political candidate, while the federal law prohibited corporate expenditures for communications expressly advocating the election or defeat of a political candidate or for certain communications that refer to a clearly identified candidate and are made within specified time periods.[2] Any differences in the substantive scope of the two prohibitions are not of a sort that would shield the Wisconsin law from the impact of *Citizens United*.

¶13. Second, the Wisconsin and federal provisions both share the particular feature that was found to be constitutionally objectionable in *Citizens United*. The *Citizens United* Court expressly and strongly reaffirmed its holding in many earlier cases that corporate speech is protected by the First Amendment. *Citizens United*, 130 S. Ct. at 899-900. The Court derived that holding from the general principle that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." *Id.* at 898. The Court was clear that government may not take the right to speak away from some speakers and give it to others, thereby depriving the public of the opportunity to determine for itself which speakers and which speech are worthy of consideration. *Id.* at 899. This principle, the Court reasoned, applies not only to individual speakers, but also to associations of individuals, including corporations. *Id.* at 899-900.

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[2]This office has also in the past found the prohibition on corporate disbursements under Wis. Stat. § 11.38 to be similar to the prohibition on corporate expenditures under 18 U.S.C. § 610 (which was the predecessor version of 2 U.S.C. § 441b). *See* 65 Op. Att'y Gen. 10, 12 n.5 and 13 (1976); 65 Op. Att'y Gen. at 158.

¶14. From these principles, the Court reached the broad conclusion that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 913. What the Supreme Court found to be constitutionally objectionable in 2 U.S.C. § 441b was the fact that it purported to prohibit political speech by certain speakers based on their corporate identity. Applying the Court's reasoning here, it is clear that Wis. Stat. § 11.38(1)(a)1., similarly prohibits political speech based on the corporate identity of the speaker. The Wisconsin prohibition is thus squarely within the scope of the holding in *Citizens United*.

¶15. This conclusion is consistent with the previous opinion of this office in 67 Op. Att'y Gen. 211. At that time, Wis. Stat. § 11.38(1)(a)1., included a prohibition on corporate spending in referendum elections. My predecessor found that prohibition to be unconstitutional under *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in which the U.S. Supreme Court had held that a Massachusetts law limiting corporate expenditures aimed at influencing referendum votes violated the First and Fourteenth Amendments to the United States Constitution. In reaching that conclusion, my predecessor found that Wis. Stat. § 11.38 was similar to the Massachusetts law at issue in *Bellotti* which, among other things, broadly prohibited corporations from making expenditures for the purpose of promoting or preventing the election of a candidate or influencing the vote on a question submitted to the electorate. 67 Op. Att'y Gen. at 212-13. Accordingly, my predecessor concluded that the reasoning and conclusions in *Bellotti* with regard to the Massachusetts prohibition were "clearly applicable" to the comparable prohibition in Wis. Stat. § 11.38(1)(a)1.

¶16. In *Citizens United*, the United States Supreme Court extended the reasoning and conclusions of *Bellotti* to broadly invalidate prohibitions on any independent political expenditures by corporations. *See, e.g., Citizens United*, 130 S. Ct. at 898-900, 902-03, 913. It follows, under the same logic that this office applied in 67 Op. Att'y Gen. 211, that the reasoning and conclusions in *Citizens United* are likewise clearly applicable to the general prohibition on corporate independent expenditures in Wis. Stat. § 11.38(1)(a)1.

¶17. It does not follow, however, that *Citizens United* has invalidated Wis. Stat. § 11.38(1)(a)1., in its entirety. On the contrary, the federal law at issue in *Citizens United*, like the state law at issue here, included a ban on corporate political *contributions*, in addition to the ban on corporate political *expenditures*. *See* 2 U.S.C. § 441b(a). The Supreme Court, however, did not strike down, or even question, the ban to the extent it applied to direct contributions. Rather, the Court emphasized that the *Citizens United* case was about expenditures, not about contributions, and made it clear that it was not disturbing the principle, recognized in *Buckley*, that political expenditures receive greater protection under the First Amendment than do political contributions. *See Citizens United*, 130 S. Ct. at 908-10. Ultimately, the Court invalidated the prohibition on corporate independent expenditures without affecting other aspects of 2 U.S.C. § 441b. *Citizens United* thus provides no direct or immediate basis for questioning the validity of any part of Wis. Stat. § 11.38(1)(a)1., other than the corporate expenditure prohibition.

