RECEIVED
04-03-2015
CLERK OF SUPREME COURT
OF WISCONSIN

**FILED UNDER SEAL**
STATE OF WISCONSIN
IN THE SUPREME COURT

---

Nos. 2013AP2504-2508-W, 2014AP296-OA, 2014AP417-421-W

---

Nos. 2013AP2504-2508-W

IN THE MATTER OF JOHN DOE PROCEEDING

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor,
Respondents.

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

[Captions continue on following page.]

# REDACTED REPLY BRIEF OF UNNAMED MOVANT NO. 1

[redacted]

Steven M. Biskupic, SBN 1018217
Michelle L. Jacobs, SBN 1021706
Biskupic & Jacobs, S.C.
1045 W. Glen Oaks Lane, Suite 106
Mequon, WI 53092
(262) 241-0033
sbiskupic@biskupicjacobs.com
mjacobs@biskupicjacobs.com

*Counsel for Unnamed Movant No. 1*

Revised Redactions per 3-27-15 Order

No. 2014AP296-OA

STATE OF WISCONSIN ex. rel. TWO UNNAMED PETITIONERS,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge, and FRANCIS D. SCHMITZ, Special Prosecutor,
Respondents.

L.C.#s 2012JD23, 2013JD1, 2013JD6, 2013JD9 & 2013JD11

---

Nos. 2014AP417-421-W

STATE OF WISCONSIN ex. rel. FRANCIS D. SCHMITZ,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
Respondent,

and

EIGHT UNNAMED MOVANTS,
Interested Parties.

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2013JD23

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities

**Regulations**

## INTRODUCTION

The Special Prosecutor seeks to criminalize conduct that is not prohibited under Wisconsin Statutes and would not survive constitutional scrutiny if it were. The standards he suggests are not found in the statutes, are entirely subjective, and thus are entirely improper. Having invested thousands of man hours, including issuing dozens of sweeping subpoenas and executing search warrants, he reasons that the conduct at issue *must be* improper and works backwards through hundreds of pages of his brief to argue, all evidence to the contrary, that the "conclusion to be drawn is clear." SP 166.[1]

The dangerousness of the Special Prosecutor's approach is demonstrated most starkly in his purported line-drawing as to what conduct does or does not constitute "coordination," what it means to be "truly independent," and what it means to "influence an election." As Justice Breyer said almost 20 years ago, "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 621-22 (1996).

---

[1] In this Reply Brief, "SP" refers to the Special Prosecutor's Response Brief; "OB" refers to Unnamed Movant No. 1's Opening Brief; "Joint App." refers to the Unnamed Movants' joint appendix to their opening briefs; and "RD" refers to the Dane County record.

More fundamentally, even if the Special Prosecutor's new line-drawing interpretation of Chapter 11 were right, how would any reasonable person or campaign committee in 2011 and 2012 have been on proper notice of those lines, such that a criminal investigation into their conduct could be justified? To be constitutionally valid, all such "laws must be clear and precise enough to give a person of ordinary intelligence fair notice about what is required of him and also to guard against the arbitrary and discriminatory exercise of enforcement discretion." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 835 (7th Cir. 2014) ("*Barland II*"). But, as the Seventh Circuit recently described them, the Wisconsin statutes on which the Special Prosecutor has staked this investigation are "labyrinthian and difficult to decipher." *Id.* at 808. No one could possibly have had notice of the Special Prosecutor's ever-changing interpretation of Chapter 11.

Having reviewed the Special Prosecutor's evidence, the John Doe Judge found no potential violation of the law. His decision alone should be enough to end this criminal investigation on vagueness grounds. Indeed, *every* judge who has analyzed this matter in detail has found that the lines of coordination restrictions are blurry. *See O'Keefe v. Chisholm*, 769 F.3d 936, 942 (7th Cir. 2014) (reversing district court but noting that the law on coordination is unclear).

The Special Prosecutor's refusal to come to grips with the problematic state of the law and the lack of statutory grounds for his investigation require this Court to act decisively in ending the current John Doe investigation.

