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Testimony of

Wisconsin Right to Life, Inc.

before the

Election and Campaign Reform Committee

of the

Wisconsin State Assembly

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Chairman Tauchen and members of the Election and Campaign Reform Committee.

Wisconsin Right to Life, Inc. ("WRTL"), appreciates the opportunity to testify today regarding a new Wisconsin Government Accountability Board ("GAB") rule.

As you may know, WRTL, a non-profit corporation exempt from federal income taxation under I.R.C. § 501.c.4 (2006), is a non-sectarian and non-partisan entity.[1] It is not connected with any political candidate or political party. Nor is it connected with any political committee other than its own. *Cf.* 2 U.S.C. § 431.7 (2002) (defining "connected organization" under federal law).

WRTL engages in political speech that it reasonably fears a GAB rule, GAB § 1.91 (2010), regulates. In short, Section 1.91 is unconstitutionally vague and unconstitutionally overbroad. Either would suffice to reject Section 1.91 as written,[2] yet Section 1.91 is both. It is unconstitutionally vague for the reasons explained below.[3] It is unconstitutionally overbroad, because it defines entities as "organizations" and thereby imposes on them full-fledged political-committee-like burdens when the entities neither are under the control of, nor have the major purpose of nominating or electing, a candidate or candidates for state or local office

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[1] One should avoid saying "organization" generically here, because "organization" is a term of art in the Wisconsin law at issue. *See* GAB § 1.91.1.f (2010).

[2] *Infra* Part C.

[3] *Infra* Part D.

in Wisconsin.[4] Section 1.91 is also overbroad for other reasons.[5] Nevertheless, there are ways to amend Section 1.91 to make it constitutional.[6]

Understanding this requires, first, understanding Wisconsin election law, and, second, understanding constitutional law. The first task is no small one, because – to put it politely – Chapter 11 of the Wisconsin statutes and the GAB rules are extraordinarily difficult to read, much less understand.

A. Section 1.91 Organization Definition

Section 1.91 defines organizations as persons *other than* individuals, committees, or groups, GAB § 1.91.1.f, that "accept[] contributions made for, incur[] obligations for, or mak[e] an independent disbursement exceeding $25 in aggregate during a calendar year," *id.* § 1.91.3, with "contribution," "incurred obligation," and "independent disbursement" having the same meaning as in the statute. *See id.* § 1.91.1.a, b, d (citations omitted).

The incurred-obligation definition depends on the contribution and disbursement definitions. *See* WIS. STAT. § 11.01.11 (2007). With limited exceptions, "contribution" includes:

> A gift, subscription, loan, advance, or deposit of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made *for political*

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[4] *Infra* Part F.

[5] *Infra* Part G.

[6] *Infra* Part H.

purposes. In this subdivision "anything of value" means a thing of merchantable value.

Id. § 11.01.6.a.1 (emphasis added). With limited exceptions, disbursement similarly includes:

> A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made *for political purposes.* In this subdivision, "anything of value" means a thing of merchantable value.

Id. § 11.01.7.a.1 (emphasis added).

> An act is for "political purposes" when it is done *for the purpose of influencing the election or nomination for election* of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum. In the case of a candidate, or a committee or group which is organized *primarily for the purpose of influencing the election or nomination for election* of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, or for the purpose of influencing a particular vote at a referendum, all administrative and overhead expenses for the maintenance of an office or staff which are used principally for any such purpose are deemed to be for a political purpose.
>
> (a) Acts which are for "political purposes" include but are not limited to:
>
> 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.
>
> 2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in

whole or in part, any campaign for state or local office.

Id. § 11.01.16 (emphasis added).

The GAB has limited Section 11.01.16. Under the newly amended Section 1.28, "the applicable requirements of ch. 11., Stats.," GAB § 1.28.2, apply when speakers:

- "Make ... *disbursements* for *political purposes,*" *id.* § 1.28.2.a (emphasis added); *see id.* § 1.28.4, or
- "Make a communication for a political purpose." *Id.* § 1.28.2.c; *see id.* § 1.28.4. Regardless of the medium, *see id.* § 1.28.1.b (listing specific media and adding "any other form of communication that may be utilized for a political purpose"), "a communication is for a 'political purpose'"[7] when

> (a) The communication contains terms such as the following *or their functional equivalents* with reference to a clearly identified candidate that 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."
>
> (b) The communication is *susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.* ~~A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring~~

[7] Section 1.28.2.a refers to "disbursements for political purposes" while Section 1.28.2.c refers to "a communication for a political purpose." Section 1.28.3 limits the latter yet not the former.

~~election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:~~

~~1. Refers to the personal qualities, character, or fitness of that candidate;~~
~~2. *Supports or condemns* that candidate's position or stance on issues; or~~
~~3. *Supports or condemns* that candidate's public record.~~

GAB § 1.28.3 (emphasis added) (stricken text deleted by a GAB emergency rule).[8]

Which speakers Section 1.28 applies to is another matter. Section 1.28 applies to "[i]ndividuals other than candidates[.]" *Id.* § 1.28.2.a. It also applies to "persons *other than* political committees[,]" *id.* (emphasis added), *i.e.*, "persons other than" committees[9] that are (1) "under the control of a candidate" or (2) "formed *primarily* to *influence elections*[.]" *Id.* § 1.28.1.a (emphasis added). However, Wisconsin law does not define "formed primarily to influence elections."[10] *See generally Wisconsin Right to Life, Inc. v. Paradise,* 138 F.3d 1183, 1185 (7th Cir.

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[8] *See* Notice of Order Adopting Emergency Rule (Dec. 22, 2010), *available at* http://gab.wi.gov/sites/default/files/event/123/notice_of_hearing_emr_order_1_28_pdf_17450.pdf (all Internet sites visited March 14, 2011).

[9] Under Wisconsin campaign-finance law generally, "committee" and "political committee" are synonyms, *see* WIS. STAT. § 11.01.4, but under this regulation "political committee" is a proper subset of "committee." *See* GAB § 1.28.1.a ("'Political committee' means every committee which ...").

[10] *See generally* Order of the GAB, CR 09-013 at 1 (March 23, 2010) (recalling the application of former Section 1.28 to "individuals and organizations"), *available at* http://elections.state.wi.us/docview.asp?docid=19255&locid=47.

