Nos. 12-2915, 12-3046, & 12-3158

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

DAVID G. DEININGER, THOMAS BARLAND, MICHAEL BRENNAN, THOMAS CANE, GERALD NICHOL, TIMOTHY VOCKE, and JOHN CHISHOLM,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, CASE NO. 10-C-0669
THE HONORABLE CHARLES N. CLEVERT, JR.

BRIEF OF DEFENDANTS-APPELLEES

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INTRODUCTION

These consolidated appeals involve First Amendment challenges to Wisconsin campaign finance laws. The main issue on appeal is whether the district court abused its discretion when it denied, in part, a preliminary injunction motion and denied two motions for injunction pending appeal. The district court did not abuse its discretion, and its decisions should be affirmed.

Plaintiffs-Appellants[1] Wisconsin Right to Life, Inc. and Wisconsin Right to Life State Political Action Committee are not likely to succeed on the merits. The central issues in this matter do not involve limits on contributions to candidates or on spending by candidates or independent groups. Rather, the challenged laws primarily pertain to registration, recordkeeping, periodic reporting, attribution, and disclaimer requirements. Also challenged are certain definitions in Wisconsin statutes and administrative rules, along with statutes concerning corporate disbursements for political speech and the solicitation of contributions for a corporation's separate segregated fund.

[1]Plaintiffs-Appellants will be referred to individually as WRTL and WRTL-SPAC and collectively as Plaintiffs. Defendants-Appellees, the individual members of the Wisconsin Government Accountability Board and the Milwaukee County District Attorney, will be referred to collectively as Defendants.

As argued herein, these laws pass constitutional muster under the standards established by the Supreme Court in *Citizens United* and related cases and by this Court in *Center for Individual Freedom v. Madigan*.[2] Plaintiffs have not demonstrated the remaining preliminary injunction criteria. The district court should be affirmed.

JURISDICTIONAL STATEMENT

Plaintiffs have submitted a jurisdictional statement that is not complete and correct. (Plaintiffs-Appellants WRTL and WRTL-SPAC's Principal Brief, 7th Cir. Dkt. #27 at 25-34, Appeal No. 12-2915, *hereinafter* "Pl.'s Br. at ___.") Defendants provide a complete jurisdictional summary, as is required by Circuit Rule 28(b) and including the information in Circuit Rule 28(a). Defendants also submit this jurisdictional statement pursuant to the Court's September 24, 2012, order, which states:

> IT IS FURTHER ORDERED that the parties fully address in their respective briefs the issue of the necessity of both the first two appeals which was raised in the court's order of September 7, 2012, and the issue of appellate jurisdiction over these appeals which was raised in appellants' September 10, 2012, memorandum.

(7th Cir. Dkt. #23 at 1-2, Appeal No. 12-2915).

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[2]*Center for Individual Freedom v. Madigan*, No. 11-3693, 2012 WL 3930437 (7th Cir. Sept. 10, 2012) ("*Madigan*"), *combined petition for panel rehearing and rehearing en banc filed*, Oct. 9, 2012.

I. Statement Concerning The District Court's Jurisdiction, Which Is Required By Circuit Rule 28(a)(1).

In their First Amended Verified Complaint, Plaintiffs have challenged the constitutionality of a number of Wisconsin campaign finance laws. (Joint Appendix at 515-46, *hereinafter* "A. ___.") The First and Fourteenth Amendments to the United States Constitution form the basis for Plaintiffs' constitutional claims and for the district court's federal question jurisdiction. (A. 516 at ¶ 3); 28 U.S.C. § 1331.[3]

There is no diversity or supplemental jurisdiction. WRTL-SPAC is not a corporation, and WRTL is a Wisconsin corporation with its principal place of business at 9730 West Bluemound Road, Suite 200, Milwaukee, WI 53226. *See* Circuit Rule 28(a)(1).

II. Statement Concerning This Court's Jurisdiction, Which Is Required By Circuit Rule 28(a)(2).

Plaintiffs have filed three appeals: Appeals No. 12-2915, 12-3046, and 12-3158. The appeals have been consolidated for briefing and disposition. (*See* 7th Cir. Dkt. #23 at 1, Appeal No. 12-2915.) The

[3]Plaintiffs' claims also arise under 42 U.S.C. § 1983 (A. 516 at ¶ 4); therefore, the district court has jurisdiction pursuant to 28 U.S.C. § 1343. Plaintiffs also seek a declaratory judgment (A. 516 at ¶ 5, A. 539-42); therefore, the district court has jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202.

procedural posture is complicated, but there is no question that this Court has jurisdiction over Appeals No. 12-3046 and 12-3158.

First, this Court does not have jurisdiction over Appeal No. 12-2915, and that appeal is not necessary because the same legal issues presented by it are raised in Appeal No. 12-3046. Second, this Court has jurisdiction over Appeal No. 12-3046 because it is an appeal of the district court's interlocutory order denying, in part, an injunction. 28 U.S.C. § 1292(a)(1). Finally, this Court has jurisdiction over Appeal No. 12-3158 because it is an appeal of the district court's interlocutory order denying an injunction. *Id.*

There is no motion for a new trial or alteration of the judgment or any other motion claimed to toll the time within which to appeal. *See* Circuit Rules 28(a)(2)(ii), (iii). The instant cases are not a direct appeal from the decision of a magistrate judge; they are appeals of decisions by United States District Judge Charles N. Clevert, Jr. *See* Circuit Court Rule 28(a)(2)(v). The following discussion addresses the jurisdictional issues that this Court ordered the parties to brief. (7th Cir. Dkt. #23 at 1-2, Appeal No. 12-2915).

A. Appeal No. 12-2915

Appeal No. 12-2915 relates to Plaintiffs' temporary restraining order and second preliminary injunction motion. (A. 547-52.) The

motion was filed on April 18, 2012, briefing was completed on May 1, 2012, and the motion was argued orally on May 4, 2012. (A. 547-52; A. 220; A. 108-62.) Plaintiffs filed an approximately 65 page proposed order on May 9. (Dist. Ct. Dkt. #77.)

On August 17, 2012, Plaintiffs filed their Second Notice of Appeal[4] to appeal from the district court's "constructive denial" of their second preliminary injunction motion. (A. 614-16.) This filing initiated Appeal No. 12-2915. Instead of appealing some *action* by the district court, Plaintiffs appealed the district court's *inaction* in failing to rule upon their second preliminary injunction motion by August 17, 2012. (7th Cir. Dkt. #1-1 at 22-24, Appeal No. 12-2915.)

On August 20, 2012, the district court scheduled a hearing for August 31, 2012, to issue an oral ruling on Plaintiffs' second preliminary injunction motion. (A. 221 ("NOTICE of hearing . . .").) On August 31, 2012, the district court had jurisdiction to enter a decision on Plaintiffs' second preliminary injunction motion because it had not actually or constructively denied the motion. Plaintiffs' Second Notice of Appeal was ineffective to confer jurisdiction upon this Court.

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[4]This was the second notice of appeal because WRTL-SPAC filed its first notice of appeal on July 18, 2011, in Case No. 10-C-0669 (E.D. Wis.). (Dist. Ct. Dkt. #48.) That notice of appeal initiated Appeal No. 11-2623, which resulted in this Court's decision in *Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011).

The court of appeals has jurisdiction of appeals from "[i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions[.]" 28 U.S.C. § 1292(a)(1). The district court had not issued an interlocutory order disposing of Plaintiffs' second preliminary injunction motion when Plaintiffs filed their Second Notice of Appeal on August 17, 2012. Thus, Plaintiffs did not appeal an order "granting, continuing, modifying, refusing or dissolving" or "refusing to dissolve or modify" an injunction. 28 U.S.C. § 1292(a)(1). They appealed no order.

Upon filing their Second Notice of Appeal on August 17, 2012, Plaintiffs did not demonstrate "unjustifiable delay coupled with irreparable injury" that could transform the district court's alleged "constructive denial" of their second preliminary injunction motion into an appealable interlocutory order. *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996) (citations omitted). The district court's consideration of Plaintiffs' second preliminary injunction motion, while lasting a few months, was not unjustifiable when the claims at issue are legally complex and sought to enjoin a swath of

Wisconsin campaign finance law prior to several upcoming elections.[5] The district court was justified in taking sufficient time to: (1) conduct the complicated work of construing Plaintiffs' legal claims; (2) consider the factual record; (3) review the relevant (and complex) case law; and (4) issue a cogent oral ruling on August 31, 2012, which was formalized in a written decision and order that same day. (A. 167-202 (minutes of August 31, 2012, oral ruling on Plaintiffs' motion); A. 163-64 (August 31, 2012, Decision and Order).) The district court's postponement of its ruling was not so protracted that it had the practical effect of a denial. *See United States v. Bd. of Sch. Comm'rs of City of Indianapolis*, 128 F.3d 507, 509 (7th Cir. 1997).

A delay incident to the orderly process of ruling upon an injunction motion is permissible. *See Middleby Corp. v. Hussmann Corp.*, 962 F.2d 614, 616 (7th Cir. 1992). The parties, and ultimately this Court, benefit from having a decision from the district court that explains the district court's reasoning and holding, thereby crystallizing the issues for appeal. Without a written order from the district court, this Court would be essentially starting from scratch on

[5]Historic gubernatorial and Wisconsin state senate recall elections took place on June 5, 2012, which were preceded by recall election primaries on May 8, 2012. Partisan primary elections were also held on August 14, 2012. *See generally http://gab.wi.gov/elections-voting/results* (last visited Oct. 31, 2012).

Plaintiffs' claims as if it were the district court. The district court's delay in issuing a ruling was reasonable and incident to its orderly process of disposing of Plaintiffs' motion.

