

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646.292.8310 Fax 212.463.7308
www.brennancenter.org

Wisconsin State Legislature
Wisconsin State Capitol
2 East Main Street
Madison, WI 53703

Re: Disclosure provisions in 2015 Senate Bill 292 and Assembly Bill 387

Dear Wisconsin Legislators:

On behalf of the Brennan Center for Justice at NYU School of Law, we write to address the disclosure changes contained in Senate Bill 292 and Assembly Bill 387.¹ These provisions would make it easy for super PACs and other outside groups to flood Wisconsin races with secret campaign money, thereby transforming Wisconsin's political system from one of the most open and transparent in the nation to one of the least. They are not required by any recent federal or state court case; in fact, SB 292 / AB 387 would leave Wisconsin with far weaker transparency protections than those upheld by the U.S. Supreme Court in *Citizens United v. FEC*.² For all of these reasons, we urge you to reject the bills.

(1) The bills greatly narrow existing disclosure requirements, and make the law far easier to circumvent

Under current law, groups and individuals who receive or spend over \$300 per year for political purposes must register with the state and file financial reports.³ Thus, while any super PAC or other outside group that spends money on campaign ads may raise and spend unlimited funds, such groups must report that spending and information about who funded it, so that Wisconsin voters can make informed decisions about candidates and ballot measures.

The bills would fundamentally change Wisconsin's disclosure law. Under the bills, an outside group would only be required to register and file periodic reports if it qualifies as a

¹ The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The opinions expressed in this letter are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law.

² 558 U.S. 310, 368-69 (2010).

³ Wis. Stat. Ann. §§ 11.05, 11.06.

“political action committee” (PAC) or an “independent expenditure committee” (IEC);⁴ yet a group only qualifies as a PAC or IEC if its “major purpose” is producing advertisements that “expressly advocate” for or against a candidate’s election.⁵

Initially, whether a group’s “major purpose” is express advocacy appears to be up to the group itself, because SB 292 / AB 387 instruct the Board to make this determination by looking to the group’s “organizational documents” or other statements to the Board.⁶

Moreover, even if the Board is permitted to make an independent assessment, the proposed new disclosure requirements remain exceptionally easy to evade. Advertisements containing express advocacy are only those that explicitly tell viewers to vote for or against a candidate, or contain functionally equivalent language.⁷ Thus, any group could completely circumvent the law by avoiding these words in a certain portion of its ads, or if a large part of its mission involves other political activities, perhaps in other states. As we have seen throughout the country, such circumvention is simple and common, in part because the most effective campaign ads don’t contain express advocacy anyway.⁸

While the bills do require some reporting for individuals and groups that are not classified as PACs or IECs, they do so in very limited circumstances: when an entity spends over \$5,000 on advertisements containing express advocacy within thirty days of an election.⁹

In short, if SB 292 / AB 387 become law, sophisticated outside interests will be able to flood Wisconsin races with secret spending like never before, depriving the state’s voters of information they need to make informed choices. That would fundamentally change the dynamic of Wisconsin elections and weaken democracy in the state.

(2) No state or federal court decision requires the proposed changes

Without question, the legal landscape governing campaign finance has changed greatly in recent years. Most notably, in *Citizens United*, the U.S. Supreme Court struck down a ban on corporate and union political spending, and ruled that under most circumstances, “independent” political spending cannot be limited.¹⁰

⁴ Under the bills’ provisions, PACs are groups that may give contributions directly to candidates, while IECs may not. Yet because the bills define a PAC as a group whose major purpose is express advocacy, they could be interpreted to allow a group that gives heavily to candidates but does not run its own ads to avoid registering. Whether or not intended, the fact that the bills create the potential for such an absurd result is a further reason to reject them.

⁵ SB 292 / AB 387 §§ 11.0101(17), (25).

⁶ *Id.* § 11.0101(20).

⁷ *Id.* § 11.0101(11).

⁸ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 127 (2003) (“[C]ampaign professionals testified that the most effective campaign ads . . . should, and did, avoid the use of [express advocacy].”); *see also* Michael Franz et al., *Much More of the Same: Television Advertising Pre and Post-BCRA*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT* 141, 144 (Michael J. Malbin ed., 2006) (concluding that candidates only used express advocacy in 11.4% of their advertisements in the 2000 election).

⁹ SB 292 / AB 387 § 11.1001.

¹⁰ 558 U.S. at 357.

Far from calling disclosure rules into question, however, the Court (by a vote of 8-1) *embraced* disclosure as an alternative to other types of regulation, explaining that “effective disclosure” is what “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹¹ Consistent with this reasoning, the justices upheld provisions of federal law requiring spending reports to be filed by groups who run advertisements that simply mention a candidate within 60 days of an election, regardless of whether the ads contain express advocacy.¹² The plaintiffs had argued that “disclosure requirements . . . must be confined to speech that is the functional equivalent of express advocacy,” but the Court stated: “We reject this contention.”¹³

In *Wisconsin Right to Life v. Barland*, the Seventh Circuit recognized *Citizens United*’s broad approval of disclosure rules, but held that Wisconsin’s “pervasive” regulation of groups “that only occasionally engage in express advocacy” was too burdensome.¹⁴ The court focused on the difficulty posed by extensive registration and reporting requirements, especially on groups that spent a relatively small amount of money.¹⁵ It acknowledged that “[a] simpler, less burdensome disclosure rule for occasional express-advocacy by ‘nonmajor-purpose groups’ would be constitutionally permissible under *Citizens United*,”¹⁶ but did not specify exactly what level of registration and reporting requirements it would deem permissible. The Wisconsin Supreme Court recently relied on *Barland* in *State ex rel. Two Unnamed Petitioners v. Peterson*, but that decision involved a challenge to Wisconsin’s restrictions on coordination between candidates and outside groups, not its disclosure rules.¹⁷

In sum, *Citizens United* expressly held that the government may require an outside group to report its spending and its contributors for ads that merely mention a candidate within two months of an election (and it gave no indication this was the outer limit of permissible regulation). *Barland* and other lower court cases have not, and could not, alter that holding. The proposed changes to Wisconsin’s disclosure regime are not required under current law.

* * *

SB 292 and AB 387 fundamentally alter Wisconsin’s campaign finance disclosure rules in a way that will make it easy for well-funded outside groups to flood Wisconsin races with secret money. Such changes are not required by any court decision, and should not be made. If you have any questions about the bills or the legal analysis in this letter, please do not hesitate to contact the Brennan Center.

¹¹ *Id.* at 371.

¹² *Id.* at 366; *see also* Delaware Strong Families v. Attorney Gen. of Delaware, 793 F.3d 304 (3d Cir. 2015).

¹³ 558 U.S. at 368-69.

¹⁴ 751 F.3d 804, 841 (7th Cir. 2014).

¹⁵ *E.g., id.* at 837.

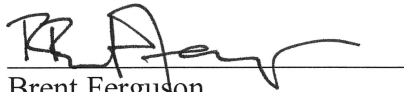
¹⁶ *Id.* at 841. The *Barland* Court also acknowledged that a 2012 case from the Seventh Circuit “declined to apply the major-purpose limitation to the Illinois disclosure system.” *Id.* at 839 (citing *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012)). *Barland* did not overrule *Madigan*.

¹⁷ *See* 363 Wis. 2d 1 (2015).

Sincerely,



Daniel I. Weiner
Senior Counsel, Democracy Program
Daniel.Weiner@nyu.edu
646-292-8383



Brent Ferguson
Counsel, Democracy Program
Brent.Ferguson@nyu.edu
646-292-8355