

2013 WL 600720 (C.A.7) (Appellate Brief)  
United States Court of Appeals, Seventh Circuit.

WISCONSIN RIGHT TO LIFE, INC. and Wisconsin Right to Life State Political Action Committee,  
Plaintiffs-Appellants,  
v.  
Timothy VOCKE, in his official capacity as Chair and Member of the Wisconsin Government Accountability  
Board, et al., Defendants-Appellees.

Nos. 12-2915, 12-3046, 12-3158.  
February 4, 2013.

Appeal from the United States District Court for the Eastern District of Wisconsin, Case No. 10-C-0669 the  
Honorable Charles N. Clevert, Jr.

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**Supplemental Brief of Defendants-Appellees**

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\*1 On January 24, 2013, the Court ordered the parties to submit supplemental briefs to answer three questions. (7th Cir. Dkt. #49, Appeal No. 12-2915.) Defendants now answer the Court’s questions, breaking out sub-questions where appropriate.

**\*2 QUESTIONS AND ANSWERS**

I. *QUESTION ONE*: What specific duties and restrictions do the Wisconsin statutes and GAB rules impose on organizations that make independent political expenditures? What triggers the statutory and regulatory duties and restrictions? Are the statutory and regulatory requirements any different for an organization that engages in express advocacy for or against the election of candidates but does not do so as its major purpose? We remind counsel to be *specific*; include the relevant text of the applicable statutes and rules, and any relevant regulatory or litigation history; and discuss any Board guidance that bears on these questions.<sup>1</sup>

***ANSWER TO QUESTION ONE***

There are a number of specific duties and restrictions that the Wisconsin Statutes and GAB rules impose on organizations that make \*3 independent disbursements.<sup>2</sup> These statutory and regulatory duties and restrictions are triggered when organizations make or receive particular defined types and dollar values of contributions or engage in particular defined types and dollar values of disbursements for political speech. Understanding what actions trigger duties and restrictions is the key to determining what obligations are applicable to an organization that makes independent disbursements.

It is not difficult for organizations that make independent disbursements to comply with the requirements of Wisconsin campaign finance law. Wisconsin Admin. Code § GAB 1.91 (2012)<sup>3</sup> (“GAB 1.91”) sets forth plainly what obligations apply. Organizations accepting contributions for and making independent disbursements exceeding \$25 in a calendar year are

required to establish a designated depository account, designate a treasurer, file a registration statement, pay an annual filing fee, file an oath confirming that their disbursements are independent, make periodic campaign finance reports, and indicate in \*4 their speech that the speech is not coordinated with any candidate. GAB 1.91(3) through (9). The Wisconsin Government Accountability Board ("GAB") has created a number of simple forms, which can be downloaded from the Internet or filled in online, that can be used to complete many of these basic administrative tasks. See <http://gab.wi.gov/forms> (downloadable forms); <http://cfis.wi.gov/> (Wisconsin Campaign Finance Information System website, which allows for online reporting) (last visited Feb. 1, 2013).

The most succinct summary of the obligations placed upon organizations that make independent disbursements is found in guidance issued by GAB's Board, namely, Guideline GAB 1284. A copy of this guideline is found in the Joint Appendix at pages A. 312-13; it was filed by Plaintiffs as Dist. Ct. Dkt. #66-16 in support of their second preliminary injunction motion. A current version of Guideline GAB 1284 can be found on GAB's website at [http://gab.wi.gov/sites/default/files/guideline/26/1284\\_independent\\_disbursement\\_organizations\\_pdf\\_13708.pdf](http://gab.wi.gov/sites/default/files/guideline/26/1284_independent_disbursement_organizations_pdf_13708.pdf) (last visited Feb. 1, 2013).

\*5 Guideline GAB 1284 states:

### **Wisconsin Government Accountability Board *For members of the public***

#### **Independent Disbursements of Corporations and Non-Political Organizations**

**This Guideline is provided as an information resource only. For authoritative advice, contact the Wisconsin Government Accountability Board.**

Under Wisconsin Statutes and federal case law, independent disbursements may be made by individuals, registered political committees, and other organizations subject to certain registration and reporting requirements. This Guideline summarizes regulations applicable to the latter category of organizations, including corporations, which are not organized primarily for political purposes, and which may make independent disbursements without being subject to all of the restrictions applicable to political committees[.]

**Independent Disbursement Organizations:** This Guideline applies to for-profit and non-profit corporations and other organizations which are primarily organized for non-political purposes, and which are referred to in this Guideline as Independent Disbursement Organizations. This Guideline does not apply to individuals or political committees. Independent Disbursement Organizations are permitted to accept contributions for, and to make, independent disbursements subject to the registration and reporting requirements described in this Guideline.

**What is an independent disbursement?** Wisconsin Statutes define an independent disbursement as a payment used to advocate the election or defeat of a clearly identified candidate for state or local office. To be independent, a disbursement must be made without cooperating or consulting with any candidate or candidate's agent or authorized committee who is supported by the independent disbursement. The disbursement must not be made in concert with, or at the request or suggestion of, any \*6 candidate, candidate's agent or authorized committee of a candidate who is supported by the disbursement.

**Reporting and registration requirements for independent disbursements related to candidates:** An Independent Disbursement Organization which accepts contributions for, incurs obligations for, or makes independent disbursements exceeding \$25 in the aggregate in a calendar year in support of or in opposition to a state or local candidate, must comply with the following requirements:

- 1) Designate a depository account for the deposit of all political contributions and payment of all political disbursements.
- 2) Designate a treasurer who must authorize all political disbursements and obligations.

- 3) Register with the Government Accountability Board if independent disbursements are made which advocate the election or defeat of an identified candidate for state office, or register with the local filing office[r] if the disbursements advocate the election or defeat of an identified candidate for local office, using Form GAB-1.
- 4) Pay an annual filing fee of \$100 to the Board if the aggregate independent disbursements exceed \$2500 in a calendar year.
- 5) File the oath for independent disbursements with the appropriate filing officer using Form GAB-6.
- 6) File campaign finance reports, using Forms GAB-2 and GAB-7, listing both contributions received and expenditures incurred, for the purpose of making independent disbursements.
- 7) Include an attribution statement in all independent disbursements indicating the source of the disbursement, the name of the treasurer or other authorized agent of the organization, and indicating that the communication is not authorized by any candidate or candidate's agent or committee.

**\*7Regulation of contributions and expenditures:** Independent Disbursement Organizations may receive unlimited contributions from individuals, corporations, and political committees, but may not coordinate disbursements with a candidate benefiting from the disbursement. A corporation or other Independent Disbursement Organization may make political contributions from its corporate account to another Independent Disbursement Organization. The contribution must be reported as a receipt by the receiving organization, and must be deposited into that organization's separate depository account. A separate depository account may be used only to deposit contributions and to make independent disbursements. An Independent Disbursement Organization may not make contributions to candidates or to political action committees.

**Legal references:** §§11.01, 11.05(2), 11.055, 11.06, 11.23, 11.30, 11.38, *Wisconsin Statutes*; *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *OAG-05-10* (Aug 9, 2010).

(*Id.*)<sup>4</sup>

Guideline GAB 1284 describes the obligations and restrictions placed upon organizations that make independent disbursements, but it does not specifically reference the statutory or regulatory sources for each obligation or restriction. In an effort to illustrate for the Court the specific statutory and regulatory references for each requirement described in Guideline GAB 1284, below is the text of the registration \*8 and reporting requirements, as described in Guideline GAB 1284, followed by references to the relevant statutes and rules in brackets.

**Reporting and registration requirements for independent disbursements related to candidates:** An Independent Disbursement Organization which accepts contributions for, incurs obligations for, or makes independent disbursements exceeding \$25 in the aggregate in a calendar year in support of or in opposition to a state or local candidate, must comply with the following requirements:

[Wis. Stat. § 11.01(1) (definition of "candidate"); Wis. Stat. § 11.01(6) (definition of "contribution"); Wis. Stat. § 11.01(7) (definition of "disbursement"); Wis. Stat. § 11.01(11) (definition of "incurred obligation"); Wis. Stat. § 11.05(1) (\$25 aggregate registration threshold); GAB 1.91(1)(a), (c), (e), (f), (g) (regulatory definitions of "contribution," "disbursement," "incurred obligation," "independent," and "organization").]

**1) Designate a depository account for the deposit of all political contributions and payment of all political disbursements.**

[Wis. Stat. § 11.01(6) (definition of "contribution"); Wis. Stat. § 11.01(7) (definition of "disbursement"); Wis. Stat. § 11.14(1) (regarding the deposit of contributions in a "separate campaign depository account"); GAB 1.91(1)(a)-(c) (definitions of "contribution," \*9 "designated depository account," and "disbursement"); GAB 1.91(3) (designated depository account requirement).]



**2) Designate a treasurer who must authorize all political disbursements and obligations.**

[Wis. Stat. § 11.01(7) (definition of “disbursement”); Wis. Stat. § 11.01(11) (definition of “incurred obligation”); Wis. Stat. § 11.01(3)(e) (requirement to designate a treasurer); Wis. Stat. § 11.10(3) (requirement to appoint a treasurer); GAB 1.91(1)(c), (e) (definitions of “disbursement” and “incurred obligation”); GAB 1.91(3) (requirement to designate a treasurer).]

**3) Register with the Government Accountability Board if independent disbursements are made which advocate the election or defeat of an identified candidate for state office, or register with the local filing office if the disbursements advocate the election or defeat of an identified candidate for local office, using Form GAB-1.**

[Wis. Stat. § 11.01(7) (definition of “disbursement”); Wis. Stat. § 11.02 (regarding determining whether the filing officer is the GAB or a local filing office); Wis. Stat. § 11.05(1) (registration requirements); Wis. Stat. § 11.05(3) (listing the required information to include in a registration statement); Wis. Stat. § 11.05(5) (regarding changes to information in registration statements); Wis. Stat. § 11.21(1) (requiring \*10 the GAB to prescribe the form of statements, such as the GAB-1 form); GAB 1.91(1)(c) (definition of “disbursement”); GAB 1.91(4)(a)-(e) (listing the required information to include in a registration statement); GAB 1.91(6) (requiring the organization to comply with Wis. Stat. § 11.05(5) and to “notify the appropriate filing officer within 10 days of any change in information previously submitted in a statement of registration”).]

