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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wisconsin Right to Life, Inc., et al.

Plaintiffs-Appellants,

v.

David G. Deininger, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Wisconsin, No. 2:10-cv-00669-CNC

BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLEES AND URGING AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-2915, 12-3046, and 12-3158

Short Caption: Wisconsin Right to Life, Inc., et al. v. Deininger, et al.

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Attorney's Printed Name: J. Gerald Hebert

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Attorney's Signature: /s/ Paul S. Ryan Date: 11/9/2012

Attorney's Printed Name: Paul S. Ryan

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Attorney's Signature: /s/ Tara Malloy Date: 11/9/2012

Attorney's Printed Name: Tara Malloy

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Attorney's Signature: /s/ Megan McAllen Date: 11/9/2012

Attorney's Printed Name: Megan McAllen

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to strengthen laws governing campaign finance and political disclosure. The CLC has participated in numerous cases addressing campaign finance issues, including *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ["*WRTL*"], and *Human Life of Washington v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) ["*HLW*"]. *Amicus* thus has a longstanding, demonstrated interest in the laws at issue here. [2]

SUMMARY OF ARGUMENT

Plaintiffs-appellants Wisconsin Right to Life, Inc. ("WRTL") and Wisconsin Right to Life State Political Action Committee ("WRTL-SPAC") wish to make expenditures to sway Wisconsin elections without providing meaningful disclosure of their activity.

In the district court, appellants challenged numerous provisions of Wisconsin's campaign finance law, ranging from the state corporate disbursement restriction, Wis. Stat. § 11.38(1)(a)(1), to the annual contribution limit, *id.* at § 11.26(4). Appellants' challenges to Wisconsin's contribution and expenditure restrictions have been resolved, however, and appellants are no longer subject to these substantive campaign finance measures. *See WRTL-SPAC v. Barland*, 664 F.3d

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[1] Counsel for Appellants and Appellees have been contacted and all parties, through counsel, have consented to the participation of the CLC as *amicus curiae*.

[2] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* affirms that no party's counsel authored the brief in whole or in part, and no person – other than the *amicus* – contributed money that was intended to fund the brief.

139 (7th Cir. 2011) (striking down contribution limit as applied to independent expenditure-only committees). *See also* Br. of Defs.-Appellees 15 (Nov. 2, 2012) ["Appellees' Br."] (state not appealing grant of preliminary injunction in connection to Wis. Stat. § 11.38(1)(a)(1)).[3] The issues that remain on appeal all relate to the statutory and regulatory definitions that implement Wisconsin's political disclosure system, as well as several specific reporting requirements crucial to the functioning of this system.

The question before this Court is thus not whether appellants can make expenditures for the communications they propose, nor whether they may raise contributions without limitation, but simply whether they must provide disclosure of their electoral advocacy to the Wisconsin public.

In this memorandum of law, *amicus* CLC urges this Court to affirm the district court's decision to deny appellants' second motion for preliminary relief with respect to four counts in their complaint, all of which relate to disclosure. *See* Tr. of Mot. Hr'g/Oral Decision, Aug. 31, 2012 ["Tr."]. *See also* Am. Compl., Mar. 30, 2012, ¶¶ 71-74, 77-82, 91-95 (Counts 1, 3, 6, 7).

First, the district court was correct in holding that appellants were unlikely to succeed in challenging on vagueness grounds the statutory and regulatory definitions of "political committee," *see* Wis. Stat. § 11.01(4), and "political purpose," *see id.* at § 11.01(16) and Wis. Admin. Code § GAB 1.28(3). Appellants object to these definitions on two bases: first, that these definitions regulate the "functional

[3] Appellees also state that they will not enforce the $500 limitation in Wis. Stat. § 11.38(1)(a)(3) as applied to appellants. Appellees' Br. 61.

equivalent of express advocacy," not simply "express advocacy"; and second, that the regulatory definition of "political purpose" includes the phrase "supports or condemns" in connection to a candidate's position or public record. However, the Supreme Court has endorsed *both* phrases. The test for the "functional equivalent of express advocacy" was created and applied by the Supreme Court in *WRTL* and *Citizens United*. *See* Section I.A. *infra*. And in *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court held that words like "promote," "oppose," "attack," and "support" "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* at 170 n.64 (internal quotations omitted). Appellants thus have no legal support for their attack.

Second, the district court properly rejected appellants' argument that Wisconsin's registration and reporting requirements for "committees" and "persons other than political committees" are overbroad because these disclosure requirements may apply to groups whose "major purpose" is not the nomination or election of a candidate. This Circuit has recognized that "the Supreme Court has never applied a 'major purpose' test to a state's regulation of political committees." *Ctr. for Individual Freedom v. Madigan*, No. 11-3693, 2012 WL 3930437, at *16 (7th Cir. Sept. 10, 2012), *petition for reh'g en banc denied* (7th Cir. Nov. 6, 2012). Furthermore, this test is particularly inappropriate in states such as Wisconsin where political committee status ("PAC status") generally entails only disclosure obligations.

