

GREEN FOR WISCONSIN,

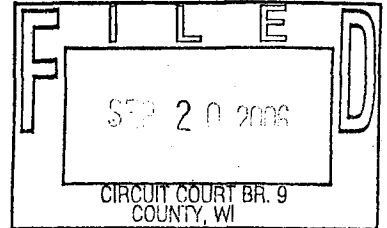
Plaintiff,

v.

Case No. 06-CV-3055

STATE OF WISCONSIN ELECTIONS
BOARD, et al.,

Defendants.



DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR TEMPORARY INJUNCTION

Defendants State of Wisconsin Elections Board and Kevin J. Kennedy, by their attorneys Assistant Attorneys General Christopher J. Blythe and Lara A. Sutherlin, and Department of Justice Legal Services Division Administrator Michael R. Bauer, submit this brief in opposition to Plaintiff's Motion for Temporary Injunction.

INTRODUCTION

Plaintiff Green for Wisconsin ("Green"), the state campaign committee of gubernatorial candidate Mark Green, seeks an order from this Court temporarily enjoining defendants from enforcing an order of the State of Wisconsin Elections Board ("the Board") directing Green to divest itself of certain funds converted from Congressman Mark Green's federal campaign committee. Green alleges that the Board's order has no basis in law and that Green's rights would be violated by enforcement of the order. As discussed below, Green's motion should be denied for the following reasons: (1) the conversion of Congressman Mark Green's federal

campaign funds to Green for Wisconsin violated federal and state law; (2) Green violated the Board's emergency rule and continues to be in violation of such rule; (3) the Board's actions have not deprived Green of its constitutional rights; (4) the Board will suffer irreparable harm if Green is allowed to avoid compliance with the Board's order and with federal and state law; and (5) denial of Green's motion will preserve the status quo.

STANDARD OF REVIEW

To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. *The Kimberly & Clark Co. v. Hewitt*, 75 Wis. 371, 375, 44 N.W. 303 (1890).

The purpose of a temporary injunction is to "maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought." *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964). A party moving for a temporary restraining order or preliminary injunction must establish: (1) a reasonable probability of success on the merits; (2) that the injunction is necessary to preserve the status quo; (3) the presence of irreparable harm; and (4) an inadequate remedy at law. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 521, 259 N.W.2d 310 (1977); *Wis. Asso. of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 293 N.W.2d 540 (1980).

Whether there is a chance of success on the merits in part turns on whether the moving party has stated a claim entitling it to relief. *See School Dist. of Slinger v. Athletic Ass'n*, 210 Wis. 2d 365, 374, 563 N.W.2d 585 (Ct. App. 1997). The plaintiff also must present sufficient evidence to permit the conclusion that the plaintiff has a reasonable probability of success. *See id.* at 374-75. The complaint fails to state a claim if it appears to a certainty that no relief can be granted

under any set of facts which the plaintiff could prove. *See Quesenberry v. Milwaukee County*, 106 Wis. 2d 685, 690, 317 N.W.2d 468 (1982).

I. FACTUAL HISTORY AND ANALYSIS.

The basic facts of this matter are not in dispute. What *is* in dispute is the relevance of many of those facts to the legal issues that are before the Court. Green places great emphasis on past actions and opinions of the Board, ascribing to such actions and decisions a precedential or *stare decisis* status that it implores the Court to adopt. Not only is such reliance on previous Board actions and opinions misplaced, it is largely irrelevant to the legal issues of the current dispute, given the substantial changes in federal and state law regarding campaign financing that have been enacted over the past four years. Nevertheless, a historical overview has value in placing the current action in context.

Green first references a 1977 opinion of the Board regarding the conversion of a federal campaign committee to a state-registered campaign committee, and the ability of a state committee to use converted campaign funds. Green notes that the Board opined that such conversions were allowed under the law and that the Board soon thereafter promulgated a rule allowing such transfers. Green conveniently ignores, however, two other significant elements of the Board opinion and its subsequent promulgation of the rule. First, the Board opinion noted that “there is nothing in the campaign finance laws explicitly answering your questions.”¹ In other words, while the Board found no prohibitions in the law to such conversions, neither was there any explicit authority authorizing such conversions under either state or federal law. Second, while the Board promulgated a rule allowing such transfers,² in doing so it envisioned

¹See Millis Affidavit, Exh. A (Formal Opinion, EIBd 77-2).

²Wisconsin Admin. Code § EIBd 1.37 (later renumbered as § EIBd 1.39).

that applicable state spending and contribution limits would still apply to any funds converted. As noted in the Board opinion with respect to preserving the integrity of the state's campaign finance laws, "[t]his may be accomplished by returning to the reported donors of the funds on hand any amount in excess of applicable limits for the state office which is sought." . . . "[The] Board feels that the above procedure, as qualified, serves the purposes of the campaign finance laws, including . . . appropriate limitation of contributions." Formal Opinion, EIBd 77-2.

Green next references a decision of the Elections Board with respect to a 2001 complaint filed with the Board regarding the conversion of Congressman Tom Barrett's federal campaign fund to a state campaign fund when Barrett gave up his Congressional seat to run for Governor. The Board ruled in favor of Barrett, basing its ruling on the reasoning that the transfer of the federal funds constituted a "conversion" of the funds rather than a "contribution." This reasoning of the Board in the Barrett matter,³ while irrelevant to the case at hand as will be discussed herein, nevertheless was contrary to the clear purpose of both Chapter 11 of the Wisconsin statutes and EIBd 1.39 as it then existed.