Furthermore, Plaintiffs did not demonstrate that they would be irreparably injured when the challenged laws remained in effect during the district court's consideration of their second preliminary injunction motion. *See Middleby*, 962 F.2d at 616. On the contrary, Plaintiffs' First Amended Verified Complaint confirms that, with regard to several of the challenged laws, Plaintiffs' speech is not "chilled" by the laws. (A. 532 at ¶ 68.) This Court does not have jurisdiction over Appeal No. 12-2915 based upon a "constructive denial" theory because there was no constructive denial of Plaintiffs' second preliminary injunction motion. *IDS Life Ins. Co.*, 103 F.3d at 526. The district court retained jurisdiction to dispose of the motion.

Appeal No. 12-2915 is also unnecessary because the same legal issues in it are raised by Appeal No. 12-3046. The district court disposed of Plaintiffs' second preliminary injunction motion on August 31, 2012, when it issued its Decision and Order Granting in Part and Denying in Part Plaintiffs' Second Motion for Preliminary Injunction and Temporary Restraining Order. (A. 163-64.) Plaintiffs' asserted basis for pursuing Appeal No. 12-2915 is that the district court

had constructively denied their *entire* second preliminary injunction motion by failing to timely rule upon it. (*See* Pl.'s Br. at 25-29.) Appeal No. 12-3046 addresses the district court's denial *in part* of Plaintiffs' second preliminary injunction motion on August 31, 2012. In other words, Plaintiffs ultimately prevailed on their motion, in part.

It is peculiar that Plaintiffs now want to pursue Appeal No. 12-2915 when the order giving rise to Appeal No. 12-3046 actually granted, in part, certain injunctive relief Plaintiffs sought. (A. 163-64 (granting injunctive relief as to Count 2, part of Count 5, and part of Count 9 of the First Amended Verified Complaint).) Appeal No. 12-2915 is, therefore, unnecessary and redundant of Appeal No. 12-3046 because both appeals address the district court's disposition of the same injunction motion, based upon the same legal claims.

B. Appeal No. 12-3046

Appeal No. 12-3046 also relates to Plaintiffs' temporary restraining order and second preliminary injunction motion. (A. 547-52.) On September 6, 2012, Plaintiffs filed their Third Notice of Appeal to appeal the district court's August 31, 2012, Decision and Order. (A. 654-56; A. 163-64.) This filing initiated Appeal No. 12-3046. This Court has jurisdiction over Appeal No. 12-3046 because it is an

appeal of the district court's interlocutory order denying an injunction. 28 U.S.C. § 1292(a)(1). Defendants did not cross-appeal the claims upon which Plaintiffs prevailed.

C. Appeal No. 12-3158

Appeal No. 12-3158 relates to Plaintiffs' second and third motions for injunction pending appeal. (*See* A. 222-23; Dist. Ct. Dkts. #94 and #103.) On September 19, 2012, Plaintiffs filed their Fourth Notice of Appeal to appeal the district court's September 18, 2012, "Decision and Order Denying Plaintiffs' Rule 7(h) Expedited Non-Dispositive Motions for Injunction Pending Appeal (Doc. 94, 103)." (A. 657-59; A. 199-203.) This filing initiated Appeal No. 12-3158. This Court has jurisdiction over Appeal No. 12-3158 because it is an appeal of the district court's interlocutory order denying an injunction. 28 U.S.C. § 1292(a)(1).

Contrary to Plaintiffs' assertions, the district court's September 18, 2012, Decision and Order did not "amend"[6] an injunction or "in effect" render a "final decision." (Pl.'s Br. at 33; *see also* Pl.'s Br. at 29-30 ("The district court amended its August 31 ruling on September 18 and held WRTL's GAB-1.91 challenge is moot.").) The

[6]Plaintiffs incorrectly label the district court's September 18, 2012, Decision and Order as an "Order Amending Ruling from the Bench 9-18-12." (A. 205.) The September 18, 2012, Decision and Order is an order denying an injunction, not amending one. (A. 199-203.)

district court's September 18, 2012, Decision and Order only *denied* Plaintiffs' second and third motions for injunction pending appeal and did not amend any injunction or render any final decision. (A. 199-203.)

III. Information Regarding Whether The District Court's "Inaction" And Interlocutory Orders Are Immediately Appealable, Which Is Required By Circuit Rule 28(A)(3).

This Court does not have jurisdiction over Appeal No. 12-2915, for the reasons stated above. The district court's August 31, 2012, Decision and Order is immediately appealable as an interlocutory order denying an injunction. (A. 163-64); 28 U.S.C. § 1292(a)(1). The district court's September 18, 2012, Decision and Order is also immediately appealable as an interlocutory order denying an injunction. (A. 199-203); 28 U.S.C. § 1292(a)(1). In short, this Court has jurisdiction over Appeal Nos. 12-3046 and 12-3158, but not 12-2915.

Finally, Plaintiffs assert that they "bring all the claims to this Court" and that "[no claims] remain in the district court." (Pl.'s Br. at 34.) Plaintiffs are incorrect. The district court has jurisdiction to proceed on Plaintiffs' claims while an appeal of its preliminary injunction ruling is pending. *See Shevlin v. Schewe*, 809 F.2d 447, 450-51 (7th Cir. 1987); *United States v. City of Chicago*, 534 F.2d 708,

711 (7th Cir. 1976). However, the parties jointly moved the district court to stay all proceedings pending appeal, and that motion was granted on October 12, 2012. (Dist. Ct. Dkts. #117, 118.)

STATEMENT OF THE ISSUES

The issue on appeal is: Whether the district court abused its discretion when it denied, in part, Plaintiffs' second preliminary injunction motion and denied Plaintiffs' second and third motions for an injunction pending appeal.

Plaintiffs identify an issue regarding jurisdiction, namely, whether "[t]he district court had jurisdiction for the August 31, 2012, ruling, and if so, whether it erred in holding the challenge to GAB-1.91 is moot[.]" (Pl.'s Br. at 34.) This jurisdictional issue is addressed by Defendants' jurisdictional statement. Plaintiffs' sub-issue regarding mootness will be addressed in section I.B. of the Argument, below.

Plaintiffs also identify eight issues that address the likelihood of success on the merits of their constitutional claims. (*See* Pl.'s Br. at 34-36.) Defendants agree that the issue of Plaintiffs' likelihood of success on their claims is presented by Plaintiffs' appeals of the district court's August 31, 2012, and September 18, 2012, Decision and Orders. Each claim is addressed below.

SUMMARY OF THE ARGUMENT

Plaintiffs moved the district court to enjoin the enforcement of several Wisconsin campaign finance laws. Plaintiffs appeal the district court's denial of their three injunction motions.

The district court did not abuse its discretion when it: (1) denied, in part, Plaintiffs' April 18, 2012, TRO and Second Preliminary Injunction Motion (A. 547-52); and (2) denied Plaintiffs' August 31, 2012, Expedited Motion for Injunction Pending Appeal, (Dist. Ct. Dkt. #94), and Plaintiffs' September 6, 2012, Third Expedited Motion for Injunction Pending Appeal and Brief. (Dist. Ct. Dkt. #103.) The district court did not err when it denied these three motions because Plaintiffs did not satisfy their burden to obtain injunctive relief.

Plaintiffs are not likely to succeed on the merits of their First Amendment claims. The challenged language in Wisconsin law is not unconstitutionally vague, either as applied or facially. The challenged political committee and other definitions in Wisconsin law are constitutional, both as applied and facially. The disclosure requirements created by these definitions pass exacting scrutiny because they are substantially related to the sufficiently important

state interest in providing timely information to the electorate regarding the sources of spending for campaign-related speech.

The district court did not err when it held that Plaintiffs' challenge to Wis. Admin. Code § GAB 1.91(1)(f) (2010) is moot; that emergency rule has expired, and Plaintiffs' complaint does not challenge the current permanent rule.

Wisconsin's 24-hour reporting requirements and oath for independent disbursement requirements pass exacting scrutiny and are constitutional, both facially and as applied. These requirements foster Wisconsin's important interest in providing information to the electorate about the sources of spending for campaign-related speech.

Defendants do not appeal the district court's rulings with regard to Wis. Stat. § 11.38(1)(a)1. and Wis. Admin. Code § GAB 1.42(5).

With regard to Plaintiffs' as-applied challenge to the $500 limitation in Wis. Stat. § 11.38(1)(a)3. on what organizations may expend to solicit contributions for their separate segregated funds, Defendants will not enforce this limitation as applied to WRTL and WRTL-SPAC *only*, in light of this Court's decision in *Barland*, 664 F.3d 139.

This Court should affirm the district court because the district court did not abuse its discretion when it denied, in part, Plaintiffs'

second preliminary injunction motion and Plaintiffs' second and third motions for injunction pending appeal.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

On an appeal of the denial of a preliminary injunction, this Court reviews the district court's legal conclusions *de novo*, its findings of fact for clear error, and its balancing of the injunction factors for an abuse of discretion. *Ezell v. City of Chicago*, 651 F.3d 684, 693 (7th Cir. 2011).

Plaintiffs incorrectly assert that "Defendants must prove their law survives scrutiny." (Pl.'s Br. at 71.) A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation and internal quotation marks omitted) (emphasis in original); *see also*

Christian Legal Soc'y v. Walker, 453 F.3d 853, 870 (7th Cir. 2006) (citing *Mazurek*).

Plaintiffs cite *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011), as authority to place the burden on Defendants to prove the constitutionality of Wisconsin law as applied to Plaintiffs. (Pl.'s Br. at 71-74.) This Court has never followed this burden-shifting scheme from *Thalheimer* and should not do so now.

