IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CRG NETWORK,

Plaintiff,

v. Case No. 14-CV-719

THOMAS BARLAND, *et al*.,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case involves a facial constitutional challenge to the aggregate limitation in Wis. Stat. § 11.26(9) on political committee contributions to candidates for elective office. The Court should deny Plaintiff CRG Network's ("CRG") motion for summary judgment and grant summary judgment to Defendants. *See* Fed. R. Civ. P. 56(f).

CRG is a political committee that tried—partially unsuccessfully—to make contributions to a handful of Assembly candidates in 2014. Some of CRG's contributions were returned because the candidates had already accepted contributions up to the $7,763 contribution limit from political committees.

CRG asserts that Wis. Stat. § 11.26(9) violates its federal constitutional rights under the First and Fourteenth Amendments. It has moved this Court for summary judgment and to permanently enjoin Defendants from enforcing Wis. Stat. § 11.26(9). CRG relies primarily upon the U.S. Supreme Court's decision in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014).

Wisconsin Stat. § 11.26(9) does not violate the Constitution. The State of Wisconsin has important interests in preventing quid pro quo corruption or its appearance, and in preventing the circumvention of individual campaign contribution limitations. The anti-circumvention rationale that the U.S. Supreme Court recognized in *Federal Election Commission v. Beaumont*, 539 U.S. 146, 155 (2003), has not been overruled—it is still a vital state interest.

Wisconsin's law is closely drawn to serve these interests. *McCutcheon* is distinguishable because federal campaign finance law, unlike Wisconsin law, includes statutes and rules that discourage or prevent individuals from creating multiple political committees to circumvent individual contribution limitations. This Court should deny CRG's motion for summary judgment and should grant summary judgment to Defendants.

BACKGROUND

In support of its motion, CRG filed a witness affidavit and a set of proposed factual findings. (Dkts. 21, 22.) Defendants do not dispute the factual assertions in these documents.

To the extent additional background is helpful, it is provided as part of the Argument section of this brief. Defendants are filing with this brief the Declaration of Clayton P. Kawski, along with exhibits.

SUMMARY JUDGMENT STANDARD

CRG has correctly stated the summary judgment standard. (*See* Dkt. 20:3-4.) This case is appropriate for summary judgment, as there is no genuine dispute as to any material fact.

ARGUMENT

The Court should grant summary judgment to Defendants. Wisconsin Stat. § 11.26(9) does not violate the First Amendment. It is designed to prevent the risk and appearance of quid pro quo corruption. Importantly, the law also accomplishes the important, related goal of minimizing the circumvention of individual contribution limitations.

The U.S. Supreme Court has held that preventing the circumvention of contribution limitations is *itself* a legally sufficient state interest that supports contribution limitations. *See Beaumont*, 539 U.S. at 155. *Beaumont*

has not been overruled, even by *McCutcheon*. This case presents, in stark relief, the importance of recognizing this particular state interest.

I. Contribution limitations must satisfy "closely drawn" scrutiny.

This case is about contribution limitations (*i.e.*, giving to a candidate), and not independent expenditure limitations (*i.e.*, direct political speech), which matters when it comes to the level of scrutiny. For contribution limitations, such as the aggregate limits here, courts are more deferential to legislative judgments and the means selected to carry them out.

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the U.S. Supreme Court recognized that contribution limitations impose a "lesser restraint" on political speech than expenditure limitations. *McCutcheon*, 134 S. Ct. at 1444. Expenditure limitations "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* (quoting *Buckley*, 424 U.S. at 19) (alternation in original). Expenditure limitations are reviewed under "exacting scrutiny." *Id.* Under exacting scrutiny, "the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." *Id.*

Contribution limitations, on the other hand, "may be sustained if the State demonstrates a sufficiently important interest and employs means

closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25). This is the "closely drawn" scrutiny test that must be applied here. It requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 1456-57. (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) (alternation in original).

II. Case law recognizes the State's interests in (1) preventing quid pro quo corruption or the appearance of quid pro quo corruption; and (2) deterring and preventing the circumvention of individual contribution limitations.

The aggregate contribution limit in Wis. Stat. § 11.26(9) is constitutional because it furthers important State interests. The State's interests are (1) preventing quid pro quo corruption or the appearance of quid pro quo corruption; and (2) deterring and preventing the circumvention of individual contribution limitations. These are both legally sufficient justifications for Wis. Stat. § 11.26(9).