**4) Pay an annual filing fee of \$100 to the Board if the aggregate independent disbursements exceed \$2500 in a calendar year.**

[Wis. Stat. § 11.01(7) (definition of “disbursement”); Wis. Stat. § 11.01(18m) (definition of “registrant”); Wis. Stat. § 11.055(1) (\$100 annual filing fee); Wis. Stat. § 11.055(3) (exemption from paying the \$100 annual filing fee for “registrants” under Wis. Stat. § 11.05 “for any year during which the registrant does not make disbursements exceeding a total of \$2,500”); GAB 1.91(1)(c), (f) (definitions of “disbursement” and “independent”); GAB 1.91(5) (requiring the “designated depository account for an organization required to register with the Board” to “annually pay a filing fee of \$100.00 to the Board as provided in s. 11.055, Stats.”).]

**\*115) File the oath for independent disbursements with the appropriate filing officer using Form GAB-6[.]**

[Wis. Stat. § 11.01(7) (definition of “disbursement”); Wis. Stat. § 11.02 (regarding determining whether the filing officer is the GAB or a local filing office); Wis. Stat. § 11.06(7) (oath for independent disbursements requirement); Wis. Stat. § 11.21(1) (requiring the GAB to prescribe the form of statements, such as the GAB-6 form); GAB 1.42(1) (“voluntary oath for independent candidate-related activities”); GAB 1.91(c), (f) (definitions of “disbursement” and “independent”); GAB 1.91(7) (requiring that “[a]n organization making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats.”).]

**6) File campaign finance reports, using Forms GAB-2 and GAB-7, listing both contributions received and expenditures incurred, for the purpose of making independent disbursements.**

[Wis. Stat. § 11.01(6) (definition of “contribution”); Wis. Stat. § 11.01(7) (definition of “disbursement”); Wis. Stat. § 11.06 (listing the campaign finance reporting requirements); Wis. Stat. § 11.12(4) (requiring that “[e]ach registrant shall report contributions, disbursements and incurred obligations in accordance with s. 11.20.”); Wis. Stat. § 11.20 (establishing filing requirements for campaign \*12 finance reports); Wis. Stat. § 11.21(1) (requiring the GAB to prescribe the form of statements, such as the GAB-2 and GAB-7 forms); GAB 1.91(1)(a), (c), (f) (definitions of “contribution,” “disbursement,” and “independent”); GAB 1.91(8) (requiring GAB 1.91 “organizations” receiving contributions for independent disbursements or making independent disbursements to “file periodic reports as provided [in] ss. 11.06, 11.12, 11.19, 11.20 and 11.21(16), Stats.”).]

**7) Include an attribution statement in all independent disbursements indicating the source of the disbursement, the name of the treasurer or other authorized agent of the organization, and indicating that the communication is not authorized by any candidate or candidate's agent or committee.**

[Wis. Stat. § 11.01(7) (definition of "disbursement"); Wis. Stat. § 11.30(1), (2) (requiring the attribution of disbursements, including the words "Paid for by" and "Not authorized by any candidate or candidate's agent or committee."); GAB 1.91(1)(c), (f) (definitions of "disbursement" and "independent"); GAB 1.91(9) (requiring an organization making independent disbursements to "comply with the requirements of s. 11.30(1) and (2)(a) and (d), Stats., and include an attribution identifying the organization paying for any communication, arising out of independent disbursements on behalf of or in opposition \*13 to candidates, with the following words: 'Paid for by' followed by the name of the organization and the name of the treasurer or other authorized agent of the organization followed by 'Not authorized by any candidate or candidate's agent or committee.' ")].]

The above description of the requirements set forth in Guideline GAB 1284 is an accurate summary, but it does not describe in detail the regulatory scheme for organizations making independent disbursements. A more complete description follows, focusing in particular on the definitions of "contribution," "disbursement," and "political purposes," along with a discussion of exemptions and restrictions found in the statutes and implementing rules.

Instead of including many lengthy block quotations of the text of the relevant statutes and rules, reference will be made to the Short Appendix that Plaintiffs filed with their principal brief, where appropriate. (See 7th Cir. Dkt. #54, Appeal No. 12-2915.)

Whether an organization that makes independent disbursements is regulated under Wisconsin law depends upon the actions of that organization; therefore, the logical starting point in analyzing the relevant statutory and regulatory duties and restrictions is the \*14 definitions of "committee" and "political committee" in Wis. Stat. § 11.01(4). Wisconsin Stat. § 11.01(4) states:

"Committee" or "political committee" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a "committee" does not include a political "group" under this chapter.<sup>5</sup>

"Committees" and "political committees" under Chapter 11 of the Wisconsin Statutes are regulated if they make or accept contributions or make disbursements, which are defined terms. A "contribution" is defined in Wis. Stat. § 11.01(6)(a) and (b). (See A. 18-20.) A "disbursement" is defined in Wis. Stat. § 11.01(7)(a) and (b). (See A. 20-21.)

Likewise, "organizations" under GAB 1.91 are regulated if they accept contributions made for, incur obligations for, or make independent disbursements exceeding \$25 aggregate during a calendar year. GAB 1.91(3).

The statutory definitions of "contribution" and "disbursement" include the phrases "made for political purposes," "for a political purpose," and "for political purposes." \*15 Wis. Stat. §§ 11.01(6)(a)1., 11.01(6)(a)3., 11.01(6)(a)5., 11.01(6)(a)7., 11.01(7)(a)1., 11.01(7)(a)3., 11.01(7)(b)4. Whether an act is for a "political purpose" is a key question to ask to determine whether the act triggers certain duties or restrictions under Chapter 11 and regulations promulgated to implement Chapter 11, including Wis. Admin. Code ch. GAB 1. The answer to the question whether an act is for a political purpose is defined by both statute and administrative rule. Wisconsin Stat. § 11.01(16) is a starting point; it states:

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.

\*16 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.

(b) A “political purpose” does not include expenditures made for the purpose of supporting or defending a person who is being investigated for, charged with or convicted of a criminal violation of state or federal law, or an agent or dependent of such a person.

It is important to recognize that Wis. Stat. § 11.01(16)(a) does not define all acts which are for “political purposes” under Wisconsin law. This is so because Wis. Stat. § 11.01(16)(a) states: “include but are not limited to.” Accordingly, one must also refer to Wis. Admin. Code § GAB 1.28 (“GAB 1.28”) to determine whether an act is for a political purpose and, therefore, regulated. GAB 1.28 interprets Wis. Stat. §11.01(16) to elaborate further upon what acts are for a “political purpose.”

GAB 1.28 defines when contributions are made for political purposes. GAB 1.28(1)(c) defines “contributions for political purposes” to mean: “contributions made to 1) a candidate, or 2) a political \*17 committee<sup>6</sup> or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for political purposes.”

GAB 1.28 also defines when “communications,” such as printed advertisements, billboards, etc., are made for political purposes. “Communication” is defined in GAB 1.28(1)(b) and means: “any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose.”

GAB 1.28(3) defines when a “communication” is made for a “political purpose”; it states: A communication is for a “political purpose” if either of the following applies:

(a) The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate and unambiguously relates to the campaign of that candidate:

1. “Vote for;”

2. “Elect;”

\*18 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 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 establishes that "individuals other than candidates" and "persons other than political committees" are "subject to the applicable requirements of ch. 11, Stats., when they" do the following: "(a) Make contributions or disbursements for political purposes, or (b) Make contributions to any person at the request or with the \*19 authorization of a candidate or political committee, or (c) Make a communication for a political purpose." GAB 1.28(2). Because GAB 1.28(2) references only the "applicable" requirements of Chapter 11, it creates no new or additional duties or restrictions for organizations or committees that make independent disbursements beyond those in Chapter 11 that are already applicable.

As will be discussed below in the Answer to Question Three, the GAB 1.28 rule that was in effect on August 1, 2010 (prior to this lawsuit being filed), is identical to the GAB 1.28 rule that is currently in the Wisconsin Administrative Code as the law of Wisconsin.

GAB 1.91, which was promulgated as a permanent rule effective July 1, 2012, also includes definitions that are relevant to determining whether the actions of an organization trigger duties or restrictions under Chapter 11 of the Wisconsin Statutes. The GAB 1.91 regulatory definitions of "contribution," "disbursement," "filing officer," "incurred obligation," and "person" refer back to statutory definitions in Chapter 11. *See* GAB 1.91(1)(a), (c), (d), (e), and (h). GAB 1.91(1)(b), (f), and (g), on the other hand, define the terms "designated depository \*20 account," "independent," and "organization," consistent with the statutes, as follows:

(b) "Designated depository account" means a depository account specifically established by an organization to receive contributions and from which to make independent disbursements.

....

(f) "Independent" means the absence of acting in cooperation or consultation with any candidate or authorized committee of a candidate who is supported or opposed, and is not made in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed.

(g) "Organization" means any person other than an individual, committee, or political group subject to registration under s. 11.23, Stats.

In this case, WRTL has challenged the constitutionality of the definitions of "committee" and "political committee" in Wis. Stat. § 11.01(4), the language "persons other than political committees" in GAB 1.28(2), and the definition of "organization" in GAB 1.91, both facially and as applied to WRTL's speech. (A. 533, ¶¶ 71-74; A. 534-36, ¶¶ 77-87.) In the alternative, WRTL has also challenged the "political-committee-like burdens" created by these provisions. (*Id.*) The district court denied Plaintiffs' second preliminary injunction \*21 motion with regard to these challenges. (A. 163-64; A. 170-81; A. 185-91; A. 196-97.) Plaintiffs appealed.