¶18. Principles of severability support the same conclusion. Under Wisconsin law, statutory provisions are presumed to be severable and, if a particular provision is found to be

invalid, "such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application." Wis. Stat. § 990.001(11). In applying that mandate, the Wisconsin Supreme Court has held that an invalid provision must be severed unless doing so '"would produce a result inconsistent with the manifest intent of the legislature.'" *Burlington Northern v. Superior*, 131 Wis. 2d 564, 580, 388 N.W.2d 916 (1986) (quoting Wis. Stat. § 990.001). This office has, in the past, taken the position that the legislative purpose of the contribution restrictions in Wis. Stat. ch. 11 "is largely capable of being achieved by the contribution limits alone, without concurrent expenditure limits." 65 Op. Att'y Gen. 237, 241, (1976). I find no reason to depart from that view. Accordingly, it is my opinion that it would be consistent with legislative intent to invalidate Wis. Stat. § 11.38(1)(a)1. only to the extent it prohibits corporate political expenditures, without affecting the contribution restrictions also contained in that provision. Any prohibition on corporate independent expenditures is thus severable from the remainder of Wis. Stat. § 11.38(1)(a)1.

¶19. Your letter of inquiry suggests that the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1., can be severed from the remainder of that provision by the simple expedient of interpreting and applying the provision as if the terms "or disbursement" and "independently" had been stricken from it. I respectfully disagree with that suggestion. The practical impact of Wis. Stat. § 11.38(1)(a)1., is determined not only by the specific words of that provision, but also by the way in which those words interact with other, related statutory provisions.

¶20. For example, the definition of "contribution" in Wis. Stat. § 11.01(6) includes a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of influencing the election or nomination of a political candidate, without reference to the identity of the recipient of the gift, subscription, loan, advance, or deposit of money or thing of value. Under the federal provisions at issue in *Citizens United*, however, an "expenditure" includes a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made for the purpose of influencing an election. *See* 2 U.S.C. §§ 431(9)(A)(i) and 441b(2). Under these overlapping state and federal definitions, it is possible that a corporation could make a gift, loan, advance or deposit of money or some other thing of value that might be considered both a "contribution," within the meaning of Wis. Stat. § 11.01(6), and an "expenditure," within the meaning of 2 U.S.C. §§ 431(9)(A)(i) and 441b(2).

¶21. The significance of this overlap between Wisconsin's definition of "contribution" and federal law's definition of "expenditure" is more than statutory. It is of constitutional significance. As most recently reiterated in the *Citizens United* decision, *Buckley* and its progeny make clear that expenditures are entitled to the highest degree of constitutional protection. *Citizens United*, 130 S. Ct. at 908-10. This is because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. In contrast, *Buckley* held that contributions deserve a somewhat lower degree of constitutional protection because "a limitation upon the amount that any one person or group may contribute *to a candidate or political committee* entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20 (emphasis added). In other words, the

constitutional difference between a transfer of value that is an expenditure and a transfer of value that is a contribution is determined by the identity of the recipient of that transfer.

¶22. Because Wis. Stat. § 11.01(6) defines "contribution" without reference to the identity of the recipient, that definition does not reflect the constitutional distinction between a contribution and an expenditure. Put differently, some "contributions" as defined in Wisconsin law could also be "expenditures" within the meaning of *Buckley* and *Citizens United* and, as such, are entitled to a higher degree of constitutional protection than *Buckley* and progeny afford to "contributions" made to a candidate or a political committee.[3]

¶23. Therefore, even if the terms "or disbursement" and "independently" were stricken from Wis. Stat. § 11.38(1)(a)1., as you suggest, the remaining prohibition on corporate "contributions"—as that term is defined in Wis. Stat. § 11.01(6)—still could apply to some corporate actions that would be constitutionally protected "expenditures" under *Citizens United*. The impact of *Citizens United* on Wis. Stat. § 11.38(1)(a)1., thus cannot be fully captured simply by striking certain words or phrases from that provision.[4]

¶24. The constitutionality of a restriction on an "expenditure" or a "contribution" thus depends on the nature of the conduct restricted, not on the particular statutory language used to describe that conduct. Accordingly, the United States Supreme Court, in *Citizens United*, invalidated the restrictions on corporate independent expenditures contained in 2 U.S.C. § 441b without specifying any particular words or phrases to be excised from that statute. *See Citizens United*, 130 S. Ct. at 913. Here, similarly, I conclude that, under the reasoning of *Citizens United*, the prohibition on corporate independent expenditures contained in Wis. Stat.