Third, the district court correctly held that appellants were unlikely to succeed in arguing that Wisconsin's 24-hour reporting requirement for contributions received and expenditures made within 15 days of an election, Wis. Stat. §§ 11.12(5) and (6), is unconstitutionally burdensome. Pre-election 24-hour reporting requirements are common features of both state and federal campaign finance laws, and are necessary to ensure that voters have the information they need in the crucial time period before an election.

Lastly, appellants have no basis for their argument that Wisconsin's oath for independent disbursements unduly burdens First Amendment rights. Wis. Stat. § 11.06(7); Wis. Admin. Code § GAB 1.42(1). Requiring organizations that style themselves as "independent expenditure-only committees" to affirm their independence is a reasonable measure to ensure that such organizations are not improperly coordinating their expenditures and to defend against corruption and the appearance of corruption.

For all these reasons, the district court's decision to deny plaintiffs-appellants' second motion for a preliminary injunction as to Counts 1, 3, 6 and 7 should be affirmed.

ARGUMENT

I. Wisconsin's Campaign Finance Laws Are Not Unconstitutionally Vague.

A. Use of *WRTL*'s "functional equivalent" test does not render Wisconsin law vague.

Both the statutory definitions of "political purposes" and "political committee" rely upon the phrase "for the purpose of influencing" and similar language, and

were challenged on this basis as impermissibly vague by appellants in the district court. *See* Appellants' Br. 55 (citing Wis. Stat. §§ 11.01(16), (4), and Wis. Admin. Code § GAB 1.28(1)). These definitions determine which groups are subject to a number of registration, reporting and record-keeping requirements under Wisconsin law. *See*, *e.g.*, Wis. Stat. §§ 11.05; 11.06; 11.10(3), 11.12(3); 11.12(4); 11.20. At the suggestion of defendants-appellees, the district court narrowly construed these terms to encompass only express advocacy or "the functional equivalent of express advocacy." Tr. 7-8.

Also utilizing a "functional equivalent" test, GAB 1.28(1)(3) states that a communication is for a "political purpose" if it constitutes express advocacy or its "functional equivalents," *or* if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." GAB 1.28(1)(3)(a), (b).

Appellants now assert that the inclusion of these tests for the "functional equivalent of express advocacy" in the challenged statutory definitions and GAB 1.28(1)(3) renders these laws unconstitutionally vague. Appellants' Br. VI.D.1, .3. As grounds for this assertion, they argue first that the Supreme Court in *Citizens United* wholly eliminated the "significance" of the "functional equivalent" test articulated in its earlier *WRTL* decision, *id.* at 55-56, 62, and, in the alternative, that the "functional equivalent" test is vague when it is not used in conjunction with the federal definition of "electioneering communications," *id.* at 61-62.

These claims have no merit and are at odds with recent Supreme Court precedent, as well as with *all* lower court decisions following *WRTL* and *Citizens United*.

1. The constitutionality of the "functional equivalent" test is supported by *WRTL* and *Citizens United*.

The "functional equivalent" test that is now part of Wisconsin's statutory definitions of "political purpose" and "political committee" and of GAB 1.28(1)(3) mirrors the test for the "functional equivalent of express advocacy" articulated by the Supreme Court in *WRTL*. Appellants' attempt to invalidate this part of the challenged definitions is tantamount to a demand that this Court override the Supreme Court.

In *WRTL*, the Supreme Court reviewed Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which prohibited the use of corporate or union treasury funds to pay for an "electioneering communication" ("EC"). 2 U.S.C. § 441b(b)(2). *See also* 2 U.S.C. § 434(f)(3)(A)(i) (defining EC as a broadcast ad that "refers to a clearly identified candidate for Federal office," is made within 30 days of a primary election or within 60 days of a general election, and is "targeted to the relevant electorate"). Because this EC funding restriction had been upheld against a facial challenge in *McConnell*, WRTL brought an as-applied challenge, asserting that the restriction was unconstitutional as applied to its three proposed ECs because the communications did not represent the "functional equivalent of express advocacy." Chief Justice Roberts agreed with the plaintiff WRTL, and interpreted *McConnell* as upholding the Title II funding restriction only insofar as an EC

constituted "the functional equivalent of express advocacy." *WRTL*, 551 U.S. at 456. The Chief Justice then formulated a test to delineate the communications that would qualify as "the functional equivalent of express advocacy," holding that "a court should find that an ad is the functional equivalent of express advocacy only if the ad *is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate*." *Id.* at 469-70 (emphasis added). This "WRTL test" for the "functional equivalent of express advocacy" is virtually identical to the "functional equivalent" tests in Wisconsin law at issue here.