## ARGUMENT[2]

**Issue 6: The Special Prosecutor's argument regarding subsection 13m ignores the constitutional requirement that coordination restrictions must be narrowly tailored to serve the specific compelling interest of preventing *quid pro quo* corruption.**

The Special Prosecutor entirely misses the import of Wis. Stat. § 11.26(13m) ("subsection 13m"). Campaign finance limits are the primary prophylactic measure for combating *quid pro quo* corruption. *McCutcheon v. Fed. Elections Comm'n,* -- U.S. --, 134 S. Ct. 1434, 1441, 1458 (2014). Yet in passing subsection 13m, the Wisconsin legislature demonstrated a lack of concern for such limits in the context of recall elections. Therefore, one is hard pressed to constitutionally justify a secondary prophylactic measure, such as the strict coordination rules the Special Prosecutor seeks to introduce, when the legislature has already made a contrary determination.

---

[2] Unnamed Movant No. 1 adopts the reply briefs of the other Unnamed Movants and specifically addresses the following issues.

### A. Wisconsin law permits almost unlimited contributions to recall candidates.

As the Special Prosecutor surely must concede, the coordination restrictions he seeks to impose involve infringement of First Amendment rights. *See Barland II*, 751 F.3d at 836 ("[C]ampaign-finance laws operate in a core free-speech zone and *directly* target protected speech."). Thus, any coordination restriction must be narrowly tailored to serve the only constitutionally permissible compelling state interest—preventing *quid pro quo* corruption or its appearance. *McCutcheon*, 134 S. Ct. at 1441-42 (noting that campaign finance restrictions that pursue objectives other than *quid pro quo* corruption "impermissibly inject the Government into the debate over who should govern"); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153-54 (7th Cir. 2011) (other justifications for restricting political speech have been offered—including that of reducing the appearance of favoritism and undue political access or influence among others—but the Supreme Court has repudiated them all save *quid pro quo* corruption); *see also Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.").

Ignoring the constitutional mandate of narrowly tailoring any restriction, the Special Prosecutor contends that Chapter 11 broadly and heavily restricts coordination because otherwise, a candidate may receive the benefit of unlimited, unreported corporate contributions. SP 170-71. This contention is wrong for several reasons.

First, subsection 13m provides that a recall candidate may receive unlimited contributions from individuals, parties, and PACs during a significant period of time prior to the recall election. OB 24-27.

Second, during all elections, Wisconsin statutes provide that candidates may receive unlimited amounts of money from political parties, which in turn may receive unlimited individual contributions.[3]

Third, issue advocacy groups, including corporations, are permitted almost unlimited involvement in Wisconsin elections without subjecting themselves to reporting requirements. *See Barland II*, 751 F.3d at 815 ("The effect of [certain limiting language in the definition of 'political purposes' under Wis. Stat. § 11.01(16)] was to place issue advocacy—political ads and other communications that do *not* expressly

[3] *See* GAB, "G.A.B. Stops Enforcing Aggregate PAC Limits," Sept. 9, 2014, http://gab.wi.gov/node/3363 (site visited Mar. 9, 2015).

advocate the election or defeat of a clearly identified candidate—beyond the reach of the regulatory scheme.").

Fourth, the very coordination restrictions at issue were not even applied during the 2014 election, where a federal injunction prohibited the Milwaukee County District Attorney and the GAB from enforcing the exact theory set forth by the Special Prosecutor against the Unnamed Movants here.[4]

Beyond a general and repeated reference to "openness," the Special Prosecutor fails to explain how, in the context of a recall election, preventing *quid pro quo* corruption or its appearance is served by broad-based restrictions that marry the otherwise protected activities of an issue-advocacy group with otherwise protected activities of a candidate to create, in the eyes of the Special Prosecutor, hundreds of potential felonies.

In the end, the Supreme Court has unequivocally and repeatedly held that general statements regarding the necessity of "disclosure" and "preventing circumvention" do not suffice. *Cf. Buckley* 424 U.S. at

---

[4] *Citizens for Responsible Gov't Advocates, Inc. v. Barland*, No. 14-C-1222 (E.D. Wis. Oct. 14, 2014); Joint App. 396-402; SP 10. The Special Prosecutor acknowledges the existence of the injunction, but otherwise ignores the holding because he apparently does not like how the lawyer for the District Attorney and the GAB was selected. SP 10-11. In any event, it is remarkable that the Special Prosecutor continues to seek to criminally enforce statutory restrictions that had no effect during the last election.