Likewise, Plaintiffs' reliance on *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), is misplaced. (Pl.'s Br. at 74.) The *Gonzales* Court addressed a burden-shifting scheme in the Religious Freedom Restoration Act of 1993 that has no analog here. Unlike in *Gonzales*, Congress has imposed no burden on Defendants to prove the constitutionality of Wisconsin campaign finance laws.

ARGUMENT

I. Plaintiffs Have Not Shown A Likelihood Of Success On The Merits Of Their Claims.

A. The challenged language in Wisconsin law is not unconstitutionally vague.

Count 1 of Plaintiffs' First Amended Verified Complaint asserts that Wisconsin's committee/political-committee, persons other than political committees, and organization definitions in "[Wis. Stat. §] 11.01.4; [Wis. Admin. Code §§] GAB 1.28.1.a, 1.28.2, 1.91.f.1" are

unconstitutionally vague as applied to WRTL's speech. (A. 533 at ¶ 72.) Count 9 of Plaintiffs' First Amended Verified Complaint asserts that the laws challenged in Count 1 are facially unconstitutional. (A. 538-39 at ¶¶ 98-100.)

Plaintiffs apparently purport to challenge:

1) "influencing" language, namely,

   a. "for the purpose of influencing the election or nomination for election[,]" Wis. Stat. § 11.01(16),

   b. "attempting to influence an endorsement or nomination[,]" Wis. Stat. § 11.01(16)(a)2., and

   c. "primarily to influence elections," GAB 1.28(1)(a).

2) The phrase "supports or condemns" in GAB 1.28(3)(b)2. and 1.28(3)(b)3.; and

3) The phrase "functional equivalents" in GAB 1.28(3)(a).

(Pl.'s Br. at 54-71.) However, with one exception, nowhere in Plaintiffs' First Amended Verified Complaint do they make factual allegations regarding the "influencing/influence," "supports or condemns" or "functional equivalents" language that they assail in their brief. *There are no allegations regarding this language in the complaint.*

Plaintiffs referenced the wrong laws in their complaint. In particular, the paragraphs in Plaintiffs' First Amended Verified

Complaint constituting "Count 1" cite *other* laws as vague, not Wis. Stat. § 11.01(16), GAB 1.28(3)(a), GAB 1.28(3)(b)2., or GAB 1.28(3)(b)3. (A. 533 at ¶¶ 71-74.) (However, Plaintiffs do cite to GAB 1.28(1)(a) in paragraphs 72 and 103 of the complaint. (A. 533; A. 539.)) Likewise, Plaintiffs' "Prayers for Relief" do not request relief as to Wis. Stat. § 11.01(16), GAB 1.28(3)(a), GAB 1.28(3)(b)2., or GAB 1.28(3)(b)3. (A. 539-42.) Accordingly, Plaintiffs' purported vagueness challenges in their brief are not properly before this Court because Plaintiffs have not made sufficient factual allegations to plead vagueness claims as to Wis. Stat. § 11.01(16), GAB 1.28(3)(a), GAB 1.28(3)(b)2., or GAB 1.28(3)(b)3. in their First Amended Verified Complaint. Fed. R. Civ. P. 8(a)(2); Fed. R. Civ. P. 8(a)(3); (A. 533 at ¶¶ 71-74; A. 539-42.)

In any event, Plaintiffs are not likely to succeed on the merits even if they had properly pled their vagueness challenges.

1. Vagueness legal standard.

To succeed on a vagueness challenge, Plaintiffs must demonstrate that the law is "impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 (1982). A law is "impermissibly vague" if it

"fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001); *see also Madigan*, 2012 WL 3930437 at *8 (addressing the void-for-vagueness doctrine).

Another way to state the vagueness standard is that Plaintiffs are required to demonstrate that the law does not give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). In the First Amendment context, the Supreme Court has indicated that the analysis should focus on whether the law in question "gives 'fair notice to those to whom [it] is directed[.]'" *McConnell v. FEC*, 540 U.S. 93, 223 (2003), *overruled on other grounds* (quoting *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 412 (1950)) (brackets in *McConnell*), *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 896-914 (2010).

The Supreme Court reiterated the vagueness standard in *Holder v. Humanitarian Law Project*, ___ U.S. ___, 130 S. Ct. 2705 (2010): "'A conviction fails to comport with due process if the statute under which

it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* at 2718 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Although a "more stringent" vagueness inquiry applies in the free speech context, "'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Id.* at 2719 (quoting *Williams*, 553 U.S. at 304).

2. Application of the vagueness legal standard.

a. The "influencing" language can be subjected to a limiting construction under *Buckley*.

In *Buckley v. Valeo*, the Supreme Court addressed a provision in the Federal Election Campaign Act's ("FECA's") definition of "expenditure" that included the language "for the purpose of . . . influencing" an election or nomination of a candidate for federal office. 424 U.S. 1 at 76, 79 (1976) (per curiam). The Supreme Court held that, without a narrowing construction of the FECA language "for the purpose of . . . influencing," the requirement in FECA that political committees "disclose their expenditures could raise . . . vagueness problems, for 'political committee' is defined [in such a way that it]

could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79.

The *Buckley* Court avoided the unconstitutional vagueness of the term "influencing" by interpreting it as limited to express advocacy to elect or defeat a clearly identified candidate. *Buckley*, 424 U.S. at 79-80; *see also Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-64 (5th Cir. 2006), *petition for cert. denied*, 549 U.S. 1112 (2007) (applying the *Buckley* narrowing construction to the phrase "'or otherwise influencing the nomination or election of a person to public office[]'" in Louisiana law and rejecting a facial challenge). This Court should follow *Buckley* and its progeny to narrowly construe the "influencing" language that Plaintiffs have challenged to limit such language to apply only to express advocacy or the functional equivalent of express advocacy.[7]

[7]Express advocacy or speech that is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate (*i.e.*, the "functional equivalent" of express advocacy) may be regulated. *See Citizens United*, 130 S. Ct. at 889-90; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-74 (2007) (Robert, C.J.) ("*WRTL II*"). Plaintiffs' argument that the Supreme Court has abandoned what Plaintiffs call the "appeal-to-vote test" is plainly wrong in light of *WRTL II* and *Citizens United*. (Pl.'s Br. at 59-68.)

Plaintiffs assert that the following "influencing" language in Wisconsin law is vague:

- "for the purpose of influencing the election or nomination for election[,]" Wis. Stat. § 11.01(16),
- "attempting to influence an endorsement or nomination[,]" Wis. Stat. § 11.01(16)(a)2., and
- "primarily to influence elections," GAB 1.28(1)(a).

(Pl.'s Br. at 55-67.) In light of *Buckley*, Plaintiffs have a point. *See Buckley*, 424 U.S. at 79-80. However, the "influencing" language in Wisconsin law need not be invalidated because a narrowing construction to limit this language to only express advocacy or the functional equivalent of express advocacy is "reasonable and readily apparent" in light of *Buckley*. *See Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (citations and internal quotation marks omitted). Moreover, such a narrowing construction is appropriate under the canon of constitutional avoidance. *See Harris v. United States*, 536 U.S. 545, 555 (2002) (when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter" (citation and internal quotation marks omitted)).

The "influencing" language that Plaintiffs have challenged is equivalent to that which the *Buckley* Court held could be narrowly construed to avoid vagueness. Wisconsin Stat. § 11.01(16) ("for the purpose of influencing the election or nomination for election[,]") is virtually identical to the language that was construed narrowly in *Buckley*. *Buckley*, 424 U.S. at 76, 79. Likewise, "primarily to influence elections" in GAB 1.28(1) is virtually identical to the FECA language at issue in *Buckley* and should therefore be similarly narrowly construed.

The challenged language in Wis. Stat. § 11.01(16)(a)2., ("attempting to influence an endorsement or nomination[,]"), is somewhat different than the language narrowly construed in *Buckley*, but not materially so. Wisconsin Stat. § 11.01(16)(a)2. concerns political speech "made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office." A person's or group's influencing of an endorsement or nomination of a candidate at a convention is unquestionably related to the ultimate election of that candidate. Therefore, the challenged language in Wis. Stat. § 11.01(16)(a)2. should also be subject to the narrowing construction applied in *Buckley* because such language is "unambiguously related to the campaign of a particular . . . candidate." *Buckley*, 424 U.S. at 80.

Applying a narrow construction to the "influencing" language that Plaintiffs have challenged is consistent with the Wisconsin Department of Justice's position since *Buckley* was decided in 1976. In 1976, Wisconsin Attorney General Bronson La Follette issued a published opinion that advocated that the scope of then-existing Wis. Stat. § 11.01(16) should be "narrowed by construction" as suggested in *Buckley* to avoid placing unconstitutional burdens on speech and association rights. Opinion of Wis. Att'y Gen. to James. R. Klauser, Chairman, State Elections Board, OAG 55-76 (Aug. 16, 1976), 1976 Wisc. AG LEXIS 42. Wisconsin Stat. § 11.01(16) has been amended since 1976, but the logic of Attorney General La Follette's position regarding a narrowing construction consistent with *Buckley* is equally applicable to the challenged "influencing" and "influence" provisions in this case.

The "influencing" and "influence" language in Wis. Stat. § 11.01(16) and GAB 1.28(1) need not be invalidated because it can be preserved by applying a narrowing construction that limits it to apply to express advocacy or its functional equivalent. *Buckley*, 424 U.S. at 79-80; *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 45, 64-67 (1st Cir. 2011), *petition for cert. denied*, 132 S. Ct. 1635 (2012) (narrowing the use of the terms "influencing" and "influence" in Maine's campaign finance statutes

to include only "communications and activities that expressly advocate for or against [a candidate] or that clearly identify a candidate by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate." (citation and internal quotation marks omitted)). Accordingly, Plaintiffs are not likely to prevail on their as-applied and facial challenges to the "influencing" language in Wisconsin campaign finance law.

b. "Supports or condemns" is not unconstitutionally vague.

