wisconsin DEMOCRACY campaign
203 South Paterson Street, Suite 100 / Madison, WI 53703-3689 / 608 255-4260 / www.wisdc.org

Testimony of Matthew Rothschild, Executive Director, Wisconsin Democracy Campaign, before the Joint Informational Hearing of the Assembly Committee on Campaigns and Elections and the Senate Committee on Elections and Local Government

March 24, 2015

Thank you, Senator LeMahieu and Representative Bernier, for inviting me to testify today. And thank you to all the distinguished Senators and Assembly members here.

I'm Matt Rothschild, the executive director of the Wisconsin Democracy Campaign, now celebrating our 20th year as an advocate for clean, fair, open, and transparent government.

I'd like to begin by reaffirming two basic principles, which are spelled out clearly in the "Declaration of Policy" of Chapter 11 on campaign finance. And it's constructive to have this legislative intent right up front in black and white. We sure hope you preserve it.

The first principle that we believe strongly in is that, and I'm quoting from the statute, "excessive spending on campaigns for public office jeopardizes the integrity of elections." We now have "excessive spending."

Candidates and outside electioneering groups spent a record $81.8 million in the 2014 gubernatorial election. This was more than double what was spent in the 2010 governor's race. And legislative candidates and outside groups spent almost $17 million in the 2014 elections.

When this volume of money is being thrown around, the average citizen understandably wonders whether elective offices are being sold to the highest bidder.

The second basic principle is that full disclosure is vital to our democracy. As the statute reads, disclosure (and now I'm quoting again) "aids the public in fully

understanding the public positions taken by a candidate or political organization." Here's the kicker, and I'm quoting again: "When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence."

We have both of those problems today. There is a sea of dark money that is inundating our campaigns, which raises the specter of corruption.

And we have candidates and elected officials in Wisconsin "overly dependent on large private contributors," which is subjecting our democratic process to a potential corrupting influence.

Let me cite a few examples.

1. When Rep. Joel Kleefisch introduced a bill last session that would have helped reduce the child support that one of his largest campaign contributors had to pay, a reasonable person could conclude that there was, indeed, a corrupting influence.

2. When Gogebic Taconite gave $700,000 to Wisconsin Club for Growth in 2011, which then spent lots of money on the recalls to keep Republicans in power, who then rewrote the mining bill largely along the specs provided by the company, a reasonable person could conclude that there was, indeed, a corrupting influence.

3. When Justice Prosser was running for reelection, Wisconsin Manufacturers & Commerce spent about $1,100,000 in election-related activities that supported him. Wisconsin Club for Growth spent $500,000. And Citizens for a Strong America spent about $1 million. Justice Prosser won by a mere 7,000 votes. His victory was largely dependent on these expenditures. And now he is about to hear the John Doe case in which these three groups are a party. A reasonable person could conclude that there has been a corrupting influence and he can't be impartial.

4. In the 2013-2015 budget, a provision was inserted that required the DNR to provide a $500,000 grant to a nonprofit that was tailor-made for one group only, the United Sportsmen of Wisconsin Foundation. That group had teamed up with Americans for Prosperity to sponsor a mailing to support Republican candidates in the recall elections, and it had sponsored a rally for Republican candidates in 2012. Only when embarrassing facts surfaced about United Sportsmen was the grant rescinded. A reasonable person could conclude that there was a corrupting influence at play.

5. In Gov. Doyle's 2002 reelection race, the DNC raised $725,000 from the Ho-Chunk, Potowatomi and Oneida tribes in late October. The DNC then transferred more than $1 million to the Democratic Party of Wisconsin, which spent lots of money on issue ads for Doyle. Three months later, Doyle negotiated sweetheart deals with these tribes for the expansion of casinos. Again, a reasonable person might conclude that there was a corrupting influence.

Given the extent of corruption already jeopardizing the integrity of our elections, now is no time to allow more potentially corrupting money to flow into the system.

In upholding the two basic principles outlined in the statute – limiting the size of contributions and providing full disclosure – we have nine policy recommendations for you.

First, we strongly favor full disclosure of all expenditures in excess of $5,000 by PACs, political parties, 527s, corporations, unions, associations, nonprofits, so-called independent groups, and other groups within 60 days of an election for election-related communications that clearly identify a candidate by name and whose purpose, to any reasonable observer, is to help elect or defeat that candidate. That disclosure must come within 48 hours of the expenditure.

Even in the infamous Supreme Court case of *Citizens United* in 2010, the justices, by a vote of 8-1, favored full disclosure. Justice Kennedy wrote about the need to pair "corporate independent expenditures with effective disclosure." He noted that disclosure is necessary so "citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests ... and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions."

And this next point is important: In the *Citizens United* case, the Supreme Court went out of its way *not* to limit disclosure to express advocacy or its functional equivalent, as the plaintiffs had urged it to do. "We reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy," the Court ruled.

In a case that same term, Justice Antonin Scalia was even more outspoken in favor of disclosure.

"Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed," Justice Scalia wrote in *John Doe v. Sam*

Reed, 2010, a case where anti-gay rights advocates in Washington State were attempting to prevent disclosure of the names of the people who signed their petitions to get a referendum on the ballot on the grounds that compelling them to do so violated their First Amendment rights. Scalia said the disclosure did not violate their First Amendment rights. He added: "For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."

Our second policy recommendation is to put a low ceiling on individual donations to candidates.

The $10,000 limit on individual contributions to statewide candidates is already way too high. The median income in Wisconsin is about $27,500. No regular person can contemplate giving $10,000, and a gift of this magnitude itself raises the potential of a corrupting influence.

We believe that no one should be able to give more than 10 percent of the median annual individual income in Wisconsin to any candidate for statewide races, and not more than 5 percent of the median annual individual income to any state senate race, and not more than 2.5 percent of the median annual individual income to any state assembly race.

Third, these limits also must apply during any recall election. There is no valid reason to maintain the loophole that allows candidates in a recall election to receive unlimited amounts from individual donors, which raises the specter of corruption that the statute rightly warns us about.

Fourth, put a low ceiling on contributions to political parties and PACs. This should be no more than the limit that people can give to any statewide candidate. There used to be, in effect, a $10,000 limit since that was the total that any individual could give to any candidate, party, PAC, or group combined. But when Judge Randa tore down the $10,000 ceiling on aggregate individual contributions, in line with the Supreme Court's *McCutcheon* ruling, that left Wisconsin with no limit whatsoever on donations to parties or PACs. As a result, we had one person

making a $1 million donation to the Republican Party of Wisconsin last fall, and another one making a $1 million donation to the Democratic Party of Wisconsin. Amounts of that magnitude carry a "potential corrupting influence." For instance, the person who gave $1 million to the Republican Party, Diane Hendricks, desperately wanted "right to work" legislation, and she got her wish.

Fifth, we believe strongly that the Legislature should maintain the language in the statute—11.06(7)—requiring an oath for independent expenditures. This is the prohibition against coordination, and it's crucial to uphold it. The public has a vital right to know whether groups are working independently of the candidate, or colluding with the candidate. And without this ban on coordination, the limits on contributions to candidates could be effectively wiped out, as the groups could gather huge contributions, far in excess of what the candidate could raise, and then essentially funnel that money to the candidate.

Please note: The Seventh Circuit in its "Barland II" decision ruled against Wisconsin Right to Life precisely on this point. It upheld the oath about noncoordination, calling it "a minimally burdensome regulatory requirement, and it's reasonably tailored to the public's informational interest in knowing the sources of independent election-related spending."

Our sixth proposal is that the legislature amplify the voice of small donors with public matching funds, as happens in New York City. Anyone who gives up to $175 to a candidate will have his or her contribution matched at 5 times that amount by the public treasury. To be eligible for matching funds, candidates must collect twice the number of signatures of qualified electors on nomination papers required under state law for each office.

Seven, given that one of the major expenses, at least in statewide races, is TV time, and given that the airwaves belong to the people, we propose that candidates be given free air time in the last 30 days of an election to make their case to the public. To be eligible for matching funds, candidates must collect twice the number of signatures of qualified electors on nomination papers required under state law for each office. Each candidate who clears this hurdle must be given a half hour of free air time in the last 30 days during prime time, or 10 thirty-second commercials of free air time in the last 30 days during prime time.

Eight, we believe in shareholder rights, and so we propose that the Legislature pass a law that says any publicly held company must receive the votes of a majority of its shareholders before it can make any political contribution or expenditure that any reasonable individual would recognize as being designed to influence the outcome of an election.

Lastly, but crucially, we endorse Representative Subeck's and Senator Hansen's resolution on overturning *Citizens United.* Their resolution would bring a referendum to the people of Wisconsin in November 2016, asking:

"Shall Wisconsin's congressional delegation support, and the Wisconsin legislature ratify, an amendment to the U.S. Constitution stating:

1. Only human beings—not corporations, unions, nonprofit organizations, or similar associations—are endowed with constitutional rights, and

2. Money is not speech, and therefore limiting political contributions and spending is not equivalent to restricting political speech."

Already, 54 villages, towns, cities, and counties all across Wisconsin have passed, by overwhelming margins, resolutions or referendums in favor of such an amendment to our U.S. Constitution. And former Supreme Court Justice John Paul Stevens has endorsed such an amendment.

Because of *Citizens United* and other unfortunate rulings by the Supreme Court, we've arrived at an absurd and treacherous place for our system of democracy.

Only super-wealthy individuals, or well-heeled corporations, unions, associations, PACS, or so-called independent groups have the wherewithal to contribute or spend sufficient amounts of money to make any difference in the outcome of campaigns. **Increasingly, the vast majority of citizens are relegated to the role of spectators in this crucial arena of our democracy.** As Justice Ruth Bader Ginsburg recently observed, "Our system is being polluted by money."

We believe that elections should not be the private playground of the ultra-rich. According to U.S. Senator Bernie Sanders, "The top 0.01 percent of income

earners are responsible for more than 40 percent of campaign contributions." That makes a mockery of our democracy.

Today, we are heading full speed toward plutocracy.