81-82 ("disclosure requirement" must be narrowly tailored to the other government interests at stake); *McCutcheon*, 134 S. Ct. at 1452 (rejecting "anti-circumvention" as sufficient basis to for aggregate limits on contributions). If "openness" were enough, then all of the campaign finance restrictions at issue since *Buckley* would have been unassailable. Obviously that has not been the case.

### B. The Special Prosecutor's theory cannot be squared with the application of *McCutcheon* to a recall election.

In many ways, *McCutcheon* anticipates and rejects the very theory put forward by the Special Prosecutor—namely, that a candidate allegedly circumvents campaign finance disclosures by utilizing a closely-connected independent group. In *McCutcheon*, the issue before the Court was an aggregate limit on all campaign contributions by a single individual during a particular election cycle. 134 S. Ct. at 1442. In seeking to uphold the restriction, the government argued, and the lower court accepted, that the restriction was necessary because otherwise a contributor would circumvent contribution limits for a particular candidate by giving money to *specific* third-party committees which would then use the money "for coordinated expenditures" on behalf of the initial candidate, thereby

"allowing the single donor to circumvent the amount he may contribute to that candidate." *Id.* at 1443.

The Court held this rationale insufficient to uphold the restriction at issue. *Id.* at 1452. The Court began by explaining the general principle that:

> there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. . . . As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of *quid pro quo* corruption is generally applicable only to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder."

*Id.* (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 310 (2003)).

The Court then went through a series of hypotheticals mirroring the scenario described by the Special Prosecutor here, including instances where a rich donor gives a large sum of money ("$500,000") to any number of entities (including a single PAC) with the specific desire of "channeling massive amounts of money" to the benefit of the single preferred candidate. *Id.* at 1452-56.

Importantly, the Court noted that for purposes of analyzing the *quid pro quo* corruption element, the focus was not on whether the

candidate *actually benefitted* from the re-routed contribution, but rather whether, from "the *donor's* point of view," the restriction was necessary to prevent *the donor* from engaging in potential *quid pro quo* corruption through the circumvention efforts. *Id.* at 1454. Ultimately, the Court rejected the probative aspect of these scenarios because other, specific federal regulations adequately addressed attempts for a *donor* to "earmark" particular uses of his or her money. *Id.* at 1453.

Using *McCutcheon* as a backdrop for an analysis here, it becomes apparent that subsection 13(m) significantly undermines the Special Prosecutor's rationale that in a recall election, the Wisconsin legislature was concerned about schemes to circumvent contribution limits. Contribution limits are the primary "prophylactic measure" for preventing *quid pro quo* corruption, but the legislature imposed *no* such limits.

Thus, in analyzing any remaining corruption concerns, from the perspective of the intent of the *donor* (which *McCutcheon* requires), what undue favor or influence is curried by such a donor if he or she directs an unlimited donation to an unrestricted independent group, no matter how closely tied to the candidate, rather than simply donating the same amount of money directly to the control of the candidate committee? *McCutcheon* says the donor would do the latter, if undue

influence is what the donor wanted to accomplish. *McCutcheon* also says that as a result, any interest of the State in such a restriction does not justify the infringement of otherwise-protected First Amendment activity.

### C. Regardless of the remaining justification, the Special Prosecutor's construction fails because he misreads *Buckley* and Chapter 11 by ignoring the election context of a coordinated expenditure.

The Special Prosecutor reads *Buckley* backwards: he assumes there may be unreported campaign contributions *at any time*—based on interaction of a candidate committee and an independent group—regardless of whether an election is taking place. But *Buckley* (and Chapter 11) began its analysis of impermissible coordination with a focus on the *context* of the "expenditure" at issue. *Buckley*, 424 U.S. at 39-47 (coordination prohibition discussed in section titled, "The $1,000 Limitation On Expenditures 'Relative to a Clearly Identified Candidate'"); *see also* OB 16-18 (discussing Wis. Stat. § 11.06(7)).