The Declaration of Policy in Chapter 11, as passed by the Legislature, clearly states that reasonable spending and contribution limits are in the public interest. Wis. Stat. § 11.001(1) states, in part:

The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. . . . The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, *and in placing reasonable limitations on such activities.*

³The analysis by the Board essentially provided Barrett with a huge loophole in the law by interpreting EIBd 1.39 as allowing an *unlimited* transfer of funds from a federal campaign committee to a state campaign committee. Green seeks to exploit this same loophole, even though the Board's decision in Barrett was not only wrong as a matter of law, it has long been rendered moot by intervening changes in the law on both the federal and state level.

The Board's decision in Barrett, therefore, and the reading of the law by Green constitute a complete departure from the intent of the Legislature as clearly stated in the above statute. An interpretation of a rule or statute that completely obliterates not only the state's ability to regulate the amount of money transferred from a federal campaign to a state campaign, but also the state's ability to regulate the source of that money, is entirely contrary to the statutory scheme and purpose of Chapter 11.

In addition, the language of EIBd 1.39, as it existed at the time of the Barrett decision, specifically required an itemized reporting of the funds that were being transferred:

A federal campaign committee may convert to a state campaign committee and use funds collected for federal purposes in a state or local campaign by filing a campaign finance registration statement, pursuant to s. 11.05, Stats., with the appropriate filing officer and simultaneously filing a campaign finance disclosure report showing the sources of all funds on hand at the time of the report, pursuant to requirements of s. 11.06(1)(a), (b), (c), (d) and (f), Stats. In determining the sources of funds on hand and allocating those funds among the sources, the funds shall be treated on a last-in, last-out basis, so that they will be attributed in a report to the most recent sources, and the full amount received from each source.

Wis. Admin. Code § EIBd 1.39(2) (2001 version, later amended). There would be no reason for requiring such itemized reporting if the transferred funds were not subject to the contribution limits. A cardinal tenet of statutory construction is that a statute is to be construed, where possible, so that no part of it is rendered superfluous. *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 250, 493 N.W.2d 68 (1992). An interpretation of the rule that concludes that transferred funds are not subject to contribution limits would render the entire italicized portion of the statute above moot. The Barrett decision's and Green's reading of the previous version of EIBd 1.39 as including no limits whatsoever on contributions transferred to a state campaign committee from a federal campaign committee have no basis in law.

In 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), also known as the McCain-Feingold Act. BCRA changed the legal landscape by specifically restricting how federal campaign funds could be used. The act included four permitted uses of federal campaign funds, none of which included making contributions or transfers or conversions to state campaign committees. The four permitted uses under BCRA were:

- (1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;
- (2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;
- (3) for contributions to an organization described in section 170(c) of Title 26; or
- (4) for transfers, without limitation, to a national, State, or local committee of a political party.

2 U.S.C. § 439a.(a) (2002). A series of opinions by the Federal Elections Commission (“FEC”) held that the four enumerated uses were exclusive—that they were the only allowed uses of federal campaign funds. *See, e.g.*, Advisory Op. FEC 2003-26, Advisory Op. FEC 2004-3. Thus, commencing in 2002 with the passage of BCRA, federal campaign committees were absolutely prohibited from transferring funds to a state campaign committee.

In late 2004, however, Congress amended BCRA by adding two additional allowed uses of federal campaign funds.⁴ The fifth provision allowed the use of such funds “for *donations* to State and local candidates subject to the provisions of State law.” 2 U.S.C. § 439a.(a) (2004).⁵ This allowed federal campaign committees to move funds to state campaign committees, but

⁴The amendments to BCRA were passed by Congress on November 20, 2004, and became effective on December 8, 2004. Pub.L. 108-447, Div. H, Title V, § 532, Dec. 8, 2004, 118 Stat. 3272.

⁵The sixth provision allowed such funds to be used “for any other lawful purpose unless prohibited by subsection (b) of this section.” 2 U.S.C. § 439a.(a)(6) (2004).

only in the form of “donations,” and such donations were required to be made in conformance with state law.⁶ The impact of this change in BCRA for Wisconsin was that a federal campaign could now make a donation to a state or local campaign committee in Wisconsin, subject to the applicable laws regarding such donations. In Wisconsin, a committee is limited by statute to only contributing certain amounts to state or local campaigns. For Governor, for example, a committee may contribute no more than \$43,128.00. Wis. Stat. § 11.26(1)(a). Therefore, following the 2004 amendments to BCRA, a federal campaign committee was limited to contributing no more than \$43,128.00 to any candidate for Governor in Wisconsin during an election cycle.

But despite the clear proscription against moving federal campaign funds into a state campaign committee via any kind of transfer other than a donation, on January 25, 2005,⁷ Congressman Mark Green’s federal campaign committee “converted” to a state campaign committee, the reincarnation of which became the plaintiff in this action, Green for Wisconsin. Green filed an itemized statement with the Board, indicating that it was “converting” approximately \$1.3 million of federal campaign funds to the Green for Wisconsin state committee. Green apparently claimed as authority for its “conversion” the version of ElBd 1.39 that had been rendered moot by BCRA. But what Green failed to grasp was that ElBd 1.39 remained moot, despite the 2004 amendments, which only allowed a *donation* from a federal campaign to a state campaign, because ElBd 1.39 specifically dealt with conversions, which

⁶The added provision specifically referenced “donations.” It did not authorize conversions of committees nor any other type of transfers.