1998) (appearing to bring "groups,"[11] including WRTL, under former Section 1.28); *Elections Bd. v. Wisconsin Mfrs. & Commerce,* 597 N.W.2d 721, 727 & n.10, 731, 736 (Wis.), *cert. denied,* 528 U.S. 969 (1999).[12]

B. The Burdens on Section 1.91 Organizations

Wisconsin imposes a panoply of burdens on entities that Wisconsin *via* Section 1.91 defines as organizations:

- Registration (including treasurer-designation and bank-account) and termination requirements. GAB §§ 1.91.3 (bank account, treasurer, and registration), 1.91.4, 6 (registration), 1.91.5 (filing fee), 1.91.8 (citing WIS. STAT. § 11.19 (termination)).

- Recordkeeping requirements. *Id.* § 1.91.8 (citing WIS. STAT. § 11.12 (which includes recordkeeping requirements in Section 11.12.3)), and

- Extensive reporting requirements. *Id.* (citing full-fledged political-committee reporting requirements).

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[11] This is different from how Wisconsin law defines "group." *See* WIS. STAT. § 11.01.10.

[12] Until the GAB amended Section 1.28 in 2010, this law or Wisconsin law in general, *see Wisconsin Mfrs.,* 597 N.W.2d at 727 & n.10, reached only express advocacy as defined in *Buckley,* 424 U.S. at 44 & n.52, 80. *Wisconsin Mfrs.,* 597 N.W.2d at 731; *see also* WIS. STAT. § 11.06.2 ("if a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee or group, the disbursement or obligation is required to be reported only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum"). The Wisconsin Supreme Court left it to the Wisconsin Legislature or the GAB to decide whether to amend Wisconsin law. *See Wisconsin Mfrs.,* 597 N.W.2d at 736 (referring to the Elections Board, the GAB's predecessor).

The weight of these political-committee-like burdens[13] is such that the speech would simply not be "worth it" for many entities that do not want to bear these burdens. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) ("*MCFL*").

C. First Principles

Freedom of speech is the norm, not the exception. *See, e.g., Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 911 (2010) ("more speech, not less, is the governing rule"); *Buckley v. Valeo,* 424 U.S. 1, 14-15 (1976).

The framers established government with the consent of the governed, *see, e.g.,* U.S. CONST. preamble (1787) ("We the People of the United States"); WIS. CONST. preamble ("We, the people of Wisconsin, grateful to Almighty God for our freedom"), and government has only those powers that the governed surrendered to it in the first place.

This power – including the "constitutional power of Congress to regulate federal elections[,]" *Buckley*, 424 U.S. at 13 & n.16, and each state's parallel power over its own, though not other states', elections, *see, e.g., North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 281 (4th Cir. 2008) ("*NCRL III*") (citing *Buckley,* 424 U.S. at 13); WIS. CONST. art. III – is further constrained by other law.

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[13] As opposed to, for example, limited independent-expenditure reports, *see, e.g., Buckley,* 424 U.S. at 80-81; 2 U.S.C. § 434.c (2002), or limited reports for electioneering-communications as defined in the Federal Election Campaign Act ("FECA"), *see, e.g., Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 914-16 (2010); 2 U.S.C. § 434.f (2002), which Wisconsin does not have.

Under the Fourteenth Amendment, U.S. CONST. amend. XIV (1868), state law regulating political speech must not be vague. *See Buckley,* 424 U.S. at 41-43, 76-77. To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. *See Citizens United,* 130 S.Ct. at 889.

Even non-vague law regulating political speech must comply with the First Amendment, U.S. CONST. amend. I (1791), which guards against overbreadth, *Buckley,* 424 U.S. at 80 ("impermissibly broad"), and applies to the states. *Gitlow v. New York,* 268 U.S. 652, 666 (1925).

The government's power to regulate *elections* is an exception to the norm of freedom of speech. *See Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 296-97 (1981). The power to regulate *elections* is also self-limiting. To ensure law is not "impermissibly broad," *Buckley* establishes that government may, subject to further inquiry,[14] have the power to regulate donations received and spending for political speech only when they are "unambiguously related to the campaign of a particular ... candidate" in the jurisdiction in question, 424 U.S. at 80, *quoted in Wisconsin Mfrs.,* 597 N.W.2d at 729, or "unambiguously campaign related" for short. *Id.* at 81. This principle, which continues after *Citizens United, see New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 676 & n.4 (10th Cir. 2010) ("*NMYO*"), helps ensure government regulates only speech that government has the "power to regulate," *NCRL III,* 525 F.3d at 282, *i.e.,* speech that government has a

[14] *E.g., infra* Parts F, G.

constitutional interest in regulating. *See id.* at 281 (citing *Buckley,* 424 U.S. at 80). It is part of the larger principle that law regulating political speech must not be overbroad. *See Buckley,* 424 U.S. at 80 ("impermissibly broad").

D. Vagueness

Given the language of Section 1.28, it is not clear whether the definitions of "contribution" and "disbursement" as Section 1.91 uses the terms depend only on the Wisconsin statute, or on the Wisconsin statute plus Section 1.28.

On the one hand, if Section 1.91 depends only on the Wisconsin statute, then there is no vagueness problem *if* the statute *per Wisconsin Manufacturers,* 597 N.W.2d at 731, reaches only express advocacy as defined in *Buckley,* 424 U.S. at 44 n.52, 80; otherwise, "purpose of influencing the election[,]" WIS. STAT. § 11.01.16, is unconstitutionally vague under *Buckley,* 424 U.S. at 77.

On the other hand, if Section 1.91 also depends on Section 1.28 and the Wisconsin Supreme Court lifts its temporary injunction on Section 1.28, then the "contribution" and "disbursement" definitions are unconstitutionally vague, because Section 1.28 refers to what *Citizens United,* 130 S.Ct. at 895 (citing *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 470 (2007) ("*WRTL II*")), calls the appeal-to-vote test. *See* GAB § 1.28.3.a ("functional equivalents"), 1.28.3.b ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate").[15]

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[15] Section 1.28.3.a *without* the phrase "or their functional equivalents" means express advocacy as defined in *Buckley,* 424 U.S. at 44 & n.52, 80, *vis-à-vis* state or

WRTL II rejects a contention that the appeal-to-vote test is vague by noting it applied *only* to electioneering communications as defined in the Federal Election Campaign Act ("FECA"). 551 U.S. at 474 n.7.[16] The implication is that elsewhere the test *is* vague. *See id.* Section 1.28 reaches beyond FECA electioneering communications. *See, e.g.,* GAB § 1.28.3. Therefore, Section 1.28, and by extension Section 1.91, are vague even under *WRTL II,* to say nothing about *Citizens United.*

Moreover, *Citizens United* removes the appeal-to-vote test as a constitutional limit on government power.[17] What remains from *WRTL II* regarding the appeal-

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local office in Wisconsin. *See* WIS. STAT. § 11.01.1 (defining "candidate"). Whatever the phrase "or their functional equivalents" may have meant in the previous version of this regulation, GAB § 1.28.2.c (2001), the phrase has since become a term of art, *see McConnell v. FEC,* 540 U.S. 93, 206 (2003), that means the appeal-to-vote test. *See WRTL II,* 551 U.S. at 457, 469-70, 474 n.7.