I urge you not to further undermine our democracy by allowing more money to pollute our system even worse than it is now. **Do not hustle us further down the dangerous road to plutocracy.**

Wisconsin's legendary political figure Fighting Bob La Follette once said, "The cure for the ills of democracy is more democracy."

We need more democracy in Wisconsin.

We need more transparency in Wisconsin.

We need more clean government in Wisconsin, and it is in that spirit that I submit this testimony.

Thank you.

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Addendum: We at the Wisconsin Democracy Campaign are also concerned about a budgetary and technology matter concerning the Government Accountability Board. In the budget, all IT services would be taken over by DOA. The GAB has strongly objected to this, as do we. We are concerned that if the DOA takes over the technical fixes on the CFIS, that it might create problems. Also, we are concerned that the DOA might not prioritize answering questions from the public about the database as promptly as GAB does. Plus, it would be a waste of taxpayer money to bring in a new IT team when a perfectly good one is already in place.

Common Cause in Wisconsin

152 W. Johnson Street * P.O. Box 2597 * Madison, WI 53701-2597 * (608) 256-2686
Jay Heck, Executive Director * www.commoncausewisconsin.org

Testimony of Jay Heck

Executive Director of Common Cause in Wisconsin

March 24, 2015

Assembly Committee on Campaigns and Elections
&
State Senate Committee on Elections and Local Government

Chair Bernier, Chair LeMahieu, and Members of both Committees.

Thank you for your invitation to appear before you today. I'm Jay Heck, the Director of Common Cause in Wisconsin, a non-partisan state reform advocacy organization with more than 3,000 members and activists from all over Wisconsin.

As you move to rewrite the campaign finance laws of Wisconsin in the weeks ahead, we urge you to keep in mind why we have campaign finance laws at all. Excessive political money in politics and in the public-policy making process can be, and has been, a corrupting influence in Wisconsin. When left uncontrolled and unregulated, this money has undermined the public trust in our democratic institutions and has demoralized our citizenry. It has led to corruption, scandal and the removal from office of top legislative leaders of both political parties. It has undermined and sullied Wisconsin's once proud and admired reputation as the national model for honest, clean and accountable state government -- uncorrupted by political money.

Just because some courts, in recent years, have moved--usually by a single vote majority in bitterly divided opinions--toward increased deregulation of campaign finance at the state and federal level, doesn't mean that the Wisconsin Legislature must move in that direction. Indeed, there is ample reason and justification to move toward increased limitation and to requiring

far more transparency of the political money from within and outside of Wisconsin that has increased to alarming and unprecedented levels in recent years, inundating Wisconsin elections and despoiling our political discourse.

While there may be philosophical disagreement about the role of political money within this Legislature and certainly among experts and advocates, there is little doubt that the vast majority of Wisconsinites believe there is too much money in our elections and that view is shared by voters of all ideological dispositions. Just ask them. Polling consistently underscores this underlying truth.

Contrary to the myths propagated by many opponents of campaign finance reform – the citizens of Wisconsin overwhelmingly want sweeping reform of the current system and have for a long time. In 2000, a state-wide advisory referendum asked whether citizens thought there should be spending limits in state elections and disclosure of the donors to campaigns. Just shy of 90 percent of the people of this state voted "yes." And in one county a further question was asked: "Do you support public financing of elections of state candidates who abide by spending limits?" The number of voters answering in the affirmative was also overwhelming – more than 80 percent. And no, that question was not asked in Dane County where such support for public financing might be expected. More than four out of five voters in bright red Waukesha County supported public financing of elections in Wisconsin.

Today, I want to make the case for a few basic elements of campaign finance that we believe you ought to include and make a central part of your construction of a revised Chapter 11 of the Wisconsin Statutes.

Contribution Limits

The current statutory contribution limits for statewide and legislative candidates were established thirty years ago and we understand that the cost of campaigns and running for office has increased dramatically over the years. Nevertheless, the $10,000 limit for contributions by individuals to statewide candidates seems to us to be very high, even today. A very tiny percentage of Wisconsin citizens have the ability, let alone the inclination, to be able to make a political contribution of any significant size, much less $10,000. Increasing that limit would only create an additional group of "elite

donors" with increased access to, and influence with, state elected officials. So we oppose increasing this current limit.

The $500 contribution limit for Assembly candidates and $1,000 limit for State Senate candidates also seems sufficient and, in fact, for many years we actively advocated reducing these amounts by 50 percent. We support keeping the current limits in place.

We recognize and regret that last year's U.S. Supreme Court decision in *McCutcheon* has opened the flood gates nationally and in Wisconsin for wealthy individuals to be able to make contributions without limit to political parties and political action committees (PACs). And indeed that process began last Fall in Wisconsin with million dollar individual contributions to each of the political parties. We believe this provides only the most wealthy in our society to be able to exercise outsize influence and power to influence elections through their six or seven figure contributions. That diminishes the voice of everyone else. But we note that *McCutcheon* was decided very narrowly -- 5 to 4 -- and look forward to a reversal of that decision in the near future. The previous $10,000 aggregate limit that was long in place prior to last year for party and PAC contributions seems to us to be reasonable and prudent.

Public Financing of Elections

The establishment of a voluntary system of partial public financing for statewide and legislative elections in Wisconsin in 1977 was a reform that was widely accepted and embraced by the citizens of Wisconsin and by many members of both major political parties. It worked very well for about a decade before failure to strengthen and update the funding mechanism caused it to wither and eventually die. It was defunded altogether in the 2011-12 biennium budget. But the rationale for public financing of elections remains strong and compelling in our judgment. In return for agreeing to abide by a spending limit, a candidate receives partial or all of their campaign funding, freeing them from burden of having to spend vast amounts of time and effort groveling for funds from special interest groups and wealthy individuals. Elections should be won or lost based on policy positions rather than who is able to raise and spend the most money to engage in negative advertising, including character assassination. In addition, with public financing, winning candidates are beholden to the public at large who funded their campaigns rather than a few wealthy individual donors and/or special interest groups who often come armed with

a policy agenda as well as dollars. This *quid pro quo* is rarely explicit. But there is no doubt it exists.

Likewise, a more recent reform, also repealed in 2011, should be revived and reinstated. The Impartial Justice Law, which passed with robust bipartisan support in the Legislature in 2009, provided full public financing to candidates for the Wisconsin Supreme Court who agreed to limit their spending to $400,000. In 2007, all seven Justices – conservatives and progressives alike – signed a public letter urging public financing for their own elections. In place for only one election – in 2011 -- both incumbent Justice David Prosser and challenger Joann Kloppenburg voluntarily agreed to abide by the spending limit, accepted the public financing and their campaigns did not have to engage in the troubling and conflicting exercise of raising campaign funds from the very people who argue before the court or who are party to decisions made by the court. The provision of the Impartial Justice law that was not in effect in that election was the "matching fund" provision that stipulated that a candidate who was the target of an outside expenditure, (or if his or her opponent was the beneficiary of such an expenditure) that candidate was eligible to receive up to three time the statutory spending limit of $400,000. The matching fund provision was the subject of a case involving Arizona's public financing law before the U.S. Supreme Court when the Prosser-Kloppenburg election occurred. And the Court, again on a narrow and fiercely contested 5 to 4 vote, struck down matching fund provisions such as the one in the Impartial Justice law in the *McComish* decision. Despite the evisceration of that key provision there would have been much value in retaining full public financing for Wisconsin Supreme Court candidates. Their campaigns would not have to be engaged in special interest fund raising, which has contributed to the now widely-held public perception that the decisions rendered by our state's highest court are influenced by political money.

Fortunately, there is no shortage of very good suggestions about what can be done and models that can be examined to come up with campaign finance system that makes sense for Wisconsin. Other states such as Maine, Arizona and Connecticut have all established 100 percent public financing systems that work well, that enjoy the high confidence and trust of their citizens and that have strong, bipartisan support.

Closer to home is our neighbor Minnesota, which actually modeled its campaign finance system after Wisconsin's in the late 1970's but, unlike

Wisconsin, continually tweaked and improved its system to keep pace with the increasing costs of campaigns and to make their system more attractive to candidates and to the public. In Minnesota, candidates are eligible to receive up to 50 percent public financing and there is still very robust participation of both Republican and Democratic candidates for statewide and legislative offices in their system, even in the wake of the unlimited outside spending unleashed by the *Citizens United* decision as well as the negative consequences of *McComish* and *McCutcheon*.

There are also public financing programs established in some cities around the nation in which a small donor is matched with public matching funds up to five times the amount of the small donation. In this way small donations rather than large campaign contributions are encouraged resulting in broader participation of citizens of more modest means in the campaign finance process. New York City and Albuquerque, New Mexico are models for this.

The source for public financing of elections need not only include general purpose revenue, although that is most desirable. But in Arizona, for example, rather than utilizing taxpayer dollars, revenue utilized for public financing comes from a surcharge on civil and criminal forfeitures. In Connecticut, the state's unclaimed assets fund provides the resources for public financing of campaigns. There are other non-GPR sources of revenue that can be explored including some proposed by former Wisconsin legislators such as State Senator Mike Ellis (R-Neenah).

Senator Ellis once famously said, (and I am paraphrasing), public financing is an insurance policy for Wisconsin taxpayers on the state budget to help protect it from the hooks of big outside special interest groups who seek to carve the budget up for their own selfish purposes at the expense of taxpayers.

Outside Spending - Disclosure

While the narrowly decided *Citizens United* decision in 2010 opened up the floodgates for unlimited corporate and union treasury money to be used by outside spending groups, reversing 100 years of settled law, it did not foreclose requiring disclosure for electioneering communications beyond those identified as "express advocacy." Indeed, eight of the nice U.S. Supreme Court Justices, including four who voted in the majority in Citizens United, encouraged Congress and the states to enact laws requiring the disclosure of campaign communications masquerading as issue advocacy.

Disclosure of electioneering communications, beyond only express advocacy, is a reform that Wisconsin has needed for many years. The amount of undisclosed "dark" money from both within and outside of Wisconsin has increased in each successive election and the right of Wisconsinites to know where that money is coming from and who is trying to influence their vote trumps the perceived need for anonymity. The U.S. Supreme Court is very clear on this point and any attempt to codify into Wisconsin law a provision that only "express advocacy" can be subject to disclosure ought to be rejected outright. Phony issue ads are the functional equivalent of express advocacy (the so-called "magic words") and should be treated as such under the law.