Beginning with *Buckley*, the U.S. Supreme Court has held that laws limiting political contributions can be justified by the Government's interest in addressing both the "actuality" and the "appearance" of corruption.

Buckley, 424 U.S. at 26; *McConnell v. FEC*, 540 U.S. 93, 143 (2003) ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon*, 134 S. Ct. at 1450.

Prior to *McCutcheon*, the U.S. Supreme Court had also recognized that the Government has a related interest in preventing the circumvention of contribution limitations. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption[.]"). In *Beaumont*, the Supreme Court addressed the anti-circumvention interest as it related to corporate political contributions:

> [R]ecent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for "circumvention of [valid] contribution limits". *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456, and n. 18, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001); *see Austin*, *supra*, at 664, 110 S.Ct. 1391. To the degree that a corporation could contribute to political candidates, the individuals "who created it, who own it, or whom it employs," *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001), could exceed the bounds imposed on their own contributions by diverting money through the corporation, cf. *Colorado Republican*, 533 U.S., at 446-447, 121 S.Ct. 2351. As we said on the subject of limiting coordinated expenditures by political parties, experience "demonstrates how candidates, donors, and parties test the limits of the current law, and

> it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *Id.*, at 457, 121 S.Ct. 2351.

Id. at 155.

CRG asserts that "the anti-circumvention rationale was rejected in *McCutcheon*." (Dkt. 20:14.) CRG is wrong. The Supreme Court has not rejected the *Beaumont* anti-circumvention rationale or overruled *Beaumont*. In *McCutcheon*, the majority opinion did not address *Beaumont* at all. In *Citizens United*, the Supreme Court observed that circumvention is a legitimate concern: "Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws." *Citizens United*, 558 U.S. at 364 (citing *McConnell*, 540 U.S. at 176-77).

Beaumont is still a vital precedent. For example, the Second Circuit has recently observed that—even after *McCutcheon*—the Supreme Court has left open "anti-circumvention" as an independent reason to uphold an aggregate contribution limitation. The Second Circuit stated that, "The [Supreme] Court also allowed for the possibility that such regulation could be justified as preventing circumvention of contribution limits." *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 140 n.20 (2d Cir. 2014) (citing *McCutcheon*, 134 S. Ct. at 1452-53), *cert denied* 135 S. Ct. 949 (2015); *see also Ognibene v. Parkes*, 671 F.3d 174, 194-95 (2d Cir. 2011) (identifying interests that could justify contribution limitations as (1) an anti-corruption interest in avoiding

quid pro quo corruption or the appearance of quid pro quo corruption; and (2) an "anti-circumvention interest in preventing the evasion of valid contribution limits").[1]

Even more recently, the Court of Appeals for the D.C. Circuit, sitting en banc, unanimously held that *Beaumont*'s "closely drawn" standard "remains the appropriate one for review of a ban on campaign contributions." *Wagner v. FEC*, No. 13-5162, 2015 WL 4079575 at *3 (D.C. Cir. July 7, 2015) (en banc). In so holding, the D.C. Circuit rejected the argument that *Citizens United v. FEC* "casts doubt" on *Beaumont*. *Id.*

This Court should also apply *Beaumont* and its holding that an anti-circumvention rationale—together with the interest in avoiding corruption or the appearance of it—is a proper basis for contribution limitations.

These recent holdings are consistent with the Wisconsin Supreme Court's recognition of those concerns in upholding Wisconsin's aggregate limitations on the amounts that political committees can contribute to

[1]*See also United States v. Danielczyk*, 683 F.3d 611, 618 (4th Cir. 2012) (explaining that the Supreme Court "preserved two of the four important government interests recognized in *Beaumont*: anti-corruption and anti-circumvention"); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-25 (9th Cir. 2011) (explaining that *Citizens United* overturned *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), that the Court's analysis for the anti-circumvention interest in *Beaumont* did not rely on *Austin*, and that "nothing in the explicit holdings or broad reasoning" of *Citizens United* invalidates the anti-circumvention interest).

candidates. In *Gard v. Wisconsin State Elections Board*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990), the Wisconsin Supreme Court decided an original action challenging the constitutionality of the aggregate contribution limits in Wis. Stat. § 11.26(9). The unanimous *Gard* court found that there is a "compelling state interest" in the limitations. *Gard*, 156 Wis. 2d at 58. The court explained, specifically addressing the anti-circumvention rationale:

> We conclude that respondents have demonstrated that there is a compelling state interest in placing an aggregate limit on the contributions that an individual candidate may receive from all committees. The purpose of sec. 11.26(9)(a), Stats., along with other restrictions on contributions to individual candidates, is to limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance of corruption. In *Buckley,* the Court recognized that, *although the ceiling imposed on an individual's total contributions did impose an ultimate restriction upon the number of candidates and committees with which an individual could associate by means of financial support, an aggregate limit was necessary in order to prevent evasion of the individual-candidate contribution limit by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to committees likely to contribute to that candidate, or huge contributions to the candidate's political party*. The Court concluded that this additional restriction imposed by the overall ceiling "is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." 424 U.S. at 38, 96 S.Ct. at 644. So, too, we conclude that the aggregate limit on committee contributions is necessary because of the ability of committees having the same interests to join together and make large contributions which could unduly dominate an individual candidate's campaign. All of the contribution limits set on PACs and

> party-related committees are necessary in order to prevent individual candidates from becoming unduly dependent upon large narrow interest contributions.

Id. at 58-59 (emphasis added). The *Gard* court also addressed the fact that Wisconsin campaign finance law includes no provision to prevent an individual from creating multiple political committees to evade individual contribution limits:

> Respondents, however, contend that sec. 11.26(9)(a), Stats., is all that stands between PACs and the candidate. As illustrated by the example of the legislative campaign committees, Respondents' statement is not far-fetched. Despite all of the contribution limits on PACs, without sec. 11.26(9)(a), PAC-dominated party-related committees would be able to contribute $150,000 of PAC money to an individual candidate. *Furthermore, we conclude that no provisions prevent narrow issue PACs from proliferating into several other committees. Therefore, there is potential for these narrow issue PACs with large aggregations of wealth to circumvent the PAC-candidate contribution limits if it were not for secs. 11.26(9)(a) and (b). See NRWC,* 459 U.S. at 210, 103 S.Ct. at 560-561. While overt "earmarking" and "laundering" are prohibited, these measures are not enough. In order to maintain the integrity of the political process and prevent corruption caused by large contributions to an individual candidate from a narrow special interest group, effective and comprehensive contribution limits are required.

Id. at 60 (emphasis added).

The Wisconsin Supreme Court declared that Wis. Stat. § 11.26(9) is constitutional, that it "places only a marginal restriction on the First and Fourteenth Amendment rights of committees and candidates," and that it is "necessary to serve the State's compelling interest in preventing narrow issue PACs from circumventing PAC-candidate contribution limits through

contributions to party-related committees, thereby unduly influencing an individual candidate's campaign." *Gard*, 156 Wis. 2d at 72-73.[2]

This Court should hold that Wisconsin has two related interests in Wis. Stat. § 11.26(9): (1) anti-corruption; and (2) anti-circumvention.

III. Wisconsin's aggregate contribution limitation in Wis. Stat. § 11.26(9) is constitutional because it is closely drawn to serve the State's anti-corruption and anti-circumvention interests.

Having identified important interests, the remaining question is whether Wisconsin's law is closely drawn to serve those interests. It is.

Absent Wis. Stat. § 11.26(9), there is no substantial regulatory barrier in Wisconsin to the proliferation of committees and the funneling of money to candidates in circumvention of individual base contribution limits. Indeed, the federal anti-proliferation protections discussed in *McCutcheon*—including federal laws that prohibit donors from creating multiple PACs supporting particular candidates, and laws that regulate even implicit earmarking—do not exist in Wisconsin law. Wisconsin Stat. § 11.26(9) is constitutional because it is closely drawn to prevent corruption in Wisconsin, or its

[2]In addition to *Gard*, other courts have upheld aggregate contribution limitations like Wis. Stat. § 11.26(9). *See Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1114-16 (8th Cir. 2005); *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 649-51 (6th Cir. 1997).

appearance, and it properly does so by preventing the circumvention of individual base contribution limits.

A. Individual contribution limitations may be circumvented by proliferation of committees absent the aggregate limits in Wis. Stat. § 11.26(9).