Wisconsin Stat. § 11.10(3) is also relevant because it requires that organizations that make independent disbursements must do so with the authorization of their treasurer. Wisconsin Stat. § 11.10(3) states:

Every committee shall appoint a treasurer. Every individual under s. 11.06(7) shall be deemed his or her own treasurer. No disbursement may be made or obligation incurred by or on behalf of a committee without the authorization of the treasurer or designated agents. No contribution may be accepted and no disbursement may be made or obligation incurred by any committee at a time when there is a vacancy in

the office of treasurer.

In light of the acts that are regulated under the statutory and regulatory definitions of “contribution,” “incurred obligation,” and “disbursement,” Wisconsin law establishes certain registration, recordkeeping, and periodic reporting requirements for organizations that make or accept contributions, incur obligations, or make disbursements. In particular, Wis. Stat. § 11.05 and GAB 1.91(4) establish registration requirements for organizations making independent disbursements. In addition, Wis. Stat. § 11.05 includes certain restrictions and exemptions, which will be discussed separately \*22 where appropriate. Wisconsin Stat. § 11.05 is found in the Short Appendix at A. 24-29. In particular, the required information that must be included in a registration statement is found in Wis. Stat. § 11.05(3). (A. 25-26.)

The general reporting exemptions found in Wis. Stat. § 11.05(2r) would not apply to an organization that makes independent disbursements if the independent disbursements are “used to advocate the election or defeat of any clearly identified candidate or candidates[.]” Wis. Stat. § 11.06(7). This is so because Wis. Stat. § 11.05(2r) applies to “[a]ny committee... other than a committee... required to file an oath under s. 11.06(7)[.]” Wis. Stat. § 11.05(2r).<sup>7</sup>

Likewise, the Wis. Stat. § 11.05(11) exemption from filing a Wis. Stat. § 11.05 registration statement applies only to a “committee” that “makes only those disbursements and incurs only those obligations which are exempted from reporting under s. 11.06(2), or if any committee... makes no contributions, and makes only those \*23 disbursements and incurs only those obligations which are exempted from reporting under s. 11.06(2)[.]” Wisconsin Stat. § 11.06(2) states:

Disclosure of certain indirect disbursements. Notwithstanding sub. (1), 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 exemption provided by this subsection shall in no case be construed to apply to a political party, legislative campaign, personal campaign or support committee.

The emphasized language from Wis. Stat. § 11.06(2) illustrates that certain disbursements are exempt from reporting when they are: (1) made by a committee “which is not primarily organized for political purposes”; and (2) the disbursement is not made with the purpose to “expressly advocate the election or defeat of a clearly identified candidate.” Wis. Stat. § 11.06(2).

GAB 1.91 also reiterates the registration requirements established by Wis. Stat. § 11.05, in particular by reiterating the \*24 required registration information in Wis. Stat. § 11.05(3). GAB 1.91(4) and (6) state:

(4 The organization shall file a registration statement with the appropriate filing officer and it shall include, where applicable:

- (a) The name, street address, and mailing address of the organization.
- (b) The name and mailing address of the treasurer for the designated depository account of the organization and any other custodian of books and accounts for the designated depository account.
- (c) The name, mailing address, and position of other principal officers of the organization, including officers and members of the finance committee, if any.
- (d) The name, street address, mailing address, and account number of the designated depository account.
- (e) A signature of the treasurer for the designated depository account of the organization and a certification that all information contained in the registration statement is true, correct and complete.

....

(6) The organization shall comply with s. 11.05(5), Stats., and notify the appropriate filing officer within 10 days of any

change in information previously submitted in a statement of registration.

Next, Wis. Stat. § 11.055 and GAB 1.91(5) establish a \$100 annual filing fee for organizations making independent disbursements **\*25** when such organizations make disbursements greater than \$2,500 in a year. Wisconsin Stat. § 11.055 states:

(1) Except as provided in sub. (3), each individual who, or committee, group or corporation that, is required to register with the board under s. 11.05 or 11.38(1) shall annually pay a filing fee of \$100 to the board.

(2) Except as provided in s. 11.19(1), an individual who, or committee, group or corporation that, is subject to sub. (1) shall pay the fee specified in sub. (1) together with the continuing report filed under s. 11.20(4) in January of each year. If an individual, committee, group or corporation registers under s. 11.05 or changes status so that sub. (1) becomes applicable to the individual, committee, group or corporation during a calendar year, the individual, committee, group or corporation shall pay the fee for that year with the filing of the individual's, committee's, group's or corporation's registration statement under s. 11.05 or at any time before the change in status becomes effective.

(3) Subsection (1) does not apply to a candidate or personal campaign committee. Subsection (1) does not apply to any registrant under s. 11.05 for any year during which the registrant does not make disbursements exceeding a total of \$2,500.

GAB 1.91(5) states: "The designated depository account for an organization required to register with the Board shall annually pay a filing fee of \$100.00 to the Board as provided in s. 11.055, Stats."

In addition to registration requirements and the annual filing fee, organizations that make independent disbursements are subject to financial reporting requirements. Wisconsin Stat. §§ 11.06, 11.12, **\*26**11.19, 11.20, 11.21(16), and GAB 1.91(8) establish these requirements. The text of Wis. Stat. § 11.06 is found in the Short Appendix at A. 29-37. In particular, Wis. Stat. § 11.06(1) sets for the contents for required campaign finance reports.

Wisconsin Stat. § 11.06(7) is a reporting requirement that is relevant to organizations that make independent disbursements. This sub-section requires that a committee that "desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election shall" file with their Wis. Stat. § 11.05 registration statement an oath affirming that they do not coordinate their speech with the candidate or candidates in question. The text of Wis. Stat. § 11.06(7) is found in the Short Appendix at A. 34-35.

Wisconsin Admin. Code § GAB 1.42 ("GAB 1.42") is a regulation that interprets Wis. Stat. § 11.06(7) and provides guidance regarding when disbursements relating to candidates are independent under Wisconsin law. The text of GAB 1.42 is found in the Short Appendix at A. 91-94.

**\*27** To comply with the Wis. Stat. § 11.06(7) oath requirement, an organization making independent disbursements can complete and file form GAB-6. See [http://gab.wi.gov/sites/default/files/gab\\_forms/126/gab\\_6\\_oathinddisbursements\\_pdf\\_14046.pdf](http://gab.wi.gov/sites/default/files/gab_forms/126/gab_6_oathinddisbursements_pdf_14046.pdf) (last visited Feb. 1, 2013).

At oral argument on January 18, 2013, Judge Sykes asked a question about the applicability of GAB 1.42(1) and whether it creates a presumption that an independent disbursement made when the Wis. Stat. § 11.06(7) oath has not been filed constitutes a contribution to a candidate or the candidate's opponent. GAB 1.42(1) establishes that organizations making expenditures "in support of or [in] opposition to a specific candidate" over \$25 can do so only if they: (1) treat and report the expenditures "as a contribution to the candidate or the candidate's opponent"; or (2) file the voluntary oath under Wis. Stat. § 11.06(7). GAB 1.42(1) does not create a presumption that a disbursement will be treated as a contribution to a candidate if the Wis. Stat. § 11.06(7) oath has not been filed by the organization making the disbursement. On the contrary, GAB 1.42(1) creates only an **\*28** obligation for the organization making the disbursement, not an obligation for the candidate that is supported by the disbursement.

GAB 1.42(6) is also relevant to organizations making independent disbursements because it helps them determine whether their speech is considered independent under Wisconsin law. This sub-section provides guidelines to determine whether an

“expenditure made on behalf of a candidate” will be presumed to be treated as an in-kind contribution to that candidate. GAB 1.42 (6)(a). GAB 1.42(6)(a)l. and 2. establish when the presumption applies. GAB 1.42(6)(b) indicates that the presumption may be overcome by countervailing evidence.

The Wisconsin State Elections Board, the predecessor to GAB, has also issued a formal opinion that bears upon the question of when a disbursement is independent. El. Bd. 00-2, a formal State Elections Board opinion that was reviewed and reaffirmed by GAB on March 26, 2008, includes a lengthy discussion of the difference between coordinated and independent expenditures. See [http://gab.wi.gov/sites/default/files/opinions/29/00\\_02opelbd\\_pdf\\_17587.pdf](http://gab.wi.gov/sites/default/files/opinions/29/00_02opelbd_pdf_17587.pdf) at 8-13 (last visited Feb. 1, 2013).

\*29 GAB 1.91(7) reiterates that “[a]n organization making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats.”

Wisconsin Stat. § 11.06(7) has been challenged by WRTL-SPAC in this case. (A. 529, ¶¶ 54-59; A. 537, ¶¶ 93-95.) The district court denied Plaintiffs’ second preliminary injunction motion as to their claim that Wis. Stat. § 11.06(7) is unconstitutionally burdensome. (A. 164; A. 195.) Plaintiffs appealed.

Wisconsin Stat. § 11.12 also establishes reporting requirements for organizations making independent disbursements. The text of Wis. Stat. § 11.12 is found in the Short Appendix at A. 40-41.

Wisconsin Admin. Code § GAB 1.15 (“GAB 1.15”) is a regulation that establishes what is required for organizations receiving contributions for or making independent disbursements that fall under Wis. Stat. § 11.12(5) or (6). These statutes require 24-hour reporting of late contributions or disbursements. The text of GAB 1.15 is found in the Short Appendix at A. 82-83.

The late reporting requirements of Wis. Stat. § 11.12(5) and (6) have been challenged in the instant case. (See A. 528, ¶ 53; A. 536-37, \*30 1191-92.) The district court denied Plaintiffs’ second preliminary injunction motion with regard to their challenges to these 24-hour reporting requirements. (A. 164; A. 193-95.) Plaintiffs appealed.

Wisconsin Stat. § 11.20 also establishes reporting requirements for organizations that make independent disbursements. The text of Wis. Stat. § 11.20 is found in the Short Appendix at A. 51-55. In particular, Wis. Stat. § 11.20 establishes that campaign finance reports must be filed and also sets forth deadlines for filing such reports.