We support the disclosure of the donors for all widely disseminated electioneering communications which are made in the period of up to sixty days prior to an election.

Illegal Campaign Coordination

Under current Wisconsin law, money spent in coordination with a candidate for the purpose of influencing an election is deemed a contribution subject to limits and source restrictions, as well as disclosure obligations. This includes so-called "issue advocacy."

The goal of the Wisconsin law – and many similar laws at the federal and state levels – is to block attempts by big donors to purchase influence over candidates "through prearranged or coordinated expenditures amounting to disguised contributions," and thereby to prevent corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S.1, 47 (1976)

The U.S. Supreme Court has made it abundantly clear that regulation of coordinated spending can extend beyond express advocacy communications.

While *Buckley* obviously applied the express advocacy test to independent expenditures it left intact limitations on coordinated campaign spending. So have the Supreme Court decisions that have addressed outside spending issues since then. That includes the 2003 decision in *McConnell* that upheld the major provisions of the McCain-Feingold law, the 2007 *Wisconsin Right to Life* decision that narrowed the scope of what communications could be regulated: from "the functional equivalent of express advocacy" further to those communications that were "susceptible of no reasonable interpretation

other than an appeal to vote for or against a certain candidate." But at no point did the court say these tests were applicable to coordinated spending.

And just as the *Citizens United* decision up held challenged electioneering communications (phony issue ads) disclosure requirements, it did not support the use of an express advocacy standard in regulating coordinated spending.

Wisconsin's law is consistent with the Supreme Court's decisions and so too have been state court decisions with regard to coordinated spending.

In *Wisconsin Coalition for Voter Participation, Inc.* (WCVP), the Court of Appeals in 1999 ruled that an investigation was unfounded because WCVP's mailings did not contain express advocacy, but it also held that the communications were regulable "whether or not they constitute express advocacy." Why? Because they are considered contributions. In last year's *Wisconsin Right to Life, Inc. v. Barland* decision, the Seventh Circuit held that the express advocacy test applies to the regulation of independent spending, not the regulation of contributions and coordinated spending.

Narrowing Wisconsin law to define coordinated spending as only that outside spending which employs express advocacy would be a huge and tragic mistake. It would effectively eviscerate campaign contribution limits, which may be the objective of the proponents advocating for this change.

For example, If a statewide candidate's campaign can receive a maximum contribution of $10,000 from an entity and then be allowed to coordinate campaign activities with that same entity that engages in issue advocacy in behalf of that candidate (in the period of 60 days or less before and election) or against the candidate's opponent for, say, $100,000, that is essentially a $110,000 contribution from the entity to the candidate it is coordinating with and thus, rendering the $10,000 contribution limit meaningless.

This is, of course, the very heart of the matter of the John Doe II case currently before the Wisconsin Supreme Court and CC/WI has joined several other groups in an *amici* brief in defense of the current law.

Summary

CC/WI believes that rewriting Chapter 11 of the Wisconsin Statutes is needed and overdue. But far from agreeing with those who view this as an

opportunity to deregulate and dismantle all limitations on money in our elections, we view this as an opportunity instead, to strengthen our once effective and widely admired campaign finance laws and return Wisconsin elections and state government to the citizens to whom it ought to be accountable. Robust campaign finance laws are needed to deter corruption or the appearance of corruption. Wisconsin has always been a state that abhors and rejects political corruption in all of its forms. That's what made us unique and great. Let's keep it that way.

Thank you.

SUMMARY

There are four main elements to Wisconsin's campaign finance system: source restrictions, contribution limits, disclosure requirements, and independent-speech regulation. The Wisconsin Government Accountability Board (G.A.B.) is responsible for enforcing the laws.

The most notable recent cases affecting campaign finance are the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* and its 2014 decision in *McCutcheon v. Federal Election Commission*.

The campaign finance legislation enacted this year as 2013 Wisconsin Act 153 made minor modifications but unfortunately did not include the significant revisions necessary to ensure Wisconsin statutes comport with current case law and contemporary practices.

BY MIKE B. WITTENWYLER & JODI E. JENSEN

Decoding the Maze: Wisconsin's Campaign Finance Laws

The Seventh Circuit Court of Appeals recently urged state lawmakers to update the statutes, calling Wisconsin campaign finance laws "labyrinthian and difficult to decipher." Such a task may be easier said than done, however.

Wisconsin's system of campaign finance regulation, contained in Wis. Stat. chapter 11 [hereinafter chapter 11], is built on four pillars: source restrictions, contribution limits, disclosure requirements, and the regulation of independent speech. In the last five years, each has been affected by court decisions and other developments, but Wisconsin statutes and administrative rules have not been updated to reflect the changes. The campaign finance legislation enacted this year as 2013 Wisconsin Act 153 made minor modifications but unfortunately did not include the significant revisions necessary to ensure Wisconsin statutes comport with current case law and contemporary practices.

The Seventh Circuit Court of Appeals recently urged state lawmakers to update the statutes, calling Wisconsin campaign finance laws "labyrinthian and difficult to decipher."[1] Such a task may be easier said than done, however. Not only is the Wisconsin Legislature adjourned until 2015,[2] but also political realities make enacting significant changes to chapter 11 a challenging task. As a result, it remains understandably difficult to navigate Wisconsin's campaign finance laws. The impact of recent developments described below is intended to assist anyone attempting to work through this maze.

Source Restrictions

In Wisconsin, all contributions to candidates for state office and to other political committees originate from individuals. Corporations (both nonprofit and for-profit) and limited liability companies are prohibited by chapter 11 from contributing to candidates and other political committees (political action committees (PACs) and political party committees, which include legislative campaign committees organized to support legislative candidates of a single political party).[3] These restrictions apply to both monetary and in-kind contributions (the provision of goods and services to a candidate's campaign at no charge or at less than the usual and normal charge), as well as to noncommercial loans.

The U.S. Supreme Court's landmark decision in *Citizens United v. Federal Election Commission*[4] is incorrectly perceived by some to have eliminated these source restrictions. However, the Court did not address the issue of corporate contributions made directly to candidates or other political committees. Rather, *Citizens United* struck down prohibitions on corporate sponsorship of independent political speech — speech by someone other than a candidate.

PAC and Conduit Sponsorship. Corporations cannot contribute to a PAC or a conduit,[5] but they can sponsor both. Chapter 11 allows unlimited corporate expenditures for administrative costs but caps spending for the purpose of soliciting members and contributions.[6] Act 153 increased this cap from $500 annually to $20,000 or 20 percent of the amount of contributions made to the PAC or conduit in the previous year.[7] It also established separate expenditure caps for PACs and conduits sponsored by the same organization.

In 2014, the Seventh Circuit Court of Appeals ruled in *Wisconsin Right to Life Inc. v. Barland* (*Barland II*) that any cap on the solicitation of contributions to an independent expenditure-only PAC (a PAC that engages in independent political speech, but does not contribute directly to candidates) is unconstitutional.[8] In response to the ruling, the Wisconsin Government Accountability Board (G.A.B.) also ceased enforcing the $20,000/20 percent cap against sponsors of traditional PACs (those formed primarily to contribute to candidates) and conduits. As a result, corporations can spend unlimited amounts

to recruit members to and raise funds for their Wisconsin PACs and conduits until the G.A.B. advises otherwise.

Contribution Limits

Contributions to candidates from individuals, PACs, and other candidate committees are subject to statutory caps, which are referred to as base limits.[9] A base limit is the maximum amount an individual may contribute, or a committee may transfer, to a single candidate during a two-year or four-year election cycle. Under Wisconsin law, it is a combined limit for both the primary election and the general election. Contributions to state political parties or PACs from individuals are not subject to base limits. The state's base limits have not been increased since their enactment in 1973.[10] (See Figure 1: Base Contribution Limits.)

The base limits apply to monetary and in-kind contributions combined. For example, an individual who spends $500 hosting a fundraising event for a Wisconsin Assembly candidate has reached the contribution cap for that two-year cycle. He or she cannot make any further monetary or in-kind contributions to that candidate until the following cycle. Small businesses can make in-kind contributions only if organized as a sole proprietorship or partnership. In any other case, an individual must purchase the goods or services and then contribute them to the candidate. Candidates must be notified about an in-kind contribution before it is made and then report its fair market value to the G.A.B.[11]

The base limits apply separately to a husband and a wife. While the fundraiser host in the example reached the $500 cap with event expenses, his or her spouse would be permitted to contribute $500 to the same candidate. To ensure that the contributions are reported correctly, spouses should notify the campaign about proper attribution by identifying which spouse made the contribution, on the memorandum line of a check or as an attachment to a receipt for an in-kind contribution or to a check.

Like other individuals, a lobbyist registered with the G.A.B. may contribute an unlimited amount to a political party or a PAC at any time. A lobbyist may also contribute to a candidate for partisan state office, subject to the base limits, but only during a time period defined by statute.[12] Before passage of Act 153, this period began on June 1 of an even-numbered year and ended on Election Day, unless the legislature had not completed its final floor period or was in special or extraordinary session. In such cases, a lobbyist was prohibited from contributing to a candidate committee until the floor period had passed or the legislature had adjourned. Act 153 adjusted this lobbyist contribution period so that it begins on April 15 of an even-numbered year, while retaining the limitations related to an unfinished floor period or an ongoing special or extraordinary session. A lobbyist's spouse, although not subject to these limitations, must abide by the base limits.