⁷Defendant State Elections Board had noticed a hearing for the following day, January 26, 2005, for the purpose, among others, of reviewing potential rule revisions to harmonize the Board’s rules with the changes in federal law.

were still not allowed under federal law. As a legal matter, therefore, Green's action in converting federal funds to a state campaign was contrary to both state and federal law.

Green's claims that its conversion was permitted by and founded in long-standing practices of the Board allowing such conversions is wrong on two counts. First, past actions of the Board do not have precedential value—they are not binding on future boards, nor in this case, as noted above, were they uniformly consistent, contrary to Green's assertions. Second, and more important, Green ignores the substantial changes in the law at the federal level that occurred during the 2002-04 period (BCRA and the BCRA amendments).

In response to Green's conversion, the Board took two initial actions. First, at its meeting on January 26, 2005, the Board promulgated an emergency rule, EIBd 1.395, which prohibited a state campaign committee from spending any funds converted from a federal campaign committee if those funds could not have been directly contributed to the state campaign committee under state law. The emergency rule also provided that a state campaign committee in possession of any such funds must divest itself of the funds.

Second, the Board promulgated a permanent rule in the form of a revision of EIBd 1.39. The revisions to EIBd 1.39 harmonized that rule with BCRA, as amended, and with the relevant provisions of Chapter 11 of the Wisconsin statutes. The new version of EIBd 1.39 took effect on December 1, 2005, and specifies that "A candidate's federal campaign committee may not be converted to a state campaign committee." Wis. Admin. Code § EIBd 1.39(2)(a) (2005). The rule goes on to state that a federal campaign committee can make a contribution to a state campaign committee, subject to the limits that any committee may contribute under state law.

Emergency Rule EIBd 1.395 took effect on February 3, 2005. Six days later, it was suspended by the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR").

Under Wis. Stat. § 227.26(2)(d) and (f), if JCRAR suspends a proposed rule it must, within 30 days of the date of the suspension, introduce bills in each house of the legislature to support the suspension. If either bill becomes law, the rule is repealed. If both bills are defeated, or fail to be enacted in any other manner, the rule remains in effect and JCRAR may not suspend it again. Wis. Stat. § 227.26(2)(i).

The Legislature adjourned its session on July 12, 2006, without taking action on either bill. Therefore, both bills failed to be enacted and the emergency rule became effective again on July 13, 2006. Emergency rules are in effect for 150 days. Wis. Stat. § 227.24(1)(c). Because Emergency Rule EIBd 1.395 was only in effect for six days prior to its suspension, it will remain in effect for 144 days, beginning on July 13, 2006.

During the six days the emergency rule was in effect prior to its suspension by JCRAR, Green for Wisconsin disbursed \$6,653.62, according to reports filed with the Board. These disbursements were all paid with funds converted from Congressman Green's federal campaign committee. Using the "last in, last out" accounting approach employed by the Board, of the \$6,653.62 Green disbursed from February 3, 2005, through February 8, 2005, \$1,140.00 came from individual contributions to Congressman Green's federal campaign committee and \$5,513.62 came from three Political Action Committee ("PAC") contributions to Congressman Green's federal campaign committee. None of the three PACs (DEAC PAC, National Association of Insurance and Financial Advisors PAC and ITW Better Government PAC) were registered in Wisconsin. The disbursement of this \$5,513.62 was in direct violation of the Board's emergency rule. In addition, Green provides no evidence that it took or has taken any steps to divest itself of converted funds that could not have been directly contributed to the state

campaign committee under state law, thereby violating the second provision of the emergency rule.

At its meeting on August 30, 2006, the Board met to discuss, among other items, Green's failure to comply with the provisions of the emergency rule. The Board then voted to direct Green to divest itself of \$467,844.60 of converted funds that came from contributions to the federal campaign fund from PACs that were not registered in Wisconsin. The Board also voted to direct Green to divest itself of all PAC contributions in excess of the state PAC limit of \$485,190.

Green's claims of being damaged by the Board's actions are curious, given that, as noted above, Green should only have been allowed to receive a one-time donation from Congressman Green's federal campaign fund in the amount of \$43,128.00, pursuant to federal and state law, with the remainder of the \$1.3 million remaining in the federal campaign account. The Board, however, has to date only directed Green to return approximately \$500,000 of the roughly \$1.3 million that was illegally converted to Green for Wisconsin.

ARGUMENT

II. THE BOARD'S PROMULGATION OF EIBd RULE 1.395 WAS A VALID EXERCISE OF RULEMAKING AUTHORITY, WHICH COMPLIED WITH THE STRICTURES OF CHAPTER 227.

Green asks this Court to invalidate Emergency Rule EIBd 1.395. As a basis for this relief, Green asserts that the Board failed to hold a hearing on the Emergency Rule within 45 days as required by the statute, that the Emergency Rule expired before the Board issued its Order, and that the Board exceeded its statutory authority in enacting the rule.