Wisconsin Stat. § 11.21(16) and Wis. Admin. Code § GAB 6.05 (“GAB 6.05”) require that organizations that make independent disbursements in a total amount or value of \$20,000 or more during a campaign period must file reports electronically. Wisconsin Stat. § 11.21(16) states:

[The GAB’s Board shall] [r]equire each registrant for whom the board serves as filing officer and who or which accepts contributions in a total amount or value of \$20,000 or more during a campaign period to file each campaign finance report that is required to be filed under this chapter in an electronic format, and accept from any other registrant for whom the board serves as a filing officer any campaign finance report that is required to be filed under this chapter in an electronic format. A registrant who or which becomes subject to a requirement to file reports in an electronic format under this subsection shall initially file the registrant’s report in an electronic format for the period which includes the date on which the registrant becomes subject to the requirement. To facilitate \*31 implementation of this subsection, the board shall specify, by rule, a type of software that is suitable for compliance with the electronic filing requirement under this subsection. The board shall provide copies of the software to registrants at a price fixed by the board that may not exceed cost. Each registrant who or which files a report under this subsection in an electronic format shall also file a copy of the report with the board that is recorded on a medium specified by the board. The copy shall be signed by an authorized individual and filed with the board by each registrant no later than the time prescribed for filing of the report under this chapter. The board shall provide complete instructions to any registrant who or which files a report under this subsection. In this subsection, the “campaign period” of a candidate, personal campaign committee or support committee begins and ends with the “campaign” of the candidate whose candidacy is supported, as defined in s. 11.26(17), and the “campaign period” of any other registrant begins on January 1 of each

odd-numbered year and ends on December 31 of the following year.

GAB 6.05(2) states: "Any registrant who files with the government accountability board and who accepts contributions or makes disbursements in a total amount or value of \$20,000 or more during a campaign period shall file each campaign finance report that is required to be filed by ch. 11, Stats., in an electronic format."

A registrant that is not required to file electronic reports may elect to file any campaign finance report in an electronic format. GAB 6.05(3). Wisconsin Admin. Code §§ GAB 6.04 and 6.05 provide for the filing of campaign finance reports by facsimile and in an electronic format, respectively. GAB has created the Wisconsin Campaign \*32 Finance Information System ("CFIS") (<http://cfis.wi.gov/>) to facilitate electronic filing of required campaign finance reports. A frequently asked questions document regarding how CFIS works was filed as part of the record in district court. (Dist. Ct. Dkt. #74-4.) Training manuals on the CFIS website also explain how to use the site to complete required campaign finance reporting. See <http://ethics.state.wi.us/cfis/PAC/> (last visited Feb. 1, 2013).

GAB 1.91 explains the reporting requirements for organizations making independent disbursements. In particular, the requirements in GAB 1.91 reference those reporting requirements found in Chapter 11. GAB 1.91(8) states:

An organization receiving contributions for independent disbursements or making independent disbursements shall file periodic reports as provided ss. 11.06, 11.12, 11.19, 11.20 and 11.21(16), Stats., and include all contributions received for independent disbursements, incurred obligations for independent disbursements, and independent disbursements made. When applicable, an organization shall also file periodic reports as provided in s. 11.513, Stats.<sup>8</sup>

Wisconsin Stat. § 11.19 is also relevant to organizations that make independent disbursements because this section creates reporting requirements and exemptions when a registrant dissolves or \*33 suspends its regulated activities. The text of Wis. Stat. § 11.19 is found in the Short Appendix at A. 50-51.

The above reporting requirements can be completed using forms promulgated by GAB's Board pursuant to Wis. Stat. § 11.21(1). These forms, including the GAB-1, GAB-2a, GAB-2L, GAB-2S, GAB-3, GAB-4, GAB-6, and GAB-7 forms, can be found online at GAB's website: <http://gab.wi.gov/forms> (last visited Feb. 1, 2013).

In addition to the reporting requirements above, organizations that make independent disbursements are subject to the attribution and disclaimer requirements of Wis. Stat. § 11.30 and GAB 1.42(5). GAB 1.91(9) reiterates that these requirements apply to such organizations. The text of Wis. Stat. § 11.30 is found in the Short Appendix at A. 63-65. In particular, this statute requires the inclusion of "Paid for by" and "Not authorized by any candidate or candidate's agent or committee" language in political communications.

GAB 1.42(5) establishes a regulatory attribution and disclaimer requirement that additional disclaimer language must be included \*34 beyond what is required by Wis. Stat. § 11.30; it states:

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

GAB 1.91 reiterates the statutory attribution and disclaimer requirements applicable to organizations that make independent disbursements. GAB 1.91(9) states:

An organization making independent disbursements shall comply with the requirements of s. 11.30(1) and (2)(a) and (d), Stats., and include an attribution identifying the organization paying for any communication, arising out of independent disbursements on behalf of or in opposition to candidates, with the following words: "Paid for by" followed by the name of



the organization and the name of the treasurer or other authorized agent of the organization followed by "Not authorized by any candidate or candidate's agent or committee."

WRTL-SPAC has challenged the regulatory attribution and disclaimer requirements in GAB 1.42(5) as applied to its radio broadcast speech (*i.e.*, 30 second radio ads). (A. 527, ¶¶ 46-48; A. 536, ¶¶ 88-90.) The district court granted Plaintiffs' second \*35 preliminary injunction motion as to this claim, insofar as the district court ordered that "plaintiffs' second motion for preliminary injunction as to count five is granted with respect to ads that are less than 30 seconds in length, and denied with respect to the remaining aspects of count five." (A. 163.) Defendants did not appeal this ruling.

Wisconsin Stat. § 11.25 is also relevant to organizations that make independent disbursements because it prohibits the making of disbursements for political purposes in a manner that is contrary to law. This section also regulates how monies solicited for political purposes may be invested. The text of Wis. Stat. § 11.25 is found in the Short Appendix at A. 68-69.

Chapter 11 of the Wisconsin Statutes also includes contribution limitations. (See A. 56-61.) At oral argument on January 18, 2013, Judge Sykes addressed the contribution limitations found in Wis. Stat. § 11.26 by inquiring whether these limitations are applicable to organizations that make independent disbursements, such as WRTL. This Court's January 24, 2013, order also requests that the parties address Wis. Stat. "§ 11.26(1) (limits on contributions to any 'committee under s. 11.06(7) acting solely in support of... a candidate or in \*36 opposition to the candidate's opponent')." (7th Cir. Dkt. #49 at 3, Appeal No. 12-2915 (omissions in original).)

Although undersigned counsel did not recall it during oral argument, GAB's Board has issued guidance that bears upon the applicability of these statutory contribution limitations to organizations making independent disbursements. Specifically, Guideline GAB 1284 states:

Independent Disbursement Organizations may receive unlimited contributions from individuals, corporations, and political committees, but may not coordinate disbursements with a candidate benefiting from the disbursement.

(A. 312-13); *see also* [http://gab.wi.gov/sites/default/files/guideline/26/1284\\_independent\\_disbursement\\_organizations\\_pdf\\_13708.pdf](http://gab.wi.gov/sites/default/files/guideline/26/1284_independent_disbursement_organizations_pdf_13708.pdf) (last visited Feb. 1, 2013). Accordingly, the Board has publicly taken the position, albeit without specifically referencing Wis. Stat. § 11.26(1), that organizations that make only independent disbursements are not subject to the contribution limitations of Wis. Stat. § 11.26.

It follows from this Court's decision in *Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011), that, if the annual \$10,000 aggregate contribution limitation for individuals found in \*37 Wis. Stat. § 11.26(4) cannot constitutionally be applied to independent disbursements-only committees, the other limitations on contributions found in Wis. Stat. § 11.26, likewise, cannot constitutionally be applied to such committees. This is what follows from *Barland*, but such analysis has not been expressed publicly by GAB other than indirectly in Guideline GAB 1284.

Wisconsin Stat. § 11.38 places limitations on corporate speakers and associations organized under chapter 185 or 193 of the Wisconsin Statutes. Since organizations that make independent disbursements could be such entities, Wis. Stat. § 11.38 must be considered, as well. Wisconsin Stat. § 11.38 states, in relevant part:

(1)(a)1. No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

2. Notwithstanding subd. 1., any such corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to the fund to be utilized by such corporation or association, for the purpose of supporting or opposing any candidate for state or local office but the corporation or association may not make any contribution to the fund. The fund shall appoint a treasurer and shall register as a political committee under s. 11.05. A parent corporation or association engaging solely in this activity is not subject to registration under s. 11.05, but shall register and file special reports on forms prescribed by the board disclosing its \*38 administrative and solicitation expenses on behalf of such fund. A corporation not domiciled in this state need report only its expenses for administration and solicitation of

contributions in this state together with a statement indicating where information concerning other administration and solicitation expenses of its fund may be obtained. The reports shall be filed with the filing officer for the fund specified in s. 11.02 in the manner in which continuing reports are filed under s. 11.20(4) and (8).

3. No corporation or association specified in subd. 1. may expend more than a combined total of \$500 annually for solicitation of contributions to a fund established under subd. 2. or to a conduit.

In *Citizens United*, the Supreme Court invalidated a federal ban on corporate independent expenditures under the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010). In light of *Citizens United*, and at the request of GAB's Director and General Counsel, Wisconsin Attorney General J.B. Van Hollen issued an August 9, 2010, attorney general opinion in which he analyzed whether Wis. Stat. § 11.38(1)(a)1. is constitutional after *Citizens United*. Attorney General Van Hollen concluded that the ban on corporate independent disbursements in Wis. Stat. § 11.38(1)(a)1. is unconstitutional after *Citizens United*. See OAG-05-10, 2010 WL 3166628 (Aug. 9, 2010); (see also A. 572-83.) The Wisconsin \*39 Legislature has not amended Wis. Stat. § 11.38 in light of *Citizens United* or the Attorney General's opinion.

In response to *Citizens United*, however, GAB's Board promulgated GAB 1.91 as an emergency rule in May 2010. (See A. 10-16.) GAB 1.91 was then promulgated as a permanent rule effective July 1, 2012. See [http://docs.legis.wi.gov/code/chr/2010/cr\\_10\\_087](http://docs.legis.wi.gov/code/chr/2010/cr_10_087) (a summary of the regulatory history of GAB 1.91) (last visited Feb. 1, 2013.) GAB 1.91(2) states:

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

Thus, GAB 1.91(2) indicates that the corporate ban on independent disbursements in Wis. Stat. § 11.38(1)(a)1. no longer applies.