Aggregate Limits Unconstitutional. With the U.S. Supreme Court's decision in *McCutcheon v. Federal Election Commission*,[13] the amount that an individual may contribute to all state committees, including candidates, PACs, and political parties, is now unlimited. In *McCutcheon*, the Court struck down aggregate limits, finding that they "intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'"[14] Before the Court's holding, Wisconsin prohibited an individual from contributing more than $10,000 in a calendar year to all political committees.[15]

When the *McCutcheon* decision was issued, a challenge to Wisconsin's aggregate limit was pending in the U.S. District Court for the Eastern District of Wisconsin.[16] On May 22, 2014, the Eastern District Court issued an order declaring the limit unconstitutional as applied to contributions to all candidates and committees and permanently enjoining its enforcement.[17] On the same day, the G.A.B. announced that it will no longer enforce the statutory $10,000 annual aggregate limit for individuals.[18] Base limits were not affected by *McCutcheon*

Figure 1

Base Contribution Limits*

Office	Individual Limit	Committee Limit**
Governor	$10,000	$43,128
Lt. Governor	$10,000	$12,939
Attorney General	$10,000	$21,560
State Treasurer, Secretary of State, Superintendent of Public Instruction, Supreme Court Justice	$10,000	$8,625
State Senate	$1,000	$4,000
State Assembly	$500	$500

*Since members of the Assembly serve two-year terms, these contribution limits apply to a two-year election cycle. Limits for other offices apply to a four-year election cycle.

**This limit applies to PACs and other candidate committees.

or the district court order, and they remain in effect in Wisconsin.

Before *McCutcheon*, the Seventh Circuit Court of Appeals found Wisconsin's aggregate limit unconstitutional as applied to contributions to independent expenditure-only PACs. In *Wisconsin Right to Life State Political Action Committee v. Barland* (*Barland I*), the court permanently enjoined enforcement of the aggregate limit in this context, allowing individuals to contribute unlimited amounts for the purpose of funding independent expenditures.[19]

Wisconsin's Other Aggregate Limit. Wisconsin statutes contain another aggregate limit that caps the amount of contributions a candidate may accept from all PACs, political party committees, and other candidates' committees. These statutory provisions establish separate caps for contributions from PACs and contributions from all committees combined.[20] Once the cap is reached, no other committee may contribute any amount – even the base limit – to that candidate. In September 2014, the U.S. District Court for the Eastern District of Wisconsin issued a preliminary injunction prohibiting enforcement of this aggregate limit.[21] Soon thereafter, the G.A.B. announced that it will not enforce the statutory caps, but it did not address the possibility of an appeal.[22] Once again, the base limits are not affected and remain in place. However, because contributions to candidates from political party committees, including legislative campaign committees, are not subject to base limits; these committees may now make unlimited contributions to candidates. Until the G.A.B. or a court directs otherwise, there is no limit on the amount of contributions that candidates may accept from a single political party committee or from all state committees combined. (See Figure 2: Political Committee Aggregate Contribution Limits.)

Disclosure Requirements

Candidate committees and other political committees must register with the G.A.B. and report their contributions and disbursements at least twice per year.[23] The frequency of reporting increases before a primary election and a general election if a committee is active during that time.[24] Committees with minimal activity, as defined by statute, are exempt from the reporting requirements.[25] Electronic filing is required for committees that accept contributions of $20,000 or more during a calendar year.[26]

Candidate committees and other political committees must register with the G.A.B. and report their contributions and disbursements at least twice per year.

Every candidate committee must register with the G.A.B. before accepting contributions or making disbursements.[27] PACs and political party committees must register if they accept contributions, incur obligations, or make disbursements of more than $300 during a calendar year.[28] Before passage of Act 153, the registration threshold was $25.

All committees must report the name and address of every individual and committee contributing more than $20 during an election cycle.[29] If an individual contributes $100 or more, his or her employer and occupation must also be reported.[30] The dollar thresholds include monetary and in-kind contributions, as well as loans. In addition, a committee receiving contributions of $500 or more from a single contributor within 15 days of a primary election or a general election must report the contribution within 48 hours.[31] Before Act 153, reporting of late contributions was required within 24 hours after their receipt.

Independent Political Speech

When an individual or organization other than a candidate engages in political speech, it is generally considered to be "independent" political speech. These independent speakers may use television or radio ads, direct mail, Internet sites, and other means of communication to share with the general public their views about public officials, candidates, and public policy.

Independent political speech is classified as either express advocacy or issue advocacy. Express advocacy communications expressly advocate for the election or defeat of a clearly identified candidate and are regulated under chapter 11. Express advocacy communications funded by third parties are called independent expenditures. Issue advocacy communications avoid any statements of express advocacy and provide information about a public official, candidate, or public policy without calling for anyone's election or defeat. Issue advocacy communications are considered to be grassroots lobbying messages and are not regulated by chapter 11.[32]

While independent expenditures have long been subject to campaign finance regulation, the First Amendment strictly limits governmental regulation of issue advocacy.[33] Furthermore, in *Citizens United*, the Supreme Court made clear that the government cannot restrict or limit any speech based on the identity

Mike B. Wittenwyler, U.W. 1998, is an administrative and regulatory attorney at Godfrey & Kahn S.C., Madison, and the lead attorney in the firm's political law group. His practice includes campaign finance, election law, ethics and lobbying regulation, and the tax regulation of political and lobbying activities.

www.gklaw.com

Jodi E. Jensen, U.W. 1995, is an administrative and regulatory attorney at Godfrey & Kahn S.C., Madison, and a member of the firm's political law group. Her practice includes campaign finance, election law, and lobbying regulation.

www.gklaw.com

of the speaker – individuals, corporations, labor organizations, or tribes.[34] In the four years since *Citizens United* was issued, the Wisconsin Legislature has not acted to repeal the state's statutory ban on corporate sponsorship of independent expenditures. Nonetheless, the G.A.B. ceased enforcement of it in 2010 in response to a Wisconsin Attorney General Opinion interpreting *Citizens United*.[35] Earlier this year, the Seventh Circuit Court of Appeals permanently enjoined the statute in *Barland II*.[36]

Reporting of Independent Expenditures. After the Supreme Court issued *Citizens United*, the G.A.B. adopted an administrative rule allowing organizations, including for-profit and nonprofit corporations, to make unlimited independent expenditures. The rule, section GAB 1.91 of the Wisconsin Administrative Code [hereinafter section GAB 1.91], requires an organization making independent expenditures (referred to as an independent-disbursement organization) to follow most of the rules applicable to PACs including establishing a separate bank account, registering with the G.A.B., and filing periodic campaign finance reports.[37] On these reports, the organization must disclose all earmarked contributions made for independent expenditures but not donations or other revenues received for other purposes.[38]

In *Barland II*, the Seventh Circuit held that section GAB 1.91 is unconstitutional as applied to organizations whose major purpose is not express advocacy because the rule establishes a special "PAC-like disclosure program" for them.[39] Although the government can impose reporting requirements on organizations that make independent expenditures, it can require PAC status only if an organization's major purpose is political activity.[40] The court acknowledged that the public's interest in information about independent expenditures is strong, but that it can be achieved in a less burdensome manner than what was adopted in the G.A.B. rule.[41]

The G.A.B. has suspended reporting of independent expenditures by independent-disbursement organizations while it awaits the Eastern District Court's order giving effect to *Barland II*. Independent-disbursement organizations nonetheless might wish to voluntarily report during this time. It is possible that the G.A.B. will require organizations whose major purpose is express advocacy to belatedly report these expenditures once it lifts the suspension. Additionally, organizations choosing to report may benefit from having an oath on file with the G.A.B. affirming that they are not impermissibly coordinating expenditures with any candidate.[42]

Attempted Regulation of Issue Advocacy. Although issue advocacy communications are not regulated under chapter 11, the G.A.B. promulgated Wisconsin Administrative Code section GAB 1.28(3)(b) [hereinafter section GAB 1.28(3)(b)] in 2010 in an attempt to regulate such communications during the 30 days before a primary election and the 60 days before a general election. The rule deemed these communications independent expenditures subject to the reporting and disclosure requirements of chapter 11. Within a few days of the rule's promulgation, three separate lawsuits were filed.[43] The G.A.B. ceased enforcement of the amended rule almost immediately after this occurred, but the rule remains in place and no court had ruled on its constitutionality until *Barland II*.

In *Barland II*, the Seventh Circuit ruled that section GAB 1.28(3)(b) violates the First Amendment because it subjects sponsors of issue advocacy communications to overly burdensome disclosure requirements. While the government may establish only narrow disclosure requirements for sponsors of issue advocacy under *Citizens United*, the G.A.B. rule subjects them to the same registration and reporting requirements as a PAC.[44] In striking down the rule, the Seventh Circuit said that "ordinary political speech about issues, policy, and public officials must remain unencumbered."[45]

Furthermore, chapter 11 does not

Figure 2

Political Committee Aggregate Contribution Limits
(currently enjoined by the U.S. District Court for the Eastern District of Wisconsin)

Office	PAC Limit	All Committees Limit*
Governor	$185,190	$370,380
Lt. Governor	$145,544	$210,259
Attorney General	$121,550	$350,350
State Treasurer, Secretary of State, Superintendent of Public Instruction, Supreme Court Justice	$97,031	$140,156
State Senate	$15,152	$21,525
State Assembly	$7,763	$11,213

*This includes PACs, political party committees, and other candidate committees.

authorize the G.A.B. to place even limited, constitutional disclosure requirements on the sponsors of issue advocacy.[46] According to the Seventh Circuit, the government's authority to regulate political speech under state campaign finance law extends only to "express advocacy and its functional equivalent as those terms were explained [by the Supreme Court]."[47] As a result, section GAB 1.28 "sweeps a far wider universe of political speech into the 'applicable requirements of chap. 11, Stats.' than does Chapter 11 itself."[48] Unless the Wisconsin Legislature amends chapter 11, sponsors of issue advocacy communications cannot be required to file any type of campaign finance report with the G.A.B.

Coordination Prohibited. A PAC or other organization may not coordinate an independent expenditure with a candidate or a candidate's agent.[49] In general, impermissible coordination occurs when an expenditure is made at the request or suggestion of the candidate, when a candidate is able to exercise control or influence over the expenditure, or when there has been substantial discussion or negotiation with the candidate regarding the expenditure.[50] This is a fact-intensive inquiry that is determined on a case-by-case basis.[51] The G.A.B. has issued an advisory opinion setting forth a coordination standard but has yet to promulgate an administrative rule on the topic. Similarly, the state legislature has not updated statutes to reflect the case law and other legal developments related to impermissible coordination.