[16] In short, electioneering communications as defined in FECA are communications that (1) are broadcast, cablecast, or satellite ("Broadcast"), 2 U.S.C. § 434.f.3.A.i (2002), (2) run in the 30 days before a primary or 60 days before a general election ("30-60 Day Windows"), *id.* § 434.f.3.A.i.II, (3) have a clearly identified candidate in the jurisdiction in question, *see id.* § 434.f.3.A.i.I, (4) are targeted to the relevant electorate, *id.* § 434.f.3.A.i.III, and (5) do not expressly advocate. *See id.* § 434.f.3.B.ii; *see also id.* § 434.f.3.B.

[17] Although *Citizens United* holds that an electioneering communication as defined in FECA passes the appeal-to-vote test, 130 S.Ct. at 889-90, the question of whether electioneering communications as defined in FECA pass the appeal-to-vote test no longer affects whether government may regulate them. *Compare WRTL II,* 551 U.S. at 457, 469-70, 474 n.7, *with Citizens United,* 130 S.Ct. at 889-90, 912-13, 915. *WRTL II* holds that government may ban them – and implies that government may otherwise regulate them, *see* 551 U.S. at 457, 465, 471, 476-77, 477, 478, 478-79, 479, 480, 481 – only when they pass the test. *Id.* at 457, 469-70, 474 n.7. They pass the test when their only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate in the jurisdiction. *See id.* at 457, 469-70, 474 n.7. But *Citizens United* holds that regardless of whether they pass the test, government may *not* ban electioneering communications as defined in FECA, *e.g.,*

to-vote test is the conclusion that the test *is* unconstitutionally vague, and therefore overbroad, as to all speech, not just electioneering communications as defined in FECA. *See* 551 U.S. at 492-94 (Scalia, J., concurring in part and concurring in the judgment). Here is why. The appeal-to-vote test lacks "the degree of clarity necessary to avoid the chilling of fundamental political discourse[.]" *Id.* at 493. It "provides ample room for debate and uncertainty" about its meaning. *Id.* The appeal-to-vote test

> ultimately depend[s] ... upon a judicial judgment (or is it – worse still – a jury judgment?) concerning "reasonable" or "plausible" import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker's subjective evaluation of the importance or unimportance of the challenged speech. In this critical area of political discourse, the speaker[s] cannot be compelled to risk felony [or other] prosecution with no more assurance of impunity than [their] prediction that what [t]he[y] say[] will be found susceptible of some "reasonable interpretation other than as an appeal to vote for or against a specific candidate." Under these circumstances, "many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to

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130 S.Ct. at 889-90, 912-13, by persons other than foreign nationals. *See id.* at 911 (citing 2 U.S.C. § 441e). And regardless of whether electioneering communications as defined in FECA pass the test, government *may,* subject to further inquiry, *see, e.g., id.* at 915-16 (giving an example of when disclosure is unconstitutional), have the power to regulate them by requiring *non-political-committee* reporting. *Id.* at 915 (upholding non-political-committee reporting). *Infra* Part F. Since the appeal-to-vote test applied *only* to electioneering communications as defined in FECA, *WRTL II,* 551 U.S. at 474 n.7; *see also North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 282 (4th Cir. 2008) ("*NCRL III*") (citing *WRTL II,* 127 S.Ct. 2652, 2667 (2007)); *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert,* 581 F. Supp.2d 1132, 1144, 1150 (D. Utah 2008) (citing *NCRL III,* 525 F.3d at 282), it no longer serves any constitutional purpose. *Citizens United* removes the appeal-to-vote test as a constitutional limit on government power.

> abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks,* 539 U.S. 113, 119 (2003) (citation omitted).

WRTL II, 551 U.S. at 493-94 (Scalia, J., concurring in part and concurring in the judgment) (brackets in original omitted).

So *Citizens United* does not just remove the appeal-to-vote test as a constitutional limit on government power. It renders the test unconstitutionally vague. How is anyone – including a speaker or a law enforcer – to know whether speech is the "functional equivalent[]" of terms that GAB § 1.28.3.a lists or is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" under GAB § 1.28.3.b? Such a standard is "impermissibly vague[.]" *Id.* at 492.

Calling the appeal-to-vote test "objective[,]" *Citizens United,* 130 S.Ct. at 889, 895, does not mean the test is *not* vague. *See WRTL II,* 551 U.S. at 474 n.7. "Objective" is not the opposite of "vague." A standard can be both.[18] The fact that *WRTL II thought* the appeal-to-vote test was "objective[,]" *see Citizens United,* 130 S.Ct. at 895 (citing *WRTL II,* 551 U.S. at 470), does not mean that the test is not vague. After *Citizens United* removed the *WRTL II* appeal-to-vote test as a constitutional limit on government power, all that remains of the test is the

[18] For example, a standard asking whether a reasonable person would conclude that speech "'advocat[es] the election or defeat' of a candidate" or is "for the purpose of influencing" an election would be both objective, *see WRTL II,* 551 U.S. at 470 ("reasonable"), and vague. *Buckley,* 424 U.S. at 42-43, 77 (ellipsis omitted).

conclusion that it *is* unconstitutionally vague. *See* 551 U.S. at 492-94 (Scalia, J., concurring in part and concurring in the judgment).

Therefore, Section 1.28, and by extension Section 1.91, are unconstitutionally vague.[19]

E. Overbreadth: In General

Where "the First Amendment is implicated, the tie [(if there is one)] goes to the speaker, not the censor." *WRTL II,* 551 U.S. at 474.

F. Overbreadth: The Section 1.91 Organization Definition

Most case law addresses political-committee burdens by addressing political-committee definitions. However, Wisconsin imposes political-committee burdens *via* its committee/political-committee, "persons other than political committees," and organization definitions. WIS. STAT. § 11.01.4; GAB §§ 1.28.1.a, 1.28.2 ("Individuals other than candidates and persons other than political committees"), 1.91.1.f.

In a constitutional analysis, it is important to remember that it is not the label but the substance that matters. As explained below,[20] the burdens that apply when Wisconsin defines an entity as an organization under Section 1.91.1.f[21] are the very burdens that *Citizens United* recognizes are "onerous" when they apply to

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[19] The constitutional law that applies to Section 1.91 has implications for Wisconsin law beyond Section 1.91, yet Section 1.91 is what at issue here.