WRTL has challenged the Wis. Stat. § 11.38(1)(a)1. corporate disbursement ban in this case, both facially and as applied to WRTL. (A. 519, ¶ 20; A. 533-34, ¶¶ 75-76.) The district court granted Plaintiffs' second preliminary injunction motion as to \*40 Wis. Stat. § 11.38(1)(a)1. and ordered that "defendants are hereby preliminarily enjoined from enforcing limitations on corporate expenditures under Wis. Stat. § 11.38(1)(a)1 pending the final resolution of this case." (A. 164; see also A. 181-85; A. 196.) Defendants did not appeal.

The \$500 annual limitation in Wis. Stat. § 11.38(1)(a)3. on how much a corporation or association may "expend... for solicitation of contributions to a fund established under [Wis. Stat. § 11.38(1)(a)2.] or to a conduit" is also relevant to organizations that make independent disbursements. WRTL and WRTL-SPAC have challenged the Wis. Stat. § 11.38(1)(a)3. \$500 annual limitation in this case, as applied to WRTL and WRTL-SPAC. (A. 530, ¶ 60; A. 537-38, ¶¶ 96-97.) The district court denied Plaintiffs' second preliminary injunction motion as to their challenge to Wis. Stat. § 11.38(1)(a)3. (A. 164; A. 195-96.) However, GAB has stated in this litigation that it will not enforce this limitation as to WRTL and WRTL-SPAC in light of *Barland*. (7th Cir. Dkt. #30 at 61, Appeal No. 12-2915.)

Finally, the Court has inquired whether the statutory and regulatory requirements are "different for an organization that engages in express advocacy for or against the election of candidates but does \*41 not do so as its major purpose?" (7th Cir. Dkt. #49 at 3, Appeal No. 12-2915.) The answer is No.

II. *QUESTION TWO*: Although perhaps subsumed within question (1), the parties should specifically address the substance of GAB 1.91, the new rule governing independent-expenditure organizations. On this claim counsel for the defendants limited his argument to justifying the district court's mootness finding. That was a mistake. The challenge to GAB 1.91 is not moot. Although the emergency rule has expired, it was replaced by a permanent rule that is the same as the emergency rule in all material respects. Counsel explained at oral argument that the permanent rule was renumbered to correct an alphabetizing error but that is immaterial. What was subsection (f) is now subsection (g); otherwise permanent GAB 1.91 is identical to

emergency GAB 1.91, so the claim is not moot. *See* 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.6 (3d ed. 2008) (explaining that the expiration of a temporary rule “will not moot an attack... if there is a reasonably concrete basis to anticipate that the expired rule will be reenacted in a form that will raise the same questions”).

On the merits it is unclear the extent to which “committee” (the statutory term used throughout Chapter 11) and “organization” (the term used in GAB 1.91) are overlapping categories in the regulatory scheme. Are “organizations” under GAB 1.91 subject to the same duties and restrictions imposed on “committees” in Chapter 11 or some subset of the duties and restrictions imposed on “committees”? Do the statutory exemptions from registration and reporting--in particular, Wis. Stat. § 11.05(11) and § 11.06(2)--apply to “organizations” under GAB 1.91? Stated differently, how, if at all, do the duties and restrictions imposed on “organizations” under GAB 1.91 differ from the duties and restrictions imposed on “committees” under Chapter 11? In short, to what extent has the Board, through GAB 1.91, expanded or narrowed the scope of regulated entities and/or activities?

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**\*42ANSWER TO QUESTION TWO**

Under Wisconsin law, GAB 1.91 “organizations” are subject to a sub-set of the duties imposed upon Wis. Stat. § 11.01(4) “committees.” Thus, GAB 1.91 was not promulgated to add additional requirements to those found in Chapter 11 of the Wisconsin Statutes. Instead, it was promulgated to simplify the campaign finance regulatory scheme for organizations that make only independent disbursements by limiting the required duties to those found in GAB 1.91.

GAB 1.91 was promulgated by GAB’s Board to provide guidance to and to assist regulated entities such as corporations and associations organized for non-political purposes that were not permitted to make independent disbursements prior to *Citizens United*. *See* A. 11-16 (May 10, 2010, “Notice of Order of the Government Accountability Board” regarding promulgating GAB 1.91 as an emergency rule). A summary of the regulatory and legislative history surrounding GAB 1.91 can be found in a May 15, 2012, memorandum from GAB staff to GAB’s Board: [http://gab.wi.gov/sites/default/files/event/74/open\\_session\\_all\\_pdf\\_1](http://gab.wi.gov/sites/default/files/event/74/open_session_all_pdf_1) \*43 1362.pdf at 65-69 (last visited Feb. 1, 2013). This memorandum is also found in the Joint Appendix at pages A. 607-11.

After *Citizens United*, corporations are constitutionally permitted to make independent disbursements. *See Citizens United*, 130 S. Ct. at 913 (holding that the restrictions on corporate independent expenditures in 2 U.S.C. § 441b were invalid and could not be applied to *Hillary: The Movie*). In light of *Citizens United*, then, GAB 1.91 was promulgated to:

- (1) clarify for the regulated public in Wisconsin that, after *Citizens United*, organizations such as corporations and associations organized under chapter 185 or 193 of the Wisconsin Statutes are not prohibited under Wis. Stat. § 11.38(1)(a)l. from receiving contributions for independent disbursements or from making independent disbursements. *See* GAB 1.91(2);
- (2) facilitate the reporting of contributions made for and disbursements made by such organizations. *See* GAB 1.91(3) (requiring a GAB 1.91 “organization” to establish a designated depository account for “accepting contributions made for, incurring obligations for, or \*44 making an independent disbursement exceeding \$25 in aggregate during a calendar year”); and
- (3) indicate to the regulated public in Wisconsin what registration, reporting, recordkeeping, and other administrative requirements are required of organizations such as corporations and associations organized under chapter 183 or 195 of the Wisconsin Statutes that make independent disbursements after *Citizens United*. GAB 1.91(4)-(9).

GAB 1.91(3)’s separate designated depository account requirement for “organizations” is similar to the separate campaign depository account requirement for “committees” under Wis. Stat. § 11.14. However, the designated depository account requirement in GAB 1.91(3) is a unique feature of GAB 1.91 that assists corporate speakers receiving contributions for independent disbursements and making independent disbursements. Setting up a designated depository account under GAB 1.91(3) allows a corporation (or other GAB 1.91 “organization”) to keep independent disbursement funds separate for purposes of reporting requirements.

\*45 As noted above in the Answer to Question One, GAB's Board has issued Guideline GAB 1284 to assist GAB 1.91 "organizations" making independent disbursements in complying with the applicable requirements of Chapter 11 of the Wisconsin Statutes. Guideline GAB 1284 explains in detail the registration, recordkeeping, reporting, and administrative requirements that are applicable to GAB 1.91 "organizations."

The Court has inquired in Question Two whether "statutory exemptions from registration and reporting--in particular Wis. Stat. § 11.05(11) and § 11.06(2)--apply to 'organizations' under GAB 1.91." (7th Cir. Dkt. #49 at 4, Appeal No. 12-2915.) With regard to the exemptions in Wis. Stat. §§ 11.05(11) and 11.06(2), and similar exemptions that refer to a "committee" or "committees," the answer is No.

Statutory exemptions from registration and reporting that apply to a "committee" or "committees" cannot apply to those entities defined by GAB 1.91 as "organizations" because the definition of "organization" in GAB 1.91(g) means "any person *other than* an individual, *committee*, or political group subject to registration under s. 11.23, Stats." An \*46 "organization" under GAB 1.91(1)(g) does not include a "committee," and the exemptions in Wis. Stat. §§ 11.05(11) and 11.06(2) specifically reference a "committee."

In conclusion, GAB 1.91 "organizations" are subject only to a sub-set of the duties and restrictions imposed upon Wis. Stat. § 11.01(4) "committees." GAB 1.91(3) through (9) set out those duties either expressly or by reference to provisions in Chapter 11 of the Wisconsin Statutes.

\*47 III. *QUESTION THREE*: Wisconsin Right to Life challenges certain language in the last sentence of GAB 1.28(3)(b), which appears to create a presumption that any communication made within 60 days preceding a general election or 30 days preceding a primary election is deemed an "appeal to vote," triggering the duties and restrictions imposed by Wisconsin's campaign-finance system, if the communication: (1) refers to the "personal qualities, character, or fitness" of a "clearly identified candidate"; (2) "supports or condemns" a clearly identified candidate's "position or stance on issues"; or (3) "supports or condemns" a clearly identified candidate's "public record." We are aware, based on our own research, that in December 2010 the Board adopted an emergency rule *eliminating* this entire sentence from the rule.<sup>9</sup> We are also aware that in December 2011 the Board approved a permanent rule identical to the emergency rule and has also issued guidance that bears on the challenge in this case. Inexplicably, counsel has not brought this important regulatory history to the attention of the court. What is the complete regulatory and litigation history of GAB 1.28 from 2010 to the present? What is the current status of the rule? Why was this critical information not disclosed to the court?

### ***ANSWER TO QUESTION THREE***

A short answer to Question Three is that the second sentence of GAB 1.28(3)(b) is currently the law of Wisconsin. GAB 1.28 now is identical to GAB 1.28 as it existed on August 1, 2010, prior to the \*48 instant case being filed in district court. Although in December 2011 GAB passed a motion to promulgate a permanent rule identical to the January 2011 emergency rule that eliminated the second sentence of GAB 1.28(3)(b), the Board has not completed the required process under Wis. Stat. ch. 227 to promulgate the permanent rule to eliminate the second sentence of GAB 1.28(3)(b). Therefore, GAB 1.28(3)(b) currently includes the second sentence and is identical to the GAB 1.28 rule that was in place on August 1, 2010.