If impermissible coordination occurs, the independent expenditure will be treated as an in-kind contribution to the candidate. Generally, the in-kind contribution will be prohibited by chapter 11 because the independent expenditure is funded with corporate funds or because it exceeds the base contribution limit, or both.

The G.A.B. has advised that coordinated issue advocacy communications also are prohibited,[52] and its position is currently being challenged in the Seventh Circuit Court of Appeals.[53] Until the case is resolved, individuals and organizations sponsoring issue advocacy communications should avoid discussions with a candidate about their independent activities, including discussions that illustrate control or influence by the candidate.

Conclusion

Court decisions in recent years have significantly affected Wisconsin campaign finance law, and chapter 11 needs updating. While state statutes were not updated before the 2014 election, legislation may be considered during the upcoming 2015 legislative session. **WL**

ENDNOTES

[1]*Wisconsin Right to Life Inc. v. Barland (Barland II)*, 751 F.3d 804, 808 (7th Cir. 2014).

[2]2013 Senate Joint Resolution 1.

[3]Wis. Stat. §§ 11.01(6L), 11.38(1)(a)1. While not mentioned in the statute, labor organizations and tribes are effectively prohibited by the G.A.B. from making direct contributions to candidates.

[4]558 U.S. 310 (2010).

[5]Wis. Stat. § 11.01(5m). "Conduit" means an individual who or an organization that receives a contribution of money and transfers the contribution to another individual or organization without exercising discretion as to the amount that is transferred and the individual to whom or organization to which the transfer is made.

[6]Wis. Stat. § 11.38(1)(b).

[7]Wis. Stat. § 11.38(1)(a)3.

[8]*Barland II*, 751 F.3d at 832.

[9]Wis. Stat. § 11.26.

[10]Ch. 334, Laws of 1973, July 6, 1974.

[11]Wis. Admin. Code § GAB 1.20.

[12]Wis. Stat. § 13.625(1)(c)(intro.).

[13]134 S. Ct. 1434 (2014).

[14]*Id.* at 1450 (internal citations omitted).

[15]Wis. Stat. § 11.26(4).

[16]*Young v. Vocke*, No. 13-635 (E.D. Wis. filed June 6, 2013).

[17]Order at 1, *Young v. Vocke*, No. 13-635 (E.D. Wis. May 22, 2014).

[18]Press Release, G.A.B. Will Not Enforce Aggregate Campaign Donation Limit (May 22, 2014).

[19]664 F.3d 139 (7th Cir. 2011).

[20]Wis. Stat. § 11.26(9)(a), (b).

[21]*CRG Network v. Barland*, No. 14-C-719, 2014 WL 4391193 (E.D. Wis. Sept. 5, 2014).

[22]Press Release, G.A.B. Stops Enforcing Aggregate PAC Limit (Sept. 9, 2014).

[23]Wis. Stat. §§ 11.05, 11.20.

[24]Wis. Stat. § 11.20(2), (3).

[25]Wis. Stat. § 11.05(2r).

[26]Wis. Stat. § 11.21(16).

[27]Wis. Stat. § 11.05(2g).

[28]Wis. Stat. §§ 11.05(1), 11.07(1).

[29]Wis. Stat. § 11.06(1)(a).

[30]Wis. Stat. § 11.06(1)(b).

[31]Wis. Stat. § 11.12(5).

[32]Wis. Stat. § 11.01(16)(a): "Acts which are for 'political purposes' include but are not limited to:

1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.

2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office."

[33]*Buckley v. Valeo*, 424 U.S. 1 (1976); *Federal Election Comm'n v. Wisconsin Right to Life Inc.*, 551 U.S. 449 (2007).

[34]*Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

[35]Opinion of Wis. Att'y Gen. to Kevin Kennedy, Director and General Counsel, G.A.B., AOG 5-10 (Aug. 9, 2010).

[36]*Barland II*, 751 F.3d at 831.

[37]Wis. Admin. Code § GAB 1.91(4), (8).

[38]Wis. Admin. Code § GAB 1.91(8).

[39]*Barland II*, 751 F.3d at 834, 840-42.

[40]*Buckley*, 424 U.S. 1; *North Carolina Right to Life Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008); *Citizens United*, 558 U.S. 310.

[41]*Barland II*, 751 F.3d at 875.

[42]Wis. Stat. § 11.06(7); Wis. Admin. Code § GAB 1.42.

[43]*Wisconsin Prosperity Network v. Myse*, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356; *Wisconsin Club for Growth Inc. v. Myse*, No. 10-427 (W.D. Wis. filed July 31, 2010); *Wisconsin Right to Life Inc. v. Myse*, No. 10-669 (E.D. Wis. filed Aug. 5, 2010).

[44]*Barland II*, 751 F.3d at 841.

[45]*Id.* at 810.

[46]*Id.* at 835; Wis. Stat. § 11.01(16)(a).

[47]*Barland II*, 751 F.3d at 834.

[48]*Id.* at 835.

[49]Wis. Stat. § 11.06(7); Wis. Admin. Code §§ GAB 1.42, 1.91(1)(f), El. Bd. Op. 00-2 (Reaffirmed by the G.A.B. March 26, 2008).

[50]El. Bd. Op. 00-2 (Reaffirmed by the G.A.B. March 26, 2008).

[51]*Id.*

[52]*Id.*

[53]*Wisconsin Club for Growth v. Schmitz*, No. 14-1822 (7th Circuit filed April 15, 2014). **WL**

Association of WISCONSIN LOBBYISTS

- **Furnishing Contributions – Clarify definition of "furnish"**

Any proposed legislation should put to rest the debate on whether "furnish" includes the discussion or delivery of campaign contributions by a lobbyist. While the G.A.B. has presently retreated from its historically broad interpretation, agency staff recently indicated an interest in revisiting this issue and returning to its prior interpretation of state law. To that end, AWL requests that any campaign finance reform legislation clarify state law to explicitly:

- Permit lobbyists to deliver the campaign contributions of others including PAC and conduit checks at all times; and,
- Permit lobbyists and state public officials to discuss fundraising and the campaign contributions of others including PAC and conduit checks at all times.

Such a statutory change will ensure that the G.A.B. cannot interpret "furnish" to prohibit such activities.

- **Conduit Reporting – Maintain current law and do not require deposit information**

Any proposed legislation should maintain current law on conduit reporting requirements and not require any additional information about individual conduit member account balances or on reporting aggregate conduit balances. Under current law, donor/recipient information and amounts disbursed are reported when funds are transferred from the conduit to political committees. Proposals have been made to require reporting of funds as they are deposited by conduit members into a conduit account and then providing ongoing reporting of individual conduit account balances as well as information on the total amount of deposits held in trust by the conduit.

As private political savings accounts owned and controlled by a conduit member, AWL opposes such additional reporting about individual conduit members or aggregate conduit balances before any contributions occur. Instead, current reporting adequately requires disclosure of information on these funds by the conduit sponsor at the time a political contribution is made and the funds are transferred from the conduit account. Any additional disclosure would be akin to requiring all of those who contribute from a personal checking account to report publicly the balance of that personal account.

- **Procurement Consulting – Maintain current law and do not include as "lobbying"**

Under current law, regulated "lobbying" in Wisconsin includes actions to influence legislative activity and administrative rulemaking. It does not include other activities related to executive branch activities. Some have proposed that state law be modified to include procurement activity as part of regulated "lobbying." AWL opposes any efforts to expand the scope of what is regulated "lobbying" in Wisconsin. Bona fide salespersons should not be regulated as lobbyists and no one should be prohibited from collecting a commission or other contingent payment tied to a sale. Accordingly, any attempt to get at information about sales and consulting activities related to state procurements should not be included as part of the state's lobbying law.

10 E Doty Street, Suite 523 – Madison, WI 53703
p. 608-442-7295 – f. 608-441-1435 e. awl@wisconsinlobbyists.com

association of
WISCONSIN
LOBBYISTS

Correspondence Memorandum

Date: Tuesday, March 24, 2015

To: The Honorable Senate Majority Leader Scott Fitzgerald
The Honorable Senator Devin LeMahieu
The Honorable Assembly Speaker Robin Vos
The Honorable Representative Dean Knudson

From: Association of Wisconsin Lobbyists

Re: Campaign Finance and Lobbying Reform Proposals

Thank you for your leadership on updating our state's campaign finance and lobbying laws. As a voluntary association for government relations professionals, AWL is committed to facilitating high professional standards and takes any changes to the law in this area seriously.

The following items were identified by the AWL Board of Directors and its current members as issues that should be addressed in any reform proposal. We respectfully request your consideration of these recommendations.

- **Lobbying Reporting – Eliminate time itemization worksheets**

Currently the G.A.B. requires lobbying principals to file a report of daily itemization worksheets twice a year for lobbyist and certain non-lobbyist time. In addition. a lobbying principal is required to file a statement on its lobbying activity and expenditures. These reports include a summary of the amount of time and money spent on the principal's lobbying activities as well as an overview of the subjects lobbied. The daily itemized worksheet summaries do not specify particular bills, administrative rules or topics on which the time has been spent. The reports also do not provide any details on what particular activity occurred. Instead, these reports merely act as a worksheet so that a lobbying principal may calculate the amount of time and money spent on its activities. There is no other purpose to these forms other than as a place for a lobbyist to show his or her work when adding up time.

AWL suggests Wisconsin align its time and expense reporting with that of Congress and other states which require a disclosure of total time spent and expenses. This maintains the disclosure of time and expense so the public can access meaningful information but saves principals from filing outdated worksheets of daily time reporting. Moreover, many organizations now have automated software and calendaring for tracking the activities of its employees. Worksheets like the one required by the G.A.B. are outdated and no longer an efficient mechanism for calculating such costs. Accordingly, AWL proposes eliminating the daily itemization worksheets completed by lobbyists (and certain nonlobbyist employees). The information on the lobbying principal's report on the allocation of lobbying effort and money spent will not change. Instead, this statutory change would provide lobbying principals flexibility on how to track their efforts and expenses.