[20] *Infra* Part F.

[21] *Supra* Part A.

political committees. *See* 130 S.Ct. at 897. But government may not abrogate First Amendment rights through clever drafting or revision. It "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button,* 371 U.S. 415, 429 (1963), *followed in FEC v. Colorado Republican Fed. Campaign Comm.,* 518 U.S. 604, 622 (1996) ("*Colorado Republican I*").

As a matter of *law,* not fact, political-committee – or, here, organization – status is not only "burdensome[,]" *Citizens United,* 130 S.Ct. at 897, but also "onerous[,]" *id.* at 898; *WRTL II,* 551 U.S. at 477 n.9 (citing *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 253-55 (1986) ("*MCFL*")), because political committees "are expensive and subject to extensive regulations." *Citizens United,* 130 S.Ct. at 897. Any contrary contention conflicts with Supreme Court precedent. Government may impose far greater burdens on entities it may define as political committees under *Buckley,* 424 U.S. at 74-79, than it may impose on other persons. *See MCFL,* 479 U.S. at 251-56. These are "well-documented and onerous burdens," *WRTL II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), *regardless* of whether government bans an entity itself from speaking and says only an entity's political committee may speak, *see, e.g., Citizens United,* 130 S.Ct. at 897, or whether government requires the entity itself to be a political committee. *See, e.g., id.* (noting that allowing the entity to speak would "not alleviate the First Amendment problems").[22] While it is one thing to assert that *non*-political-

[22] Federal courts of appeal have struck down state laws that – like Wisconsin's – do not ban speech but instead require that entities themselves bear political-

committee disclosure requirements "do not prevent anyone from speaking," *id.* at 914 (quoting *McConnell v. FEC,* 540 U.S. 93, 201 (2003)),[23] full-fledged political-committee burdens are another matter. These requirements are so burdensome and onerous that allowing speech only if an entity becomes a political committee – or, here, an organization – is like banning the entity's speech, *see id.* at 897, when the entity reasonably concludes that the speech is "simply not worth it." *MCFL,* 479 U.S. at 255.

Political-committee – or, here, organization – requirements are burdensome and onerous even if they include "only" – so to speak – (1) registration, including treasurer-designation, (2) recordkeeping, or (3) extensive reporting requirements yet not (4) limits or (5) source bans on contributions received. *See Citizens United,* 130 S.Ct. at 897-98 (mentioning (1), (2), and (3), but not (4) or (5)). Similar state

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committee-like burdens. *See NMYO,* 611 F.3d at 673 (quoting N.M. STAT. § 1-29.26.L (New Mexico's political-committee definition)); *NCRL III,* 525 F.3d at 279 ("plaintiffs challenged the constitutionality of North Carolina's definition of 'political committee,' because it threatened to impose numerous and burdensome obligations on organizations"); *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1140-41 (10th Cir. 2007) ("*CRLC*") ("whether or not a corporation meets the *MCFL* exemption, it must still register as a political committee").

National Organization for Marriage v. McKee misses this point. *See* 723 F. Supp.2d 245, 261-62, 263-64 & n.140 (D. Me. 2010), *notice of appeal filed* (1st Cir. Aug. 20, 2010).

[23] On the same page, the Court discusses such disclosure requirements that *do* prevent speaking. *See Citizens United,* 130 S.Ct. at 914 (non-political-committee disclosure (quoting *McConnell,* 540 U.S. at 198 (non-political-committee disclosure (quoting, in turn, *Buckley,* 424 U.S. at 74 (political-committee disclosure))))).

requirements, such as Wisconsin's,[24] are also a "significant regulatory burden[,]" *NCRL III,* 525 F.3d at 286 (citing *North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 712 (4th Cir. 1999) (*"NCRL I"*), *cert. denied,* 528 U.S. 1153 (2000)), even if they do not include (4)[25] or (5).[26] Under *Citizens United,* 130 S.Ct. at 897, (1), (2), and (3) are full-fledged political-committee burdens, regardless of whether (4) and (5) are present. Onerous requirements such as (1), (2), or (3) may not be prior restraints on speech, yet by giving government the power to license speech, they in effect are prior restraints. *Cf. id.* at 895-96. Wisconsin *via* its organization definition, GAB 1.91.1.f, imposes (1), (2), and (3) on entities.

With such burdens in mind, *Buckley* establishes that government may define an entity as a political committee or otherwise impose political-committee-like burdens only if (a) it is "under the control of a candidate" or candidates, or (b) "the

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[24] *Supra* Part A. *McKee* misses this point as well. *See* 723 F. Supp.2d at 261-62.

[25] *See CRLC,* 498 F.3d at 1141 (referring to political-committee "disclosure requirements" and "administrative, organizational, and reporting requirements"); *Richey v. Tyson,* 120 F. Supp.2d 1298, 1316 & nn.19-21 (S.D. Ala. 2000) (citing political-committee registration, recordkeeping, and reporting requirements); *Volle v. Webster,* 69 F. Supp.2d 171, 172 (D. Me. 1999) (same); *New York Civil Liberties Union v. Acito,* 459 F. Supp. 75, 78-79 (S.D.N.Y. 1978) (same).

Some contribution-source bans apply whenever government defines an entity as a "political committee." *See* 2 U.S.C. §§ 441b.a, 441b.b.2 (2002) (national banks and national corporations), 441e (2002) (foreign nationals).

[26] *See National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert,* 581 F. Supp.2d 1132, 1136, 1138, 1139 (D. Utah 2008) (citing political-committee burdens for political-issues committees, burdens which do not include limits or source bans on contributions received).

major purpose" of the entity is "the nomination or election of a candidate" or candidates, in the jurisdiction. *See* 424 U.S. at 79, *followed in McConnell,* 540 U.S. at 170 n.64, *and MCFL,* 479 U.S. at 252 n.6, 262; *Brownsburg Area Patrons Affecting Change v. Baldwin,* 137 F.3d 503, 505 n.5 (7th Cir. 1998); *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1153-54 (10th Cir. 2007) ("*CRLC*") (noting that *McConnell* did not change the test (citations omitted)); *NCRL III,* 525 F.3d at 287-90.[27]

These two tests address whether a *definition* through which government imposes political-committee burdens is constitutional. *Brownsburg,* 137 F.3d at 505 n.5 (holding that *Buckley* limits a political-committee *definition* to entities passing the major-purpose test); *Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir. 2010) (noting that the tests limit a political-committee *definition* (quoting *FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380, 392, 395-96 (D.C. Cir.), *cert. denied,* 454 U.S. 897 (1981))); *NCRL III,* 525 F.3d at 288-89 (considering whether a political-committee *definition* has the major-purpose test); *CRLC,* 498 F.3d at 1139 (holding a political-committee *definition* unconstitutional because it lacks the major-purpose test); *id.* at 1154-55 (applying the major-purpose test to a political-committee