[3]Precision in the use of terminology is important with respect to the term "political committee" as well. In *Buckley*, political committees were discussed with reference to the permissibility of limits on their direct contributions to candidates. 424 U.S. at 35. As underscored in *Citizens United*, such direct contributions to a candidate by a political committee are subject to a lesser degree of constitutional scrutiny than would be applied to other political expenditures by the committee. 130 S. Ct. at 909 (distinguishing contribution cases from expenditure cases, stating that *Federal Election Com'n v. Nat. Right to Work Comm.*, 459 U. S. 197 (1982) "decided no more than that a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. *NRWC* thus involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.")(internal citations omitted).

[4]Unlike the statutory definition of "contribution" in Wis. Stat. § 11.01(6), Wis. Admin. Code § GAB 1.28(1)(c) (2010) defines "contributions for political purposes" in terms of the identity of the recipient. This regulatory definition, however, does not avoid the potential constitutional difficulty discussed above because "contributions for political purposes" are not limited to direct contributions to candidates and their committees. For example, a contribution to an individual who does not contribute to candidates but who engages in independent political speech would qualify under the rule's definition of "contributions for political purposes." *See* Wis. Admin. Code § GAB 1.28(1)(c). Such a contribution could be an "expenditure" within the meaning of *Buckley* and *Citizens United*, while also falling within the definition of "contributions for political purposes" in Wis. Admin. Code § GAB 1.28(1)(c).

§ 11.38(1)(a)1., is invalid, without need to interpret that provision as if any particular words or phrases had been stricken from it.

¶25. Finally, I note that Wis. Stat. § 11.38(1)(b) provides that "[n]o political party, committee, group, candidate or individual may accept any contribution or disbursement made to or on behalf of such individual or entity which is prohibited by this section." For the reasons discussed above, the prohibition contained in Wis. Stat. § 11.38(1)(a) on corporate political expenditures—as that concept is discussed in *Citizens United* and in the present opinion—is constitutionally invalid. The prohibition contained in Wis. Stat. § 11.38(1)(b) on the acceptance of such corporate independent expenditures is thus similarly invalid. As previously noted, however, *Citizens United* did not address the constitutionality of statutory prohibitions on corporate contributions, as distinguished from corporate expenditures. Accordingly, nothing in *Citizens United* precludes Wis. Stat. § 11.38(1)(a) and (b) from continuing to be enforced with respect to both making and accepting of corporate political "contributions"—not as the term is defined in Wis. Stat. § 11.01(6), but as it is understood in the sense that the Supreme Court used when it approved contribution limits in *Buckley*. *See* 424 U.S. at 20-22; *see also Citizens United*, 130 S.Ct. at 908-10 (distinguishing precedent upholding limits on contributions from precedents finding limits on expenditures unconstitutional).[5]

**The Impact of *Citizens United* on Wis. Stat. § 11.12(1)(a)**

¶26. While your inquiry is principally directed at the constitutionality of Wis. Stat. § 11.38, your letter also seeks guidance on the implications of *Citizens United* on the constitutional enforcement of Wis. Stat. ch. 11.

¶27. The fatal feature of the federal campaign finance law challenged in *Citizens United* is that it prohibited corporations and unions from making independent expenditures from their general treasuries. Notably, however, it is not the only statutory subsection that potentially prohibits expenditures protected by the First Amendment.

¶28. Wisconsin Stat. § 11.12(1)(a) provides:

> No contribution may be made or received and no disbursement may be made or obligation incurred by a person or committee, except within the amount authorized under s. 11.05 (1) and (2), in support of or in opposition to any specific candidate or candidates in an election, other than through the campaign treasurer of the candidate or the candidate's opponent, or by or through an individual or committee registered under s. 11.05 and filing a statement under s. 11.06 (7).

[5]In 65 Op. Atty. Gen. 10 (1976) and 65 Op. Att'y Gen. 145, my predecessor issued opinions construing the scope of permissible prohibitions on corporate contributions and disbursements under Wis. Stat. § 11.38. These opinions were modified by 67 Op. Att'y Gen. at 214. *Citizens United* supersedes any contrary statements in earlier opinions of this office, and those opinions are further modified to the extent they are inconsistent with this opinion.