10 E Doty Street, Suite 523 – Madison, WI 53703
p. 608-442-7295 – f. 608-441-1435 e. awl@wisconsinlobbyists.com

Testimony of Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

Senate Committee on Elections and Local Government
Assembly Committee on Campaigns and Elections

Joint Informational Hearing
Room 411 South, State Capitol

March 24, 2015
9:00 a.m.

Chairpersons LeMahieu and Bernier and Committee Members:

Thank you for the opportunity to speak to you about long overdue revisions to Wisconsin's campaign finance law. Chapter 11 of the Wisconsin Statutes was created in 1974 following the national campaign finance scandal revealed by the Watergate break-in and subsequent Congressional hearings. Chapter 334, Laws of 1973. Chapter 11 had its genesis in a 1974 report of the Governor's Study Committee on Political Finance. Professor David W. Adamany, who was serving as Governor Lucey's Secretary of the Department of Revenue, chaired the Committee and authored the report which was submitted in March 1974.

The report called for sweeping changes in Wisconsin's campaign finance disclosure regulations including expenditure limits, contribution limits, full and complete disclosure of campaign finance transactions, an independent enforcement agency and a generous measure of public financing of campaigns. The report advocated for joining the trend of comprehensive

campaign finance revision that had already begun at the national level and in several states.

In 1911, Wisconsin adopted the Corrupt Practices Act (Wis. Stat. ch. 12) to regulate the financing of political campaigns. At the time it was a model for the nation. The 1974 Report described the current state of that campaign finance regulation as "wholly inadequate to the times ... enfeebled by lack of enforcement ... and in urgent need of complete revision." Given the parade of campaign finance decisions emanating from the United States Supreme Court, as well as other federal courts, the current campaign finance law set out in Chapter 11 is also "wholly inadequate to the times." The driving force for reviewing and revising Wisconsin campaign finance law is to harmonize regulation with new case law.

In 1974, the Legislature included a declaration of policy along with a directive on statutory construction for Chapter 11. That policy and directive are found in the preface to the then new comprehensive regulatory structure. A copy of those provisions is attached to my written remarks. Some of the legislative policies have been relegated to mere aspirations by court decisions limiting the role of regulation. For example, the policies sought to limit "excessive spending on campaigns for public office," to "encourage the broadest possible participation in financing campaigns by all citizens" and to "enable candidates to have an equal opportunity to present their programs to the voters." These are laudable public policy goals, but they are not likely to withstand the compelling state interest test of First Amendment scrutiny.

However, the fundamental finding of the 1974 Wisconsin Legislature remains viable and critical to any campaign finance reform – "our democratic system of government can be maintained only if the electorate is informed." The Legislature went on to state: "One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization."

The 1974 Legislature pinned its concerns about an informed electorate on a robust system of campaign finance disclosure. The Legislature found the state "has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities." Our current system provides an excellent source of disclosure on the political finances of candidates, political parties, political action committees and conduits. Any revision to Chapter 11 should be focused on continuing to make campaign finance information readily available for public consumption.

Chapter 11, as enacted in 1974, was soon the subject of revision due to the seminal case on campaign finance regulation. *Buckley v. Valeo*, 424 U.S. 1 (1976). It continued to be the subject of legal challenges throughout the 1970s, 80s, 90s and well into the current century.

As noted earlier there has been a parade of court cases that have rendered the current campaign finance law wholly inadequate to the times. These include

Citizens United v. FEC, 586 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. __ (2014); *Wisconsin Right to Life v. Barland*, 664 F. 3d 139 (7th Cir. 2011) (*Barland I*); and *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014) (*Barland II*). These and other recent decisions are the impetus for reviewing and revising Wisconsin regulation of campaign finance to harmonize regulation with case law interpreting the First Amendment and reflect current legislative intent.

The Government Accountability Board has offered its take on a basic outline for campaign finance reform. In December 2014 it reviewed a series of legislative proposals from its staff. The Board established a subcommittee to draft a resolution to the Legislature on the topic of campaign finance reform. The Board adopted the resolution on January 13, 2015. A copy of that resolution is attached to my testimony.

In its resolution the Government Accountability Board urges the Legislature to undertake a comprehensive review and revision of chapter 11 of the Wisconsin Statutes. The resolution focuses on eight areas for reform.

- ***The definition of "political purpose" in order to be consistent with court rulings;***

The *Barland II* decision challenges Wisconsin's definition of political purpose in Wis. Stats. 11.01 (16), particularly as it applies to entities and organizations whose major purpose is not to expressly advocate for the election or defeat of a candidate or candidates. This also includes entities and organizations whose major purpose is not to expressly advocate for the

passage or defeat of referenda. Any Chapter 11 revision should provide direction on the factors to include in addressing the "major purpose" criteria.

- ***What, if any, registration and reporting requirements should apply to organizations that only make independent disbursements;***

Citizens United made it clear that First Amendment associational and speech provisions enable a wide array of entities and organizations to engage in political speech without limitation. The Legislature should address how much disclosure it desires of independent candidate and referenda advocacy to ensure a well informed electorate.

- ***Reporting requirements related to independent disbursements;***

Essential to any decision on the scope of disclosure of independent candidate and referenda advocacy is a clear articulation of the specific reporting requirements related to independent speech. The amount, timing and source of funds are key elements of these requirements.

- ***Thresholds for registration and reporting and to what entities those thresholds apply;***

There are a wide range of candidates and committees organized to win election to public office or secure passage of a ballot measure. It is essential to revisit current thresholds. Registration and reporting thresholds need to be low enough to give the public critical information which aids it in knowing the true source and extent of support for a candidate or political organization. However, thresholds must be high enough to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process.

- ***Adjusting or eliminating contribution limits enacted in the 1970s;***

Contribution limits enacted in 1974 have not changed in the past 40 years. The costs and nature of political campaigns however have changed dramatically. In 1972 total political spending for state and local campaigns creeped over the $5 million threshold. Now in many statewide campaigns, each major candidate spends in excess of $5 million and attracts at least that amount in independent spending.

Any limit on contributions to candidates and political committees needs to reflect the current political landscape and be flexible enough to anticipate changes in the future political landscape. Contribution limits also need to harmonize with court decisions striking down restrictions that impinged on First Amendment associational and speech rights. Courts have upheld contribution limits which serve as barriers to quid pro quo corruption of candidates for public office.

- ***Whether and what type of corporate contributions should be allowed;***

Wisconsin has banned corporate contributions to candidates for public office since 1911. Many states permit such contributions. This remains a critical policy decision in any revision of Chapter 11.

- ***What coordination between a candidate and other committees should be permissible and what should be prohibited;***

As court cases limit the amount of regulation of political speech, it is essential for the Legislature to carefully consider the parameters for

regulating coordination between candidates and other entities. Restricting coordination has been a core element of campaign finance regulation in order to ensure the efficacy of campaign contribution limits. The 7th Circuit has noted the U.S. Supreme Court has not defined coordination and no state or federal court has ruled on coordination of issue advocacy in the context of the First Amendment. *O'Keefe v. Chisholm*,____ F. 3d ____ (7th Cir. 2014).

- ***Consider whether or not to establish contribution limits from individuals to non-candidate committees that were removed when the statutory aggregate limit was deemed unconstitutional.***

One consequence of the removal of aggregate contribution limits was to remove any limit on the amount an individual could give to a political party or legislative campaign committee. As the Legislature examines the nature and scope of contribution limits, it should be clear to which political entities contribution limits will apply.

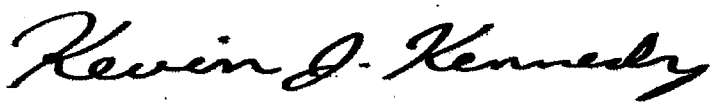
The Board believes that the best approach to this endeavor would be through the establishment of a Legislative Council study committee. As noted earlier, our current set of campaign finance regulations had its origins in a Governor's Study Committee. Chapter 11 has been the subject of considerable study since its inception.

In November 1996, Governor Thompson appointed a Blue Ribbon Commission on Campaign Finance Reform. That Commission issued a report in May, 1997. At the same time a group of citizens established its own Commission on campaign finance reform. The Wisconsin Citizen's

Panel for a Clean Election Option issued its report in June, 1997. A Legislative Council Study Committee was also established in 1992. The conduct and financing of political campaigns is at the heart of our representative form of government. For that reason, the Board believes a thorough and transparent study of changes to the current regulatory structure is critical to achieving a result that provides the public with the fullest amount of information on political campaigns consistent with the principles of the First Amendment which is the basis for that representative government.

Whether or not a Legislative Council study committee is established, the Board believes that revision of campaign finance laws is necessary, and offers its assistance, experience and cooperation to the Legislature in that endeavor.

Respectfully submitted,



Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Kevin.Kennedy@wi.gov
608-261-8683

Declaration of policy

The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

Wis. Stat. § 11.001(1)

Construction

This chapter shall be construed to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process, consistent with the right of the public to have a full, complete and readily understandable accounting of those activities intended to influence elections.

Wis. Stat. § 11.002

State of Wisconsin \ Government Accountability Board

212 East Washington Avenue, 3rd Floor
Post Office Box 7984
Madison, WI 53707-7984
Voice (608) 261-2028
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
http://gab.wi.gov

RESOLUTION

1. Whereas, Wisconsin's campaign finance laws, Wis. Stats. Ch. 11, have not undergone a thorough legislative review or revision since 1978.

2. Whereas, a number of federal court cases, holding various portions of the statutes unconstitutional, have made the practical application of the law difficult.

3. Whereas, the Government Accountability Board believes that, rather than a patchwork attempt to revise the law, a better approach would be a thorough review and revision of Wisconsin's campaign finance laws.