[27] While *McKee* cited the plaintiff as saying the Supreme Court had not applied the major-purpose test to state law, 723 F. Supp.2d at 264, the court did not acknowledge the rest of the sentence: "yet other courts, including this Court, have." *Id.,* D.Ct. Doc. 140 at 14 (citing D.Ct. Doc. 115 at 18 (citing, in turn, *Volle v. Webster,* 69 F. Supp.2d 171, 174-77 (D. Me. 1999) ("general registration and disclosure requirements can now apply only to organizations that are under the control of a candidate or whose 'major purpose' is the nomination or election of a candidate" (citing, in turn, *Buckley,* 424 U.S. at 78))).

definition);[28] *see also Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 997-98, 1008-09, 1011-12 (9th Cir. 2010) ("*HLW*") (considering a political-committee *definition,* stating incorrectly that the plaintiff also challenged the political-committee disclosure requirements,[29] and applying a major-purpose test), *cert. denied,* 562 U.S. ____, 131 S.Ct. ____ (U.S. Feb. 22, 2011).[30]

Furthermore, government may not cleverly draft or revise its law to impose burdens such as (1) registration and termination requirements, (2) recordkeeping requirements, or (3) extensive reporting requirements[31] on entities *in a capacity other than as a political committee* when the entities do not pass the proper "under the control of a candidate" or major-purpose test. *See National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert,* 581 F. Supp.2d 1132, 1152-54 (D. Utah 2008)

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[28] *See also NMYO,* 611 F.3d at 676 ("the issue ... is solely whether NMYO and SWAP may be classified as political committees").

[29] *See HLW,* No. 1:08-cv-00590-JCC, VERIFIED COMPL. FOR DECLARATORY & INJUNCTIVE RELIEF at 10-12 (Count 1) (W.D. Wash. April 16, 2008), *available at* http://jamesmadisoncenter.org/Main/WA/Complaint.pdf.

[30] With varying degrees of precision, other circuits have quoted *Buckley* or *MCFL* and recognized the major-purpose test. *See, e.g., FEC v. EMILY's List,* 581 F.3d 1, 16 n.15 (D.C. Cir. 2009); *Real Truth About Obama, Inc. v. FEC,* 575 F.3d 342, 348, 350-51 (4th Cir. 2009) ("*RTAO*"), *cert. granted and judgment vacated,* 559 U.S. ____, 130 S.Ct. 2371 (2010); *California Pro-Life Council v. Getman,* 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) ("*CPLC I*"); *Akins v. FEC,* 146 F.3d 1049, 1050 (D.C. Cir. 1998) (Silberman, J., concurring); *FEC v. Survival Educ. Fund,* 65 F.3d 285, 295 (2d Cir. 1995); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th Cir. 1982); *see also United States v. National Comm. for Impeachment,* 469 F.2d 1135, 1141-42 (2d Cir. 1972) (pre-dating *Buckley* and *MCFL*).

[31] *Supra* Part F.

(political-issues committee). Such entities have a First Amendment right to be free of these burdens. *See MCFL,* 479 U.S. at 254-56; *Buckley,* 424 U.S. at 79; *NCRL III,* 525 F.3d at 286; *CRLC,* 498 F.3d at 1153-54; *see generally Citizens United,* 130 S.Ct. at 897-98.[32] Government may not abrogate this right through clever drafting or revision. It "cannot foreclose the exercise of constitutional rights by mere labels." *Button,* 371 U.S. at 429, *followed in Colorado Republican I,* 518 U.S. at 622.

Determining whether an entity is "under the control of a candidate" or candidates for state or local office in Wisconsin is straightforward. *See NMYO,* 611 F.3d at 677 (citing *Buckley,* 424 U.S. at 79); *Unity08,* 596 F.3d at 867; *Machinists Non-Partisan Political League,* 655 F.2d at 394-96; *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th Cir. 1982).

Determining whether an entity passes the major-purpose test is also straightforward. *See CRLC,* 498 F.3d at 1152. The test asks what *the* major purpose of an entity is, not whether something is *a* major purpose. *MCFL,* 479 U.S. at 252 n.6, 262; *Buckley,* 424 U.S. at 79; *NCRL III,* 525 F.3d at 287-89, 302-04. And "major" is the root of "majority," which means more than half. Thus, an entity can have only one major purpose. *See MCFL,* 479 U.S. at 252 n.6 (referring to "the major purpose" of an entity and "its organizational purpose," not purposes).

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[32] A Ninth Circuit panel missed this point and lumped full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis. This panel contradicted a previous Ninth Circuit panel. A subsequent Ninth Circuit panel compounded the confusion. *Infra* Part G.

The law provides two methods to determine whether an entity passes the major-purpose test. Either suffices. The first method to determine an entity's major purpose considers how the entity has *articulated* its mission in its organizational documents, *see MCFL,* 479 U.S. at 241-42, 252 n.6, or in public statements, *FEC v. GOPAC, Inc.,* 917 F. Supp. 851, 859 (D.D.C. 1996), and the second method considers whether, in *carrying out* its mission, the entity spends the majority of its money on contributions to candidates or on independent expenditures[33] for candidates, *CRLC,* 498 F.3d at 1152, *followed in NMYO,* 611 F.3d at 678; *NCRL III,* 525 F.3d at 289, in the jurisdiction in question.

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[33] Meaning express advocacy as defined in *Buckley* and not coordinated with a candidate, the candidate's agents, the candidate's committee, or a party, which is the standard under the Constitution. *See* 424 U.S. at 39-51, 74-81; *McConnell,* 540 U.S. at 219-23; *Brownsburg,* 137 F.3d at 505. The phrase "independent spending" in *CRLC,* 498 F.3d at 1152 (citing/quoting *MCFL,* 479 U.S. at 252 n.6, 262), refers to express advocacy as defined in *Buckley. See MCFL,* 479 U.S. at 249.

A word of caution: In assessing independent expenditures, one looks to express advocacy as defined in *Buckley,* 424 U.S. at 44 & n.52, 80, not the "functional equivalent" of express advocacy. Speech that is the "functional equivalent" of express advocacy is speech that passes the appeal-to-vote test, *WRTL II,* 551 U.S. at 469-70, which applied *only* to electioneering communications as defined in FECA, *id.* at 474 n.7, which by definition are not express advocacy.

