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STATE OF WISCONSIN
SUPREME COURT
Case Nos. 2013AP2504-2508-W,
2014AP296-OA, 2014AP417-421-W

State of Wisconsin ex rel.,
Two Unnamed Petitioners,

Petitioners,

v. Case No. 2014AP296-OA

The Hon. Gregory A. Peterson,
John Doe Judge, et al.,

Respondents.

State of Wisconsin ex rel.,
Francis D. Schmitz,

Petitioner,

v. Case No. 2014AP417-421-W

The Hon. Gregory A. Peterson,
John Doe Judge,

Respondent.

State of Wisconsin ex rel.,
Three Unnamed Petitioners,

Petitioners,

v. Case No. 2013AP2504-2508-W

The Hon. Gregory A. Peterson,
John Doe Judge, et al.,

Respondents.

BRIEF OF PETITIONER, UNNAMED MOVANT #6,

[redacted]

Michael J. Bresnick
Julie O'Sullivan
Edward Meyers
Philip O'Beirne
Margaret Nettesheim
Stein Mitchell Muse Cipollone & Beato LLP
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777
mbresnick@steinmitchell.com

Dennis P. Coffey
Mawicke & Goisman, S.C.
1509 N. Prospect Avenue
Milwaukee, WI 53202-2323
(414) 224-0600

Dated: January 30, 2015

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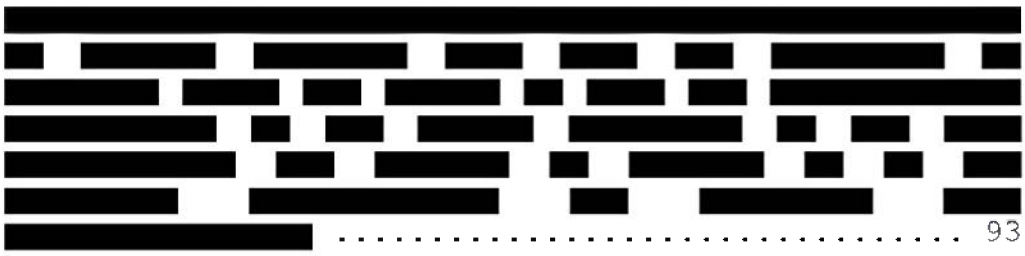
G.  93

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ISSUES PRESENTED

In the Court's December 16, 2014, Order, it raised 14 Issues for the parties to address. In the Brief below, Movant specifically addresses Issues 7 (including its subparts), 9, and 11 through 14. With respect to Issue 10, [redacted]. While Movant does not have sufficient access to the John Doe record to respond to this Issue in his principal brief, Movant reserves the right to respond to the Special Prosecutor's arguments in his reply brief. As stated within, Movant adopts the arguments of other parties with respect to the remaining Issues to be decided.

ISSUE #7.

Whether the statutory definitions of "contributions," "disbursements," and "political purposes" in Wis. Stat. §§ 11.01(6), (7) and (16) are limited to contributions or expenditures for express advocacy or whether they encompass the conduct of coordination between a candidate or a campaign committee and an independent organization that engages in issue advocacy. If they extend to issue advocacy coordination, what constitutes prohibited "coordination?"

Below, the John Doe judge held that [redacted]

[redacted].

ISSUE #7a.

Whether Wis. Stat. § 11.10(4) and § 11.06(4)(d) apply to any activity other than contributions or disbursements that are made for political purposes under Wis. Stat. § 11.01(16) by

(i). The candidate's campaign committee; or

(ii). An independent political committee.

Below, the John Doe judge did not address Wis. Stat. §§ 11.10(4) or 11.06(4)(d).

ISSUE #7b.

Whether Wis. Stat. § 11.10(4) operates to transform an independent organization engaged in issue advocacy into a "subcommittee" of a candidate's campaign committee if the independent advocacy organization has coordinated its issue advocacy with the candidate or the candidate's campaign committee.

Below, the John Doe judge did not address this issue.

ISSUE #7c.

Whether the campaign finance reporting requirements in Wis Stat. ch. 11 apply to contributions or disbursements that are not made for political purposes, as defined by Wis. Stat. § 11.01(16).

Below, the John Doe judge held that [redacted].

ISSUE #7d.