Plaintiffs cite no controlling authority where a court has found the terms "supports or condemns" to be unconstitutionally vague, and the Supreme Court has rejected that view. In *McConnell*, the Supreme Court concluded that language virtually identical to "supports or condemns" is not unconstitutionally vague. *McConnell*, 540 U.S. at 170 n.64 ("We likewise reject the argument that § 301(20)(A)(iii) is unconstitutionally vague. The words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision.").[8]

[8]"Condemns" is equivalent to "opposes." *See* THE AMERICAN HERITAGE DICTIONARY 306 (2d college ed. 1982) (defining "condemn" as "To express disapproval of; denounce.").

In *Madigan*, this Court followed *McConnell* and held that the language "'in support of or in opposition to'" in Illinois law is not unconstitutionally vague. *Madigan*, 2012 WL 3930437 at *14. This Court observed that this holding of *McConnell* remains valid after *Citizens United*. *Id.* Under *Madigan* and *McConnell*, "supports or condemns" in Wisconsin law is not unconstitutionally vague.

Other courts that have considered this issue have reached the same conclusion: "supports or condemns" language is not unconstitutionally vague. *McKee*, 649 F.3d at 62-64 (applying *McConnell*); *Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 701 (S.D. W. Va. July 18, 2011) (same); *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 166 P.3d 1174, 1184 (Wash. 2007) ("[W]e conclude that a person of ordinary intelligence would have a reasonable opportunity to understand the meaning of 'in support of, or opposition to, any candidate' in the definition of '[p]olitical committee' . . ."); *cf. Carmouche*, 449 F.3d at 663 (dismissing a vagueness challenge to a Louisiana statute that defined "expenditure" as "'a purchase . . . made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office'" because a limiting construction was sufficient). This Court should rule the same.

Plaintiffs attempt to avoid the Supreme Court's holding in *McConnell* regarding the non-vague nature of "supports" or "opposes"/condemns language by arguing that such language is clear only for political parties and professionals well-versed in election law. (*See* Pl.'s Br. at 70.) The *McConnell* Court's reasoning refutes this contention: "These words [support and oppose] 'provide explicit standards for those who apply them' and '*give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.*'" *McConnell*, 540 U.S. at 170 n.64 (quoting *Grayned*, 408 U.S. at 108-09) (emphasis added); *see also Tennant*, 849 F. Supp. 2d at 701. It is not necessary to be an expert in campaign finance law to understand the words "supports or condemns." In sum, the Supreme Court has held that language like "supports or condemns" is not vague.

Finally, Plaintiffs have provided no analysis or authority for their assertion that "supports or condemns" is unconstitutionally vague as applied to WRTL.[9] Plaintiffs have made no effort to analyze the legal claim they have presented, to point to facts in their favor regarding WRTL's speech, or to apply the controlling legal standards for vagueness to GAB 1.28. WRTL has not met its burden of persuasion.

[9]Not that it would make much difference since "the as-applied and facial vagueness challenges are largely parallel." (Pl.'s Br. at 54.)

Mazurek, 520 U.S. at 972. Plaintiffs are not likely to succeed on their facial and as-applied vagueness challenges to "supports or condemns."

c. "Functional equivalents" is not unconstitutionally vague.

Plaintiffs assert in their brief that the language "functional equivalents" in GAB 1.28(3)(a) is unconstitutionally vague as applied to WRTL and facially. (Pl.'s Br. at 71.) The "functional equivalents" language is used in GAB 1.28(3)(a) to define when a communication is made for "political purposes." GAB 1.28(3)(a) states:

> (3) A communication is for a "political purpose" if either of the following applies:
>
> (a) The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate and unambiguously relates to the campaign of that candidate:
>
> 1. "Vote for;"
>
> 2. "Elect;"
>
> 3. "Support;"
>
> 4. "Cast your ballot for;"
>
> 5. "Smith for Assembly;"
>
> 6. "Vote against;"
>
> 7. "Defeat;" or
>
> 8. "Reject."

Plaintiffs refer to the language "functional equivalents" or materially similar language as the "appeal-to-vote test." *Id.*; *see also*

id. at 61-67. Plaintiffs' conclusion that this test is unconstitutionally vague is incorrect. The so-called "appeal-to-vote test" is not void for vagueness. On the contrary, the "functional equivalents" language in GAB 1.28 that Plaintiffs assert is vague incorporates an objective standard that was applied by the Supreme Court in *WRTL II* and in *Citizens United*.[10]

In *WRTL II*, Chief Justice Roberts recognized the competing government interests at stake when regulating election communications. 551 U.S. at 469-70. While the government must have the ability to regulate elections to protect the public from being misled and to prevent corruption, public debate on issues is essential to our system of government and thus protected by the First Amendment. *Id.*; *see also Buckley,* 424 U.S. at 26.

To remain faithful to both interests, the Supreme Court has recognized the government's ability to regulate election communications, but limited the authority to communications that are unambiguously campaign related. *Buckley*, 424 U.S. at 80. Such communications fall into two categories. The first is "express advocacy," which refers to communications with explicit words

[10]The genesis of the "appeal-to-vote test" is *McConnell*. *See McConnell*, 540 U.S. at 193, 206; *see also id.* at 127.

expressly advocating for or against a candidate's election, such as "vote for." *Id.* at 43-44 and n.52. The express advocacy test provides a bright line to ensure regulations remain within the realm of election activities and do not restrict ordinary debate on issues (often referred to as "issue advocacy"), which is protected by the First Amendment. *Id.* The express advocacy test, however, is not the constitutional boundary for the regulation of elections communications. *McConnell*, 540 U.S. at 190-93; *WRTL II*, 551 U.S. at 474 n.7.

Beyond the express advocacy test, the Supreme Court has also recognized a need to regulate communications that do not contain the precise words that constitute express advocacy but yet are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-70. The Chief Justice's opinion in *WRTL II* applied the functional equivalent of express advocacy standard and concluded that the three ads in question were not the functional equivalent of express advocacy. *See WRTL II*, 551 U.S. at 470-76. Wisconsin has essentially adopted this standard in GAB 1.28(3)(a)1. by including the phrase "functional equivalents" in the rule and setting forth specific examples of express advocacy.

Plaintiffs argue that the "appeal-to-vote test" was abolished by the Supreme Court in *Citizens United*. (*See* Pl.'s Br. at 62.) A careful reading of *Citizens United*, however, shows otherwise. In *Citizens United*, the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which allowed political speech to be banned based on the speaker's corporate identity. The Court also overruled the portion of *McConnell* that upheld restrictions on corporate expenditures. *Citizens United*, 130 S. Ct. at 913. The Court did not abolish the "appeal-to-vote test" applied in *Citizens United*.

The *Citizens United* Court recognized that the "appeal-to-vote test" is objective. *Citizens United*, 130 S. Ct. at 889, 895. The Court applied the test and found that the communication at issue (*i.e.*, *Hillary: The Movie*) was the functional equivalent of express advocacy because it was susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. *Id.* at 890. The portion of *Citizens United* that Plaintiffs claim rejected the "appeal-to-vote test" was actually a criticism of the Federal Election Commission's regulatory scheme, which established a "two-part, 11-factor balancing test to implement [*WRTL II*]'s ruling." *Id.* at 895-96. The Court found that the FEC's regulations were "complex" and "onerous" and "precisely what [*WRTL II*] sought to avoid." *Id.* at 896.

Thus, far from overruling *WRTL II*, the *Citizens United* Court embraced a straightforward application of the "appeal-to-vote test" when it applied the test to *Hillary: The Movie* and concluded that the film was the functional equivalent of express advocacy. *Id.* at 890.

The Fourth Circuit's decision in *The Real Truth About Abortion, Inc. v. Federal Election Commission* backs up Defendants' analysis of Supreme Court precedent regarding the regulation of the "functional equivalents" of express advocacy and the continuing validity of the "appeal-to-vote test" after *Citizens United*. 681 F.3d 544, 552-55 (4th Cir. 2012), *petition for cert. filed* (Sept. 10, 2012) (No. 12-311).

Wisconsin employs essentially the same test that was applied in *Citizens United* by using the "functional equivalents" language in GAB 1.28(3)(a)1. The use of the phrase "functional equivalents" in the rule is in reference to a list of examples of language in GAB 1.28(3)(a)1. through GAB 1.28(3)(a)8., which includes what the Supreme Court in footnote 52 of *Buckley* determined constitutes express advocacy. *See Buckley*, 424 U.S. at 44 n.52. By regulating the "functional equivalents" of the list of express advocacy language, Wisconsin is only following the hand that was laid by the Supreme Court in *Citizens United* when it found that *Hillary: The Movie* was the "functional equivalent" of express advocacy. *Citizens United*, 130 S. Ct. at 890.

The Supreme Court deemed this type of analysis constitutionally acceptable, so Wisconsin law is not unconstitutionally vague when it emulates the analysis and language that was found acceptable in *WRTL II* and *Citizens United*. *See The Real Truth About Abortion*, 681 F.3d at 552.

Finally, WRTL provides no analysis of its speech or proposed speech in relation to the "functional equivalents" language in GAB 1.28 to demonstrate why this language is vague as applied to WRTL. Like its facial challenge to this language, Plaintiffs have not met their burden of persuasion and are not likely to succeed on their claims. *Mazurek*, 520 U.S. at 972 (citation omitted).

B. The district court did not err when it held that Count 4 of Plaintiffs' First Amended Verified Complaint regarding the "organization" definition in now-expired emergency rule Wis. Admin. Code § GAB 1.91(1)(f) (2010) is moot.