Appellants suggest that the *Citizens United* Court called into question *WRTL*'s "functional equivalent" test, but there the Supreme Court actually *applied* the test to the communications at issue there. In the district court, Citizens United challenged the federal EC funding restriction as applied to its film, *Hillary: the Movie*, but in its petition for Supreme Court review, it broadened its case to challenge the constitutionality of the federal restriction on corporate spending on its face, *see* 2 U.S.C. § 441b. To determine how broadly the Court would have to rule in order to decide the case, the *Citizens United* Court applied the *WRTL* test to *Hillary*. Had *Hillary* not met *WRTL*'s test for the "functional equivalent of express advocacy," the film would not have been prohibited by the EC funding restriction, and the case could have been resolved on these "narrower grounds." *Citizens United*, 130 S. Ct. at 888-89. Instead, the Court determined that "[u]nder the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy," and decided it was obligated to

review the broader challenge to section 441b. *Id.* at 890. The fact that the *Citizens United* Court applied the *WRTL* test without difficulty, however, belies appellants' suggestion that the Court considered this test invalid. *See also Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551 (4th Cir. 2012) ["*RTAA*"], *petition for cert. filed*, No. 12-311 (Sept. 10, 2012).

Indeed, appellants never bother to explain *how* it "follows from" *Citizens United* that the *WRTL* test is vague, but simply assert that after *Citizens United* "the appeal-to-vote test is no longer a constitutional limit on government power." Appellants' Br. 62. This observation, even if true in a limited sense, has no bearing on whether the *WRTL* test is unconstitutionally *vague*, which is the crux of appellants' arguments here. *Citizens United* held that corporations have a First Amendment right to make independent expenditures for all speech – regardless of whether such speech qualifies as express advocacy or its functional equivalent – and so in that limited respect, the *WRTL* test no longer represents the "constitutional limit" on corporate spending. *See* Appellants' Br. 62-63 n.21. But in merely eliminating one application of the "functional equivalent" test, the *Citizens United* Court in no way rendered the *WRTL* test impermissibly vague. Moreover, the fact that the Supreme Court applied the test to *Hillary: the Movie* underscores that the Court still believes the test is a clear and workable demarcation of the line between express advocacy and issue speech.

In the alternative, appellants argue that Wisconsin's reliance on the *WRTL* test is vague because the test is only permissible when used in conjunction with the

federal EC definition. More specifically, appellants claim that the *WRTL* test, as a judicial narrowing gloss on Wisconsin's statutory and regulatory definitions of "political committee" and "political purpose," is unconstitutional because it was not meant to function as a "free-standing" or "stand-alone test." Appellants' Br. 61-62.

But Justice Roberts did not condition the validity of his test on its use in conjunction with the federal EC definition. To be sure, he noted that *in the context* of the *WRTL* case, the test would be relevant only to federal ECs. *WRTL*, 551 U.S. at 474 n.7. But in response to charges of vagueness, Justice Roberts held broadly that his test met "the imperative for clarity in this area," explaining that the "express advocacy" standard formulated in *Buckley v. Valeo*, 424 U.S. 1 (1976), was not "the constitutional standard for clarity." *Id.*

Even in the abstract, appellants' argument makes no sense. Using the "functional equivalent" test in connection with the federal EC definition would only address overbreadth concerns, not vagueness concerns. If the language of the *WRTL* test is not vague within the pre-election period regulated by Title II, as the Chief Justice's opinion holds, it is not vague outside that time frame either. Adding the time frame or other elements of the federal EC definition would only cabin the effect of vagueness, not cure it.

In short, if the *WRTL* test is constitutional, then so too are the challenged definitions here.

2. Lower court decisions following *Citizens United* have recognized the validity of *WRTL*'s test for the "functional equivalent of express advocacy."

Along with the district court below, the Courts of Appeals for the First, Fourth, and Eleventh Circuits[4] have endorsed *WRTL*'s "functional equivalent" test following the Supreme Court's decisions in *WRTL* and *Citizens United*. Appellants have cited no legal support for their contrary position.

Indeed, several courts have applied the *WRTL* test to narrow a potentially vague state disclosure law – exactly as the district court did here. In *National Organization for Marriage ("NOM") v. McKee*, 649 F.3d 34 (1st Cir. 2011), the First Circuit reviewed a challenge to the use of the word "influence" in several provisions of Maine's campaign finance law, including the state definition of "non-major-purpose PAC," Me. Rev. Stat. tit. 21–A, § 1052(5)(A)(5). *See* 649 F.3d at 64 n.42. The Court of Appeals expressed concerns that this language was vague, and adopted a narrowing interpretation suggested by the defendant state agency, namely, that the terms "influencing" and "influence" be construed 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*

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[4] The Ninth Circuit Court of Appeals also has spoken approvingly of the *WRTL* test. In *HLW*, the Court of Appeals applied the *WRTL* test to Human Life's communications at issue in the case, and concluded that they "constitute[d] the functional equivalent of express advocacy under *WRTL*" and could therefore be constitutionally subject to disclosure. 624 F.3d at 1015. Thus, while *HLW* did not review a direct challenge to the constitutionality of the *WRTL* test, its decision left little doubt that the Ninth Circuit recognized the test's legitimacy. *See also Madigan*, 2012 WL 3930437, at *14 (citing inclusion of *WRTL*-style "functional equivalent" test in Illinois' "EC" law as further support of measure's constitutionality).

candidate." *Id.* at 66-67 (emphasis added). As appellants do here, NOM contended that "*Citizens United* eliminated 'the appeal-to-vote test as a constitutional limit on government power,'" and therefore implicitly held that the test was vague. *Id.* at 68-69. The First Circuit rejected this contention, holding that *Citizens United* "offered no view on the clarity of the appeal-to-vote test" and noting that the Supreme Court "itself relied on the appeal-to-vote test in disposing of a threshold argument that the appeal should be resolved on narrower, as-applied grounds." *Id.* at 69. *See also Yamada v. Weaver*, No. 1:10-cv-497, 2012 WL 983559, at *20 (D. Haw. Mar. 21, 2012) (construing phrases "for the purpose of influencing" and "to influence," to encompass only express advocacy *or its functional equivalent* to "ensure[] that persons of average intelligence will have reasonable notice of the provisions' coverage") (internal quotations omitted), *appeal docketed*, No. 12-15913 (9th Cir. Apr. 20, 2012).