In some instances, the coordination is *always* permissible. *See Clifton v. Fed. Election Comm'n*, 114 F.3d 1309, 1314 (1st Cir. 1997) ("It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives."). Indeed, elected officials interacting ("coordinating") with citizens is

often no different than actions designed to secure a vote in a coming election. *See id.* (finding limitations on oral contact with candidates "patently offensive to the First Amendment" because "it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office").

The two main cases relied upon by the Special Prosecutor reflect *Buckley*'s mandate of a context-driven analysis. In *Shays v. Federal Election Commission*, 414 F.3d 76, 99 (D.C. Cir. 2005), the court found that a proper interpretation of federal election law on coordinated expenditures "leav[es] space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign." And in *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999), the court found that "[a]n expressive coordinated expenditure is not fungible and its value to the candidate depends on the circumstances."[5]

[5] *See also* Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 Willamette L. Rev. 603, 627 n.106 (2013) ("Content restrictions recognize that those who speak on candidate elections will frequently wish to consult with officeholders, and speak publicly, on issues. The goal is to protect speakers from the chilling effect of FEC investigations by suggesting that certain types of speech will be defined as nonelectoral regardless of the level of consultation.").

It may well be that *actual campaign contributions* must be reported at all times.[6] But the Special Prosecutor's entire theory misses a step. From a constitutional and statutory framework of restricting coordination, a contribution cannot possibly arise until *after* the coordinated disbursement occurs, and a disbursement or expenditure, by definition, takes place only within the *context* of a specific candidacy in a specific election. In Wisconsin recall elections, that candidacy is a matter of constitutional and statutory right—and, in the specific case of the 2012 gubernatorial recall, Governor Walker's "candidacy" did not begin until April 9, 2012. OB 16-24.[7]

In the end, the Special Prosecutor simply ignores the requirement that any coordination restrictions on political speech must be narrowly tailored to prevent *quid pro quo* corruption to pass constitutional muster, and ignores the limits of the statutory language in Chapter 11. Far from respecting that constitutional mandate and acknowledging the subsection 13m legislative intent, the Special

---

[6] If Chapter 11 does contain such a requirement, it certainly is not found in § 11.01(1), as the Special Prosecutor contends. That section does not *create* obligations under Chapter 11, it simply notes that any *prior* obligation is not excused simply because an election has ended.

[7] By pointing out the Special Prosecutor's misreading of *Buckley*, Unnamed Movant No. 1 in no way concedes that the Wisconsin statutes at issue dictate that improper coordination results in a reportable campaign contribution or that the statutes are not unconstitutionally vague. *See* OB 51-55, 63-66; *see also* Opening Brief of Unnamed Movant No. 6 at 40-45.

Prosecutor improperly sweeps into his personal definition of coordination substantial amounts of protected conduct. He is wrong, and his argument must be rejected.

**Issue 8: The Special Prosecutor simply makes up a statutory definition of independence and grafts it on to the Wisconsin statutes, including provisions that permit coordinated fundraising.**

**A. The Special Prosecutor has made up his own standard or definition of "independence."**

The Special Prosecutor contends that some coordinated activity between a campaign committee and any third-party entity is legal and some is not. SP 180-82. He seems to suggest that the level of independence between a third party entity and a candidate is the line that demarcates proper and improper fundraising. But he fails to support his line-drawing with a statute, and he fails to explain how one is to determine when an independent group is "truly independent," instead seemingly appointing himself as the arbiter of right and wrong. There simply is no legal foundation underlying his position on fundraising.