¶29. Among other things, this subsection bans a corporation from engaging in independent expenditures unless those expenditures are by or through a registered committee who has filed the appropriate statement. *Citizens United* makes clear these expenditures may come from a corporation's general treasury. 130 S. Ct. at 913. Thus, Wisconsin statutes must provide a mechanism by which a corporation may register under Wis. Stat. § 11.05 and file a statement under Wis. Stat. § 11.06(7) or the registration and filing requirements would be, for all practical purposes, a ban. In that case, Wis. Stat. § 11.12(1)(a) could not be constitutionally applied because application would ban First Amendment activities. However, such a mechanism for corporate registration and filing exists.

¶30. "Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political 'group . . . .'" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies politic or corporate." Wis. Stat. § 990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

¶31. Because Wis. Stat. § 11.12(1)(a) applies to corporations, Wisconsin law must also permit corporations to register and file under Wis. Stat. §§ 11.05 and 11.06(7), so that they may exercise their constitutional right to engage in political speech. The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which . . . makes disbursements in a calendar year in an aggregate amount in excess of $25 . . . ." Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which . . . desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election . . . ." Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7).[6] Thus, there is a statutory mechanism for corporate registration and reporting. Put another way, Wisconsin statutes are not constructed in a fashion that prevents a corporation from registering.

¶32. In addition to this plain reading of the statutes, the Government Accountability Board has issued an emergency rule to "ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC*." Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010) (available at *http://www.legis.state.wi.us/erules/gab001_EmR1016.pdf*) (last visited, July 30, 2010). The Rule

[6]Any corporation may also be a "group" as defined by Wis. Stat. § 11.01(10), and required to register by Wis. Stat. § 11.23. *See also* Wis. Stat. § 11.05(1)(a).

interprets Wis. Stat. §§ 11.05, 11.06 and other relevant sections to facilitate a corporation's registration and filing requirements under Wis. Stat. §§ 11.05 and 11.06. *See* Wis. Admin. Code §§ GAB 1.91(3) - (8).

¶33. Thus, both the statutes and the administrative code provide a mechanism for corporate reporting. Therefore, Wis. Stat. § 11.12(1)(a) is not a ban on a corporation's constitutionally protected political advocacy unless the underlying reporting and disclosure rules are themselves unconstitutional. *Cf. Citizens United*, 130 S. Ct. at 897-98 (prohibition on corporate "electioneering communications" not alleviated by ability of corporation to create federal political action committee, given that the political action committee is a separate entity and is subject to onerous registration and reporting requirements that have the effect of chilling speech).

**Direct Impact of *Citizens United* on Reporting, Disclaimer, And Disclosure Provisions**

¶34. In *Citizens United*, the Court specifically upheld the application of federal disclosure and disclaimer requirements to the "Hillary" movie and three advertisements for the movie. 130 S. Ct. at 913-16. Those disclosure provisions mandate that a person file a statement with the Federal Elections Commission within 24 hours of making a disbursement "for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year . . . ." 2 U.S.C. § 434(f)(1). Disbursements in excess of $200 are required to be itemized, and individual contributors to the communication must be listed with a name and address only if the individual contributed over $1,000 during the year. 2 U.S.C. § 434(f)(2). Moreover, the communication must be "publicly distributed," 11 C.F.R. §100.29(a)(2), defined as "broadcast, cable, or satellite communication" that can be received by 50,000 people in the relevant district or state. *See* 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(3). *Compare with Citizens United*, 130 S. Ct. at 897-98 (discussing federal PAC requirements); *Federal Election Com'n v. Mass. Citizens for Life,* 479 U.S. 238, 253-56 (1986) (discussing same, holding requirements may not be applied to certain incorporated groups); Wis. Stat. §§ 11.05, 11.06, 11.12, 11.14, 11.19, 11.20, 11.513 (setting forth Wisconsin's disclosure requirements).

¶35. In upholding those disclosure requirements as constitutional, the Court rejected the argument that disclosure and disclaimer "must be confined to speech that is the functional equivalent of express advocacy." *Citizens United*, 130 S. Ct. at 915. This holding in *Citizens United* supersedes any contrary statements in earlier opinions of this office, including the discussion in 65 Op. Att'y Gen. 145 of the scope of activities that may be constitutionally regulated under Wis. Stat. ch. 11.