CRG asserts that "[a]ny circumvention scheme in the circumstances of Chapter 11 [Wisconsin's campaign finance code] would be impractical." (Dkt. 20:13.) CRG highlights the various disclosure requirements that apply to *some* committees, *see id.* at 4-5, 13, but the analysis ignores the fact that Wisconsin campaign finance law has much less stringent requirements when committees make lower-value contributions. Thus, the campaign finance law framework in Wisconsin makes circumvention a substantial concern. Absent Wis. Stat § 11.26(9), a motivated individual or committee could readily proliferate multiple committees and evade lawful individual base contribution limits, raising the appearance that well-funded committees can obtain quid pro quo results.

An individual or a political committee may not give more than $500 to an Assembly candidate. Wis. Stat. § 11.26(1)(c); Wis. Stat. § 11.26(2)(c). These kinds of "base limits" have been upheld by the U.S. Supreme Court. *See McCutcheon*, 134 S. Ct. at 1442 ("we have previously upheld [base limits] as serving the permissible objective of combating corruption"). Consistent

with that precedent, CRG does not challenge Wisconsin's base contribution limits.

Rather, CRG objects that an Assembly candidate may not accept in aggregate more than $7,763 from committees, including committees like CRG. *See* Wis. Stat § 11.26(9)(b). That is different than the aggregate limit invalidated by *McCutcheon*, which addressed an aggregate limit on contributors (thereby limiting the number of different candidates the contributor could support); Wisconsin's law, in contrast, restricts aggregate *receipts* by a candidate (and has nothing to say about how many different candidates a contributor might support). *See McCutcheon*, 134 S. Ct. at 1443. The goal is to prevent the circumvention of the individual contribution limit via proliferation of committees.[3] *See Gard*, 156 Wis. 2d at 54.

Such circumvention could be readily accomplished if an individual or committee decided to create an unlimited number of additional committees with the same interests and same targeted candidate or candidates. Without the $7,763 aggregate limit on the amount that Assembly candidates

[3]After *McCutcheon*, it is still lawful to restrict large sums of money flowing from an entity to one candidate. *See McCutcheon*, 134 S. Ct. at 1460-61 (distinguishing permissible limits addressed at "money beyond the base limits funneled in an identifiable way to a candidate" from impermissible limits addressed at "money within the base limits given widely to a candidate's party").

can accept from committees, those committees could, in combination, exceed the $500 individual limit by an unlimited amount.

For committees making low total contributions, almost no effort is required to proliferate. Under Wisconsin law, a committee contributing less than $300 total does not even need to register with the Wisconsin Government Accountability Board ("GAB"). Wis. Stat. § 11.05(1) (establishing a $300 registration threshold). Thus, a set of duplicated committees could each contribute $299 to an Assembly candidate (more than half of the $500 individual limit) without even registering with the GAB. Committees could duplicate in the tens, twenties, or hundreds, leading to contributions of tens of thousands of dollars, or more, to a single candidate.

For committees making total contributions between $300 and $999, the burden remains very minimal. Committees with total disbursements of less than $1,000 are required to register under Wis. Stat. § 11.05, but they are not required to submit reports under Wis. Stat. § 11.06. *See* Wis. Stat. § 11.05(2r) (exempting from reporting committees making total disbursements under $1,000). Registration simply requires that the committee provide a name and mailing address for itself, its treasurer, and officers or members of a finance committee, if any; a statement of what type of committee it is; what referendum, if any, is supported or opposed; and information identifying

where committee accounts are held. *See* Wis. Stat. § 11.05(3) (also listing some requirements that apply only to specific types of committees).

This simple list of registration information is not burdensome and could not reasonably be seen as a barrier to an individual or committee motivated to proliferate more committees. Indeed, every federal circuit court of appeals that has ruled on a facial challenge to campaign finance disclosure requirements has upheld them against claims of undue burden. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 470 n.1 (7th Cir. 2012) (making that observation). In turn, even where total contributions are $999, there is no substantial barrier to duplicating committees. It would allow funneling the $500 maximum individual contribution amount to an Assembly candidate, which, in combination, could add up to tens of thousands of dollars, or more, to a single candidate.

For committees wishing to contribute more—up to $2,499 total—periodic reports must be submitted to the GAB, but those reports are not burdensome, especially when it comes to narrowly focused committees. Wisconsin Stat. § 11.06 requires semiannual reporting when total contributions are $1,000 or more. Wis. Stat. § 11.06 (report contents); Wis. Stat. § 11.20(4) (requiring semi-annual continuing reports). A committee reports "contributions received, contributions or disbursements made, and obligations incurred," which means the committee identifies contributors and

when and how much they gave, lists disbursements and other sources of income and obligations, if applicable, and provides totals. Wis. Stat. § 11.06(1). This reporting is straightforward, especially where a committee is funded by only a few donors and is narrowly focused only on a few candidates. Where the committee is duplicated, the report from one committee could also be duplicated with minimal effort.