A. The Board Adequately Complied With The Rulemaking Procedures of Chapter 227.

With respect Green's procedural challenges to the Board's action, it maintains that the Board issued an order after the expiration of the rule and that the Board failed to comply with Wis. Stat. § 227.24(4), which requires it hold a public hearing with 45 days after promulgating the rule.

The Board promulgated EIBd 1.395 on February 3, 2005. Pursuant to Wis. Stat. § 227.26(d), the joint committee for the review of administrative rules suspended EIBd 1.395 on February 9, 2005. After suspending the rule, the joint committee, in compliance with Wis. Stat. § 227.26(f), introduced bills in each house of the Legislature in support of the suspension. Both bills failed to be enacted before the close of the legislative session on July 12, 2006.

Contrary to Green's tortured reading of the statute, the plain reading makes clear that the rule went back into effect on July 13, 2006, for the remainder of the 150 days, totaling 144 days. Indeed, this statutory construction has long been recognized by the Wisconsin Supreme Court. In *Wisconsin's Environmental Decade, Inc. v. Joint Committee for Review of Administrative Rules, et al*, 73 Wis. 2d 234, 235, 243 N.W.2d 497 (1976), the Wisconsin Supreme Court described the role of JCRAR. It stated:

[t]he critical power of JCRAR is that of entertaining 'complaints' concerning administrative rules and, if it considers such complaints 'meritorious and worthy of attention,' suspending those rules until the entire legislature has either repealed the challenged rules or failed to do so. If the legislature fails to repeal, the rule goes back into effect.

Id. As in *Wisconsin's Environmental Decade*, in the instant case the rule went back into effect after the Legislature failed to repeal it. The Board then issued its Order requiring Green to divest itself of illegal campaign funds on August 30, 2006, well within the life span of the rule.

As Green correctly states, the Board is required to hold a public hearing on its proposed rule, emergency or otherwise. Wis. Stat. § 227.24(4). The statute reads in relevant part:

(4) an agency shall hold a public hearing within 45 days after it promulgates a rule under sub. (1). If within that 45-day period the agency submits to the legislative council staff under s. 227.15 a proposed rule corresponding to the rule under sub. (1), it shall hold a public hearing on both rules within 90 days after promulgation of the rule under sub. (1)....

In compliance with the statutory procedures outlined above, the Board, prior to the expiration of the 45 days, submitted to the legislative council staff a proposed rule corresponding to the Emergency Rule EIBd 1.395 and noticed that a public hearing would be held on October 4, 2006. All of this was done well within 90 days after of the emergency rule came back into effect, as required by the statute. This notice substantially complied with the statute.

For these reasons, the Board readily and adequately complied with the rulemaking procedures of Chapter 227, and Green's allegations that EIBd 1.395 is procedurally defective are unfounded in law and in fact.

B. The Board Was Well Within Its Statutory Authority When It Promulgated Emergency Rule EIBd 1.395.

As an agency, the Board, "may promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements under this chapter if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures." Wis. Stat. § 227.24(1). "It is the general rule that an administrative agency has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates." *State v. ILHR Department*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977).

Pursuant to these rulemaking powers, the Board promulgated EIBd 1.395 in an effort to restrict the use of funds converted from a federal campaign committee to a state campaign

committee to those that would have been lawfully obtained under the state's election laws. This rule is clearly in the public interest, as it enforces the policies and guidelines Chapter 11 seeks to employ.

Chapter 11 makes clear that reasonable spending and contribution limits are in the public interest. Wis. Stat. § 11.001(1) states, in part:

The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, *and in placing reasonable limitations on such activities.*

The statutory mandate for EIBd 1.395 can be found throughout Chapter 11. For instance, Wis. Stat. § 11.26 *et seq.* places significant caps on the amount of money that can be contributed to a candidate's campaign, depending on the source of the contribution and the type of campaign. For example, individual donations to a gubernatorial candidate are capped at \$10,000 per year and PAC donations to a gubernatorial candidate are capped at \$43,500 per year. Wis. Stat. § 11.26(1)(a) and (2)(a). Significantly, Wis. Stat. § 11.26(10) places a cap on the amount of money a candidate can contribute to his or her own campaign from another of his or her campaign committees, if the candidate has applied for a grant from the Wisconsin election campaign fund. The statute states in relevant part:

For purposes of this subsection, any contribution received by a candidate or his or her personal campaign committee from a committee which is registered with the federal elections commission as the authorized committee of the candidate under 2 U.S.C. § 432(e) shall be treated as a contribution made by the candidate to his or her own campaign.

Id. The statutes also require that PAC contributions come only from those properly registered in Wisconsin. Wis. Stat. § 11.05(11).

These are but a few sections, viewed separately or in concert, that exemplify the Legislature's intent to curb unregulated contributions from entering a state campaign, which is precisely the goal of the Emergency Rule.

The Board's authority for the passage of this Emergency Rule is further bolstered by the fact that the Board passed a permanent rule prohibiting the very transfer of funds from a federal campaign, and this rule was approved in committee by the Legislature. *See* EIBd 1.39. Significantly there was no change in statute prior the promulgation of the current version of EIBd 1.39, thus evidencing the fact that the statutes in their current state proscribe the unregulated funneling of funds from a federal campaign into a state campaign. Viewed in the context of Chapter 11's stated policy of creating and enforcing reasonable campaign limits, and the particular statutory provisions to effectuate that policy, it is clear the Board's authority to apply these provisions to funds converted from a federal campaign to a state campaign committee comes directly from the four corners of the statute.