Below are answers to the Court's sub-questions in Question Three.

#### **A. What is the complete regulatory and litigation history of GAB 1.28 from 2010 to the present?**

GAB's July 31, 2010, amendments to GAB 1.28--in particular the addition of the second sentence of GAB 1.28(3)(b)--spawned three lawsuits, two in federal district court and one original action in the Wisconsin Supreme Court.

Before turning to the history of GAB 1.28, Defendants would like to respond to two statements that the Court made in its January 24, 2013, order. The Court stated that "[a]t no time did the parties advise this court (or, apparently, the district court either) that the Board has \*49 adopted an amendment to GAB 1.28 and issued regulatory guidance that affects the challenge

in this case.” (7th Cir. Dkt. #49 at 2, Appeal No. 12-2915.) The Court also stated that it is “also aware that in December 2011 the Board approved a permanent rule identical to the emergency rule and has also issued guidance that bears on the challenge in this case.” (*Id.* at 4.) See also *id.* at 3 n.1 (“the December 2011 permanent rule.”) Defendants would like to provide further information to the Court to clarify the status of GAB 1.28 in light of the Board’s December 2011 actions and whether any relevant guidance issued by the Board regarding GAB 1.28 exists.

First, during its December 13, 2011, meeting, GAB’s Board approved a motion to issue an order adopting a permanent rule amending the second sentence of GAB 1.28(3)(b). See [http://gab.wi.gov/sites/default/files/event/74/12\\_13\\_11\\_open\\_session\\_minutes\\_signed\\_pdf\\_62545.pdf](http://gab.wi.gov/sites/default/files/event/74/12_13_11_open_session_minutes_signed_pdf_62545.pdf) at 4 (last visited Feb. 1, 2013). However, the administrative rulemaking process required by Chapter 227 of the Wisconsin Statutes is not complete. A GAB staff memorandum that was part of the Board’s meeting packet for its December 13, 2011, meeting describes the additional steps that are \*50 required to complete promulgation of the proposed permanent rule. See [http://gab.wi.gov/sites/default/files/event/74/12\\_13\\_11\\_open\\_agenda\\_and\\_board\\_materials\\_pdf\\_67032.pdf](http://gab.wi.gov/sites/default/files/event/74/12_13_11_open_agenda_and_board_materials_pdf_67032.pdf) at 60-64 (last visited Feb. 1, 2013). Therefore, the December 13, 2011, proposed permanent rule (which would eliminate the second sentence of GAB 1.28(3)(b)) is not yet in effect.

Second, GAB’s Board has not issued guidance that bears on Plaintiffs’ challenge to GAB 1.28. A proposed guideline, GAB 1285, has not yet been adopted or issued by the Board. The proposed guideline can be found at pages 164 and 165 of the Board’s August 28, 2012, meeting minutes: [http://gab.wi.gov/sites/default/files/event/74/open\\_session\\_materials\\_for\\_website\\_8\\_28\\_12\\_pdf\\_48495.pdf](http://gab.wi.gov/sites/default/files/event/74/open_session_materials_for_website_8_28_12_pdf_48495.pdf) (last visited Feb. 1, 2013).

GAB staff proposed that the Board issue Guideline GAB 1285, but the Board did not take action on the proposal at its May 15, 2012, meeting. See [http://gab.wi.gov/sites/default/files/event/74/open\\_session\\_board\\_materials\\_05\\_08\\_12\\_pdf\\_68018.pdf](http://gab.wi.gov/sites/default/files/event/74/open_session_board_materials_05_08_12_pdf_68018.pdf) at 7 (last visited Feb. 1, 2013). The proposed guideline was withdrawn from the agenda for the Board’s \*51 meeting on August 28, 2012, and the guideline has not been taken up by the Board again. See [http://gab.wi.gov/sites/default/files/event/74/10\\_23\\_12\\_open\\_session\\_agenda\\_and\\_board\\_materials\\_p\\_17443.pdf](http://gab.wi.gov/sites/default/files/event/74/10_23_12_open_session_agenda_and_board_materials_p_17443.pdf) at 9 (last visited Feb. 1, 2013). Therefore, GAB’s Board has not issued guidance regarding GAB 1.28 that bears upon Plaintiffs’ challenge to GAB 1.28.

Below is the complete regulatory and litigation history of GAB 1.28 from 2010 to the present, in chronological order.

- *July 31, 2010*: The amendments to GAB 1.28 promulgated by GAB were published in the Wisconsin Administrative Register.
- *August 1, 2010*: The amendments to GAB 1.28 that were published in the Wisconsin Administrative Register on July 31, 2010, went into effect.
- *August 2, 2010*: A complaint for Declaratory Judgment and for Preliminary and Permanent Injunctive Relief was filed in *Wisconsin Club for Growth, Inc., et al. v. Myse, et al.*, Case No. 10-C-427 (W.D. Wis.) (“*Club for Growth*”). Plaintiffs sought to permanently enjoin the enforcement of the amendments to GAB 1.28.
- \*52 • *August 3, 2010*: The plaintiffs in *Club for Growth* filed a motion for a preliminary injunction, seeking to enjoin the amendments to GAB 1.28.
- *August 5, 2010*: A Verified Complaint, preliminary injunction motion, and supporting brief were filed in *Wisconsin Right to Life, Inc., et al. v. Myse*, Case No. 10-C-0669 (E.D. Wis.) (“*WRTL*”). The Verified Complaint and motion challenged GAB 1.28, as amended, among other statutes and rules in Wisconsin campaign finance law.
- *August 9, 2010*: A Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief was filed in *Wisconsin Prosperity Network, et al. v. Myse, et al.*, No. 2010AP1937-OA (Wis. Supr. Ct.) (“*WPN*”). *WPN* challenged the constitutionality of the amendments to GAB 1.28 under constitutional theories, and the petitioners requested a preliminary injunction to enjoin the July 31, 2010, amendments to GAB 1.28.
- *August 9, 2010*: The plaintiffs in *Club for Growth* filed their brief in support of their motion for a preliminary injunction.

• *August 10, 2010*: The plaintiffs and the defendants in *Club for Growth* executed and filed a stipulation and proposed order with the \*53 district court. See *Club for Growth*, Dkt. #22-2. The stipulation states, in relevant part:

Defendants... and Plaintiffs... do hereby STIPULATE and AGREE as follows:

1. The Court may enter a permanent injunction, order, and judgment enjoining the application or enforcement of the second sentence of Wis. Admin. GAB § 1.28(3)(b).

2. Plaintiffs will withdraw their motion for preliminary injunction. If the Court fails to enter the stipulated injunction, Plaintiffs may re-file their motion for preliminary injunction within five (5) days of the Court's decision not to enter the stipulated injunction, or as otherwise permitted by the Court. Should Plaintiffs refile their motion within five (5) days of the Court's decision not to enter the stipulated injunction, Defendants agree to not apply or enforce the second sentence of Wis. Admin. GAB § 1.28(3)(b) until such time that Plaintiffs' motion for a preliminary injunction is decided.

(*Id.* at 1-2.) (GAB continues to honor the stipulation regarding the second sentence of GAB 1.28(3)(b), and the *Club for Growth* case has not been litigated since mid-October 2010.)

• *August 11, 2010*: In *Club for Growth*, the district court ordered briefing from the parties to ascertain whether it had the ability to enter a permanent injunction enjoining the enforcement of the second sentence of GAB 1.28(3)(b), as the parties had stipulated on August 10, 2010. *Club for Growth*, Dkt. #23.

\*54 • *August 13, 2010*: In *WPN*, the Wisconsin Supreme Court temporarily enjoined the enforcement of the July 31, 2010, amendments to GAB 1.28. A copy of the Wisconsin Supreme Court's August 13, 2010, order was filed in *WRTL* as Dist. Ct. Dkt. #24-4. (The amendments, including the second sentence of GAB 1.28(3)(b), remained enjoined by the Wisconsin Supreme Court until the *WPN* case was dismissed on March 19, 2012.)

• *August 27, 2010*: In *WRTL*, Defendants filed an answer to Plaintiffs' Verified Complaint. (Dist. Ct. Dkt. #18.)

• *August 30, 2010*: In *WRTL*, Defendants filed a motion to abstain and stay, along with a supporting brief and affidavit. (Dist. Ct. Dkts. #22, 23.) Defendants asserted that *WRTL* should be stayed in its entirety in light of the *WPN* case.

• *September 17, 2010*: In *WRTL*, the district court granted Defendants' motion to abstain and stay. (Dist. Ct. Dkt. #31.) The district court ordered that *WRTL* was to remain stayed while *WPN* was pending and that Plaintiffs could re-open the *WRTL* case without prejudice within 30 days of a ruling in *WPN*. (*Id.* at 4.)

\*55 • *October 13, 2010*: In *Club for Growth*, the district court issued an order denying the parties' proposed August 10, 2010, stipulation. *Club for Growth*, Dkt. #43 at 15. The district court also denied plaintiffs' preliminary injunction motion (but left open the opportunity for plaintiffs to later file a preliminary injunction motion) and stayed all further proceedings in *Club for Growth* in light of *WPN*. (*Id.* at 15-16.)

• *November 10, 2010*: In *WPN*, the Wisconsin Supreme Court granted the petition for leave to commence an original action and assumed jurisdiction over the case.

• *December 22, 2010*: GAB conducted a meeting in which GAB's Board approved a motion to issue an order to promulgate an emergency rule that eliminates the second sentence of GAB 1.28(3)(b). See <http://gab.wi.gov/about/meetings/2010/december/22> (last visited Feb. 1, 2013).

• *January 7, 2011*: Emergency Rule EmR1049 was published in the Wisconsin Administrative Register. See [https://docs.legis.wisconsin.gov/code/emergency\\_rules/expired/emr1049.pdf](https://docs.legis.wisconsin.gov/code/emergency_rules/expired/emr1049.pdf)\*56 (last visited Feb. 1, 2013). Emergency Rule EmR1049 eliminates the second sentence of GAB 1.28(3)(b) and was effective from January 7, 2011, through June 5, 2011. (*Id.*)

• *January 11, 2011*: In *WPN*, petitioners' opening brief was filed. It is available at [https://acefiling.wicourts.gov/documents/show\\_any\\_doc?appId=wscca&docSource=EFile&p\\$caseNo](https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p$caseNo)

=2010AP001937&p\$docId)=58897&p\$eventSeqNo)d=56&p\$sectionNo))=1 (last visited Feb. 1, 2013).