Reporting is not burdensome given today's technology. In addition to the options of reporting by mail or facsimile, electronic reporting is available. The Wisconsin Campaign Finance Information System ("CFIS"), *see http://cfis.wi.gov/* (last visited July 27, 2015), allows for the electronic filing of the required information via the Internet in a matter of minutes. The CFIS system is available to all registrants, including CRG. The CFIS electronic filing system is simple, even providing drop-down menus and pre-populated fields to speed the process.[4]

Committees wishing to disburse $2,500 total or more to candidates must pay a $100 fee to the GAB. *See* Wis. Stat. § 11.055 (requiring a $100 fee, but only where the registrant makes disbursements of at least $2,500 in that year). That minimal fee, however, would have little deterrent effect on a

[4]CFIS's website includes a frequently asked questions section that describes how to file campaign finance reports online. *See http://cfis.wi.gov/Public/Registration.aspx?page=Faqs* (last visited July 27, 2015).

well-funded and properly-motivated proliferation of committees. As an example, a small and wealthy set of donors could establish fifty committees, each of which gave $500 to the same ten Assembly candidates the donors selected to carry out their preferred legislation. Each committee would then disburse $5,000 ($500 each to ten candidates), with an added transaction cost of $10 per candidate (the $100 fee divided by ten candidates). Each of the ten candidates would end up with $25,000 from that duplicated set of committees. The cost to the donors would be $250,000 in disbursements plus $5,000 in fees, for a total of $255,000, and the fees would represent only a small add-on to the donors' investment.

This all shows that, absent the Wis. Stat. § 11.26(9) aggregate limit, there is nothing substantial stopping the proliferation of a special interest committee and the funneling of large sums to a particular candidate from what is, in reality, a single entity or a single donor. CRG's assertions to the contrary—that it is "impractical" to proliferate committees—ignore the simplicity of the disclosure regulations and the many exemptions from reporting or paying fees at all. (*See* Dkt. 20:4-5, 13). CRG fails to recognize that no fee obligation exists for committees that make disbursements of less than $2,500 per year, and that no reporting requirement exists for total contributions below $1,000. Wis. Stat. § 11.055(3); Wis. Stat. § 11.05(2r). The most narrowly targeted committees—those targeting only one or two

Assembly candidates—would face almost no burdens to proliferate because their contribution totals could be less than $1,000 or, if they chose, less than $300. CRG does not explain why, in light of these exemptions, it would be far-fetched for a well-funded and motivated committee to proliferate and funnel money. It would not be.

Indeed, the potential already has been recognized by the courts and the legislature. As for the courts, in *Gard*, the Wisconsin Supreme Court confirmed that "no [Wisconsin] provisions prevent narrow issue PACs from proliferating into several other committees." *Gard*, 156 Wis. 2d at 60 (explaining that an "earmarking" law in Wisconsin would not prevent it); *see* Wis. Stat. § 11.24(1). Rather, *Gard* correctly recognized that only Wis. Stat. § 11.26(9) prevents that from happening. *Gard*, 156 Wis. 2d at 55 (explaining the purpose "to prevent PACs from having undue influence on any one candidate by circumventing the individual contribution limits through proliferation of committees").

As for the legislature, *Gard* relied on the Wisconsin Legislature's express concerns with circumvention and, in turn, the appearance of corruption. As *Gard* recounted, in the early 1970s, the Wisconsin Legislature commissioned a study of campaign finance in Wisconsin. *Gard*, 156 Wis. 2d at 37. The committee's findings were published in a lengthy

report[5] that found that the then-current laws were inadequate to curb corruption in campaign financing. *Id.* at 37. The specific concern was with "large concentrations of money from an unrepresentative pool of contributors which would have a corrupting influence on candidates." *Id.* at 49 (citing the *Governor's Study Committee on Political Finance: Final Report*, p. 49).

An aggregate limit addressed that concern by preventing "evasion" that would allow "large gifts and special interest gifts" that "circumvent[ed] contribution limits through multiple committee giving and laundering." *Gard*, 156 Wis. 2d at 53 (quoting the *Governor's Study Committee on Political Finance: Final Report*, p. 50). The law's drafting notes also echoed the concern that "a single special interest group could proliferate into many, thereby evading the individual contribution limits." *Id.* at 54.