By definition, express advocacy and electioneering communications as defined in FECA are mutually exclusive. They do not overlap. Indeed, they *cannot* overlap. *Buckley* limits the FECA expenditure and independent-expenditure definitions to express advocacy – with express advocacy being a subset of "expenditure" and "independent expenditure." 424 U.S. at 44 & n.52, 80. And under FECA, neither expenditures nor independent expenditures are electioneering communications. 2 U.S.C. § 434.f.3.B.ii; *see NCRL III,* 525 F.3d at 282 (stating that electioneering communications are "beyond" express advocacy); *see also McConnell,* 540 U.S. at 189 (stating that the electioneering-communication definition is not limited to express advocacy).

Section 1.91 defines entities as organizations, and thereby imposes full-fledged political-committee-like burdens on them, regardless of whether they are under the control of, or have the major purpose of nominating or electing, a candidate or candidates for state or local office in Wisconsin.[34]

In fact, an entity can be a Wisconsin organization by spending less – far less – than half its money on contributions to or independent expenditures for candidates for state or local office in Wisconsin. An entity, no matter how large its budget, becomes an organization by receiving contributions for, incurring obligations for, or making, disbursements exceeding $25 in a calendar year. GAB § 1.91.1.h. This is an insubstantial amount. *See Buckley,* 424 U.S. at 79 & n.105

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[34] For less-restrictive means than defining entities as political committees, see *infra* Part F. Contrary to a district court's denial of a temporary restraining order, there is nothing "pernicious" here. *National Org. for Marriage v. McKee,* 666 F. Supp.2d 193, 210 n.96 (D. Me. 2009). Although the major-purpose test may allow an entity that is active in many jurisdictions not to be a political committee in any jurisdiction, *see id.,* this follows from the twin principles that (1) each jurisdiction may regulate its own elections and (2) an entity may have only one major purpose. *See supra* Parts C, F. Besides, the fact that it is unconstitutional to define an entity as a political committee does not mean it is unconstitutional to regulate any political speech the entity does. *See infra* Part F. Moreover, the Constitution does not limit such regulation to "one-time reporting." 666 F. Supp.2d at 208. Reporting may occur during reporting periods when regulable political speech occurs, however many times that is. One difference between such reporting and full-fledged political-committee reporting is that the former occurs when regulable speech occurs, while the latter occurs during all reporting periods. *Compare* 2 U.S.C. § 434.c.1-2, 434.g (2002) (independent-expenditure reports) *and id.* § 434.f.1 (electioneering-communications reports) *with id.* § 434.a.2-4 (political-committee reports); 11 C.F.R. § 109.10.b (2003). Another difference is what government may require reports include. *Compare* 2 U.S.C. § 434.c.1-2, 434.g *and id.* § 434.f.2 *with id.* § 434.a, b, e. And that is just reporting requirements. *See, e.g., id.* §§ 432 (2004), 433 (1980).

(applying the "under the control of a candidate" and major-purpose tests to a political-committee definition with a $1000 threshold); *NMYO,* 611 F.3d at 678-79 (striking down a $500 threshold); *CRLC,* 498 F.3d at 1154 (striking down Colorado's major-purpose test as applied to CRLC's speech, because $200 was insubstantial compared to CRLC's overall budget (quoting and affirming *Colorado Right to Life Committee, Inc. v. Davidson,* 395 F. Supp.2d 1001, 1021 (D. Colo. 2005))); *Volle v. Webster,* 69 F. Supp.2d 171, 174-77 (D. Me. 1999) (striking down a $50 threshold as applied to the speech of an individual and his business).

Therefore, Wisconsin's organization definition is unconstitutionally overbroad.[35]

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[35] Whether the organization *disclosure requirements* are unconstitutional is another matter.

It is true that *SpeechNow.org v. FEC* – which is confusing, *see infra* Part G – considers political-committee disclosure requirements. 599 F.3d 686, 696-98 (D.C. Cir.) (*en banc*), *cert. denied,* 562 U.S. ____, 131 S.Ct. 553 (2010). However, under current Supreme Court case law, *see MCFL,* 479 U.S. at 262, *quoted in CRLC,* 498 F.3d at 1152, the political-committee definition *is* constitutional as applied to SpeechNow's speech, because SpeechNow *passes* the major-purpose test: It *has* the major purpose of nominating or electing candidates in the jurisdiction in question. *See SpeechNow,* No. 1:08-cv-00248, COMPL. ¶¶ 7, 47 (D.D.C. Feb. 14, 2008), *available at* http://www.fec.gov/law/litigation/speechnow_complaint.pdf. Thus, *SpeechNow* properly reaches the political-committee disclosure requirements.

McKee misses this point. *See* 723 F. Supp.2d at 263.

A subsequent Tenth Circuit panel correctly considers political-committee disclosure requirements when the plaintiffs challenge *only* political-committee disclosure requirements, not a political-committee definition. *See Sampson v. Buescher,* 625 F.3d 1247, 1253, 1255 (10th Cir. 2010).

If Wisconsin wanted to regulate, for example, spending for political speech by persons it may *not* define as political committees under *Buckley,* 424 U.S. at 74-79, then it could, subject to further inquiry, *see, e.g., Citizens United,* 130 S.Ct. at 915-16 (giving an example of when disclosure is unconstitutional), use the less-restrictive means, *id.* at 915 (citing *MCFL,* 479 U.S. at 262), of requiring burdensome yet non-"onerous" disclosure, *id.* at 898; *WRTL II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), of (1) express advocacy as defined in *Buckley,* 424 U.S. at 44 & n.52, 80, *i.e.,* independent expenditures as defined in *Buckley, id.* at 39-51, 74-81, *vis-à-vis* state or local office in Wisconsin or (2) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Wisconsin. *See Citizens United,* 130 S.Ct. at 914-16 (electioneering communications as defined in FECA); *MCFL,* 479 U.S. at 262 (express advocacy (citing 2 U.S.C. § 434.c)); *Buckley,* 424 U.S. at 80-81 (express advocacy).[36] Wisconsin does not *have to* do this though. No jurisdiction *has to* regulate absolutely, positively everything that it may regulate. But whatever course Wisconsin chooses, it may impose political-committee burdens *only* on entities it may define as full-fledged political committees – or, here, organizations.

G. Overbreadth: The Organization Disclosure Requirements

Full-fledged political-committee *disclosure requirements* apply only if the *definition* through which the jurisdiction imposes political-committee burdens is

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[36] Government must base disclosure on the nature of the speech, not the nature of the speaker. *See NCRL III,* 525 F.3d at 290.

constitutional in the first place. So when the definition is unconstitutional – as Wisconsin's organization definition is – the requirements are unnecessary to consider in concluding that Section 1.91 as whole is unconstitutionally overbroad.[37]

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[37] Moreover, government may impose greater disclosure burdens on entities it *may* define as political committees under *Buckley,* 424 U.S. at 74-79, than it may impose on other entities. *Supra* Part F.