The district court did not err when it held that Count 4 of Plaintiffs' First Amended Verified Complaint regarding the "organization" definition in now-expired emergency rule Wis. Admin. Code § GAB 1.91(1)(f) (2010) is moot. Plaintiffs' First Amended Verified Complaint challenges only the "organization" definition in now-expired emergency rule Wis. Admin. Code

§ GAB 1.91(1)(f) (2010). The complaint alleges: "Wisconsin's 'organization' definition, GAB 1.91.1.f, fails constitutional scrutiny . . . ." (A. 536 at ¶ 86.) Thus, Plaintiffs' complaint does not challenge the current definition of "organization" that is found in Wis. Admin. Code § GAB 1.91(1)(g) (2012). (A. 104.)

The current Wis. Admin. Code § GAB 1.91(1)(g) was promulgated on July 1, 2012. In the permanent rule, Wis. Admin. Code § GAB 1.91(1)(f) defines the term "independent," but not "organization." (A. 104; A. 202.) Plaintiffs did not amend their complaint to challenge the definition of "organization" found in the current permanent rule, Wis. Admin. Code § GAB 1.91(1)(g) (2012). (A. 104.) The district court observed that it could not "impliedly amend the pending complaint upon which plaintiffs are proceeding to address the permanent rule." (A. 202.) Plaintiffs have challenged the *expired* emergency rule in their First Amended Verified Complaint; therefore, the district court correctly held that Count 4 of the complaint is moot. *Id.*

C. Defendants do not appeal the district court's ruling with regard to Wisconsin's corporate disbursement and contribution ban in Wis. Stat. § 11.38(1)(a)1.

Count 2 of Plaintiffs' First Amended Verified Complaint alleges that Wisconsin's corporate disbursement and contribution ban in

Wis. Stat. § 11.38(1)(a)1. is unconstitutional as applied to WRTL's speech. (A. 533-34 at ¶¶ 75-76.) Count 9 asserts that Wis. Stat. § 11.38(1)(a)1. is facially unconstitutional. (A. 538-39 at ¶¶ 98-100.)

The district court held in its August 31, 2012, Decision and Order that "plaintiffs' second motion for preliminary injunction as to count two is granted." (A. 163.) The district court also held that "plaintiffs' second motion for preliminary injunction as to count nine is granted with respect to the corporate disbursement ban[.]" *Id.* The district court ordered that defendants are "preliminarily enjoined from enforcing limitations on corporate expenditures under Wis. Stat. § 11.38(1)(a)(1) pending the final resolution of this case." (A. 164.) Defendants do not appeal these rulings.[11]

[11] *See also* Wis. Admin. Code § GAB 1.91(2) (2012), which states:

> A corporation, or association organized under ch. 185 or 193, Stats., is a person and qualifies as an organization that is not prohibited by s. 11.38 (1) (a) 1., Stats., from making independent disbursements until such time as a court having jurisdiction in the State of Wisconsin rules that a corporation, or association organized under ch. 185 or 193, Stats., may constitutionally be restricted from making an independent disbursement.

D. Wisconsin's committee/political committee, "persons other than political committees," and "organization" definitions are constitutional.

Plaintiffs are not likely to succeed on the merits of Count 3 (and the related facial challenge in Count 9) of their First Amended Verified Complaint. Count 3 asserts that the regulation of political committees under Wisconsin law fails either strict or exacting scrutiny because Wisconsin law uses the following definitions: (1) "committee" and "political committee" in Wis. Stat. § 11.01(4) and GAB 1.28(1)(a); (2) "persons other than political committees" in GAB 1.28(2); and (3) "organization" in Wis. Admin. Code § GAB 1.91(1)(f) (2010).[12] (Pl.'s Br. at 75; *see also* A. 521-25 at ¶¶ 27-39, A. 534-35 at ¶¶ 77-84.) Plaintiffs challenge these definitions both facially and as applied to WRTL's speech. (A. 538 at ¶¶ 98-100; A. 539 at ¶ 103.)

Plaintiffs are unlikely to succeed on the merits because the challenged definitions in Wisconsin law—which give rise to certain registration, recordkeeping, and periodic reporting requirements—are substantially related to Wisconsin's sufficiently important interest in providing relevant information to the electorate regarding the sources of funding for campaign-related speech. *See Citizens United*, 130 S. Ct.

[12]As argued above, Plaintiffs' challenge to the definition of "organization" found in now-expired emergency rule GAB 1.91(1)(f) (2010) is moot.

at 914-15; *Madigan*, 2012 WL 3930437 at *8. Plaintiffs assert that the challenged definitions are unconstitutional because they do not incorporate certain non-existent "tests" that this Court and other federal courts of appeals have rejected. (*See* Pl.'s Br. at 85-96.)

1. There is no "major purpose" test that Wisconsin law must pass.

Unlike their vagueness claims, the thrust of Plaintiffs' argument with regard to Count 3 is that under *Buckley* an organization may only be regulated as a political committee and be subject to disclosure requirements if it meets one of two criteria: (1) it is under the control of a candidate (what Plaintiffs call the "under the control of a candidate" test); or (2) it has the major purpose of the nomination or election of a candidate or candidates (what Plaintiffs call the "major purpose" test). (*See* Pl.'s Br. at 85.) Plaintiffs assert that WRTL does not fall under either of these tests, so it cannot be regulated as a political committee. (*See id.* at 92-93.) However, the premise that these "tests" exist is false and has been expressly rejected by this Court in *Madigan*, and by other federal courts of appeals.

These so-called "tests" are derived from the following language in *Buckley* regarding the regulation of a "political committee" under FECA:

> The lower courts have construed the words "political committee" more narrowly. *To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.* Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Buckley, 424 U.S. at 79 (footnote omitted and emphasis added).

Defendants disagree that either Plaintiffs' "under the control of a candidate" test or Plaintiffs' "major purpose" test is applicable to Wisconsin law. There is no Supreme Court case applying a major purpose "test" to a state's regulation of political committees. *Madigan*, 2012 WL 3930437 at *16 (citation omitted). And the Supreme Court has clarified that the part of *Buckley* from which these so-called "tests" are derived involved an "intermediate step of statutory construction on the way to its constitutional holding," not "a constitutional test." *WRTL II*, 551 U.S. at 474 n.7.

In *Madigan*, this Court held that there is no "major purpose" limitation applicable to a state's regulation of political speech. *Madigan*, 2012 WL 3930437 at *16. "[T]he 'major purpose' limitation . . . was a creature of statutory interpretation, not constitutional

command." *Id.*; *see also id.* at *15-19; *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1009-10 (9th Cir. 2010). Thus, Wisconsin's political committee definitions need not reference or incorporate a "major purpose" component to be constitutional.

The First Circuit categorically rejected that there is a "major purpose" test, explaining that the test "would yield perverse results":

> We find no reason to believe that this so-called "major purpose" test, like the other narrowing constructions adopted in *Buckley,* is anything more than an artifact of the Court's construction of a federal statute. *See McConnell,* 540 U.S. at 191-92, 124 S.Ct. 619. The Court has never applied a "major purpose" test to a state's regulation of PACs, nor have we. And, as we have discussed, the line-drawing concerns that led the Court to read FECA's definition of "political committee" narrowly are not relevant to our First Amendment review of Maine's statutes. Moreover, as the district court aptly observed, application of NOM's "major-purpose" test would "yield perverse results" here:
>
> > Under NOM's interpretation, a small group with the major purpose of re-electing a Maine state representative that spends $1,500 for ads could be required to register as a PAC. But a mega-group that spends $1,500,000 to defeat the same candidate would not have to register because the defeat of that candidate could not be considered the corporation's major purpose.
>
> *Nat'l Org. for Marriage,* 723 F. Supp. 2d at 264. We, like the district court, see no basis to conclude "that the First Amendment's protections should apply so unequally." *Id.*
>
> We therefore reject NOM's argument that the non-major-purpose PAC definition is unconstitutionally overbroad. Because we find a substantial relation between

> Maine's disclosure-oriented regulation of non-major-purpose PACs and its interest in the dissemination of information regarding the financing of political speech, we conclude that the law does not, on its face, offend the First Amendment.

McKee, 649 F.3d at 59; *see also Vermont Right to Life Comm., Inc. v. Sorrell*, No. 09-CV-188, 2012 WL 2370445 (D. Vt. 2012, June 21, 2012) at *16 ("a group that spends $1.5 MM of a total of $6 MM on promoting candidates probably would not qualify [under the "major purpose" test], but one that spends $1500 of a total budget of $2000 probably would.").

The bottom line is that Plaintiffs' contention that these "tests" are controlling, or that they even exist as constitutional directives, is wishful thinking. This Court should not accede to the application of a "major purpose" test to Wisconsin law; it is not constitutionally required.

2. Wisconsin's registration, recordkeeping, and periodic reporting requirements are constitutional.

Given that there is no "major purpose" test that Wisconsin law must meet, Plaintiffs turn to attacking the constitutionality of Wisconsin's disclosure requirements directly. (Pl.'s Br. at 75-84, 88-98; *see also* A. 535 at ¶¶ 81-84.) Plaintiffs assert that Wisconsin law "impos[es] political-committee(-like) burdens." (Pl.'s Br. at 80.) Plaintiffs note that Wisconsin law requires registration, recordkeeping, and periodic reporting requirements for political committees like

WRTL. (Pl.'s Br. at 76-77.) Plaintiffs also mention: (1) limitations on contributions that political committees receive, which would not apply to WRTL if it engages in only independent spending for political speech, (Pl.'s Br. at 77-78 (citing *Barland*, 164 F.3d at 151-55); and (2) source bans on contributions received. (*Id.* at 78.) The former need not be addressed if WRTL engages only in independent political speech; the latter will be addressed as to Count 8, below.