This concern was not merely an abstract worry, but was supported by the historical fact of "an enormous growth in the campaign financing role played by PACs and an increasing dependence by candidates upon such money," leading to an appearance of "legislative quid pro quos." *Gard*, 156 Wis. 2d at 55 (quoting a Congressional report). In Wisconsin, that took the form of a rise in PAC contributions of fifty percent over only four years. *Id.* at 56. There was further evidence that "a handful of large PAC

[5]A copy of the report is being filed as Exhibit A to the Kawski Declaration.

contributors dominate the field of contributors to these committees." *Id.* at 61. It followed that, without the Wis. Stat. § 11.26(9) limits, "PAC-dominated committees could contribute an unlimited amount of this money to any individual candidate, thereby resulting in a 'special interest' candidate." *Id.* at 57.

In sum, absent Wis. Stat. § 11.26(9), there is no barrier in Wisconsin to committees proliferating in order to make large special interest contributions to a particular candidate, leading to either actual corruption or the appearance of it. *See Gard*, 156 Wis. 2d at 58.

B. Wisconsin law does not have the same anti-circumvention protections as the federal law addressed by *McCutcheon*.

Key to the result in *McCutcheon* was the fact that the federal statutory scheme had robust safeguards preventing proliferation, apart from an aggregate limit. *McCutcheon*, 134 S. Ct. at 1446-47. There are no parallel protections in Wisconsin, meaning *McCutcheon*'s result should not control.

McCutcheon's result was heavily based on the specific characteristics of the federal Bipartisan Campaign Reform Act of 2002 ("BCRA"). Indeed, the Court made note of its "distinct legal backdrop." *McCutcheon*, 134 S. Ct. at 1446 (distinguishing *Buckley*'s upholding of aggregate limits in the Federal Election Campaign Act ("FECA")), and explaining that "BCRA is

a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop").

Importantly, the *McCutcheon* Court explained that BCRA and the related federal rules contain "targeted anti-circumvention measures": "Most notably, statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive regulatory scheme." *McCutcheon*, 134 S. Ct. at 1446. In particular, post-*Buckley* amendments created an anti-proliferation rule "prohibiting donors from creating or controlling multiple affiliated political committees." *Id.* at 1446-47 (citing 2 U.S.C. § 441a(a)(5); 11 C.F.R. § 100.5(g)(4)). Thus, in *McCutcheon*, it was undisputed that the federal anti-proliferation rule "forecloses what w*ould otherwise be a particularly easy and effective means of circumventing the limits on contributions* to any particular political committee." *Id.* at 1447 (quoting the appellee's brief; emphasis added).

Thus, unlike in Wisconsin, it was a given that federal law had "eliminate[d] a donor's ability to create and use his own political committees to direct funds in excess of the individual base limits," meaning *Buckley* circumvention was no longer a risk. *McCutcheon*, 134 S. Ct. at 1447. The federal anti-proliferation rules prohibit donors, either alone or in collaboration with other donors, from creating multiple PACs supporting

particular candidates. *Id.* at 1454 (citing 2 U.S.C. § 441a(a)(5)). Such an effort would additionally run afoul of Federal Election Commission ("FEC") prohibitions on PAC affiliation, which considers overlapping membership and patterns of contribution. *Id.* at 1454 (citing 11 C.F.R. § 100.5(g)(4)(ii)).

McCutcheon also found important that the FEC had defined prohibited federal earmarking broadly to include "any designation, 'whether direct or indirect, express or implied, oral or written.'" *McCutcheon*, 134 S. Ct. at 1447, 1455 (quoting and discussing 11 C.F.R. § 110.6(b)(1)). Such a broad definition has the ability to root out more subtle forms of earmarking. *See id.* at 1455 (explaining why federal earmarking rules would prevent a donor from being able to "telegraph his desire to support one candidate"). Further, the federal regulations prohibited an individual who contributed to a particular candidate from also contributing to a single-candidate committee for that candidate. *Id.* (citing 11 C.F.R. § 110.1(h)(1)).[6]

In Wisconsin, there is no similar set of laws preventing donors from creating multiple committees to contribute in excess of the base limits. *See Gard*, 156 Wis. 2d at 60 ("no [Wisconsin] provisions prevent narrow issue

[6]*McCutcheon* explains that federal laws and rules prevent a federal donor from circumventing base limits by contributing to PACs that support only a particular candidate, or to PACs that will route "a substantial portion" of their contributions to a particular candidate. *McCutcheon*, 134 S. Ct. at 1453 (citing 11 C.F.R. § 110.1(h)(1), § 102.14(a) and quoting 11 C.F.R. § 110.1(h)(2)).