Several courts have also upheld federal and state laws and regulations that closely resemble *WRTL*'s "functional equivalent" test. The Fourth Circuit Court of Appeals in *RTAA*, for example, rejected a vagueness challenge to a federal definition of "expressly advocate," 11 C.F.R. § 100.22(b), that is virtually identical to the *WRTL* test. 681 F.3d at 550-53. Appellants claim that *RTAA* did not address the vagueness arguments raised in this case, but RTAA was represented by the same counsel and advanced the same arguments as appellants do here.[5]

[5] RTAA argued, *inter alia*: the *WRTL* test "is not free-floating and is unconstitutionally vague outside its electioneering-communication context"; and "absent the brightline context of the electioneering-communication definition, *WRTL-II* agrees that the appeal-to-vote test

Appellants' Br. 64. The Fourth Circuit rejected RTAA's challenge, highlighting that the challenged federal rule was consistent with the *WRTL* test, which "the controlling opinion [in *WRTL*] specifically stated was not 'impermissibly vague.'" 681 F.3d at 552. The Fourth Circuit went on to find that "*Citizens United* also supports the Commission's use of a functional equivalent test in defining 'express advocacy.'" *Id.* at 551. *See also* Tr. of Telephonic Oral Ruling on Pl.'s Mot. for Prelim. Inj. 17-18, 22; *Free Speech v. FEC*, No. 2:12-cv-00127 (D. Wyo. Oct. 3, 2012) (challenge on vagueness grounds to the FEC's definition of "expressly advocate" at 11 C.F.R. 100.22(b) was unlikely to succeed), *appeal docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012).

Finally, the Eleventh Circuit Court of Appeals recently upheld Florida's definition of "EC" and related disclosure statute, which incorporates *WRTL*'s "functional equivalent" test. *NOM v. Roberts*, 753 F. Supp. 2d 1217 (N.D. Fla. 2010) ["*Roberts*"], *aff'd per curiam*, No. 11-1493, 2012 WL 1758607 (11th Cir. 2012). *See also* Fla. Stat. § 106.011(18). The district court rejected plaintiffs' claim that inclusion of language drawn from the *WRTL* test rendered the statute vague and overbroad, holding that the test "provides an objective standard that was created and applied by the United States Supreme Court" in *WRTL*. *Roberts*, 753 F. Supp. 2d at 1221. The Court also rejected appellants' argument that *Citizens United* cast doubt on the validity of the *WRTL* test, finding that "[f]ar from overruling *WRTL*,

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is unconstitutionally vague." Brief of Appellant at 34-35, *RTAA*, 681 F.3d 544 (No. 11-1760), 2011 WL 4352260.

the Court [in *Citizens United*] embraced a straightforward application of the appeal to vote test." *Id.* at 1220.

B. The phrase "supports or condemns" is not unconstitutionally vague.

Appellants also challenge as vague the phrase "supports or condemns" in Wisconsin Admin. Code § GAB 1.28 ("GAB 1.28"). Appellant's Br. 68-71. GAB 1.28 extends statutory registration, recordkeeping and reporting requirements to individuals other than candidates and persons other than political committees when they "make a communication for a political purpose." GAB 1.28(2). A communication is "for a political purpose" if it is made within a specified timeframe before an election, "includes a reference to or depiction of a clearly identified candidate," *and* either "*[s]upports* or *condemns*" that candidate's positions or public record, or "refers to" the candidate's "personal qualities, character or fitness[.]" *Id.* § GAB 1.28(3)(b) (emphasis added).

Flatly contradicting appellants' claim, however, is the Supreme Court's decision in *McConnell* to uphold very similar language in Title I of BCRA. Reviewing one prong of the federal definition of "federal election activity," 2 U.S.C. § 431(20)(A)(iii), the Court concluded that words like "'promote,' 'oppose,' 'attack,' and 'support' ["PASO"] . . . '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 v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). The language at issue here is virtually identical to the language upheld in *McConnell*. Both BCRA and GAB 1.28(3)(b) use the word

"support," and the word "condemn" – like "attack" and "oppose" in BCRA – is easily understood by a "person of ordinary intelligence."