First, the Special Prosecutor seems to concede that a candidate (individually or through an agent) and a third party may "consult" about the candidate's "plans, projects, or needs" without creating an expenditure that in turn creates a reportable contribution. SP 145-46

(quoting *Christian Coalition*, 52 F. Supp. 2d at 89). But at the same time, he contends that a specific candidate should not have participated in a conference call with a third-party group in December 2011 regarding "important" issues in the recall election, including "poll results." SP 67. Similarly, he suggests campaign agents should not interact with political parties regarding "strategy," even if the candidate is a member of that party. SP 69-70. Not even a room full of lawyers could determine when permissible discussions of "plans, projects and needs" end and impermissible discussions of "strategy" begin.[8]

At another point in his brief, he suggests the standards in *Christian Coalition* might be used to sort out the "independence" issue. With no citation to Wisconsin law, he claims: "A reportable transaction occurs when the expenditure resulted from such a substantial interaction between the candidate committee and the 'spender' such that the candidate committee and the 'spender' are considered to be partners or joint venturers." SP 180, 182. But again, the Special Prosecutor points to no statutory definition for what constitutes a

[8] *See* Merriam Webster Dictionary, http://www.merriam-webster.com/dictionary/strategy (definition of "strategy" includes "a careful plan" or "the skill of making or carrying out plans") (site visited Mar. 12, 2015).

"truly independent" independent group versus those defined under the statutes as simply "independent."[9]

The Special Prosecutor offers a circular definition that, in the context of fundraising, will always destroy independence. He contends that when a candidate actually "requests" that there be donations to a third-party, independence is destroyed. SP 180 ("A candidate committee that *requests* a third party entity to collect funds incurs a reportable contribution."). Again, there is no statutory text to support these pronouncements. And, in real life, such a proposed restriction would be absurd—all fundraising involves "requests" for money.

The Special Prosecutor also says that, if the third party fundraising provides a potential "benefit" to the candidate, then the fundraising is reportable. SP 180. "Benefit" is left unexplained. Of course, in all fundraising for others, whether political or otherwise, candidates "benefit" in multiple ways—generating goodwill, empowering allies, demonstrating support for common beliefs, etc. But again, the Special Prosecutor admits that some coordinated fundraising

[9] Only Wis. Stat. § 11.06(7) uses the word "independent," but it does so solely in the context of disbursements, not contributions. OB 36-39. Nor was "true" independence mentioned in the rejected Wis. Stat. § 11.382, which would have prohibited all candidate fundraising for third-party groups, including other political groups. OB 36-37.

is not illegal, so surely, even in his view, "benefit" must have some limitations.[10]

Perhaps most importantly to the Special Prosecutor, independence is lost when a campaign committee employs common vendors and other agents that have "dual roles" with other entities. SP 181. The Special Prosecutor invents a *per se* restriction that such joint activity transforms otherwise permissible conduct into impermissible conduct. But once again, the Special Prosecutor is creating a law that he thinks should exist, when in fact it does not.

*Nowhere* in Chapter 11 is there a prohibition on campaigns and other organizations employing overlapping staffers, vendors, or other agents.[11] Nor is there any affirmative statement that by doing so, independent activity or fundraising activity produces a reportable campaign contribution.

---

[10] Again, the Special Prosecutor fails to tie his proposed restriction to the goal of preventing *quid pro quo* corruption. If fundraising for a closely-connected third party is suspect, why not similar restrictions on the common political task of fundraising for other closely-allied candidates? Under the Special Prosecutor's rationale, if one candidate uses his or her reputation to raise money for another candidate, are not *donors* improperly signaled that favor is curried by donating as directed? If so, how should independence be judged between allied candidates or, for that matter, the party to which either may belong?

[11] Certainly in Wisconsin, where the number of applicable staffers and vendors is limited for both major parties, such a rule, if it existed, would unconstitutionally limit the ability of new candidates to hire such professionals.

The lack of statutory or regulatory restriction on such overlap in Wisconsin stands in stark contrast to those set forth in detail in federal counterparts. *See* 11 C.F.R. § 109.21. That section provides specific restrictions regarding when and how common vendors or former employees may be utilized without triggering a prohibited coordinated expenditure. For example, there is a 120-day dividing line for the conduct of both current and former employees and vendors—specific activity, such as paying for a communication or developing a media strategy, is permissible if beyond the 120-day period, but not before. *Id.* § 109.21(d)(4), (5). But even then, if the vendor or employee relied upon information that is otherwise publicly available, then impermissible conduct becomes permissible again, regardless of the 120 days. *Id.* Wisconsin, however, has chosen not to adopt such a provision.