C. Green's Constitutional Rights Were Not Violated By The Promulgation of EIBd 1.395.

Green also attacks the validity of EIBd 1.395 on constitutional grounds. Green maintains the application of EIBd 1.395 is retroactive, violating its rights to due process. In addition, Green maintains that EIBd 1.395 creates disparate treatment of federal officeholders and state officeholders, in violation of the Equal Protection clauses of the U.S. and Wisconsin

Constitutions. For the reasons that follow, Green's claim that ElBd 1.395 runs afoul of the Constitution is not grounded in law or fact, and therefore must fail.⁸

1. The Board's Application of ElBd 1.395 to Green Does Not Constitute a Due Process Violation.

The due process clauses of Wis. Const. art. 1, § 1 and the Fourteenth Amendment to the United States Constitution are substantially equivalent. *Neiman v. American Nat'l Property & Casualty Co.*, 2000 WI 83, ¶ 8, 236 Wis. 2d 411, 613 N.W.2d 160; *Martin v. Richards*, 192 Wis. 2d 156, 198 n.6, 531 N.W.2d 70 (1995).⁹ Green does not explain whether it believes the retroactive application of this rule violates its right to substantive due process or to procedural due process. The right to substantive due process "protects against governmental actions that are arbitrary and wrong 'regardless of the fairness of the procedures used to implement them,'" *Monroe County Dep't of Human Servs. v. Kelli B.*, 2004 WI 48, ¶ 19, 271 Wis. 2d 51, 678 N.W.2d 831 (citation omitted), whereas procedural due process addresses the fairness of the manner in which a governmental action is implemented, *State v. Laxton*, 2002 WI 82, ¶ 10 n.8, 254 Wis. 2d 185, 647 N.W.2d 784 (citation omitted). Green is not arguing that it was denied process by the Board's ordered divesture. Indeed, Green did not even utilize

⁸As an initial matter, the Board notes that it is not clear that Green for Wisconsin, as a "personal campaign committee" is afforded the constitutional protections it asserts. Both the United States Constitution and Wisconsin Constitution afford protections to "citizens", not campaign committees such as Green for Wisconsin. *See, e.g.*, U.S. Const. amend XIV, § 1; and Wis. Const. art. 1, § 1. While courts have held that corporations are persons or citizens within the meaning of the Fourteenth Amendment, these protections do not necessarily extend to unincorporated entities such as campaign committees. *Arkansas Right to Life State Pol. Action Com. v. Butler*, 983 F. Supp. 1209 (1997).

⁹The Fourteenth Amendment of the Constitution in pertinent part provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. Wisconsin Const. art. 1, § 1 provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

the statutory delineated channels by which to challenge the Board's actions. *See* Wis. Stat. § 5.06(1) (delineating the proper avenue to challenge the actions of election officials). Instead, Green argues it is unfair to apply EIBd 1.395 retroactively because the substantive rule limits the use of converted federal funds that Green claims is contrary to the law at time it converted them. *See Green Campaign Memorandum*, at 20. (In promulgating EIBd 1.395, the Board "has tried to prevent Green for Wisconsin from using all of its rightfully obtained and held resources to reach the people of Wisconsin with Mark Green's political message.") *Schulz v. Ystad*, 155 Wis. 2d 574, 598, 456 N.W.2d 312 (1990). Thus, it appears that Green is asserting a substantive due process claim, rather than a procedural due process claim.

The threshold inquiry when analyzing an alleged violation of substantive due process is whether the challenger has established a deprivation of a liberty or property interest protected by the Constitution. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997). In arguing that retroactive application of EIBd 1.395 is unconstitutional, the particular right Green appears to be asserting is the right not to be deprived of property, without due process of law. The due process clauses of the federal and state constitutions "impose[] constraints on governmental decisions that deprive individuals of . . . property interests . . ." *Patterson v. Bd. of Regents*, 114 Wis. 2d 495, 500, 339 N.W.2d 130 (Ct. App. 1983). Thus, to succeed on this claim, Green must establish that it had a property interest in the funds converted from the federal campaign committee. *See Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). Because the conversion of these federal campaign funds to a state campaign was illegal under both federal and state law, Green cannot establish it had a property interest in funds illegally converted.

At the time the federal funds were converted to Green, the law governing the use of federal funds in a state campaign was codified in 2 U.S.C. § 439a.(a) and Wis. Stat. ch. 11 *et seq.* Nowhere in either statute was the wholesale conversion of federal campaign funds to a state campaign fund allowed. Indeed, quite the opposite was true.

Under federal law, the permitted uses for contributions is governed by 2 U.S.C. § 439a.(a), which states in relevant part:

A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual-

(5) for donations to State and local candidates subject to the provisions of State law....