PACs from proliferating into several other committees"). Nor does Wisconsin's anti-earmarking law have the breadth of the federal laws or rules, meaning it would not prevent that proliferation. *See id.* (noting that Wisconsin only prohibits "overt" earmarking). That means the federal law changes found to be critical in *McCutcheon* are absent from Wisconsin law. Wisconsin still faces the very real risk of circumvention that the *Buckley* Court recognized was possible prior to the federal anti-proliferation laws.

CRG concedes that "Wisconsin does not currently have an anti-proliferation rule similar to the federal rule described in *McCutcheon*." (Dkt. 20:15.) Nonetheless, CRG seems to argue that it matters that Wisconsin could theoretically create an anti-proliferation rule or statute. (Dkt. 20:16.) But the GAB's authority to promulgate rules is limited by statute. *See* Wis. Stat. § 5.05(1)(f) (providing that the GAB may promulgate rules to interpret or implement "the laws regulating the conduct of elections"); Wis. Stat. § 227.11(2)(a) (an agency "may promulgate rules interpreting the provisions of any statute enforced or administered by the agency . . . but a rule is not valid if the rule exceeds the bounds of correct interpretation.").

CRG points to no statute providing authority for anti-proliferation rulemaking. Just pointing out that a statute or rule is theoretically possible is not the same thing as that law actually existing. And CRG comes forward with no authority for *requiring* the Wisconsin Legislature or the GAB to

create an anti-proliferation law merely because a federal statute exists along those lines. That line of argument misses the point. The question is whether Wis. Stat. §11.26(9) is closely drawn, in light of current conditions in Wisconsin. Indeed, *McCutcheon* implicitly recognized that a constitutional analysis should take into account the overall framework *then in place*. *See McCutcheon*, 134 S. Ct. at 1446 (discussing why the result in *Buckley* was different in part because the federal regulatory framework was different when *Buckley* was decided).

Passing laws or regulations is often a daunting and time-consuming task, and there is no guarantee that Wisconsin will ever have an anti-proliferation law. *See generally Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 810-30, 841-42 (7th Cir. 2014) (discussing the delay and difficulties related to amending Wisconsin's campaign finance laws and with promulgating rules); *see also* Wis. Stat. § 227.135(2) (an agency must present a proposed rule scope statement to the Governor for approval prior to proceeding with promulgating a rule; the Governor has no time limit to approve or deny the scope statement); Wis. Stat. § 227.185 (an agency must submit a proposed rule in "final draft form" to the Governor for his approval; the Governor has no time limit to approve or deny the rule).

When CRG discusses other possible laws and the concepts of over- and under-inclusiveness, it essentially argues for what it sees as a perfect set of

different laws. (*See* Dkt. 20:17.) But there is no constitutional perfection requirement when it comes to contribution limitation laws. It is up to the legislature to decide among possible approaches to a problem, so long as the chosen approach is reasonable and tailored to the objective, as is the case here. *See McCutcheon*, 134 S. Ct. at 1444 (discussing "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective" (citation omitted)); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1111 (9th Cir. 2004) (in the context of regulating commercial speech, noting that "[t]he [Supreme] Court has generally said it is up to the legislature to choose between narrowly tailored means of regulating"). Wisconsin law passes constitutional muster for the reasons discussed.

C. Legislators also intended that Wis. Stat. § 11.26(9) help address the appearance of corruption that might result from large un-earmarked contributions to committees.

When passing Wisconsin's law, legislators discussed that proliferating committees was only one approach by which individuals could circumvent base contribution limitations, absent Wis. Stat. § 11.26(9). The Wisconsin Legislature also considered the idea that individuals might use committees as mere conduits for transferring large monetary contributions from

individuals to candidates. State Senate Majority Leader William Bablitch authored a memorandum entitled "The Problems Inherent in Partially Limiting the Amount of Special Interest Groups Can Contribute," which was entered in the legislative record of Special Senate Bill 5. (Kawski Decl. Ex. B.) The bill ultimately created Chapter 11 of the Wisconsin Statutes.