Contrast as well how the Wisconsin legislature defined impermissible "associations" for fundraising by elected officials in their official capacities:

> "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member

> of his or her immediate family is an authorized representative or agent.

Wis. Stat. § 19.42(2). The definition is not left to subjective interpretation, but requires objective formal association or stock ownership.

The only regulation to which the Special Prosecutor points is Wis. Admin. Code GAB § 1.42 ("GAB § 1.42"). According to the Special Prosecutor, this provision, which the Special Prosecutor relegated to a footnote in front of Judge Peterson, provides "not an unreasonable means of interpreting what may or may not constitute 'independence' when it comes to non-express advocacy entities like [redacted]." SP 91.

Reliance on GAB § 1.42, however, creates significant additional constitutional infirmities. First, since the promulgation of GAB § 1.42, the United States Supreme Court has held that the First Amendment does not permit a *presumption* of coordination. *Colo. Republican*, 518 U.S. at 619. Second, GAB § 1.42 exceeds statutory authority and, unless interpreted through limiting principles that the Special Prosecutor rejects, creates a "trap[] for unwary independent groups and candidates alike." OB 45 (quoting *Barland II*, 751 F.3d at 843 n.26).

In the end, the Special Prosecutor has proffered a sort of "moving target" definition of independence which must be rejected, as it lacks foundation in Chapter 11, but instead is founded on the Special Prosecutor's own, subjective view of what Wisconsin should or should not allow.

### B. The Government Accountability Board has approved the fundraising that the Special Prosecutor now calls into question.

Despite relying on GAB § 1.42, the Special Prosecutor takes pains to distance himself from the 2005 GAB guidance that permitted the type of fundraising that he now seeks to restrict. SP 191-94. But even more recent GAB guidance is more specific and approves the exact same fundraising now questioned by the Special Prosecutor.

[redacted] *See* OB 53-54.

[redacted]

Considering that there is no difference between this approved fundraising and the fundraising that the Special Prosecutor now seeks to restrict—other than, perhaps, the Special Prosecutor's subjective view of "true independence"—Judge Peterson's decision approving coordinated fundraising should be upheld.

### C. Section 11.06(4)(d) does not address or prohibit coordinated fundraising.

The Special Prosecutor contends a candidate may fundraise for a "truly independent" organization, but that "there comes a point" when the fundraising interaction renders the organization "less than independent." SP at 188. Apparently, that "point" can be identified using Wis. Stat. § 11.06(4)(d). *Id.*

The Special Prosecutor has, in multiple instances below, already thoroughly briefed his coordinated fundraising theory: (a) in his response to Judge Peterson on the motions to quash; (b) in his memorandum to the Court of Appeals in support of his motion for

supervisory writ; and (c) in his response to this Court on the petitions to bypass. Yet, remarkably, the Special Prosecutor waited until his response brief before this Court to cite Wis. Stat. § 11.06(4)(d) *for the first time*. He also argues *for the first time* that this section draws a line between permissible and impermissible fundraising. He claims that when a third party "ceases to be independent" under § 11.06(4), then the candidate or elected official's fundraising for a third party is improper.

This argument obviously misses the mark in several ways.

First, § 11.06(4) is a disclosure or reporting requirement. It requires a candidate to report certain contributions, disbursements, or obligations made or incurred with the authorization, direction, or control of or otherwise by prearrangement with the candidate. But the statute's plain and unequivocal language does *not* require a candidate to report his fundraising efforts for third-party organizations.

Second, as conceded by the Special Prosecutor, § 11.06(4) was in existence well before 2006. Consequently, he is forced to simply ignore the fact the Wisconsin legislature in 2006 considered and rejected proposed legislation that would have restricted fundraising for third-party groups. And, he is forced to ignore that during consideration of that proposed legislation, the Legislative Reference Bureau—despite

the long-standing existence of § 11.06(4)—explicitly stated that no fundraising restriction existed at that time in Wisconsin. OB 36-37.

Third, the 2006 proposed legislation addressed directly whether and in what circumstances elected officials would be prohibited from fundraising for outside organizations.[12] In stark contrast, § 11.06(4)(d) says absolutely nothing about fundraising, soliciting money, etc.