Plaintiffs' claims must fail because Wisconsin's disclosure requirements pass constitutional muster. The declaration of policy in Chapter 11 of the Wisconsin Statutes sums up the State's important interests in its campaign finance disclosure requirements:

> The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. . . . 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). The State's interest in providing relevant and timely information to its citizens regarding the sources of funding for political speech is unquestioned.

None of the challenged Wisconsin laws prevent WRTL or anyone else from speaking. *See Citizens United*, 130 S. Ct. at 914 ("disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities . . . and do not prevent anyone from speaking") (citations and internal quotation marks omitted). They are merely laws that require WRTL and similar entities to register with the Wisconsin Government Accountability Board, maintain records, and report certain information about their campaign-related speech.

Disclosure requirements are subject to exacting scrutiny. In *Madigan* this Court stated:

> Since its seminal modern campaign finance decision in *Buckley v. Valeo,* 424 U.S. 1, 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court has consistently distinguished between laws that restrict the amount of money a person or group can spend on political communication and laws that simply require disclosure of information by those who spend substantial sums on political speech affecting elections. Unlike contribution and expenditure limits, disclosure laws "impose no ceiling on campaign-related activities," *id.* at 64, 96 S.Ct. 612, and "do not prevent anyone from speaking." *Citizens United,* 130 S.Ct. at 914, quoting *McConnell v. FEC,* 540 U.S. 93, 124, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), overruled in part on other grounds, *Citizens United,* 130 S.Ct. at 913. Disclosure laws are thus a "less restrictive alternative to more comprehensive

> regulations of speech." *Citizens United,* 130 S.Ct. at 915. For that reason, the Court does not subject disclosure requirements to the same standard of strict scrutiny that applies to contribution[13] and expenditure limits but rather to "exacting scrutiny," which requires only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United,* 130 S.Ct. at 914, quoting *Buckley,* 424 U.S. at 64, 66.

Madigan, 2012 WL 3930437 at *7 (footnotes omitted). Wisconsin's registration, recordkeeping, and periodic reporting requirements are subject to exacting scrutiny, and they pass constitutional muster both facially and as applied to WRTL. Wisconsin's disclosure requirements are substantially related to the State's important interest in providing the electorate with information about the sources of funding for election-related spending. *See Citizens United*, 130 S. Ct. at 914-15; *Madigan*, 2012 WL 3930437 at *8.

To avoid the application of these principles, Plaintiffs request reconsideration of *Madigan* pursuant to Circuit Rule 40(e) and, alternatively, ask this Court not to apply *Madigan* because it involved a facial challenge. (Pl.'s Br. at 78-79.) This Court should decline Plaintiffs' requests; *Madigan* controls. Plaintiffs have done nothing to demonstrate why, as applied to WRTL, the registration, recordkeeping,

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[13]Contribution limits are subject to closely drawn scrutiny. *Barland*, 664 F.3d at 152; *Buckley*, 424 U.S. at 21; *FEC v. Beaumont*, 539 U.S. 146, 148 (2003); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, 131 S. Ct. 2806, 2817 (2011).

and periodic reporting requirements in Wisconsin law are unconstitutionally burdensome. While WRTL's speech is not "hypothetical," (Pl.'s Br. at 78), it is unquestionably regulable and subjects WRTL to the applicable disclosure requirements.

Citizens United left open the potential for as-applied challenges to disclosure requirements in particular circumstances. *See Citizens United*, 130 S. Ct. at 914. However, WRTL has not alleged (nor demonstrated) a reasonably probability that the "disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals'" due to the requirements of Wisconsin law. *See id.* at 914 (quoting *McConnell*, 540 U.S. at 198). WRTL is not reasonably likely to prevail on its claim that Wisconsin's registration, recordkeeping, and periodic reporting requirements may not be constitutionally applied.

Finally, Plaintiffs have not established why the disclosure requirements in Wisconsin law are facially unconstitutional. *Citizens United* and *Madigan* provide ample authority for upholding these requirements.

E. Defendants do not appeal the district court's ruling regarding Wisconsin's regulatory attribution and disclaimer requirements in Wis. Admin. Code § GAB 1.42(5), as applied to WRTL-SPAC's broadcast speech.

Count 5 of Plaintiffs' First Amended Verified Complaint asserts that the attribution and disclaimer requirements of GAB 1.42(5) are unconstitutional as applied to WRTL-SPAC's broadcast speech. (A. 526-27 at ¶¶ 43-48; A. 536 at ¶¶ 88-90.) Plaintiffs' have not asserted that GAB 1.42(5) is facially unconstitutional, only that it is unconstitutional as applied to certain 30 second radio ads that WRTL-SPAC sought to run in June 2012. *Id.* Copies of the scripts for the proposed 30 second ads can be found at A. 322-25.

The district court held in its August 31, 2012, Decision and Order that "plaintiffs' second motion for preliminary injunction as to count five is granted with respect to ads that are less than 30 seconds in length, and denied with respect to the remaining aspects of count five." (A. 163.) Defendants do not appeal this ruling.

Wisconsin Stat. § 11.30 requires committees, individuals, and groups to disclose the source of their printed advertisements, billboard, handbills, sample ballots, television or radio advertisements, or other communications that are paid for through any contribution,

disbursement, or incurred obligation. Wis. Stat. § 11.30(2)(a), (2)(b), and (2)(c). This statutory requirement includes both attribution and disclaimer components. Speakers are required to include the words "Paid for by" followed by the name of the committee and the name of the treasurer or other authorized agent, and the words "Not authorized by any candidate or candidate's agent or committee" in their communications. Wis. Stat. § 11.30(2)(b), (2)(c), and (2)(d). Plaintiffs do not challenge the constitutionality of Wis. Stat. § 11.30 in Count 5. Instead, they challenge GAB 1.42(5) as applied to their proposed ads.

GAB 1.42(5) is an administrative rule promulgated by the Wisconsin Government Accountability Board that requires committees making independent expenditures in support of or in opposition to a candidate to disclose that such committees are not acting in concert with any candidate. GAB 1.42(5) states:

> Special Disclaimer Requirement. A political message in support of or opposition to a candidate by a committee or individual not acting in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and 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 shall contain, in addition to the ordinary identification required by s. 11.30 (2), Stats., the words: "The committee (individual) is the sole source of this communication and the committee (individual) did not act in cooperation or consultation with, and 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 by this communication".

GAB 1.42(5) mandates specific language that goes beyond the language required by the authorizing statutory provision, Wis. Stat. § 11.30.

The language mandated by GAB 1.42(5) was drafted primarily for purposes of inclusion in print ads or television ads, where the language can easily be included in written form at the bottom of the page or screen. Defendants acknowledge that, for the limited purpose of radio ads, such language would consume a substantial portion of the air time of shorter radio ads. Under these circumstances, the Wisconsin Government Accountability Board would only enforce the requirements of Wis. Stat. § 11.30 as to WRTL-SPAC's proposed broadcast speech. Defendants adopted this position in responding to Plaintiffs' second preliminary injunction motion in district court. (*See* Dist. Ct. Dkt. # 73 at 19.) Defendants take the same position now.

The district court's August 31, 2012, Decision and Order is consistent with the position that Defendants have taken regarding enforcement of GAB 1.42(5) as to WRTL-SPAC's proposed 30 second radio ads. Accordingly, Defendants do not appeal the district court's ruling.

F. Wisconsin's 24-hour reporting requirements in Wis. Stat. § 11.12(5) and (6) are constitutional.

Wisconsin's 24-hour reporting requirements in Wis. Stat. § 11.12(5) and (6) are constitutional. Count 6 of Plaintiffs' First Amended Verified Complaint asserts that the 24-hour reporting requirements are unconstitutional as applied to WRTL-SPAC's speech. (A. 536-37 at ¶¶ 91-92.) Count 9 asserts that these requirements are facially unconstitutional. (A. 538-39 at ¶¶ 98-100.) Plaintiffs are not likely to succeed on these claims because Wisconsin's 24-hour reporting requirements are constitutional, both as-applied and facially.

The constitutionality of Wisconsin's 24-hour reporting requirements is reviewed under "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley,* 424 U.S. at 64, 66); *Madigan*, 2012 WL 3930437 at *7. Wisconsin's 24-hour reporting requirements are substantially related to serving the sufficiently important governmental interest in providing the electorate with highly relevant, timely information regarding who is speaking about a candidate immediately before an election.

Wisconsin's statutory 24-hour reporting requirements are administered pursuant to rules that have been promulgated by the Wisconsin Government Accountability Board. Plaintiffs have not challenged the constitutionality of these rules. Wisconsin Admin. Code § GAB 1.15 ("GAB 1.15") establishes how "late campaign activity" like the contributions and disclosures referenced in Wis. Stat. § 11.12(5) and (6) must be reported. GAB 1.15(2) requires that the receipt of contributions from a single source totaling more than $500 cumulatively during the 15-day period immediately preceding a primary or election shall be made using "Form EB-3 or . . . a format which is acceptable to the filing officer and which contains the information required by the board on Form EB-3." Form EB-3 is no longer used and has been replaced by Form GAB-3, which is available at *http://gab.wi.gov/forms/gab-003* (last visited Oct. 31, 2012).[14]

Similarly, GAB 1.15(3) requires that independent disbursements of $20 or more during the 15-day period immediately preceding a primary or election shall be made using "Form EB-7 or . . . a format which is acceptable to the filing officer and which contains the information required by the board on form EB-7." Form EB-7 has been

[14]A copy of this form is found in the record at Dist. Ct. Dkt. #74-2.

replaced by Form GAB-7, which is available at *http://gab.wi.gov/forms/gab-007* (last visited Oct. 31, 2012).[15]

Timely filing of the required forms may be accomplished by hand delivery to the filing officer or by U.S. first class mail, postmarked not later than the date prescribed by law for filing. GAB 1.15(4). Facsimile transmissions of the required reports are also allowed when the filing officer is the Wisconsin Government Accountability Board and the deadline for filing is on the day or day immediately preceding a primary or election, if the signed original is mailed via U.S. mail with a postmark not later than the date due. GAB 1.15(7).