Lower courts have followed the guidance of *McConnell* and upheld "PASO" language in various contexts. This Court recently rejected a vagueness claim involving an Illinois statute containing analogous "support" and "oppose" language, and reiterated that "[t]his part of *McConnell* remains valid after *Citizens United*[.]" *Madigan*, 2012 WL 3930437, at *14. *See also Human Life of Wash. v. Brumsickle*, No. 08-cv-0590, 2009 WL 62144, at *14-*15 (W.D. Wash. Jan. 8, 2009) (citing *McConnell* to uphold state statute, Wash. Rev. Code § 42.17.020(39), defining "political committee" as a group that receives contributions or makes expenditures "in support of, or opposition to, any candidate or any ballot proposition"), *aff'd*, 624 F.3d 990 (9th Cir. 2010); *McKee*, 649 F.3d at 62-64 (rejecting vagueness challenge to Maine law containing the words "promoting," "support," and "opposition," and noting that "*McConnell* remains the leading authority relevant to interpretation of the terms before us"); *NOM v. Daluz*, 654 F.3d 115, 120 (1st Cir. 2011) (rejecting a vagueness challenge to Rhode Island law containing the phrase "to support or defeat a candidate"); *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 166 P.3d 1174, 1184 (Wash. 2007) (upholding Washington state definition of "political committee" that included "support" - "opposition" language), *cert. denied*, 553 U.S. 1079 (2008).

Appellants provide no authority or argument to justify their assertion that including the words "support" and "condemn" in Wisconsin's "political purposes"

definition renders the law unconstitutionally vague. *See* Appellants' Br. 68-70.[6] Taken as a whole, GAB 1.28 "clearly set[s] forth the confines within which . . . speakers must act." *Madigan*, 2012 WL 3930437, at *14 (quoting *McConnell*, 540 U.S. at 170 n.64). As determined by the district court below, "the terms 'support' and 'condemn' are not difficult words for an average person to understand in the context of supporting or condemning a candidate's position or record . . . [E]xpertise in election law is not required." Tr. 12.

II. Wisconsin's Definition of "Political Committee" and Related Disclosure Requirements Are Not Overbroad.

A. The "major purpose" test is an artifact of federal law.

In addition to the vagueness claims discussed above, appellants also contend that the state definitions for "committee" and "persons other than political committees" are unconstitutional because they could impose "political committee status" on groups whose "major purpose" does not relate to the nomination or election of a candidate. *See* Appellants' Br. 75, 85 (citing Wis. Stat. § 11.01(4), GAB 1.28(1)(a), (2)).[7] But the Seventh Circuit recently recognized that "the 'major purpose' limitation, like the express advocacy/issue discussion distinction, was a

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[6] In support of their vagueness claim, appellants cite Justice Scalia's concurring opinion in *WRTL*, 551 U.S. at 492, but a concurrence does not overrule *McConnell* with respect to PASO language. They also cite *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-63 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007), which employed a limiting construction to uphold a Louisiana definition of "expenditure" that included PASO language. But in so holding, the *Carmouche* court identified the phrase "or otherwise influenc[e]" as the source of potential vagueness, not the PASO language.

[7] Appellants also object to the imposition of registration and reporting requirements on "organizations" as defined by GAB 1.91(1)(g). The district court found that their challenge to GAB 1.91(1)(g) was moot, *see* Tr.3, however, so *amicus* will not address this claim.

creature of statutory interpretation, not constitutional command." *Madigan*, 2012 WL 3930437, at *16. The test was formulated as a narrowing construction to the specific federal definition of "political committee," and there is no justification for importing this "major purpose" requirement into the context of state law. *See McKee*, 649 F.3d at 59 (noting that "[t]he Court has never applied a 'major purpose' test to a state's regulation of PACs . . . .").

The Supreme Court first formulated the "major purpose" test in *Buckley* to address the constitutional concern that the definition of "political committee" in the Federal Election Campaign Act ("FECA") was vague and overbroad to the extent it relied upon the statutory definition of "expenditure." FECA defined a "political committee" as a group that "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). The statute in turn defined "expenditure" as any spending "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The Court recognized that this expansive definition of "expenditure" potentially "encompass[ed] both issue discussion and advocacy of a political result." *Buckley*, 424 U.S. at 78-79. By extension, it feared that the "political committee" definition "could raise similar vagueness problems," because it relied upon the vague term "expenditure," and thus "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79.

To resolve its concerns about the definition of "political committee," the *Buckley* Court narrowed the definition to encompass only "organizations that are under the

control of a candidate *or the major purpose of which is the nomination or election of a candidate*." *Id.* (emphasis added). For such "major purpose" groups, there was no vagueness concern about the statutory "for the purpose of influencing" definition of "expenditure" because, the Supreme Court held, disbursements by such "major purpose" groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*

The "major purpose" test was thus intended to narrow the federal definition of "political committee" to ensure that federal political committee requirements would not "reach groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. But the Supreme Court did not state that the "major purpose" test was the *only* way to ensure that groups engaged purely in issue advocacy would not be subject to undue regulation. This was recognized by the Ninth Circuit in *HLW*:

> *Buckley*'s statement that defining groups with "the major purpose" of political advocacy as political committees is sufficient "[t]o fulfill the purposes of the Act," … does not indicate that an entity must have that major purpose to be deemed constitutionally a political committee. … Rather, in stating that disclosure requirements "(1) cannot cover 'groups engaged purely in issue discussion' and (2) can cover 'groups the major purpose of which is the nomination or election of a candidate,'" the *Buckley* Court defined the outer limits of permissible political committee regulation.