Finally, as the John Doe Judge originally found, Chapter 11 plainly defines a contribution as money given for "political purposes," and "political purposes" requires express advocacy. Fundraising for a third-party organization does not, in and of itself, give rise to a "contribution" to the candidate or elected official, despite the Special Prosecutor's suggestion to the contrary.

**Issue 10: Judge Peterson correctly found that the evidence does not support a violation of Wisconsin law.**

**A. There is nothing in the record, nor can there be, that [redacted] ran issue ads for the benefit of [redacted].**

As set forth above, *Buckley* requires that the coordination inquiry begin with an examination of the actual disbursements at issue. Judge

[12] The proposed statute would have read: "No individual who holds a state or local office may solicit any money or other thing of value or act in concert with any other person to solicit any money or other thing of value for or on behalf of any committee that is required to file an oath under s. 11.06(7), any organization that makes a noncandidate election expenditure; or any organization that is subject to a reporting requirement under section 527 of the Internal Revenue Code." Joint App. 435.

Peterson followed this course and found no violation of Wisconsin law. The Special Prosecutor, however, contends that Judge Peterson was mistaken and that [redacted] was co-opted for the benefit of a campaign committee.

The Special Prosecutor takes no account whatsoever of the actual ads (disbursements) that [redacted] ran during the gubernatorial recall timeframe or that resulted from the fundraising he questions. Those ads are a matter of public record and were as follows:

| DATE | SPONSOR | AD TITLE |
|---|---|---|
| Feb. 2, 2012 | [redacted] | Mining (Radio)[13] |
| Feb. 21, 2012 | [redacted] | Gamble (Radio)[14] |
| Mar. 9, 2012 | [redacted] | Got Your Number[15] |
| Mar. 13, 2012 | [redacted] | Broken Promises (Radio)[16] |
| Mar. 14, 2012 | [redacted] | Job Killers[17] |

The Special Prosecutor fails to explain how ads regarding mining, gambling, and the actions of specific state senators resulted in a

[13] http://wispolitics.com/1006/Mining_Radio_Meeting_Music.mp3.

[14] http://wispolitics.com/1006/Gamble.mp3.

[15] http://wispolitics.com/1006/120309HolperinMine.mov.

[16] http://wispolitics.com/1006/Carpenter_English.mp3.

[17] http://wispolitics.com/1006/King_Job_Killer_REV_2.mov.

reportable "benefit" to a campaign having little or nothing to do with any of these issues.

### B. Nothing in the Wisconsin statutes prohibits a candidate from having detailed involvement with political parties, issue advocacy groups, or express advocacy PACs, provided that specific "disbursements" at issue are not coordinated for the benefit of the candidate's specific election.

The Special Prosecutor contends that [redacted] essentially became a PAC of [redacted]. But even assuming that were the case (it is not), nothing in Wisconsin law prohibits individuals, including candidates, from having detailed involvement with political parties,[18] other campaigns, issue advocacy groups, and/or PACs, provided that the interaction does not violate specific, clearly understandable provisions of Wisconsin statutes. The Special Prosecutor may not like it, but single-candidate PACs, including those with overlapping staff/vendors, are constitutionally permissible and have proliferated across the country.[19]

---

[18] Although he makes no mention of such conduct now, during proceedings before Judge Peterson, the Special Prosecutor based his investigation, in part, on claims that [redacted]. RD 153 at 4-5.

[19] *See* Smith, *supra*, at 630 ("These single-candidate Super PACs have, not surprisingly, drawn their support and often their staff from various associations of the candidate.").

According to the nonpartisan Center for Responsive Politics, in 2012 there were at least 103 single-candidate super PACs, raising more than $300 million and spending $268 million.[20] All generally would have failed the "true independence" test that the Special Prosecutor seeks to apply. *See also* OB 51-54. Even Russ Feingold, the Wisconsin politician most associated with campaign finance restrictions, continues to have a PAC—one seemingly dedicated to alleging that Governor Walker is a terrible governor.[21]

Finally, as set forth in detail previously, it is entirely permissible under Wisconsin law and the First Amendment for a candidate to coordinate with third-party groups for the benefit of *other* candidates. OB 16-17.