In addition to the options of reporting by U.S. mail or facsimile, electronic means of reporting are also available to registrants. The Wisconsin Campaign Finance Information System ("CFIS"), *see http://cfis.wi.gov/* (last visited Oct. 31, 2012), allows for the electronic filing of the required information via the internet in a matter of minutes. This system is mandatory for registrants "for whom the board serves as filing officer and who or which accepts contributions in a total amount or value of $20,000[.]" Wis. Stat. § 11.21(16). However, the CFIS system is available to all registrants, including WRTL-SPAC.

[15]A copy of a prior version of this form is found in the record at Dist. Ct. Dkt. #74-3; the current Form GAB-7 on the internet has been updated.

CFIS's website includes a frequently asked questions ("FAQs") section that describes how to file 24-hour reports online. *See http://cfis.wi.gov/Public/Registration.aspx?page=Faqs* (last visited Oct. 31, 2012).[16] The CFIS electronic filing system is quite simple, even providing drop-down menus and pre-populated fields to speed the process.

WRTL-SPAC's main concern with the 24-hour reporting requirements in Wis. Stat. § 11.12(5) and (6) is not that Wisconsin lacks any substantial interest in them, but that the requirements are unconstitutionally burdensome. (*See* Pl.'s Br. at 101-02.) Plaintiffs assert that "having to devote time to preparing and filing 24 hour reports, WS-11.12.5-6, is a severe burden on WRTL-SPAC's resources, including its time to devote to its mission in critical weeks of the year, especially when the disbursement-reporting threshold is $20 or $100." (Pl.'s Br. at 45.) This argument is not persuasive. While filling out the required forms and submitting them to the filing officer takes some time, the administrative burden is minimal, even for WRTL-SPAC. Some limited administrative resources would need to be expended to comply with the requirements, but that burden cannot reasonably require more than several minutes of work for a single person,

[16]A copy of the FAQs can be found in the record at Dist. Ct. Dkt. #74-4.

particularly in light of the fact that electronic filing is also an option using the CFIS system.

Controlling and persuasive case law supports the constitutionality of Wisconsin's 24-hour reporting requirements. In *McConnell*, the Supreme Court upheld the 24-hour reporting requirements of the Bipartisan Campaign Reform Act of 2002. *McConnell*, 540 U.S. at 195-96. Likewise, the Fourth Circuit upheld a 24-hour reporting requirement similar to Wisconsin's in *North Carolina Right to Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir.), *petition for cert. denied*, 129 S. Ct. 490 (2008) ("*NCRL-FIPE*").

The *NCRL-FIPE* court held that 24-hour reporting requirements must pass "exacting scrutiny" and that, in light of the fact that *McConnell* upheld 24-hour reporting requirements, North Carolina's requirements also passed muster. *NCRL-FIPE*, 524 F.3d at 439 (citing *McConnell*, 540 U.S. at 195-96). The court reiterated that 24-hour requirements "advance three important state interests: 'providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.'" *Id.* at 440 (citing *McConnell*, 540 U.S. at 196).

The First Circuit upheld Maine's 24-hour reporting requirement for independent expenditures of over $100 made within two weeks of an election in *McKee*, 649 F.3d at 45, 59-61. The *McKee* court rejected a claim that the $100 reporting threshold is unconstitutionally low. *Id.* at 60-61; *see also NCRL-FIPE*, 524 F.3d at 439 (noting that the Supreme Court in *Buckley* "rejected an argument that FECA's $10 and $100 thresholds for disclosure of contributions were unconstitutionally low. . . . [by reasoning] that it could not 'require Congress to establish that it has chosen the highest reasonable threshold' that would still achieve the government's interests." (quoting *Buckley*, 424 U.S. at 83).).

The D.C. Circuit and Ninth Circuit have also upheld 24-hour reporting requirements. *See SpeechNow.org v. FEC*, 599 F.3d 686, 697-98 (D.C. Cir. 2010) (*en banc*) (upholding the 24-hour reporting requirement in 2 U.S.C. § 434(g)(1) for expenditures of $1,000 or more made in the 20 days before an election); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 790 n.3, 791-92 (9th Cir. 2006) (upholding the

24-hour reporting requirement in Alaska Stat. § 15.13.110 for contributions of $250 or more made within nine days of an election).[17]

Plaintiffs rely upon *Citizens for Responsible Government State Political Action Committee v. Davidson*, a Tenth Circuit decision that struck down Colorado's 24-hour reporting requirements. 236 F.3d 1174, 1197 (10th Cir. 2000) ("*Citizens for Responsible Gov't*"). (Pl.'s Br. at 102.) The case is distinguishable and not persuasive. The Tenth Circuit applied strict scrutiny to review the 24-hour reporting requirement, which is inconsistent with controlling precedent holding that such requirements are subject to exacting scrutiny. *See Citizens United,* 130 S. Ct. at 914. Furthermore, Colorado law required 24 hour reporting for independent expenditures of $1,000 or more *at all times* (*i.e.*, year-round), not just in the weeks immediately preceding an election, as is required by Wisconsin law. *Citizens for Responsible Gov't*, 236 F.3d at 1196.

Plaintiffs have not demonstrated a likelihood of success as to Count 6 of their First Amended Verified Complaint, nor as to the

[17]*See also Sorrell*, 2012 WL 2370445 at *18-21 (upholding a 24-hour reporting requirement for expenditures of $500 or more made within 30 days of an election); *Tennant*, 849 F. Supp. 2d at 714 (distinguishing *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, and upholding a 24-hour reporting requirement for electioneering communications and independent expenditures that aggregate $1,000 (or $500 in the case of county or municipal elections) in the final two weeks of an election).

related facial challenge asserted in Count 9. Wisconsin's 24-hour reporting requirements are substantially related to serving important state interests and are not unduly burdensome, even as to WRTL-SPAC. Plaintiffs are not likely to succeed on these claims.

G. Wisconsin's oath for independent disbursements requirement in Wis. Stat. § 11.06(7) and Wis. Admin. Code § GAB 1.42(1) is constitutional.

Wisconsin's oath for independent disbursements requirement in Wis. Stat. § 11.06(7) and Wis. Admin. Code § GAB 1.42(1) ("GAB 1.42(1)") is constitutional. Count 7 of Plaintiffs' First Amended Verified Complaint asserts that the oath for independent disbursements requirement is unconstitutional as applied to WRTL-SPAC's speech. (A. 537 at ¶¶ 93-95.) Count 9 asserts that the requirement is facially unconstitutional. (A. 538-39 at ¶¶ 98-100.) Plaintiffs are not likely to succeed on these claims because Wisconsin's oath for independent disbursements requirement is constitutional, both as-applied to WRTL-SPAC's speech and facially.

Wisconsin's oath for independent disbursements is a disclosure requirement that is subject to "exacting scrutiny." *Citizens United*, 130 S. Ct. at 914; *Madigan*, 2012 WL 3930437 at *7. The governmental interest in providing the electorate with information about the source of

election-related disbursements that Wis. Stat. § 11.06(7) and GAB 1.42(1) facilitates is important and substantial. *See Citizens United*, 130 S. Ct. at 914; *McConnell*, 540 U.S. at 196. The minimal burden created by Wis. Stat. § 11.06(7) is justified by the government's substantial interest and is closely tied to providing relevant information to the public. It passes exacting scrutiny, both as to WRTL-SPAC and facially. *See Citizens United*, 130 S. Ct. at 914; *Madigan*, 2012 WL 3930437 at *7.

Plaintiffs assert that the required oath and reporting of independent disbursements fails exacting scrutiny and "does not reflect the seriousness of the actual burden on First Amendment rights." (Pl.'s Br. at 103 (citation and internal quotation marks omitted.) Plaintiffs exaggerate the burdens created by these requirements.

First, independent expenditure reporting requirements have been upheld by this Court and other federal courts of appeals. In *Madigan*, this Court upheld Illinois's independent expenditure disclosure requirements in the face of vagueness and overbreadth challenges. *Madigan*, 2012 WL 3930437 at *25-26. This Court observed that, of the federal courts of appeals that have reviewed constitutional challenges to disclosure requirements, "every one has upheld the disclosure regulations against the facial attacks." *Id.*, at *1 (footnote omitted); *see*

also id., at *1 n.1 (listing cases upholding disclosure requirements from the First, Fourth, Ninth, Eleventh, and D.C. Circuits). The prevailing case law supports the constitutionality of independent expenditure disclosure requirements like Wisconsin's.

Second, the initial oath required by Wis. Stat. § 11.06(7)(a) is not unconstitutionally burdensome. It merely obligates a committee to fill in the blanks, sign, and notarize a single-page form with an attachment showing the names of candidates to which it applies. *See* Form GAB-6, which is available at *http://gab.wi.gov/forms/gab-006* (last visited Oct. 31, 2012).[18] WRTL-SPAC submitted a completed oath form in 2006, which was filed as Exhibit 28 to Plaintiffs' Verified Complaint. (Dist. Ct. Dkt. #1-29.) WRTL-SPAC submitted completed oath forms to the Wisconsin Government Accountability Board without issue in 2012. (A. 641-53.) Although compiling the list of candidate names, executing the form, and sending it in could take several minutes to complete, this amount of time is not burdensome regardless if the committee in question has "limited staff." (*See* A. 528 at ¶ 53.)