624 F.3d at 1009-10 (internal citations omitted). Otherwise expressed, the "major purpose" test operates as a sort of "safe harbor (from a regulatory perspective)." *Yamada*, 2012 WL 983559, at *17. Groups meeting the "major purpose" test can be permissibly regulated as political committees, but it does not necessarily follow that groups with multiple purposes must be exempt from all regulation, even disclosure

requirements, such as those at issue here. To the contrary, multiple courts have recognized that states have far more latitude to regulate in the area of disclosure, and may require registration and reporting from groups that do not have campaign activity as their sole or even "major" purpose. *See also HLW*, 624 F.3d at 1009-10; *McKee*, 649 F.3d at 56; *Roberts*, 753 F. Supp. 2d at 1222.[8]

In short, as this Circuit has already found, "*Buckley*'s limiting construction was drawn for the statute before it, and the Supreme Court has never applied a "major purpose" test to a state's regulation of political committees." *Madigan*, 2012 WL 3930437, at *16.

B. The "major purpose" test does not apply here.

The factors that led this Circuit to reject application of the "major purpose" test to the Illinois disclosure law challenged in *Madigan* also militate against its application here.

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[8] The recent decision by the Eighth Circuit Court of Appeals in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012) ["*MCCL*"], although incorrectly reasoned, does not compel a different conclusion. There, the Eighth Circuit considered a Minnesota disclosure law that required associations making more than $100 in independent expenditures to register a "political fund," file regular reports and comply with a range of organizational requirements. Minn. Stat. § 10A.12, subdiv. 1a. The Court of Appeals upheld much of the "political fund" disclosure regime, but struck down the "ongoing" reporting requirement as applied to non-major purpose groups, stating that an "event-driven" reporting requirement would adequately address the government's interests in disclosure. 2012 WL 3822216, at *10. *Amicus* believes the Eighth Circuit was unduly stringent in its review of the law: although the Court claimed to apply "exacting scrutiny," it incorrectly held each aspect of Minnesota's disclosure regime to the "least restrictive means" standard that should be reserved for strict scrutiny review. *Id.* at *9. However, even the *MCCL* decision did not purport to establish the "major purpose" test as a prerequisite for all "PAC"-style disclosure requirements, as WRTL urges here. To the contrary, the Court let stand the majority of Minnesota's disclosure requirements applicable to "non-major purpose" political funds.

First, in *Madigan*, this Court recognized that the "major purpose" test was developed in light of the full panoply of regulations applicable to federal political committees, including contribution limits and source restrictions. 2012 WL 3930437, at *17. It noted that "[w]hen *Buckley* was decided, political committees faced much greater burdens under FECA's 1974 amendments," than they did under the Illinois state disclosure law. *Id.* Similarly, here, "PAC status" for WRTL and WRTL-SPAC will principally entail disclosure requirements, not the full range of restrictions applicable to federal PACs. Indeed, appellants do not hide the fact that their case centers on disclosure: they acknowledge that they believe the "major purpose" test is a prerequisite for PAC status even when only registration, record-keeping and reporting requirements – *not* contributions restrictions – are triggered by such status. *See* Appellants' Br. 84 ("Political-committee(-like) requirements are burdensome and onerous even if they include "only" – so to speak – (1) registration, including treasurer-designation, (2) recordkeeping, or (3) extensive, periodic reporting requirements yet not (4) limits or (5) source bans on contributions received."). But as this Court has already held, when the law at issue involves only disclosure obligations, the appropriate standard is exacting scrutiny, not the "major purpose" test. Accordingly, a disclosure regulation is constitutional if there is a "substantial relation between [the State's] interest in informing its electorate about who is speaking before an election and [the law's] regulation of campaign-related spending by groups whose major purpose is *not* electoral politics." *Madigan*, 2012 WL 3930437, at *18.

In the alternative, appellants also assert that the challenged definitions implicate more than disclosure, and cite a list of contribution limits and source restrictions allegedly triggered by PAC status under Wisconsin law. Appellants' Br. 77-78. This is a red herring. Many of the restrictions appellants list are either not specific to "committees," *see* Wis. Stat. §§ 11.24, 11.25, 2 U.S.C. § 441e, or are *federal* laws that have no application to *state* committees, *see* 2 U.S.C. §§ 441b(a), 441b(b)(2). Further, as appellants even acknowledge, the contribution limits they cite are no longer constitutional as applied to independent expenditure-only committees, such as WRTL-SPAC, following this Court's decision in *Barland*. Similarly, the contribution source restrictions cited are also unlikely to be enforced against appellants. *See* Appellees' Br. 15 (noting that $500 solicitation limit will not be enforced as applied to WRTL and WRTL-SPAC). *See also* FEC Advisory Op. 2010-11 (Commonsense Ten) (finding that *Citizens United* compelled conclusion that restrictions on corporate contributions to independent expenditure-only federal committees are impermissible). All the contribution restrictions cited by appellants thus are either inapplicable or obsolete, and do not distinguish Wisconsin's regulation of "committees" from the Illinois law reviewed in *Madigan*.