Thus, under the plain reading of the federal statute, Congressman Green's committee was only permitted to donate or contribute to a state campaign subject to the provisions of state law. Nothing in this statute allows for the wholesale "conversion" of those funds.¹⁰

As a testament to the statutes' original intent, the passage of amended EIBd 1.39 with no corresponding change in the underlying statutory language, explicitly restricting the transfer of funds from a federal campaign to a state campaign, establishes that the statutes do not and have never allowed for the wholesale, unregulated transfer of federal campaign funds into a state campaign. Significantly, Green does not (and the Board would submit, cannot) point to any

¹⁰It is likely that Green will argue that section (6) of 2 U.S.C. § 439a allows for said transfer. It states in its entirety that contributions a federal campaign may be used: "for any other lawful purpose unless prohibited by subsection (b) of this section." It is well settled law that the specific clauses of a statute control the general clauses. *Mayer v. Mayer*, 91 Wis. 2d 342, 283 N.W.2d 591 (1979) ("[w]here two statutes deal with the same subject matter and could lead to different results, the more specific statute controls.") A reading that would permit section 6 to engulf section 5, rendering such delineation by Congress superfluous is contrary to long established principles of statutory construction. *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 250, 493 N.W.2d 68 (1992) ("[a] cardinal tenet of statutory construction is that a statute is to be construed, where possible, so that no part of it is rendered superfluous"). Section 5 specifically addresses a federal candidate's ability to donate funds, and as such, it governs Green's actions, not section 6.

aspect of Chapter 11 that *allows* for the wholesale transfer or conversion of federal funds into a state campaign committee. Green's position is simply that these funds fall outside the reach of the statutes because they cannot be considered "contributions" as that word is defined in Wis. Stat. § 11.01(6)(a)1.

Green maintains that the "conversion" of federal campaign funds to a state campaign is not a "contribution" as the term is defined by the statute and thus, the funds are not subject to the limits as defined by the statute.

The Board rejects the premise of Green's argument that by characterizing something as a "conversion" it falls outside of the reach of the statutes. Rather, there are two ways in which the funds can be characterized. If the federal campaign committee funds are "converted" (as Green maintains) to a state campaign committee as separate, segregated contributions, then the contribution limits would apply. Alternatively, if the converted federal campaign committee is but another committee and is converted as a single, unitary lump sum, that amount becomes a lump sum that is subject to the limits of a committee. To suggest, as Green does, that it can avoid compliance with Chapter 11 limits by simply calling these funds a "conversion" rather than a contribution (when the term "conversion" does not even exist in the statutes) would allow coy semantics to undermine the clear mandate and purpose of Chapter 11. A duck does not become a goose simply because one calls it a goose.

Green attempts to overcome these infirmities by asserting that the original version of the Board's rule ElBd 1.39 that was in place prior to BCRA was still the operative state law when Green converted the federal campaign funds, and that the rule allowed the "transfer" or "conversion" of federal funds to a state campaign. Congress' recent amendments to BCRA, however, did not resurrect the old version of ElBd 1.39. On the contrary, ElBd 1.39, as it was

originally written, allowed something federal law does not—the “transfer” or “conversion” of federal funds to a state campaign. As stated above, 2 U.S.C. 439a. allows federal campaign committees to make “donations” to state candidates, it does *not* allow a federal campaign to convert its entire campaign fund to a state campaign committee. For this reason, Green’s reliance on a moot agency rule that conflicts with federal law is misplaced.

Green repeatedly states that the conversion and use of federal funds in state campaigns has been permitted under Wisconsin election law for some 29 years. As explained *supra*, this assertion does not square with the undisputed facts. The issue of whether funds converted from a federal campaign to a state campaign are subject to state contribution limits was a matter of first impression in the Barrett decision. In *Whitney*, the Board opinion from 29 years ago, the sole question before the Board was whether one could transfer such funds, not the enforcement of contribution limits on the same. To the extent the *Whitney* opinion spoke to the issue of limits, a quick reading of the opinion reveals that the Board intended to enforce them, and promulgated a rule to achieve just that.¹¹

Contrary to the assertions of Green, the Board’s decision in *Barrett* does not alter this outcome. The *Barrett* decision was in 2001 and pre-BCRA; it was prior to federal and state efforts to close this enormous loophole in the campaign finance laws. It is important at this point

¹¹Indeed, the fact that the *Whitney* Board promulgated the former rule EIBd 1.39, which Green now seeks to enforce, brings this Court full circle. That is to say, the Board in *Whitney* makes specific reference to compliance with contribution limits, stating “the treasurer of a converting committee must insure that contribution limits applicable to the state office are not exceeded. This may be accomplished by returning to the reported donors of the funds on hand any amount in excess of applicable limits for the state office which is sought.” The Board goes on to say that the “Board feels that the above procedure, as qualified, serves the purposes of the campaign finance laws, including ... appropriate limitation of contributions.” Finally, the opinion states “Below is a proposed Rule consistent with that procedure.” The *Whitney* Board when promulgating this rule intended to enforce the limits as to the federal raised funds. Indeed, common sense dictates that the very reason EIBd 1.39 required the delineation of the source of funds in a conversion report was to enforce limitations on contributions.

to make clear precisely what Green postulates—that in January 2005, it was permissible for Green to take all excess funds from his federal campaign, wholly unrestricted by state campaign laws, and “convert” those funds to a state campaign with no regard for state contribution limits. While some argument can be made that in 2001 such transfers were allowed, the same cannot be said in the post-BCRA world.¹²

For two years, 2002-04, BCRA absolutely prohibited the transfer of federal campaign funds to state campaigns. 2 U.S.C. § 439a(a) (as in force in 2002-04). In 2004, Congress amended that prohibition to allow “donations” to a state campaign committee in compliance with state law. 2 U.S.C. § 439(a). It did not, as Green appears to assert, re-open the flood gates for federal candidates to funnel money into state campaign committees via “conversions” without regard to limits on such “donations.”