Third, that a committee must file an amendment to the oath when the list of candidates to which it applies changes is not

[18]A copy of a prior version of this form is found in the record at Dist. Ct. Dkt. #74-5; the current Form GAB-6 on the internet has been updated.

unconstitutionally burdensome, regardless of the committee's size. Filing an amendment to the oath requires only that a committee: (1) electronically save a word-processed copy of the candidate list that the committee initially submitted, for example as a Microsoft Word document; (2) update that list accordingly to reflect candidates currently supported or opposed; and (3) print and file the amended list. This simple three-step process creates no unconstitutional burden for any committee, regardless of its staffing. Thus, the oath for independent disbursements requirement passes exacting scrutiny. *See Citizens United*, 130 S. Ct. at 914; *McConnell*, 540 U.S. at 196.

Fourth, it makes sense that a committee like WRTL-SPAC, which allegedly engages only in independent expenditures for political speech, should be required to confirm in writing that its expenditures are *truly* independent. *See Barland*, 664 F.3d at 155. If WRTL-SPAC's expenditures are not truly independent, the completed oath for independent disbursements that WRTL-SPAC files constitutes a piece of valuable evidence.

Finally, Plaintiffs assert in the alternative that Wis. Stat. § 11.06(7) is unconstitutional because it creates a prior restraint that

fails strict scrutiny. (Pl.'s Br. at 104 n.56.) Plaintiffs are incorrect. This Court has stated when a law creates a prior restraint:

> The term "prior restraint" is used to describe "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 125 L.Ed.2d 441 (1993) (quoting Melville Nimmer, *Nimmer on Freedom of Speech*, § 4.03, p. 4-14 (1984) (emphasis added)). A restriction is a prior restraint if it meets four elements: (1) the speaker must apply to the decision maker before engaging in the proposed communication; (2) the decision maker is empowered to determine whether the applicant should be granted permission on the basis of its review of the content of the communication; (3) approval of the application requires the decision maker's affirmative action; and (4) approval is not a matter of routine, but involves "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the decision maker.

Samuelson v. LaPorte Cmty. Sch. Corp., 526 F.3d 1046, 1051-52 (7th Cir. 2008) (citations omitted and emphasis in original).

Under *Samuelson*, Wis. Stat. § 11.06(7) does not create a prior restraint. Wisconsin Stat. § 11.06(7) does not empower any "decision maker" to determine whether a party submitting an oath for independent disbursements should be granted permission to speak based on the content of their speech. Also, the filing officer receiving the oath for independent disbursements does not exercise any judgment to "approve" the speech by evaluating facts before the submitting party engages in speech. The statute calls for no determination regarding the speech whatsoever—Wis. Stat. § 11.06(7) simply requires the

submission of a statement to the appropriate filing officer. There is no prior restraint.

Plaintiffs have not demonstrated a likelihood of success as to Count 7 of their First Amended Verified Complaint, nor as to the related facial challenge asserted in Count 9. Wisconsin's oath for independent disbursements requirement is substantially related to serving important state interests. The requirement is not unduly burdensome, even as to WRTL-SPAC. Plaintiffs are not reasonably likely to succeed on these claims.

> H. With regard to Plaintiffs' as-applied challenge to the $500 limitation in Wis. Stat. § 11.38(1)(a)3. on what organizations may expend to solicit contributions for their separate segregated funds, Defendants will not enforce this limitation as applied to WRTL and WRTL-SPAC *only*.

With regard to Plaintiffs' as-applied challenge to the $500 limitation in Wis. Stat. § 11.38(1)(a)3. on what organizations may expend to solicit contributions for their separate segregated funds, Defendants will not enforce this limitation as applied to WRTL and WRTL-SPAC *only*, in light of this Court's decision in *Barland*, 664 F.3d 139.

I. Facial rulings are disfavored.

Plaintiffs assert that "[m]uch, though not all, of the challenged law is facially unconstitutional." (Pl.'s Br. at 106.) Like the district court, this Court should decline Plaintiffs' invitation to issue a facial ruling.

The Supreme Court has strongly admonished courts to adjudicate the merits of as-applied challenges before reaching facial ones, and this rule has also been reinforced by this Court. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008) (explaining that "[f]acial challenges are disfavored for several reasons"); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" (Citation omitted.)); *see also Doe v. Heck*, 327 F.3d 492, 527-28 (7th Cir. 2003) (holding that courts should exercise judicial restraint and decide as-applied challenges before facial challenges); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 683 (7th Cir. 1998). Therefore, if a plaintiff succeeds on an as-applied challenge, the Court need not consider a facial challenge. *Id.*

Facial invalidation is only appropriate "when the overbreadth of the statute is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep,' and when the statute is not susceptible to limitation or partial invalidation." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 411-12 (1992) (White, J., concurring) (citations omitted). In determining whether statutory provisions are facially overbroad or vague, the Court must find that the provisions reach a substantial amount of constitutionally protected conduct. *See Vill. of Hoffman Estates*, 455 U.S. at 494-95. However, "[c]laims of facial invalidity often rest on speculation," and consequently "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Wash. State Grange*, 552 U.S. at 450; *see also Sabri v. United States*, 541 U.S. 600, 609 (2004). This Court has made it clear that "[i]n determining whether a law is unconstitutional on its face, then, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Madigan*, 2012 WL 3930437 at *6 (citation and internal quotation marks omitted).

Plaintiffs' blanket facial challenges—which are made on a limited preliminary injunction record—are a good example of why the Supreme Court has repeatedly emphasized that "[f]acial challenges are

disfavored." *Wash. State Grange*, 552 U.S. at 450; *Ayotte*, 546 U.S. at 329. Those persons challenging a law on its face must "carry their 'heavy burden' of establishing that *all* enforcement of the law should . . . be prohibited." *WRTL II*, 551 U.S. at 456 (quoting *McConnell,* 540 U.S. at 207; emphasis in original).

Plaintiffs have submitted no evidence that the Wisconsin statutes and Wisconsin administrative code provisions they have challenged actually affect any other individual or entity aside from WRTL and WRTL-SPAC. Without a proper showing that there are virtually no circumstances in which these statues and regulations could be constitutionally applied, this Court should be wary of reaching a facial ruling. With such an incomplete record, this Court would be forced to facially invalidate the statutes and rules based on pure speculation—contrary to the Supreme Court's strong advice against taking such a risk. *See Wash. State Grange*, 552 U.S. at 450.

As this Court observed in *Madigan*, the standards for facial challenges set a "high bar." *Madigan*, 2012 WL 3930437 at *6. Plaintiffs have not cleared the bar. In sum, this Court should not embrace a facial holding because Plaintiffs have not demonstrated that particular language in the Wisconsin statutes and administrative rules challenged is: (1) so vague that it does not allow ordinary people to

understand what speech is covered; or (2) that the challenged laws burden a substantial amount of protected speech.

II. Plaintiffs Have Not Demonstrated Irreparable Harm.

Plaintiffs have not demonstrated that they will suffer irreparable harm if Wisconsin campaign finance laws are applied to them. Plaintiffs' irreparable harm analysis encompasses but two sentences in their principal brief. (Pl.'s Br. at 51-52 (relying upon *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).) While the brevity of Plaintiffs' argument is not dispositive, its faulty premise is.

Plaintiffs rely upon *Elrod* for the uncontroversial proposition that the loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury. *Id.* However, that begs the question: Have Plaintiffs demonstrated for purposes of their injunction motions that they have "lost" or will "lose" First Amendment freedoms because of the challenged laws? The answer: No.

Plaintiffs have asserted that with regard to at least four of their claims that their speech is *not* chilled. (A. 532 at ¶ 68 ("With respect to law challenged in Counts 4, 6, 7, and the corresponding parts of Count 1 and 9, there is no chill.").) Plaintiffs will, in fact, engage in their speech and challenge the law. *Id.* If there is "no chill," and

Plaintiffs will engage in their speech regardless of the challenged laws, how have Plaintiffs established irreparable harm as to these claims? They have not. Plaintiffs are not deterred from speaking by these laws, let alone prevented from speaking.

III. The Balance Of Equities Does Not Tip In Plaintiffs' Favor, And An Injunction Would Harm The Public Interest.

The balance of equities does not tip in Plaintiffs' favor, and an injunction would harm the public interest. The State of Wisconsin has a legitimate and weighty interest in seeing that constitutional laws validly enacted by the Wisconsin Legislature are applied uniformly and evenhandedly. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, ___ U.S. ___, No. 12A48, 2012 WL 3064878 (July 30, 2012), at *2 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006) (same); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same).

The best indicator of the public's interest is through the actions of the Wisconsin Legislature, which is made up of representatives duly elected by the citizens of Wisconsin. An injunction in this case would run counter to the public's interest, as expressed by the Wisconsin Legislature and implemented by rules adopted by the Wisconsin Government Accountability Board.

CONCLUSION

The district court did not abuse its discretion when it denied Plaintiffs' injunction motions. For the reasons stated herein, the district court's August 31, 2012, Decision and Order, (A. 163-64), and

the district court's September 18, 2012, Decision and Order, (A. 199-202), should be affirmed.

Dated this 2nd day of November, 2012.

Respectfully submitted,

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s/Clayton P. Kawski

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CERTIFICATE OF SERVICE

I certify that on November 2, 2012, I electronically filed the foregoing Brief of Defendants-Appellees with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the case, who are registered CM/ECF users:

James Bopp, Jr.

Randy Elf

Michael Dean

Dated this 2nd day of November, 2012.

s/Clayton P. Kawski

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