### C. The [redacted] interactions were constitutionally permissible.

In a startling bait-and-switch, the Special Prosecutor fills 65 pages with allegations regarding [redacted], but then dedicates less than two pages to the "express advocacy at

---

[20] Center for Responsive Politics, "2012 Outside Spending, by Single-Candidate Super PAC," https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C (site visited Mar. 6, 2015).

[21] Progressives United, http://www.progressivesunited.org/ (site visited Mar. 6, 2015).

issue" that he claims was ignored by Judge Peterson—namely, ads by the [redacted]. SP 69-70. The [redacted] issue is not before this Court, but the [redacted] material was squarely presented to Judge Peterson. RD 153 at 4-5.

As a member of the [redacted], including those members of [redacted] campaign committee, had an absolute constitutional right to interact with a political organization of which [redacted] was a member, and improper coordination cannot be presumed by such contacts. *Colo. Republican*, 518 U.S. at 619; *see also supra* Issue 8A at 14 (questioning special prosecutor's purported distinction between discussing permissible "plans" and impermissible "strategy"); OB 61 (coordinated fundraising and exchange of polling data and strategy are permissible interactions). The Special Prosecutor's detailed recitation of purported facts must be read against this backdrop.

The ultimate question before this Court is whether Judge Peterson violated a plain legal duty in determining that Wisconsin campaign finance laws were not violated. His determinations were supported by a plain reading of the statutes and by a proper understanding of First Amendment rights under the United States Constitution. Therefore, his decision should not be disturbed.

## CONCLUSION

For all of these reasons, and for all of the reasons adopted by reference, Unnamed Movant No. 1 respectfully requests that Judge Peterson's decision be upheld, and the Special Prosecutor's petition be dismissed.

Respectfully submitted this 16th day of March, 2015.

Steven M. Biskupic, SBN 1018217
Michelle L. Jacobs, SBN 1021706
Biskupic & Jacobs, S.C.
1045 W. Glen Oaks Lane, Suite 106
Mequon, WI 53092
(262) 241-0033
sbiskupic@biskupicjacobs.com
mjacobs@biskupicjacobs.com

*Counsel for Unnamed Movant No. 1*

**CERTIFICATION - WIS. STAT. § 809.19(8)(d)**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c)—as amended by this Court's December 16, 2014, order—for a brief produced with a proportional serif font. The length of the portions of this brief subject to the word-count requirement is 5,435 words.

Dated this 16th day of March, 2015.

Michelle L. Jacobs, SBN 1021706
Biskupic & Jacobs, S.C.
1045 W. Glen Oaks Lane, Suite 106
Mequon, WI 53092
(262) 241-0033
mjacobs@biskupicjacobs.com

*Counsel for Unnamed Movant No. 1*

**CERTIFICATION - WIS. STAT. § 809.19(12)(f)**

I certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12)(f), as modified by this Court's January 13, 2015, order. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date, and that a copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 16th day of March, 2015.

Michelle L. Jacobs, SBN 1021706
Biskupic & Jacobs, S.C.
1045 W. Glen Oaks Lane, Suite 106
Mequon, WI 53092
(262) 241-0033
mjacobs@biskupicjacobs.com

*Counsel for Unnamed Movant No. 1*

## CERTIFICATION - FILING UNDER SEAL AND SERVICE

I certify that, pursuant to this Court's December 16, 2014, order, the original and twenty-two (22) copies of this original brief, as well as seventeen (17) copies of this redacted brief, are being filed under seal pending further order of the Court.

Three (3) copies of the original brief, as well as two (2) copies of the redacted brief, are being served upon counsel of record via first-class mail, or mail at least as expeditious.

Dated this 16th day of March, 2015.

Michelle L. Jacobs, SBN 1021706
Biskupic & Jacobs, S.C.
1045 W. Glen Oaks Lane, Suite 106
Mequon, WI 53092
(262) 241-0033
mjacobs@biskupicjacobs.com

*Counsel for Unnamed Movant No. 1*