¶36. After *Citizens United*, therefore, the distinction between express advocacy and issue advocacy, standing alone, is not constitutionally determinative. Accordingly, to the extent that Wis. Admin. Code § GAB 1.28 or Wis. Admin. Code § GAB 1.91 impose registration, reporting, or disclaimer requirements on independent expenditures that are not express advocacy

or its functional equivalent, *Citizens United* does not clearly indicate the rules are unconstitutional. To the contrary, *Citizens United* recognizes that the Constitution does not categorically limit disclosure and disclaimer regulations to only express advocacy or its functional equivalent. Any *potential* conflict created by the rules are with the statutes,[7] not the Constitution. While this is no less of a serious concern for those who may be subject to the new rules, examining the statutory validity of these rules is beyond the scope of this opinion.

¶37. It does not follow, however, that every disclosure or disclaimer regulation (whether applied to express advocacy or issue advocacy) is constitutional. The *Citizens United* Court acknowledged that "as-applied challenges [to disclosure regulations] would be available if a group could show a reasonable probability that disclos[ure] [of] its contributors' names [will] subject them to threats, harassment, or reprisals from either Government officials or private parties." 130 S. Ct. at 914 (internal quotations omitted).

¶38. More generally, the *Citizens United* Court acknowledged that disclaimer and disclosure requirements "may burden the ability to speak," and thus such requirements are subjected "to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). Finally, because intentionally violating the campaign financing law is subject to criminal penalties, *see* Wis. Stat. §§ 11.61(1)(a)-(c), consideration must be given to whether a statutory provision is unconstitutionally vague. *Buckley*, 424 U.S. at 40-41; *cf. Citizens United*, 130 S. Ct. at 895-96 (noting that complex speech regulations backed by criminal penalties force speakers to seek governmental permission before speaking, and analogizing the process to prior restraints).

¶39. Nonetheless, because *Citizens United* did not address the constitutionality of disclosure and disclaimer provisions similar to Wisconsin's provisions, the "reasoning and conclusions" of the decision are not "clearly applicable" to those provisions. 67 Op. Att'y Gen. at 214. Any further discussion of the constitutionality of the Wisconsin disclosure and disclaimer requirements is thus beyond the scope of this opinion.

[7]The term "expressly advocate" is used in the definition of "political purposes," Wis. Stat. § 11.01(16)(a)1. "Expressly advocate" is also used or incorporated independently of the definition of "political purposes" in statutes limiting who must register, what disbursements must be reported, and what communications are subject to disclaimer rules. *See, e.g.*, Wis. Stat. §§ 11.05(11), 11.06(2), 11.30(2).

¶40. Finally, it should be mentioned, particularly in light of mixed messages that accompanied post-*Citizens United* rulemaking,[8] that *Citizens United* does not change Wisconsin law. While a United States Supreme Court opinion may provide guidance as to the constitutionally permissible scope of regulation, a United States Supreme Court opinion does not authorize regulatory activity. Only the Wisconsin Legislature, through its lawmaking powers, can change Wisconsin law or expand the scope of an agency's regulatory authority.

**Conclusion**

¶41. In 65 Op. Att'y Gen. 145, this office determined that the State Elections Board (the predecessor agency of the Government Accountability Board) had the authority to decline to enforce those portions of Wis. Stat. ch. 11 that were unconstitutional and to interpret and apply other parts of Wis. Stat. ch. 11 so as to avoid unconstitutionality. *Id.* at 156-58. In addition, this office urged that Wis. Stat. ch. 11 be amended to make it consistent with the *Buckley* decision. *Id.* at 147.

¶42. In the present situation, it is my understanding that the Government Accountability Board has already suspended its enforcement of the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1. I agree with that enforcement decision and would advise all district attorneys, in exercising their concurrent enforcement powers under Wis. Stat. ch. 11, to likewise interpret and apply Wis. Stat. § 11.38(1)(a)1. and (b) in a manner consistent with the views set forth in this opinion. I would also encourage the Wisconsin Legislature to amend Wis. Stat. § 11.38 to make it consistent with the *Citizens United* decision.

¶43. No other aspect of Wisconsin law is directly affected by the clear application of *Citizens United*.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:RPT:KMS:TCB:rk

[8]*Compare* Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010), ¶3 of Analysis ("*Citizens United* … strengthened the ability of the government to require disclosure and disclaimer of independent expenditures.") *with id.* ¶ 5 of Analysis ("[T]his proposed rule requires organizations to disclose only those donations 'made for' political purposes."). Nothing in the text of Wis. Admin. Code § GAB 1.91 directly contradicts the conclusions stated above.