



Mike B. Wittenwyler
608.284.2616
mwittenwyler@gklaw.com

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Wisconsin Right to Life v. Barland (7th Cir. May 14, 2014)

On May 14, 2014 the Seventh Circuit U.S. Court of Appeals released its long-awaited decision in *Wisconsin Right to Life v. Barland*. [Click here to read a copy of the court's decision.](#)

The opinion is authored by Judge Diane Sykes who was a member of the Wisconsin Supreme Court before being nominated by President Bush and then appointed to the federal Court of Appeals in 2004. The matter had been fully briefed, argued and pending since January 2013.

In 2010, the Government Accountability Board (the G.A.B.) adopted an administrative rule, GAB 1.28. In short, this rule greatly expanded the scope of communications subject to regulation as independent expenditures. As a result, issue advocacy communications in the 30/60 days before an election that identified a candidate would be presumed to be independent expenditures and subject to full PAC regulation under state campaign finance law, including donor disclosure.

In response to the G.A.B.'s adoption of this highly controversial rule, three lawsuits were filed almost immediately after the rule took effect. One of those lawsuits was filed in federal court in the Eastern District of Wisconsin by attorney James Bopp on behalf of Wisconsin Right to Life (WRTL). However, WRTL not only sued the G.A.B. about administrative rule GAB 1.28, it also challenged a multitude of other Wisconsin campaign finance laws. Today's decision is essentially a resolution of WRTL's lawsuit and all of those legal challenges.

WRTL prevailed in virtually all of its arguments, including:

- Wisconsin's ban on corporate political spending is unconstitutional under *Citizens United*;
- GAB 1.28 which treats issue advocacy during the 30/60 day preelection period as fully regulable express advocacy/independent expenditures is unconstitutional; and,
- GAB 1.91 which imposes PAC-like registration and reporting requirements on all organizations that sponsor independent expenditures is unconstitutional as applied to sponsors who are not superPACs (such as 501(c)(4) organizations and other non-committee sponsors).

The Court of Appeals reached its conclusions using very strong and clear language on government's limited ability to regulate political speech:

- "The effect of [*Buckley*] was to place issue advocacy—political ads and other communications that do not expressly advocate the election or defeat of a clearly identified candidate—beyond the reach of the regulatory scheme." (p. 20)

- “As applied to political speakers other than candidates, their committees, and political parties, the statutory definition of ‘political purposes’ in section 11.01(16) and the regulatory definition of ‘political committee’ in GAB 1.28(1)(a) are limited to express advocacy and its functional equivalent as those terms were explained in *Buckley* and *Wisconsin Right to Life II*.” (p. 62)
- The G.A.B.’s administrative rule “sweeps a far wider universe of political speech into [state campaign finance laws], introducing confusion for ordinary political speakers who lack the background or assistance of a campaign finance lawyer.” (p. 64)
- “Regulations on speech, however, must meet a higher standard of clarity and precision. In the First Amendment context, ‘rigorous adherence to [these] requirements is necessary to ensure that ambiguity does not chill protected speech.’ Vague or overbroad speech regulations carry an unacceptable risk that speakers will self-censor, so the First Amendment requires more vigorous judicial scrutiny.” (p. 65)

The *WRTL* decision also highlights the confusing nature of Wisconsin’s campaign finance statutes and the burdens these laws place on those organizations desiring to participate in the process:

Like other campaign-finance systems, Wisconsin’s is labyrinthian and difficult to decipher without a background in this area of the law; in certain critical respects, it violates the constitutional limits on the government’s power to regulate independent political speech. Part of the problem is that the state’s basic campaign-finance law—Chapter 11 of the Wisconsin Statutes—has not been updated to keep pace with the evolution in Supreme Court doctrine marking the boundaries on the government’s authority to regulate election-related speech. In addition, key administrative rules do not cohere well with the statutes, introducing a patchwork of new and different terms, definitions, and burdens on independent political speakers, the intent and cumulative effect of which is to enlarge the reach of the statutory scheme. Finally, the state elections agency has given conflicting signals about its intent to enforce some aspects of the regulatory mélange. (pp. 3-4)

The *WRTL* decision also is an excellent summary of the history of campaign finance regulation and litigation in Wisconsin during the last 20 years. It covers in detail successful legal challenges brought against the Elections Board / Government Accountability Board (the G.A.B) by our law firm on behalf of Wisconsin Manufacturers & Commerce (Wis. Supreme Court 1999); Wisconsin Realtors Association (W.D. Wis. 2002); and, Wisconsin Club for Growth / One Wisconsin Now (W.D. Wis. 2010). And, it discusses how despite losing in each of these instances, the G.A.B. continued to push for greater regulation—not less—of political speech.

Bottom line, the *WRTL* decision makes clear that the government’s authority to regulate political speech extends only to money raised and spent for speech that is express advocacy and that “ordinary political speech about issues, policy, and public officials must remain unencumbered.” (p. 9) Hopefully, with the strong language in this opinion, the G.A.B. will now understand the statutory and First Amendment limitations on its ability to regulate political speech. And, hopefully, the State Legislature will now understand that “Wisconsin’s foundational campaign finance law is in serious need of legislative attention to account for developments in the Supreme Court’s jurisprudence protecting political speech.” (p. 80)

If you have questions or need any additional information on this recent legal development, please contact Mike Wittenwyler at mwittenwyler@gklaw.com or 608.284.2616.