Whether Wisconsin Coalition for Voter Participation, Inc. v. State Elections Bd., 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App.), pet. for rev. denied, 231 Wis. 2d 377, 607 N.W.2d 293 (1999), has application to the proceedings pending before this Court.

Below, the John Doe judge held that [redacted].

ISSUE #9.

Whether a criminal prosecution may, consistent with due process, be founded on a theory that coordinated issue advocacy constitutes a regulated "contribution" under Wis. Stat. ch. 11.

Below, the John Doe judge did not address this Issue explicitly, [redacted].

ISSUE #10.

Whether the records in the John Doe proceedings provide a reasonable belief that Wisconsin law was violated by a campaign committee's coordination with independent advocacy organizations that engaged in express advocacy speech. If so, which records support such a reasonable belief.

Below, the John Doe judge found, [redacted].

ISSUE #11.

If Wis. Stat. ch. 11 prohibits a candidate or a candidate's campaign committee from engaging in "coordination" with an independent advocacy organization that engages solely in issue advocacy, whether such prohibition violates the free speech provisions of the First Amendment to the United States Constitution and/or Article I, Section 3 of the Wisconsin Constitution.

Below, the John Doe judge did not address this Issue.

ISSUE #12.

Whether pursuant to Wis. Stat. ch. 11, a criminal prosecution may, consistent with due process, be founded on an allegation that a candidate or a candidate committee "coordinated" with an independent advocacy organization's issue advocacy.

Below, the John Doe judge did not address this Issue explicitly, [redacted].

ISSUE #13.

Whether the term "for political purposes" in Wis. Stat. § 11.01(16) is unconstitutionally vague unless it is limited to express advocacy to elect or defeat a clearly identified candidate.

Below, the John Doe judge suggested that [redacted].

ISSUE #14.

Whether the affidavits underlying the warrants issued in the John Doe proceedings provided probable cause to believe that evidence of a criminal violation of Wis. Stat. §§ 11.27, 11.26(2)(a), 11.61(1), 939.31, and 939.05 would be found in the private dwellings and offices of the two individuals whose dwellings and offices were searched and from which their property was seized.

Below, the John Doe judge held that [redacted].

[redacted].

STATEMENT ON ORAL ARGUMENT

Given the statewide importance of the issues presented herein, Unnamed Movant #6 requests that this Court hear oral argument and publish its decision, consistent with the secrecy order.

STATEMENT OF THE CASE

Unnamed Movants #6 and #7 ("Movants")[1] are among the principal individual targets of a criminal John Doe investigation in Wisconsin that began in 2012 and spurred this litigation. They are strategic communications consultants to non-profit groups that engage in issue advocacy. Movants provide a wide array of advice on how to find, communicate with, and persuade voters on vital political, economic, and other public policy issues of the day. [redacted]

Led by the Special Prosecutor, [redacted], and assisted by the [redacted] County District Attorney, his staff, and the District Attorney's Offices in four other counties, the investigation concerns alleged violations of Wisconsin's campaign finance law. *See* Joint Appendix filed by Movants at 54, 130-33 ("App."). Movants and certain 501(c)(4) organizations with whom they were generally in political agreement (the "targeted entities")[2] wished, during the 2011-

[1] The designations "Unnamed Movant # 6" and "Unnamed Movant #7" derive from the Special Prosecutor's supervisory writ proceeding, discussed *infra*. *See State ex rel. Francis D. Schmitz v. Hon. Gregory A. Peterson, John Doe Judge*, Case Nos. 2014AP417W-21W (Ct. App. Feb. 21, 2014).