Second, the *Madigan* Court also rejected the major purpose test because its application "would yield perverse results." 2012 WL 3930437, at *17 (internal quotations omitted). It noted that a small "major purpose" group could spend as little as $3,000 on election ads and have to register as a committee, but that a large group might spend more than $1 million on the same and avoid disclosure because

its major purpose was not election-related. *Id.* This "perverse result" is also a dangerin Wisconsin: application of a major purpose test would distort the disclosure produced by the challenged laws because large groups could often evade regulation by virtue of their size alone.

Lastly, the *Madigan* Court explained that limiting disclosure requirements to "major purpose" groups would allow even these groups to circumvent disclosure because they could dilute their "major purpose" through mergers or other manipulations of their organizational form. *Id.* at *18. Indeed, such circumvention might be achieved by appellants here: if WRTL and WRTL-SPAC merged, the resulting organization might not meet the "major purpose" test and consequently could completely avoid disclosing its activities to the Wisconsin public.

III. Wisconsin's Disclosure Requirements Constitutionally Advance Vital State Interests.

In addition to challenging Wisconsin's disclosure laws on grounds of vagueness and overbreadth, appellants also contend that several specific disclosure requirements are so inherently burdensome that they cannot meet the exacting scrutiny standard. But *Citizens United* made clear that disclosure requirements impose only minimal burdens on First Amendment rights, which are often outweighed by the countervailing governmental interests in arming citizens "with the information needed to hold corporations and elected officials accountable[,]" and in "[enabling] the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916. Here, Wisconsin's interests

supporting each of the challenged disclosure provisions are sufficiently important to withstand exacting scrutiny review.

A. Wisconsin's late-reporting requirements are constitutional.

Wisconsin law requires committees and individuals to report, within 24 hours, any contributions exceeding $500 cumulatively, as well as any disbursements exceeding $20 cumulatively, made during the fifteen days prior to an election. Wis. Stat. § 11.12(5), (6).

Appellants assert that this 24-hour pre-election reporting requirement is unconstitutional as applied to WRTL-SPAC. Despite the Supreme Court's endorsement in *Citizens United* of the public's "interest in knowing who is speaking about a candidate shortly before an election," 130 S. Ct. at 915-16, appellants contend that 24-hour reporting fails constitutional scrutiny because it is "patently unreasonable." Appellants' Br. 102. At odds with this claim is the nationwide prevalence of similar pre-election 24-hour reporting requirements, which are a common feature of state and federal campaign finance laws. At least nineteen states have some form of late-reporting requirement for independent expenditures,[9]

[9] *See, e.g.*, Alaska Stat. § 15.13.110(h) (24-hour reporting required for independent expenditures exceeding $250 made within nine days of election); Cal. Gov't Code §§ 84204(a), 82036.5 (24-hour reporting required for any "late independent expenditure" of $1,000 or more); Colo. Rev. Stat. § 1-45-107.5(4)(c) (48-hour reporting required for independent expenditures exceeding $1,000 made within 30 days of an election); Conn. Gen. Stat. § 9-612(e)(2) (24-hour reporting required for independent expenditures exceeding $1,000 made within 90 days of an election); Del. Code Ann. tit. 15, § 8031(b) (24-hour reporting required for independent expenditures exceeding $100 made within 20 days of an election); Ga. Code Ann. § 21-5-34(f)(1) (independent committees must report within two business days any contributions or expenditures exceeding $1,000 made within two weeks of an election); Idaho Code Ann. § 67-6611(4) (48-hour reporting required for independent expenditures exceeding $1,000 made after the sixteenth day before an election); 10 Ill.

and many states mandate 24- or 48-hour reporting of independent expenditures throughout the calendar year.[10] At the federal level, 24-hour reporting is required for all independent expenditures aggregating $1,000 or more made within twenty days of a federal election. 11 C.F.R. § 104.4(c).

Comp. Stat. 5/9-10(e) (political committee required to report within five business days after making independent expenditures of $1,000 or more within 30 days of an election); La. Rev. Stat. § 18:1501.1(C) (48-hour reporting required during 20-day period preceding an election when any person, other than a candidate or political committee, makes expenditures or receives contributions exceeding $1,000 to support or oppose a candidate for major office, or exceeding $500 to support or oppose candidates for district or other office); Mass. Gen. Laws ch. 55, § 18A(b) (requiring 24-hour report from individual, group, association or political committee making independent expenditures exceeding $250 within 10 days of an election); Me. Rev. Stat. tit. 21-A, § 1019(B)(4), Me. Comm'n on Gov't'l Ethics Rules, Ch. 1, § 10(3)(B) (independent expenditures aggregating in excess of $250 per candidate made during the 60 days before an election must be reported within 2 calendar days); Mo. Rev. Stat. § 130.047 (48-hour reporting required when any person who is not a committee makes expenditures aggregating $500 or more within 14 days of an election); Neb. Rev. Stat. § 49-1478.01 (48-hour reporting required for independent expenditures of $1,000 or more made within 15 days of an election); N.J. Rev. Stat. § 19:44A-11 (48-hour reporting required when an independent expenditure exceeding $500 is made within 13 days of an election); Okla. Stat. Ann., tit. 74, ch. 62 – App., § 257:10-1-16(a), (b) (24-hour reporting required for independent expenditures exceeding $5,000 made within 14 days of election); 25 Pa. Stat. §§ 3248, 3246 (24-hour reporting required for independent expenditures exceeding $500 made within 14 days of election); Tex. Elec. Code § 254.039(a) (next-business-day reporting required for expenditures within nine days of an election supporting/opposing either a single candidate that exceed $1,000, or supporting/opposing multiple candidates that exceed $15,000); Wash. Rev. Stat. § 42.17A.265 (48-hour reporting required for independent expenditures of $1,000 or more made within 21 days of an general election); W. Va. Code § 3-8-2(c) (24-hour reporting required for independent expenditures aggregating $500 or more made within 15 days of an election for non-statewide offices).