Therefore, it would be incorrect to lump full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis. It is possible, for example, for it to be *un*constitutional to (1) define an entity as a full-fledged political committee even when it *is* constitutional to (2) regulate the entity's speech by less-restrictive means. *See, e.g., Citizens United,* 130 S.Ct. at 897-98, 914-16 (noting the burdens of being a full-fledged political committee, and later upholding disclosure requirements for electioneering communications as defined in FECA by an entity that is *not* a political committee); *MCFL,* 479 U.S. at 254-55, 262 (noting the burdens of being a full-fledged political committee, and later upholding reporting requirements for express advocacy as defined in *Buckley* by an entity that is *not* a political committee); *Buckley,* 424 U.S. at 74-81 (establishing the tests for when government may define entities as full-fledged political committees and later upholding reporting requirements for express advocacy as defined in *Buckley* by persons government may *not* define as political committees).

Not distinguishing (1) from (2) is among a *pre-Citizens United* Ninth Circuit panel's mistakes in *Alaska Right to Life Committee v. Miles,* 441 F.3d 773, 786-94 (9th Cir.) ("*ARLC*"), *cert. denied,* 549 U.S. 886 (2006). By not following the major-purpose test, *see id., ARLC* contradicts Ninth Circuit precedent that does follow the test, *see CPLC I,* 328 F.3d at 1101 n.16 (quoting *MCFL,* 479 U.S. at 252-53), albeit without "precision[.]" *Supra* Part F.

ARLC even holds full-fledged political-committee disclosure is not "onerous[,]" because Alaska law has no limits on contributions received, has no political-committee spending limits, does not have reporting requirements limiting political committees' fundraising ability, and does not require "structural changes" in entities. 441 F.3d at 791. However, this contradicts *MCFL,* 479 U.S. at 254-55. *Supra* Part F. And Supreme Court decisions since *ARLC* hold political-committee status is not only "burdensome[,]" *Citizens United,* 130 S.Ct. at 897, but also "onerous[,]" *id.* at 898; *WRTL II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), even when it requires "only" – so to speak – (1) registration, including treasurer

designation, (2) recordkeeping, or (3) extensive reporting. *See Citizens United,* 130 S.Ct. at 897-98.

Furthering the *ARLC* confusion *pre-Citizens United,* another Ninth Circuit panel – while rejecting full-fledged political-committee burdens, *California Pro-Life Council v. Randolph,* 507 F.3d 1172, 1187-89 (9th Cir. 2007) ("*CPLC II*") – says government may impose disclosure requirements "irrespective of the major purpose of an organization[.]" *Id.* at 1180 n.11 (citing *ARLC,* 441 F.3d at 786). This is incomplete and misleading. Government may impose "onerous" political-committee disclosure requirements under particular circumstances; government may impose other disclosure requirements under other particular circumstances. The two analyses differ.

Even if *ARLC* and *CPLC II* were good law before *Citizens United,* they do not survive *Citizens United,* especially in combination with *WRTL II* and *MCFL.*

Although a *post-Citizens United* Ninth Circuit panel does not lump political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis, *see HLW,* 624 F.3d at 1011-12, 1016-18, it incorrectly addresses a political-committee definition and political-committee disclosure requirements together. It also stretches the major-purpose test beyond what the Supreme Court and other circuits have established. *See id.* at 1011-12. It similarly goes beyond what the Supreme Court and other circuits have established in allowing government to regulate speech by entities that government may *not* define as political committees under *Buckley. Compare id.* at 1016-18 *with infra* Part F.

The District of Columbia Circuit's *SpeechNow.org* opinion, 599 F.3d at 697-98, also contradicts *MCFL, WRTL II,* and *Citizens United.*

Although *SpeechNow* does not lump full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis, *SpeechNow* can still be confusing, because it addresses both kinds of disclosure simultaneously. *See id.* at 696-97. It can also be confusing, because it addresses the political-committee definition *after, not before,* addressing political-committee disclosure requirements. *See id.* at 697-98. These may mislead the reader into either lumping the two types of disclosure into one overbreadth analysis or considering a political-committee definition and political-committee disclosure requirements in the wrong order.

Apart from that, *SpeechNow* in effect upholds the political-committee definition as applied to SpeechNow's speech by saying that defining an entity as a political committee is not that much more burdensome than just requiring reporting of

In fact, Wisconsin law is like state law that the Tenth Circuit has struck down: It unconstitutionally imposes full-fledged political-committee burdens. It has no less-restrictive means. Further consideration is unnecessary to determine that Section 1.91 as whole is unconstitutionally overbroad. *See NMYO,* 611 F.3d at 676-79 (considering only political-committee status and not going further, as the district court had).

Nevertheless, some aspects of the Section 1.91 disclosure requirements are unconstitutionally overbroad even for entities that Wisconsin may define as political committees – or, here, organizations.

First, the requirement to file an oath for independent disbursements, GAB § 1.91.7, is unconstitutional, because the government's interest does not reflect the burden on the speech under *Davis v. FEC,* 554 U.S. 724, 744 (2008) (citing *Buckley,* 424 U.S. at 68). Although the GAB calls this a "voluntary" oath, GAB 1.42.1-4 (1994), the law *requires* filing an oath that independent disbursements are independent when the organization desires to make independent disbursements exceeding $25 in a calendar year. The organization must (1) file the oath with its

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independent expenditures properly understood. *Id.* This is incorrect as a matter of statutory law. *Compare* 2 U.S.C. §§ 432, 433, 434 *with id.* § 434.c, g; *see also SpeechNow,* 599 F.3d at 691-92 (listing political-committee burdens). It is also incorrect as a matter of constitutional law. In this respect, *SpeechNow* – like *ARLC* and *CPLC II* – contradicts *MCFL,* 479 U.S. at 254-55. *Supra* Part F. It also contradicts Supreme Court decisions holding political-committee status is not only "burdensome[,]" *Citizens United,* 130 S.Ct. at 897, but also "onerous[,]" *id.* at 898; *WRTL II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), even when it requires "only" (1) registration, including treasurer designation, (2) recordkeeping, or (3) extensive reporting. *See Citizens United,* 130 S.Ct. at 897-98.

registration statement before making any disbursement, (2) refile the oath for each calendar year by January 31, WIS. STAT. § 11.06.7.a, b, which may well be long before an organization does its speech – and is often long before an organization even plans its speech – and then (3) amend "the oath whenever there is a change in the candidate or candidates to whom it applies." *Id.* § 11.06.7.b. In other words, organizations must guess at the beginning of the year which candidates they will mention in what Wisconsin calls "independent disbursements," and then continually update their guess whenever their plans change. This oath requirement is especially burdensome, given how quickly and frequently political-speech plans arise and change. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969) (Harlan, J., concurring). The burden is especially great on small organizations. *Cf. WRTL II,* 551 U.S. at 477 n.9 (referring to political-committee burdens on small nonprofit corporations (citing *MCFL,* 479 U.S. at 253-55)).