• *January 22 and 23, 2011*: In *WPN*, respondents' opening briefs were filed. They are available at [https://acefiling.wicourts.gov/documents/show\\_any\\_doc?appId=wscqa&docSource=EFile&p\\$caseNo\)=2010AP001937&p\\$docId\)d=58897&p\\$eventSeqNo\)d=56&p\\$sectionNo\)\)=1](https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscqa&docSource=EFile&p$caseNo)=2010AP001937&p$docId)d=58897&p$eventSeqNo)d=56&p$sectionNo))=1) and [https://acefiling.wicourts.gov/documents/show\\_any\\_doc?appId=wscqa&docSource=EFile&p\\$caseNo\)=2010AP001937&p\\$docId\)=60615&p\\$eventSeqNo\)dd=58&p\\$sectionNo\)=1](https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscqa&docSource=EFile&p$caseNo)=2010AP001937&p$docId)=60615&p$eventSeqNo)dd=58&p$sectionNo)=1) (last visited Feb. 1, 2013).

\*57 • *March 8, 2011*: In *WPN*, petitioners' reply brief was filed. It is available at [https://acefiling.wicourts.gov/documents/show\\_any\\_doc?appId=wscqa&docSource=EFile&p\\$caseNo\)=2010AP001937&p\\$docId\)=61080&p\\$eventSeqNo\)d=74&p\\$sectionNo\)\)=1](https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscqa&docSource=EFile&p$caseNo)=2010AP001937&p$docId)=61080&p$eventSeqNo)d=74&p$sectionNo))=1) (last visited Feb. 1, 2013).

• *June 5, 2011*: Emergency Rule EmR1049 expired. The July 31, 2010, amendments to GAB 1.28 remained enjoined by the Wisconsin Supreme Court in *WPN*.

• *September 6, 2011*: In *WPN*, the Wisconsin Supreme Court heard oral argument from counsel for the parties.

• *December 12, 2011*: In *WRTL*, this Court reversed the district court's stay order and granted a permanent injunction as to Count 9 of Plaintiffs' Verified Complaint. *Barland*, 664 F.3d 139. Count 9 dealt with the \$10,000 annual contribution limitation in Wis. Stat. § 11.26(4), as applied to independent expenditure committees like *WRTL-SPAC*.

• *December 13, 2011*: GAB's Board passed a motion to issue an order to promulgate a permanent administrative rule that eliminates the \*58 second sentence of GAB 1.28(3)(b). See [http://gab.wi.gov/sites/default/files/event/74/12\\_13\\_11\\_open\\_session\\_minutes\\_signed\\_pdf\\_62545.pdf](http://gab.wi.gov/sites/default/files/event/74/12_13_11_open_session_minutes_signed_pdf_62545.pdf) at 4 (last visited Feb. 1, 2013); see also [http://gab.wi.gov/sites/default/files/event/74/12\\_13\\_11\\_open\\_agenda\\_and\\_board\\_materials\\_pdf\\_67032.pdf](http://gab.wi.gov/sites/default/files/event/74/12_13_11_open_agenda_and_board_materials_pdf_67032.pdf) at 69-74 (text of the Notice of Proposed Order Adopting Rule) (last visited Feb. 1, 2013). GAB's Board has not completed the required process under Chapter 227 of the Wisconsin Statutes to promulgate this proposed permanent rule.

• *January 11, 2012*: In *WRTL*, the district court entered an order permanently enjoining the enforcement of Wis. Stat. § 11.26(4) as to independent expenditure committees like *WRTL-SPAC*. (Dist. Ct. Dkt. #64.)

• *March 19, 2012*: In *WPN*, the Wisconsin Supreme Court dismissed the case and vacated the temporary injunction, which enjoined the enforcement of the July 31, 2010, amendments to GAB 1.28. The Court split 3-3, with three justices holding that the amendments to GAB 1.28 were constitutional (Chief Justice Shirley S. Abrahamson, \*59 Justice Ann Walsh Bradley, and Justice N. Patrick Crooks) and three justices holding that the petition to commence an original action was improvidently granted (Justice Patience Drake Roggensack, Justice Annette Kingsland Ziegler, and Justice Michael J. Gableman). Justice David T. Prosser, Jr. withdrew from participation. A copy of the Wisconsin Supreme Court's March 19, 2012, order is available at <http://wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=79787> (last visited Feb. 1, 2013).

• *March 30, 2012*: In *WRTL*, Plaintiffs filed an expedited, non-dispositive motion for leave to lift the stay and for leave to amend their complaint. (Dist. Ct. Dkt. #66; see also Dist. Ct. Dkts. #66-1 to 66-40.) Along with their motion, Plaintiffs also filed a proposed First Amended Verified Complaint. (Dist. Ct. Dkt. #66-41.) Plaintiffs' proposed First Amended Verified Complaint included challenges to GAB 1.28.

• *April 18, 2012*: In *WRTL*, Plaintiffs filed a second motion for a preliminary injunction, a supporting brief, and a supporting \*60 declaration with exhibits. (Dist. Ct. Dkts. #68, 68-1, 68-2, 68-3, 68-4.)

• *May 4, 2012*: In *WRTL*, the district court held a hearing regarding Plaintiffs' second preliminary injunction motion. (A. 108-62.)

• *May 15, 2012*: GAB's Board took no action on a proposed guideline, Guideline GAB 1285, that would have interpreted GAB 1.28. GAB staff proposed that GAB's Board issue such guidance, but the Board did not take action on the proposal at its regularly scheduled meeting. See [http://gab.wi.gov/sites/default/files/event/74/open\\_session\\_board\\_materials\\_05\\_08\\_12\\_](http://gab.wi.gov/sites/default/files/event/74/open_session_board_materials_05_08_12_)

*pdf\_68018.pdf* at 7 (last visited Feb. 1, 2013).

- *August 17, 2012*: In *WRTL*, Plaintiffs filed their Second Notice of Appeal. (A. 614-16.)
- *August 28, 2012*: The proposed GAB guideline interpreting GAB 1.28, Guideline GAB 1285, was withdrawn from the agenda for the Board's meeting. See [http://gab.wi.gov/sites/default/files/event/74/10\\_23\\_12\\_open\\_session\\_agenda\\_and\\_board\\_materials\\_p\\_17443.pdf](http://gab.wi.gov/sites/default/files/event/74/10_23_12_open_session_agenda_and_board_materials_p_17443.pdf) at 9 (last visited Feb. 1, 2013). The Board has not adopted Guideline GAB 1285.
- **\*61** • *August 31, 2012*: In *WRTL*, the district court issued an oral ruling denying Plaintiffs' second preliminary injunction motion, including all requests for injunctive relief relating to GAB 1.28. (A. 167-98.) The same day, the district court entered a Decision and Order Granting in Part and Denying in Part Plaintiffs' Second Motion for Preliminary Injunction and Temporary Restraining Order. (A. 164-66.)

From August 31, 2012, onward, the litigation history of GAB 1.28 is a part of the instant appeals. There has been no subsequent regulatory history for GAB 1.28 since the Board withdrew consideration of Guideline GAB 1285 was withdrawn from the Board's agenda on August 28, 2012.

#### **B. What is the current status of the rule?**

GAB 1.28(3)(b), including the second sentence of the rule, is the law of Wisconsin. GAB 1.28 now is identical to the rule that was challenged in this case in August 2010, and that was promulgated on July 31, 2010.

GAB stipulated in the *Club for Growth* case not to enforce the second sentence of GAB 1.28(3)(b). That stipulation was rejected by the **\*62** district court in *Club for Growth*, but GAB intends to continue to honor the stipulation.

#### **C. Why was this critical information not disclosed to the court?**

There are four reasons why Defendants did not disclose this information to the Court. First, the second sentence of GAB 1.28(3)(b) is currently the law of Wisconsin. GAB 1.28 now is identical to GAB 1.28 as it was in August 2010, prior to the instant litigation being filed. Although GAB is committed to not enforcing the second sentence of GAB 1.28(3)(b) because of a stipulation in *Club for Growth*, Plaintiffs have nonetheless challenged whether the "supports or condemns" language in GAB 1.28(3)(b) is unconstitutionally vague, both facially and as applied to *WRTL*. (7th Cir. Dkt. #27 at 68-70, 106-09, Appeal No. 12-2915; 7th Cir. Dkt. #35 at 41-42, Appeal No. 12-2915.) GAB is defending the constitutionality of what is currently on the books as the law of Wisconsin in GAB 1.28(3)(b).

It would not have made sense to provide the Court with a description of the complete regulatory and litigation history of GAB 1.28 when the language of the current rule that is being challenged by Plaintiffs as unconstitutional is identical to the language **\*63** that was challenged in August 2010. After much litigation in state and federal court regarding GAB 1.28 and regulatory changes to GAB 1.28 (2010) that have since expired, the law currently on the books is the same as it was in August 2010. Defendants did not feel that it would have been helpful to the Court to go into this history of GAB 1.28 when the history has become moot.

Second, and related, Defendants did not disclose this information to the Court because of the litigation positions that Plaintiffs have taken regarding the viability of their legal claims when GAB has stated that it will not enforce a certain legal requirement. For example, Plaintiffs' counsel had the following exchange with the district court during the May 4, 2012, preliminary injunction hearing regarding whether GAB would enforce Wis. Stat. § 11.38(1)(a)l., the corporate disbursement ban (a statute that is still found in Chapter 11 of the Wisconsin Statutes):

THE COURT: Now, with regard -- again, going back to what the Defense said with regard to enforcement as discussed by the Attorney General, what is your comment?