Therefore be it RESOLVED as follows:

1. The Government Accountability Board urges the Legislature to undertake a comprehensive review and revision of Wis. Stats., ch. 11 that, among other things, addresses:

   - The definition of political purpose so as to be consistent with court rulings;
   - What, if any, registration and reporting requirements should apply to organizations that only make independent disbursements;
   - What coordination between a candidate and other committees should be permissible and what should be prohibited;
   - Whether and what type of corporate contributions should be allowed;
   - Reporting requirements related to independent disbursements;
   - Thresholds for registration and reporting and to what committees those thresholds apply;
   - Adjusting or eliminating contribution limits enacted in the 1970s;
   - Consider whether or not to establish contribution limits from individuals to non-candidate committees that were removed when the statutory aggregate limit was deemed unconstitutional.

2. The Board believes that the best approach to this endeavor would be through the establishment of a Legislative Council study committee.

3. Whether or not a Legislative Council study committee is established, the Board being persuaded that revision of campaign finance laws is necessary, the Board offers its assistance, experience and cooperation to the Legislature in revision of campaign finance laws.

Adopted by unanimous vote of the Government Accountability Board, January 13, 2015.

Proposal to Replace Wisconsin Statutes, Chapter 11, with a Simple Law
By Wisconsin Right to Life, Inc., and
Wisconsin Right to Life State Political Action Committee
December 22, 2014

In addition to the following, Wisconsin Right to Life, Inc. ("WRTL"), and Wisconsin Right to Life State Political Action Committee ("WRTL-SPAC") recommend repealing GAB 1.28, GAB 1.91, GAB 1.42(1) (the regulatory oath for independent disbursements), and GAB 1.42(5) (the regulatory attribution and disclaimer requirement), and adjusting for inflation every dollar figure below.

WRTL and WRTL-SPAC also recommend repealing law authorizing "John Doe proceedings" in Wisconsin. *O'Keefe v. Chisholm,* 769 F.3d 936, 937 (7th Cir.2014) (citing WIS. STAT. 968.26)).

WRTL and WRTL-SPAC understand that some in the Wisconsin Legislature wish to amend contribution limits and restructure, or redefine the duties of, the Government Accountability Board. WRTL and WRTL-SPAC take no position on those issues at this time, yet they would be available to offer input on proposals by members of the Wisconsin Legislature.

§ 1. Definitions

As used in this chapter:

(1) "Political committee" means any person other than an individual, or any combination of two or more persons not related by marriage, which:

(a) In a two-year general-election cycle makes $5,000 or more in contributions or spends $5,000 or more for express advocacy, and

(b) 1 is under the control of a candidate or candidates in their capacities as candidates, or

2 A says in its organizational documents or its public statements that it has the major purpose of nominating, electing, or defeating a candidate or candidates, or passing or defeating a referendum or referenda, or

B devotes the majority of its spending in a two-year general-election cycle to contributions or independent expenditures.

(2) "Two-year general-election cycle" means the time beginning on the first Wednesday after the first Monday in November in an even-numbered year, and ending on the first Tuesday after the first Monday in November two years later.

(3) "Contribution" means:

(a) a direct donation to an organization that is registered as a political committee with the Government Accountability Board, or

(b) an indirect donation, *i.e.:*

1 a donation to such an organization *via* an intermediary, or

2 express advocacy that is coordinated with

A a candidate for state- or local-government office in Wisconsin who is clearly identified in the express advocacy, or

B the clearly identified candidate's political committee.

(4) "Express advocacy" and "expressly advocate" mean express words of advocacy of nomination, election, or defeat of a clearly identified candidate for state- or local-government office in Wisconsin, or passage or defeat of a clearly identified state- or local-government referendum in Wisconsin, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Senate," "vote against," "defeat," or "reject." Appeal-to-vote speech, *i.e.,* the "functional equivalent of express advocacy," is not a form of express advocacy.

(5) "Clearly identified" means:

(a) the name of the candidate or referendum appears,

(b) a photograph or drawing of the candidate appears, or

(c) the identity of the candidate or referendum is apparent by unambiguous reference.

(6) "Independent expenditure" means express advocacy that is not coordinated with the clearly identified candidate or the clearly identified candidate's political committee under **Section 1(3)(b)2.**

(7) **(a)** Express advocacy is "coordinated" under **Section 1(3)(b)2** if it is either created, produced, or distributed at the request or suggestion of:

1 the candidate or the candidate's political committee, or

2 the person paying for the express advocacy, and the candidate or the candidate's political committee assents to the request or suggestion of the person. Such assent leads to coordination only when the person paying for the express advocacy

A consults with the candidate or the candidate's political committee about the express advocacy, and

B the candidate or the candidate's political committee assents,

before the express advocacy occurs.

(b) Safe harbor. The following are not coordinated:

1 A candidate's or a political party's response to an inquiry about that candidate's or political party's positions on legislative or policy issues.

2 An endorsement of a candidate or referendum.

3 Soliciting contributions for a candidate, a referendum, or a political committee.

§ 2. Political-committee registration and recordkeeping

(1) Every political committee shall, within 14 days of becoming a political committee, file a registration statement with the Government Accountability Board.

(a) The registration statement shall include the political committee's name and address.

(b) If the political committee is a candidate's or a political party's political committee, the registration statement shall identify the candidate or political party, and the political committee's name shall include the name of the candidate or political party.

(c) If the political committee is one that an organization has formed separately from itself, the registration statement shall identify the organization, and the political committee's name shall include the separate organization's name.

(d) The registration statement shall also include the names and addresses of the political committee's depository accounts.

(2) Every political committee shall have one treasurer. The registration statement shall include the treasurer's name and address.

(3) A candidate's campaign may not register as more than one political committee.

(4) A political committee shall amend the information in its registration statement by filing a new statement within 14 days of any change.

(5) The political-committee treasurer shall

(a) record the political committee's receipts and disbursements, including the name and address of the source of each receipt and the payee for each disbursement,

(b) itemize by date, purpose, and amount all receipts and disbursements of $100 or more, and

(c) maintain each record in an organized and legible manner for at least three years after the report to which the record pertains.

(6) Every intermediary that receives a contribution for a political committee shall, within 14 days, forward to the political committee's treasurer the contribution, the date of the contribution, and the contributor's name and address.

(7) A political committee's money shall remain segregated from other persons'.

(8) To terminate, a political committee shall file a termination statement with the Government Accountability Board.

§ 3. Political-committee reporting

(1) A political committee's treasurer shall certify – *via* either a declaration or an affidavit – and file the following reports with the Government Accountability Board:

(a) For a candidate's political committee or a political committee for a referendum or referenda:

1 a pre-election report by the seventh day before any election in which the candidate seeks nomination or election or such a referendum is on the ballot, with the report including information since the previous report and through the 14th day before the election, and

2 a post-general-election report by the 28th day after any general election in which the candidate seeks election or such a referendum is on the ballot, with the report including information since the previous report and through the 21st day after the election, and

(b) For any other political committee:

1 a pre-election report by the seventh day before any regularly scheduled primary or general election for which the political committee makes a contribution or engages in express advocacy, with the report including information since the previous report and through the 14th day before the election, and

2 a post-general-election report by the 28th day after any regularly scheduled general election, with the report including information since the previous report and through the 21st day after the election.

(c) In addition, all political committees shall file a report by January 31 and a report by July 31, with the report including information since the previous report and through the preceding December 31 and June 30, respectively.

(2) Each report shall include:

(a) the total amount of cash on hand, outstanding loans received, and outstanding loans made at the beginning of the reporting period,

(b) the total amount of all receipts for the reporting period;

(c) the name and address of:

1 each person who made a loan to the political committee, and every other political committee that made a contribution to the political committee, during the reporting period, with each loan and each such contribution itemized by date, purpose, and amount, and

2 each person, the aggregate receipts from which are $500 or more during the two-year general-election cycle, with each receipt from the person during the reporting period itemized by date, purpose, and amount,

(d) the total amount of all disbursements for the reporting period,

(e) the name and address of:

1 each person to which the political committee made a loan, and every other political committee to which the political committee made a contribution, during the reporting period, with each loan and each such contribution itemized by date, purpose, and amount, and

2 each person, the aggregate disbursements to which are $500 or more during the two-year general-election cycle, with each disbursement to the payee during the reporting period itemized by date, purpose, and amount,

(f) the total amount of cash on hand, outstanding loans received, and outstanding loans made at the end of the reporting period, and

(g) for every political committee making independent expenditures as defined in **Section 1(6),** a certification – *via* either a declaration or an affidavit – that such disbursements are not coordinated under **Section 1(3)(b)(2).**

§ 4. Seventy-two-hour reporting

(1) If a political committee

> **(a)** receives $500 or more from a person in the 15 days before an election, and
>
> **(b)** engages in express advocacy *vis-á-vis* the election in the 15 days before the election,

the political committee shall report to the Government Accountability Board within 72 hours the name and address of the person, with such receipt or receipts itemized by date, purpose, and amount. The political committee shall also report the receipt or receipts in a regular report under **Section 3.**

(2) If a political committee – other than a candidate's political committee or a political committee for a referendum or referenda when the candidate or such a referendum is on the ballot –

> **(a)** spends $500 or more for express advocacy *vis-á-vis* an election in the 15 days before the election,

the political committee shall report to the Government Accountability Board within 72 hours the name and address of the payee, with such disbursement or disbursements itemized by date, purpose, and amount. The political committee shall also report the disbursement or disbursements in a regular report under **Section 3.**

REPORT OF INDEPENDENT DISBURSEMENTS
STATE OF WISCONSIN

OFFICE USE ONLY

COMMITTEE, INDIVIDUAL OR INDEPENDENT DISBURSEMENT GROUP MAKING INDEPENDENT DISBURSEMENTS		NAME OF REPORT
Name of Committee, Individual or 1.91 Organization	GAB ID#	☐ January Continuing _____ ☐ Pre-Primary _____ ☐ Spring
Street Address		☐ July Continuing _____ ☐ Pre-Election _____ ☐ Fall
Email Address	Telephone No.	☐ Special Report of Late Independent Disbursement ☐ Special

ATTACH ADDITIONAL SHEETS IF NECESSARY

Date Paid	Name and Address of Person or Business to Whom Payment Was Made	Purpose	Amount This Period	Candidate(s) Affected by Disbursement(s)	Office Sought	Supported	Opposed	**Office Use Only**

I, _____ certify that the information in this report is true, correct and complete.