Second, Section 1.91.8 requires organizations to comply with, *inter alia,* political-committee reporting thresholds in WIS. STAT. § 11.06.1.a, b, d, g, h. The reporting thresholds are either $20, *id.* § 11.06.1.a, d, g, h, or $100. *Id.* § 11.06.1.b. Having to:

- Report contributors' names and addresses for all contributions exceeding $20. *Id.* § a.
- Report contributors' occupations and employers for all contributions exceeding $100 in a calendar year. *Id.* § b.
- Itemize other income exceeding $20. *Id.* § d.

- Itemize disbursements exceeding $20 with the names and addresses of persons receiving disbursements, plus the date and purpose of the disbursements. *Id.* § g, and

- Itemize obligations exceeding $20 and give the names and addresses of persons or business where WRTL-SPAC incurred the obligations, plus the date and purpose of the obligations, *id.* § h,

is a severe burden, especially on small organizations. *See Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1033 (9th Cir. 2009) (referring *pre-Citizens United* to tailoring); *id.* at 1036 (Noonan, J., concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). The "value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level." *Id.* at 1033 (controlling opinion) (emphasis omitted).

This is especially so since Wisconsin does not index its $20 or $100 reporting thresholds for inflation, which means their real value declines every year. *See Randall v. Sorrell,* 548 U.S. 230, 261 (2006).

H. Amending Section 1.91

Wisconsin can amend Section 1.91 to make it constitutional.

On the one hand, if Wisconsin wants to continue to impose full-fledged political-committee-like burdens on organizations, then Wisconsin should use non-vague language and limit its organization definition to entities that are under the

control of, or have the major purpose of nominating or electing, candidates for state or local office in Wisconsin, with "the major purpose" defined as noted above.[38]

On the other hand, if Wisconsin wants to regulate speech by organizations it may *not* define as political committees – or, here, organizations – then it should use non-vague language, drop the full-fledged political-committee burdens,[39] and regulate only the spending for political speech that Supreme Court case law has established Wisconsin may, subject to further inquiry, regulate *via* less restrictive, non-onerous means: (1) Express advocacy as defined in *Buckley, i.e.,* independent expenditures as defined in *Buckley, vis-à-vis* state or local office in Wisconsin, or (2) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Wisconsin, *see, e.g.,* 2 U.S.C. § 434.c, g; *id.* § 434.f,[40] without requiring reports within 24 hours of speech or contracts to engage in speech. *See Citizens for Responsible Gov't State PAC v. Davidson,* 236 F.3d 1174, 1197 (10th Cir. 2000) (striking down a 24 hour reporting requirement).[41]

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[38] *Supra* Part F.

[39] *Supra* Part A.

[40] *Supra* Part F.

[41] *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake* rejects a challenge to a 24 hour reporting requirement by saying *McConnell* upholds one. 524 F.3d 427, 439 (4th Cir.) ("*NCRL-FIPE*") (citing *McConnell,* 540 U.S. at 195-96), *cert. denied,* ____ U.S. ____, 129 S.Ct. 490 (2008). However, the *McConnell* plaintiffs did not challenge 24 hour reporting. While they challenged a law with 24 hour reporting, they challenged it for other reasons. *See* 540 U.S. at 195. Thus, *McConnell* does not apply, and *NCRL-FIPE* is incorrect.

In either event, Wisconsin should drop the Section 1.91.7 requirement to file oaths for independent disbursements, set Section 1.91.8[42] reporting thresholds at constitutional levels, and automatically adjust them for inflation. Reporting thresholds should not be so low that even the smallest donors run the risk of "threats, harassments, or reprisals if their names were disclosed." *Citizens United,* 130 S.Ct. at 916 (citing *McConnell,* 540 U.S. at 198). Nor should reporting thresholds be so low that even the least expensive political speech cannot be anonymous for those speakers that – unlike WRTL – wish to engage in anonymous speech. *Cf. McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 355 (1995).

Reporting thresholds from law addressed or challenged in previous Supreme Court opinions might provide guidance for what might be constitutional now, when the previous thresholds are adjusted for inflation. *See Randall,* 548 U.S. at 261. For example:

- As for the threshold for defining an entity as a political committee, *Buckley* addresses a law with a $1000 threshold without addressing the constitutionality of the threshold itself. *See* 424 U.S. at 62, 82-83. Adjusted for inflation since 1976, this threshold is $3889.44 in 2011.[43]

- As for entities that it is constitutional for government to define as political committees under *Buckley,* 424 U.S. at 74-79, *Buckley* approves a $100 reporting

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[42] The constitutional law that applies to Section 1.91.7 and 1.91.8 has implications for Wisconsin law beyond Section 1.91, yet Section 1.91 is what at issue here.

[43] *See* http://www.bls.gov/data/inflation_calculator.htm.

threshold for contributions that political committees receive. *Id.* at 82-83. *Buckley* also addresses a law with a $100 reporting threshold for political-committee spending without addressing the constitutionality of the threshold itself. *See id.* at 82-83, 158. Adjusted for inflation since 1976, these thresholds are $388.94 in 2011.

• As for independent expenditures properly understood, *see id.* at 39-51, 74-81; *McConnell,* 540 U.S. at 219-23; *Brownsburg,* 137 F.3d at 505,[44] *Buckley* approves a $100 reporting threshold. 424 U.S. at 74-76. Again, adjusted for inflation since 1976, this is $388.94 in 2011.

• As for electioneering communications as defined in FECA, *McConnell* approves an aggregate $10,000 reporting threshold for spending for such electioneering communications, and a $1000 reporting threshold for contributions to persons making such electioneering communications. 540 U.S. at 194-202. Adjusted for inflation since 2003, these are $11,968.64 and $1,196.86, respectively, in 2011.

WRTL appreciates the opportunity to testify today and remains available to consider providing whatever further assistance the Election and Campaign Reform Committee may feel it needs.

Thank you for your consideration.

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[44] *Supra* Part F.