Green also claims reliance on the actions of Board staff in allowing the conversion. Yet, simply because a Board staff member allowed the conversion does not render it legal. To find such would be tantamount to finding that where a Board staff member allows for an excessive contribution from a particular PAC, and later realizes the mistake, that the candidate had a vested property interest in illegally obtained funds simply because of a staff member’s oversight. This reasoning defies common sense and would severely undermine the Board’s attempt at enforcing state campaign law.

Nor can Green rely on the Board’s interpretation of EIBd 1.39 under *Barrett* to establish he had a property interest in those transferred federal funds in January of 2005. As explained

¹²It is worth noting that Green’s actions illustrate this point beautifully. Knowing full well that the transfer of federal funds to a state campaign committee without regard to state contribution limits was on tenuous legal footing at best, Green converted the funds on the eve of the Board’s meeting to address precisely that issue. For Green to suggest that such transfers were long understood to be permitted under state law begs the question—why the 11th hour transfer of said funds?

supra, Rule 1.39 as interpreted by *Barrett* was contrary to statutory authority. Resolving an alleged conflict between a statute and an interpretive rule requires statutory interpretation. *Wisconsin Hosp. Assn. v. Natural Resources Bd.*, 156 Wis. 2d 688, 705, 457 N.W.2d 879 (Ct. App. 1990). Statutory interpretation is a question of law. *State v. Bodoh*, 226 Wis. 2d 718, 724, 595 N.W.2d 330 (1999); *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999). The court's "first duty is to the legislature, not the agency." *Seider v. O'Connell*, 2000 WI 76, ¶ 26, 236 Wis. 2d 211, 612 N.W.2d 659. "A rule out of harmony with the statute is a mere nullity." *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W.2d 47 (1955) (citing *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936)). "Even if we accorded the agency that promulgated a rule great weight deference, we would not uphold a rule that directly contravenes the words of a statute." *Seider*, 236 Wis. 2d at 226 (internal citations omitted). The old version of ElBd 1.39 allowing conversion has no support in the statutes and cannot provide a basis for Green's illegal action.

Because the funds were converted illegally, Green has no property interest in them. *See, e.g., Kauffman v. Puerto Rico Telephone Co.*, 841 F.2d 1169, 1173 (1988) (cannot claim a property right in employment where position was obtained contrary to law); and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (holding an assistant professor at the University of Wisconsin-Oshkosh did not have a property interest in his employment because his tenure was not secured by state statute or university rule).

In sum, Green's inability to meet its threshold burden of establishing it had a property interest in illegally converted federal funds is fatal to its due process challenge.

2. Even If The Court Finds That Green Had A Vested Property Interest, The Board's Retroactive Rule Does Not Violate Due Process.

All legislation is presumed constitutional, and the challenger carries the burden of proving unconstitutionality beyond a reasonable doubt. *Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd.*, 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979). These principles apply to retroactive legislation as well as to legislation that is prospective only. *Martin*, 192 Wis. 2d at 200-01.

“The general rule in Wisconsin is that ‘legislation is presumed to be prospective unless the statutory language clearly reveals by express language or necessary implication an intent that it apply retroactively.’” *Chappy v. LIRC*, 136 Wis. 2d 172, 180, 401 N.W.2d 568 (1987) (quoting *State v. ILHR Department*, 101 Wis. 2d 396, 403, 304 N.W.2d 758 (1981)). However, the plain language of the Emergency Rule overcomes that presumption.

The language of the EIBd 1.395 at issue here dispels any doubt that the agency intended the rule to apply retroactively: The rule states in its entirety:

Funds which have been converted by a federal campaign committee to a Wisconsin state campaign committee may not be used for political purposes in Wisconsin if the contribution of those funds to the federal campaign committee would not have complied with Wisconsin law if the contribution had been made directly to a Wisconsin campaign committee. The state campaign committee shall divest itself of such money in compliance with s. 11.26(11), Stats.

By the rule's very language it applies to actions which occurred at an earlier date: “funds which have been converted” and “those funds to the federal campaign would not have complied Wisconsin law if the contribution had been made....” Nothing in the rule speaks to the issue of whether the funds must be or are currently on hand. The rule addresses only funds that were converted in the past, and whether, in the past, those funds complied with state campaign laws. As such, it obviously is retroactive because the conduct giving rise to the application of the rule must have occurred previously. *See Martin*, 192 Wis. 2d at 200.

Retroactive legislation enjoys a presumption of constitutionality, and the challenger bears the burden of overcoming that presumption. *Chappy*, 136 Wis. 2d at 192 (citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)). These principles apply to retroactive legislation as well as to legislation that is prospective only. *Martin*, 192 Wis. 2d at 200-01. However, because retroactive legislation presents unique constitutional problems in that it often unsettles important rights, it is viewed with some degree of suspicion and must be analyzed within a framework different from that of prospective legislation. “The [retroactive] aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

To determine whether a retroactive statute comports with due process the court must weigh the public interest served by the retroactive statute against the private interests that are overturned by it. *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080 (1st Cir. 1977). Implicit within this analysis is a consideration of the unfairness created by the retroactive legislation. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1983), and citing *Turner Elkhorn*, 428 U.S. at 14-20 (stating that retroactive legislation may offend due process if it is “particularly ‘harsh and oppressive’”). See also 2 Sutherland Stat. Const. sec. 41.06 (5th ed. 1993) (“Judicial attempts to explain whether such protection against retroactive interference will be extended disclose that elementary considerations of fairness and justice govern the decision”).