In his memorandum, Senator Bablitch described a situation whereby a special interest group ("SIG") "launders" money through a political party to a candidate with a "wink of the eye":

> SIG (to Party): We have $30,000 we sure would like to give to candidates X, Y, and Z.
>
> Party (to SIG): Isn't that strange. We've been looking for $30,000 to give to candidates X, Y, and Z.
>
> The next day, the Party has a $30,000 contribution.

(*Id.*) Such a tacit understanding between a committee and a political party would be virtually impossible to detect. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 462 (explaining that detecting circumvention of contribution limits "under actual political conditions . . . is obviously very hard to trace").

Regardless whether this kind of understanding is ever actually reached, there is the risk that the public would perceive the possibility. The State has an interest in preventing both actual quid pro quo

corruption and the *appearance* of quid pro quo corruption. *See McCutcheon*, 134 S. Ct. at 1450. To say that contributions in excess of base individual contribution limits and circumventions of those base limits are already illegal under Wis. Stat. § 11.01(5m) and Wis. Stat. § 11.24 is no answer to the potential problem discussed by Senator Bablitch.

Related to public perceptions, the media has reported that, absent Wis. Stat. § 11.26(9), large transfers of money to political parties have increased. After this Court preliminarily enjoined Defendants from enforcing Wis. Stat. § 11.26(9), it was reported that both the state Republican Party and the state Democratic Party received several large contributions from individual donors. *See* Jason Stein & Kevin Crowe, *Burke, Walker backers give $1 million to GOP and Democratic Party*, MILW. J. SENTINEL, Oct. 28, 2014, Kawski Decl. Ex. C. Both parties even received a $1 million contribution from a single donor. *Id.* The Milwaukee Journal Sentinel reported that the injunction on Wis. Stat. § 11.26(9)'s anti-circumvention measure "allowed individuals to give unlimited amounts to political parties." *Id.* "The parties [could], in turn, give as much as they want[ed] to candidates, creating an easy way around the $10,000 limit individuals can give to candidates." *Id.*

D. Wisconsin Stat. § 11.26(9) is closely drawn to serve the State's anti-corruption and anti-circumvention interests.

In sum, Wis. Stat. § 11.26(9) is a permissible way to prevent corruption or the appearance of corruption, especially given the relatively easy path to circumvention in Wisconsin. If Wis. Stat. § 11.26(9) is permanently enjoined, there is no substantial barrier to creating and, if necessary, registering, multiple duplicate committees to funnel money to individual candidates from what is actually a single interest. An entity that is already motivated to circumvent limits would likewise be adequately motivated to take the steps outlined above. Indeed, the more narrowly focused the committee (for example, contributing to only one or two candidates), the less likely it is that the committee will trigger reporting requirements and, even if it does, the easier that reporting will be.

Wisconsin Stat. § 11.26(9) is consistent with the First Amendment because it is closely tailored to the particular ill—strategies used to circumvent limits on direct contributions to candidates. The law leaves other avenues for expression open.

For example, the law does not prevent independent expenditures. *See Gard*, 156 Wis. 2d at 53-54; Wis. Stat. § 11.06(7m). It also does not dictate to the candidate the groups from which he or she will receive support, or in what amounts. *See Gard*, 156 Wis. 2d at 53. A candidate may return all

or part of a contribution at any time, Wis. Stat. § 11.06(8), and has fifteen days to decide whether to return a new contribution (or to donate it to charity), before running afoul of the statutory limits. Wis. Stat. § 11.06(4)(b). This provides a reasonable measure of flexibility to the candidate and allows a candidate to accept contributions from as many, or as few, committees as the candidate wishes. Indeed, it is always the case that "no committees are ever guaranteed that a candidate will accept their entire contribution," regardless of Wis. Stat. § 11.26(9). *See Gard*, 156 Wis. 2d at 72.

Given the ability of committees to proliferate and funnel money to individual candidates in Wisconsin, the effect of Wis. Stat. § 11.26(9) is to "limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance of corruption." *Gard*, 156 Wis. 2d at 58. That function and effect is constitutional. *See McCutcheon*, 134 S. Ct. at 1444.

CONCLUSION

For the reasons argued in this brief, the Court should deny CRG's summary judgment motion and grant summary judgment to Defendants.

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