[10] *See, e.g.*, Ariz. Rev. Stat. § 16-914.02 (24-hour reporting required for any independent expenditure exceeding $5,000 made by a corporation or union); Colo. Rev. Stat. § 1-45-107.5(3)(a) (any person making, or accepting contributions for the purpose of making, independent expenditures exceeding $1,000 must register within two business days); Conn. Gen. Stat. § 9-612(e)(2) (48-hour reporting required for independent expenditures exceeding $1,000 made more than 90 days before an election); Mass. Gen. Laws ch. 55, § 18A(a) (individual, group or association making independent expenditures exceeding $250 must file a report within seven business days); N.H. Rev. Stat. § 664:6(IV-a) (24-hour reporting required whenever a political committee makes independent expenditures exceeding $500); Va. Code § 24.2-945.2(A), (B) (24-hour reporting required for independent expenditures of $1,000 or more for statewide elections, or $200 or more for all other elections).

Immediately prior to an election, the government's interest in prompt reporting is unassailable: without timely disclosure, groups could easily circumvent their disclosure obligations, and could do so at the time most likely to impact the electoral process. Absent pre-election reporting requirements, voters would be deprived of the information they need to "place each candidate in the political spectrum" and assess "the interests to which a candidate is most likely to be responsive" at precisely the time they need the information most – namely, when they exercise their franchise. *Buckley*, 424 U.S. at 67. Moreover, appellants have not demonstrated that the compliance burdens associated with 24-hour reporting are anything other than marginal. According to the State's uncontroverted claim, each report requires no more than a few minutes of a single person's time. *See* Appellees' Br. 52-53. Such a slight regulatory burden hardly rises to the level of a constitutional violation. As the lower court concluded, appellants have failed to "set[] forth a sufficient factual or legal basis" for their assertion that Wisconsin's 24-hour reporting requirements burden their speech. Tr. 28-29.

B. Wisconsin's oath for independent disbursements is not unconstitutionally burdensome.

Finally, WRTL contends that Wisconsin's oath for independent disbursements, Wis. Stat. § 11.06(7), is unconstitutionally burdensome. Wisconsin law requires individuals and committees making independent disbursements to affirm that they do not act in consultation or cooperation with any candidate. *Id.* The oath, which must be filed at the time of registration, requires groups to identify each candidate

that will be supported or opposed, and allows for amendments whenever the list of candidates changes.

According to the Supreme Court, the fact that independent expenditures are purportedly made independently, without any coordination with candidates, means they cannot "give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. An expenditure made in coordination with a candidate, by contrast, is deemed a contribution to such candidate, *see*, *e.g.*, 11 C.F.R. § 109.20, capable of corrupting the recipient, and is thus subject to contribution limits. "Independence" is therefore central to the understanding that independent expenditures are not corruptive, whether in actuality or in appearance. *Cf. Buckley*, 424 U.S. at 47 ("The absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."). Requiring organizations to affirm such independence is a reasonable and minimally burdensome defense against corruption and the appearance of corruption – which is undoubtedly why analogous requirements can be found in federal law, *see* 11 C.F.R. § 104.3(b)(3)(vii)(B), as well as in the laws of many states.

Again, appellants have made no showing that filing this affirmation would impose a substantial administrative burden. Their complaints center on the fact that the affirmation must be amended each time a group makes expenditures to support or oppose a new candidate, but the mere fact that a document must be updated is not in itself an undue burden. As the state has asserted – and

appellants do not dispute – amending the affirmation involves nothing more than editing, executing and filing a one-page form, a process unlikely to require more than "several minutes" time. *See* Appellees' Br. 58. Appellants have advanced no credible case for why this minimal reporting requirement fails exacting scrutiny.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision to deny preliminary relief in connection to Counts 1, 3, 6 and 7.

RESPECTFULLY SUBMITTED this 9th day of November 2012.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Paul M. Smith
Paul M. Smith

Dated: November 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system, which will accomplish electronic notice and service for the following participants in the case:

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In addition, counsel of record have been served with copies of the foregoing brief via email (where email addresses are available and known).

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