Applying these standards to the case at bar, it is abundantly clear that the public interest in preventing the expenditure of campaign funds raised outside the state-mandated campaign limits far outweighs whatever unfairness Green may suffer by the retroactive application of this

rule. Indeed, it is not entirely clear what would be unfair about making Green comply contribution limits and PAC registration guidelines. The failure to apply the rule retroactively, of course, would result in allowing Green to raise funds in a federal campaign that are not in compliance with state election law, convert those funds, and then raise more from the same entities and individuals under the guise that these funds are beyond the reach of state elections law. Even if one assumes *arguendo*, however, that the rule cannot be applied retroactively at this point, the fact remains that while the rule was in effect from February 3-9, 2005, Green failed to take any steps to comply with the rule and, in fact, openly defied it by spending more than \$5,000 of the converted funds.

It is undeniably in the public interest to enforce Legislative-mandated contribution limits in state campaigns. Wis. Stat. § 11.01(1). Viewed through the lens of the balancing test described in *Martin*, a weighing of the competing interests supports the policy choice made by the Board. Defendant has failed to carry its heavy burden of proving otherwise, and its due process challenge fails as a matter of law.

3. Green Has Not Met Its Burden of Showing That An Equal Protection Violation Exists As A Result of the Board's Promulgation of EIBd 1.395.

As stated earlier, Green, as the party challenging a rule, bears a heavy burden to establish the rule's unconstitutionality beyond a reasonable doubt. *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985). “[E]very presumption must be indulged to sustain the [rule] if at all possible and, wherever doubt exists as to [its] constitutionality, it must be resolved in favor of constitutionality.” *Chappy*, 136 Wis.2d at 185, quoting *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973).

Green is far from meeting this heavy burden. While Green asserts that the Board's action impacts a fundamental right (free speech) giving rise to a strict scrutiny analysis, under any standard Green has failed to provide any record support that EIBd 1.395 places more restrictive limits on a candidate who accomplishes a federal/state conversion than it places on a candidate who pursues a state/state conversion. The record is simply silent as to how state/state conversions are treated by the Board. The Board cannot be expected to respond to hypothetical allegations of disparate treatment without the benefit of knowing all the facts on which the differing treatment for state candidates was made.

Moreover, as is the case with federal/state conversions, there is certainly no statutory basis on which to allow state candidates to convert funds to a separate state campaign with no regard to contribution limits. Absent some legal and factual showing that such a disparity in fact exists, Green has not met its burden of establishing that the application of EIBd 1.395 violates its Equal Protection Rights. And even if a disparity, in fact, exists, the State has a compelling interest in more strictly regulating the conversion of federal campaign funds, which may come from contributions over which the state has no control.

III. GREEN WILL NOT SUFFER IRREPARABLE HARM IF AN INJUNCTION IS NOT GRANTED.

Green argues that it will suffer irreparable harm if an injunction is not granted. Given that the conversion of funds was contrary to state and federal law, however, this argument must fail. On the contrary, the Board's ability to enforce its rules and orders will be irreparably harmed if an injunction is granted. Green previously showed its disdain for the Board's authority when it acted in defiance of the Emergency Rule prior to the rule's suspension by JCRAR. It is fair to presume that Green will spend all its money leading up to the November election. At that point, there would be no funds left for Green to divest to comply with the Board's rule and order,

and it would be naïve to think that Green will set aside approximately \$500,000.00 to comply with the Board's order if it is ultimately ordered to do so.

IV. GRANTING AN INJUNCTION WILL NOT PRESERVE THE STATUS QUO.


Denial of Green's request for an injunction will preserve the status quo. The status quo is that conversions of federal campaign funds to state committees in the manner employed by Green is illegal. It is also the status quo that the Board's inherent function is to enforce its rules and statutes, including the rule at issue here. By granting an injunction, the Board's purpose would be frustrated. Green's untenable position with respect to this issues seems to be "[t]he status quo is that we spent the converted money, so don't make us give it back." Green's position, however, is contrary to both federal and state law. In reviewing the status quo, the Court should favor the agency's ability to enforce its rules and orders.

CONCLUSION

Green argues that the actions and opinions of Board staff, coupled with a previous Board's action approving the Barrett conversion and the language of the previous version of ElBd 1.39 all combine to provide authority for Green's conversion of \$1.3 million in federal campaign funds to a state campaign committee. But this line of argument misses the fundamental question as to what the law is with respect to such conversions, and specifically, what the law was as of the date Green converted the funds. And the answer is clearly that such unlimited conversions were never countenanced in the statutory scheme of Chapter 11, nor were they authorized under federal law beginning in 2002 with the passage of BCRA.

Green's conversion of funds was and remains illegal under both federal and state law. Green's motion for injunctive relief should be denied.

Dated this 20th day of September 2006.


CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147

LARA A. SUTHERLIN
Assistant Attorney General
State Bar #1057096

MICHAEL R. BAUER
Administrator, Legal Services Division
State Bar #1003627

Attorneys for defendants State of Wisconsin
Elections Board and Kevin J. Kennedy

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0180