_____ Signature of Individual, Treasurer or Agent

_____ Date

THE INFORMATION ON THIS FORM IS REQUIRED BY ss. 11.06 (1), (j), (7), 11.12(6), 11.20, STATS.
FAILURE TO PROVIDE THE INFORMATION MAY SUBJECT YOU TO THE PENALTIES OF ss. 11.60, 11.61, 11.66, STATS.

THIS FORM IS PRESCRIBED BY THE Government Accountability Board, P.O. Box 7984, Madison, WI 53707-7984 |
Phone: 608-261-2028 | Fax: 608-264-9319 | Web: https://cfis.wi.gov | Email: GABCFIS@wi.gov

INSTRUCTIONS FOR REPORT OF INDEPENDENT DISBURSEMENTS

A Report of Independent Disbursements must be filed by individuals, committees and independent disbursement groups who or which filed a Voluntary Oath for Committees, Individuals and Independent Disbursement Groups Making Independent Disbursements (GAB-6) and made independent disbursements to advocate the election or defeat of a clearly identified candidate or candidates. The individual, committee or independent disbursement group making the independent disbursement may not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed with respect to the independent disbursement. The individual, committee or independent disbursement group also may not act in concert with or at the request or suggestion of any candidate or any agent or authorized committee of a candidate who is supported or opposed with respect to the independent disbursement. Contributions made directly to a candidate or in-kind contributions made on behalf of a candidate do not constitute independent expenditures and do not require this form to be completed.

All individuals, committees or independent disbursement groups who or which have made independent disbursements must complete this form and file it as a supplement to Schedule 2-A of the Campaign Finance Report (GAB-2) for the same report period. For example, if the disbursement was made during the period covered by the pre-primary report, this form must be filed with the pre-primary report. Likewise, if the disbursement was made in the period covered by the pre-election report, the form must be filed with the pre-election report.

All items on the form must be completed regardless of the amount of the disbursement - the date of the disbursement, the name and address of the person or business to which the disbursement was paid, a description of the specific purpose of the disbursement, the amount, the candidate(s) affected by the disbursement. The independent disbursements listed in this report shall also be reported in Schedule 2-A of the Campaign Finance Report (Form GAB-2).

SPECIAL REPORT OF LATE INDEPENDENT DISBURSEMENT

A special report must be filed if any independent disbursement of more than $20 cumulatively is made to advocate the election or defeat of a clearly identified candidate by an individual, committee or independent disbursement group later than 15 days before a primary or an election in which the candidate's name appears on the ballot. An independent disbursement is an expenditure made without cooperation or consultation with a candidate or agent or authorized committee of a candidate who is supported or opposed, and not in concert with or at the request or suggestion of such a candidate, agent or committee. The individual, treasurer or agent of the committee or independent disbursement group making the independent disbursement shall, within 48 hours of making the disbursement, file this form. The information on this form shall also be included in the next regular report of the individual, committee or independent disbursement group under ss.11.06, 11.20, Stats. For purposes of this report, disbursements cumulate beginning with the day after the last date covered on the pre-primary or pre-election report and ending with the day before the primary or election. Within 48 hours of receipt of this report the filing officer shall send a copy to all candidates for the office affected by the independent disbursement.

Code of Federal Regulations

Title 11 - Federal Elections

Volume: 1
Date: 2014-01-01
Original Date: 2014-01-01
Title: Section 100.16 - Independent expenditure (2 U.S.C. 431(17)).
Context: Title 11 - Federal Elections. CHAPTER I - FEDERAL ELECTION COMMISSION. SUBCHAPTER A - GENERAL. PART 100 - SCOPE AND DEFINITIONS (2 U.S.C. 431). Subpart A - General Definitions.

§ 100.16 Independent expenditure (2 U.S.C. 431(17)).

(a) The term *independent expenditure* means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents" if it is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

(b) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

(c) No expenditure shall be considered independent if the person making the expenditure allows a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents to become materially involved in decisions regarding the communication as described in 11 CFR 109.21(d)(2), or shares financial responsibility for the costs of production or dissemination with any such person.

[68 FR 451, Jan. 3, 2003]

Kuczenski, Tracy

From: Foltz, Adam
Sent: Tuesday, February 03, 2015 2:26 PM
To: Karls-Ruplinger, Jessica; Larson, Brian; Kreye, Joseph; Kuczenski, Tracy
Subject: FW: Political Law Update: WRTL v. Barland Permanent Injunction
Attachments: WRTLvBarlandPermanentInjunction.pdf

Not sure if you get these, but I wanted to make sure you all saw this.

From: Haseleu, Jessica [mailto:JHaseleu@gklaw.com] **On Behalf Of** Wittenwyler, Mike
Sent: Tuesday, February 03, 2015 2:08 PM
To: Wittenwyler, Mike
Subject: Political Law Update: WRTL v. Barland Permanent Injunction

On January 30, the District Court for the Eastern District of Wisconsin issued a permanent injunction that prohibits enforcement of several Wisconsin campaign finance statutes and administrative rules. The injunction was issued pursuant to last year's Seventh Circuit Court of Appeals decision in a lawsuit filed by Wisconsin Right to Life ("*Barland II*").

Attached is an update that highlights the Court's permanent injunction.

Mike B. Wittenwyler

wittenwyler@gklaw.com
608-284-2616 Work-Direct
608-358-1800 Mobile

1 East Main Street, Suite 500
Madison, Wisconsin 53703
608-257-3911
608-257-0609 Fax

500 New Jersey Avenue, NW, Suite 375
Washington, D.C. 20001
202-628-0305
202-628-0405 Fax

www.gklaw.com

GODFREY & KAHN S.C.

ONE EAST MAIN STREET, SUITE 500 • POST OFFICE BOX 2719
MADISON, WISCONSIN 53701-2719

TEL • 608.257.3911 FAX • 608.257.0609

WWW • GKLAW.COM

MEMORANDUM

TO: Interested Parties

FROM: Mike Wittenwyler / Jodi Jensen
Godfrey & Kahn, S.C.

DATE: February 3, 2015

SUBJECT: *Wisconsin Right to Life, Inc. v. Barland*: Permanent Injunction

On January 30, the District Court for the Eastern District of Wisconsin issued a permanent injunction that prohibits enforcement of several Wisconsin campaign finance statutes and administrative rules.[1] The injunction was issued pursuant to last year's Seventh Circuit Court of Appeals decision in a lawsuit filed by Wisconsin Right to Life ("*Barland II*").

Highlights of the court's permanent injunction include:

- **Corporate independent disbursements permitted.** The Government Accountability Board (the "G.A.B.") may not enforce Wisconsin's statutory prohibition on corporate sponsorship of independent expenditures. Although *Citizens United* struck down such prohibitions in 2010 and the G.A.B. has abided by the U.S. Supreme Court's decision, Wisconsin's statute has never been repealed. Corporations are still prohibited from contributing to candidates, traditional political action committees ("PACs") and political party committees.

- **No limits on PAC and conduit solicitation expenses.** Wisconsin's statutory limit on the amount a corporation may spend to solicit contributions to a PAC or conduit may not be enforced.

- **Chapter 11 regulates only express advocacy.** As applied to political speakers other than candidates or political parties, Chapter 11 permits the G.A.B. to regulate only express advocacy and its functional equivalent. The G.A.B. may not administer or civilly enforce Chapter 11 provisions against persons engaged in issue advocacy. Further, the G.A.B. may not criminally investigate or prosecute those engaged in issue advocacy for violations of Chapter 11.

- **The G.A.B. may not enforce administrative rules that regulate issue advocacy.** In 2010, the G.A.B. adopted an administrative rule that established reporting requirements for issue advocacy communications made in the 30-day period prior to a primary election or in the 60-day period prior to a general election. The G.A.B.'s action prompted three separate lawsuits

[1] *See Wisconsin Right to Life, Inc. v. Barland*, Case No. 10-C0669.

and ten days after the rule's promulgation, the G.A.B. entered into a stipulation in which it agreed not to enforce the rule. Although the rule was never repealed, the G.A.B. is now enjoined from enforcing the portion of GAB 1.28(3)(b) that regulates issue advocacy.

- **Independent disbursement reporting must be limited.** Going forward, PAC reporting requirements may be triggered only for organizations that have the major purpose of express advocacy such as super PACs or independent expenditure-only PACs focused on Wisconsin state elections. As a result, the G.A.B. is likely to issue guidance on new reporting requirements, including how it will evaluate an organization's "major purpose."

- **Oath for independent disbursements still required.** An organization that makes independent disbursements must continue to file an oath with the G.A.B. indicating that its spending is not coordinated with a candidate.

- **48 hour reporting of late contributions and disbursements still required.** Wisconsin Right to Life challenged the 24-hour reporting requirement for disbursements of $20 or more and contributions of $500 made or received within 15 days of an election. But the Legislature changed the reporting deadline to 48 hours after the lawsuit was filed. As a result, the Seventh Circuit did not rule on this reporting requirement.

- **30 second radio ads exempt from attribution and disclaimer requirements.** Wisconsin statutes require each communication by a political committee to contain an attribution i.e., a "paid for" line. G.A.B. rules also require an independent disbursement communication to contain a lengthy disclaimer indicating that it was not coordinated with a candidate. While Wisconsin Right to Life challenged only the G.A.B. rule requiring disclaimers, the court enjoined the enforcement of *both* attribution and disclaimer requirements in radio ads that are 30 seconds or less. The G.A.B. may issue further guidance regarding its interpretation of the order and how it will enforce Wisconsin's attribution and disclaimer requirements going forward. If it does not, organizations making independent disbursements should consult the G.A.B. before eliminating the "paid for" line from 30 second radio ads.

The district court's order requires the G.A.B. to post on its website the court orders and opinions that have been issued in this case. As noted above, it is likely that the G.A.B. will also issue additional guidance regarding changes to some of its practices and procedures regarding campaign finance regulation.

13001171.1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiffs

V. Case No. 10-C-0669

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

Defendants.

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

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

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

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

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

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

* * *

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SO ORDERED this 30th day of January 2015.

BY THE COURT

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