MR. ELF: That presentation -- that argument, as we pointed out in our reply brief, goes to standing. What they're essentially saying is that they won't enforce the law against us; therefore -- and they haven't put it in these words, but this is a standing argument. Therefore, they're saying we don't have \*64 standing. What they're essentially saying is trust us, we're nice people, or whatever it is the point is; we won't enforce the law against you. That's not the way constitutional law works. The law chills our speech and under the Circuit decisions we have provided that speak to political speech, including the --

THE COURT: But is under the circumstance a temporary restraining order necessary given what the GAB and the Attorney General have said?

MR. ELF: Yes.

THE COURT: Why?

MR. ELF: Because we don't have to trust them. We don't have to take their word that they will not enforce the law against --

THE COURT: They are on the record in this proceeding as indicating that they are not going to enforce this against you with regard to these matters at this time.

MR. ELF: That's correct.

THE COURT: During the pendency of -- at least during the pendency of, I would say at least for the next ten days, and until perhaps the issuance of a preliminary injunction or a permanent injunction on the merits in the case.

MR. ELF: That's correct, they have said that. Our position is that we don't have to trust them. Any -- as we pointed out in our reply brief.

THE COURT: But is there likely to be irreparable harm to you under the circumstance in this case?

MR. ELF: Yes, sir.

THE COURT: Why?

MR. ELF: Irreparable harm is the chill to our speech.

\*65 THE COURT: But if you know it's not going to be enforced during the pendency of this case, how is there going to be irreparable harm until the matter can be decided on the merits?

MR. ELF: We respectfully disagree with the premise. The premise is that we know that the law will not be enforced against us. Under constitutional law we don't have to take their word for that. And the reason is, that the Government Accountability Board can change its mind unless there is, for example, a binding advisory opinion. And under *Citizens United* we don't have to request an advisory opinion. Then the chill to our speech suffices to establish standing to challenge the independent expenditure --

THE COURT: Well, we're beyond - I'm beyond standing. (A. 133-35.) Thus, Plaintiffs have indicated that GAB's decision to not enforce a regulation does not impact the viability of Plaintiffs' legal challenges to that regulation and does not deprive Plaintiffs of standing. Plaintiffs would pursue their claims anyway, in spite of GAB's assurances, and they did here.

Plaintiffs also commented upon the *Club for Growth* stipulation in their opening second preliminary injunction motion brief, noting that \*66 the proposed stipulation that the GAB sought to have the *Club for Growth* district court enter was denied:

Thus, if the second sentence of GAB 1.28.3.b - not GAB 1.28.3.a - were removed or enjoined, *cf. Wisconsin Club for Growth, Inc. v. Myse*, No. 10-cv-427-WMC, Proposed Stipulation at 1 ¶1 (W.D. Wis. Aug. 10, 2010), *proposed stipulation denied and action stayed*, Order at 2-3, 15-16 (W.D. Wis. Oct. 13, 2010), only an appeal-to-vote test would remain in GAB 1.28.3.b, *see WRTL-II*, 551 U.S. at 469-70, and

GAB 1.28.3.b would be unconstitutionally vague, just as GAB 1.28.3.a is.

(Dist. Ct. Dkt. #68-4 at 11 n.10); (see also *id.* at 23 n.29).

In light of Plaintiffs' litigation positions regarding GAB's assurances that it will not enforce particular statutes or administrative rules, it became clear to Defendants that Plaintiffs believe that it is imperative to obtain an order from a federal court to satisfy themselves that their claims have been addressed. Plaintiffs will not be satisfied with a stipulation from GAB in *Club for Growth* regarding GAB not enforcing the second sentence of GAB 1.28(3)(b). (This is particularly true because the stipulation that the parties executed and filed in *Club for Growth* was rejected by the district court.) Therefore, Defendants did not disclose the complete regulatory and litigation history of GAB 1.28 to the Court because Plaintiffs intended to challenge the "supports or condemns" language in GAB 1.28(3)(b) \*67 regardless of whether GAB had stipulated in *Club for Growth* that it would not enforce the second sentence of GAB 1.28(3)(b).

Defendants also viewed it as likely that, if either of the parties raised the stipulation, the Court would agree with Plaintiffs that Defendants' stipulation in *Club for Growth* regarding the second sentence of GAB 1.28(3)(b) would not deprive this Court or the district court of jurisdiction over Plaintiffs' "supports or condemns" language claim. Plaintiffs argued in the instant appeals that Defendants' assurances that they will not enforce certain laws do not deprive Plaintiffs of standing. (See 7th Cir. Dkt. #27 at 100-01, Appeal No. 12-2915.) Defendants believed that Plaintiffs would make the same arguments regarding GAB 1.28(3)(b).

Third, Defendants did not disclose this information because Defendants were faced with selecting what arguments to address in their responsive brief from the numerous and lengthy arguments raised by Plaintiffs' initial brief, while also complying with the briefing word limitations of the Federal Rules of Appellate Procedure. Given that GAB 1.28(3)(b), including the second sentence, is currently the law of Wisconsin, it did not make sense to Defendants to describe the \*68 litigation and regulatory history of GAB 1.28 when there were many other legal and factual issues and relevant cases to discuss regarding the merits of Plaintiffs' legal challenges. Defendants would not have had space to address the complete litigation and rulemaking history of GAB 1.28 in their brief, and it would not have made sense to do so because GAB 1.28 is the same today as it was in August 2010, when this case was filed in district court.

Furthermore, a significant amount of space in Defendants' responsive brief was used to "fully address" in a jurisdictional statement the issue of the necessity of the first two appeals filed by Plaintiffs, which the Court ordered. (See 7th Cir. Dkt. #23 at 1-2, Appeal No. 12-2915.) Pages 3 through 12 of Defendants' responsive brief include a jurisdictional statement that explains in some detail why this Court has jurisdiction over Appeal Nos. 12-3046 and 12-3158, but not 12-2915. (7th Cir. Dkt. #30 at 3-12, Appeal No. 12-2915.) The Court's orders made it clear that the question of jurisdiction over the various appeals was quite important to the Court; therefore, Defendants felt that it was important to dedicate a great number of words in their brief to jurisdiction. This left few remaining words to \*69 address GAB 1.28's extensive regulatory and litigation history, particularly when the current form of GAB 1.28 is the same as it was in August 2010.

Finally, in *Center for Individual Freedom v. Madigan*, this Court already resolved the issue that "in support of or in opposition to" language, like that in GAB 1.28(3)(b), is not unconstitutionally vague. \*70697 F.3d 464, 486 (7th Cir. 2012). Therefore, Defendants believed that Plaintiffs' challenge to this language was untenable as a matter of law.

#### Footnotes

\* Counsel of Record

<sup>1</sup> The text of this footnote is from the Court's January 24, 2013, order: Counsel should address, without limitation, Wis. Stat. § 11.01(4) (definition of "committee"); § 11.01(6) (definition of "contribution"); § 11.01(7) (definition of "disbursement"); § 11.01(16) (definition of "political purposes"); § 11.05(1) (registration requirement); § 11.05(2r) (general reporting exemptions); § 11.05(3) (required registration information); § 11.05(11) (exemption for indirect political activity); § 11.055 (filing fees and exemptions); § 11.06(1) (financial report requirements); § 11.06(2) (exemption for indirect disbursements); § 11.06(7) (the noncoordination oath for independent disbursements); § 11.26(1) (limits on contributions to any "committee under s. 11.06(7) acting solely in support of... a candidate or in opposition to the candidate's opponent"); GAB 1.28 (scope of regulated political

activity) (as amended effective August 2010; the December 2010 emergency rule; and the December 2011 permanent rule); GAB 1.42 (“voluntary” oath for independent candidate-related activity); GAB 1.91 (the 2010 emergency rule and 2012 permanent rule).

<sup>2</sup> The Court’s January 24, 2013, order uses the words “independent political expenditures”; however, independent “disbursements” is the term of art used in Wisconsin campaign finance law and has a particular meaning that will be discussed in this brief. *See* Wis. Stat. § 11.01(7).

<sup>3</sup> All references to GAB 1.91 are to GAB 1.91 (2012), which became effective on July 1, 2012.

<sup>4</sup> The Guideline GAB 1284 currently found on GAB’s website does not include legal references to GAB 1.91 because references to GAB 1.91 were ordered by the district court to be removed from GAB’s website. (*See* Joint Appendix, Dkt. #37, Appeal No. 12-2915, *hereinafter* “A. \_\_\_,” at A. 190-91.) GAB has not yet updated Guideline GAB 1284 to include references to GAB 1.91.

<sup>5</sup> A “group” or “political group” is one that is formed to influence a referendum, which is not at issue in this matter. Wis. Stat. § 11.01(10).

<sup>6</sup> For purposes of GAB 1.28, “political committee” means “every committee which is formed primarily to influence elections or which is under the control of a candidate.” GAB 1.28(1)(a). Thus, if an organization that makes independent disbursements is formed primarily to influence elections, it could be considered a “political committee” for purposes of GAB 1.28.

<sup>7</sup> The Answer to Question Three below will discuss the fact that an “organization” under GAB 1.91(1)(g) does not, by definition, include a “committee”; therefore, only if an entity is a “committee” under Wis. Stat. § 11.01(4) is it potentially subject to statutory exemptions in Chapter 11 that include the word “committee” or “committees.”

<sup>8</sup> Wisconsin Stat. § 11.513 was repealed by 2011 Wisconsin Act 32, sec. 15. As a result, the last sentence of GAB 1.91(8) is without effect.

<sup>9</sup> The text of this footnote is from the Court’s January 24, 2013, order: The version of GAB 1.28 challenged here became effective on August 1, 2010, and was immediately challenged in three separate lawsuits. In addition to this case and the original action in the state supreme court, *Wisconsin Prosperity Network v. Myse*, 810 N.W.2d 356 (Wis. 2012), the rule was challenged in a lawsuit filed in the Western District of Wisconsin, *see Wis. Club for Growth v. Myse*, No. 10-cv-427, 2010 WL 4024932 (W.D. Wis. October 13, 2010). The emergency rule was apparently adopted in response to the litigation in federal and state court.