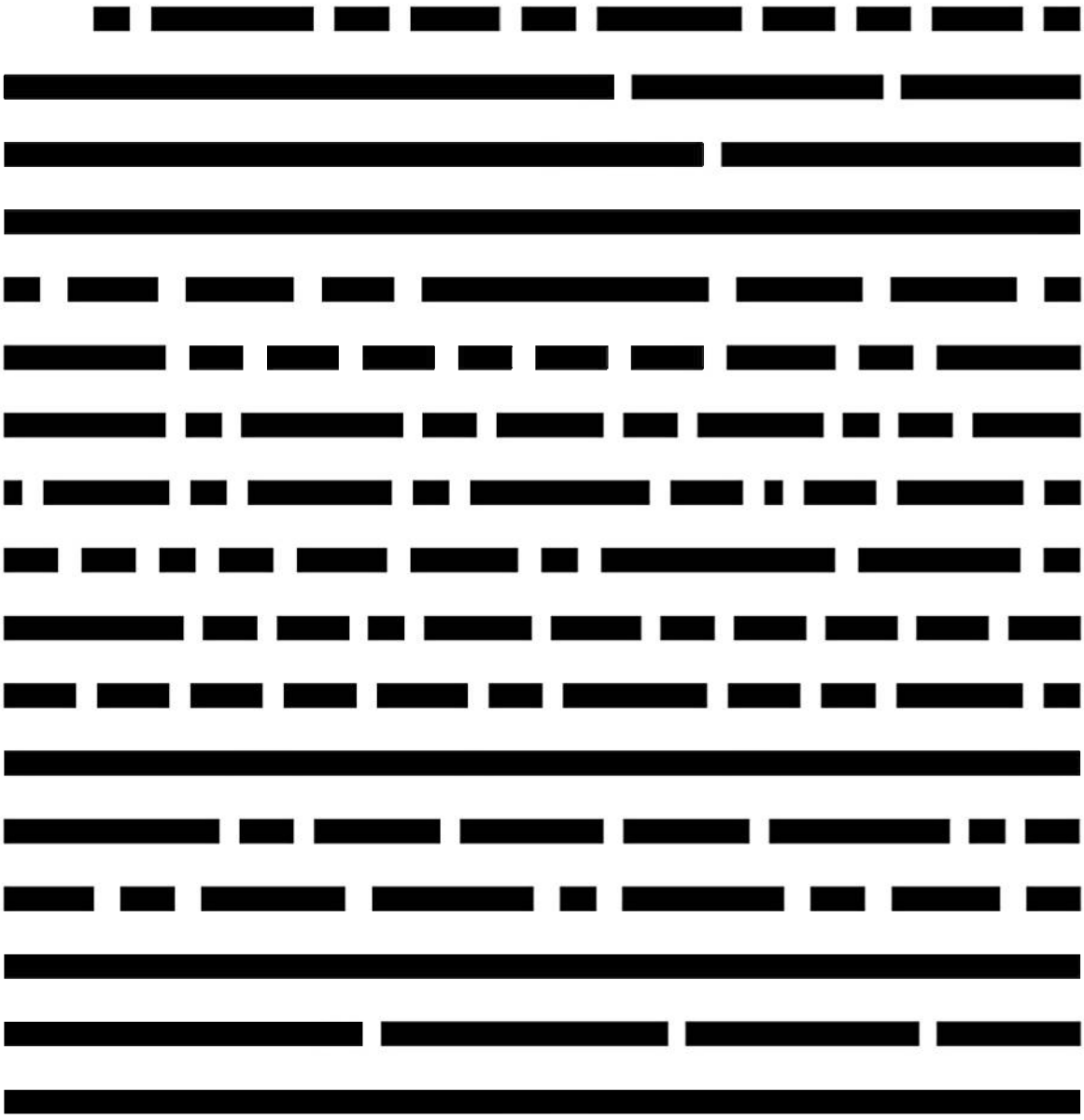
[redacted]

12 Wisconsin senate and gubernatorial recall elections, to contribute to the public debate about issues of central concern to them and to many citizens of Wisconsin. In so doing, they did not engage in express advocacy: [redacted], the Movants and the targeted entities engaged only in issue advocacy, that is, communications that do not unambiguously exhort voters to elect or defeat a clearly identified candidate but rather attempt to persuade citizens on the merits of important public policy questions. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 465-72 (2007) ("*WRTL*") (functional equivalent of express advocacy is a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate").

According to the prosecutors' original unsupported theory of criminal liability, by engaging in undefined "coordination" with candidates and others before and during recall elections periods, Movants' and the targeted entities' expenditures for issue advocacy were converted into "contributions," and incorporated entities are barred from making contributions under Wisconsin campaign finance law, codified in Wis. Stat. Chapter 11. The Special Prosecutor has

[redacted]

lately adopted an even more radical theory: that autonomous, long-standing, federally-recognized issue advocacy organizations that are not regulated "committees" and in fact are exempted from regulation by the plain terms of Chapter 11 have, by virtue of alleged coordination with candidates, become subcommittees of those candidates' personal campaign committees.



[redacted][3]

[redacted][4]

[3] No candidate was required to file a campaign finance report regarding the recall elections until July 2011. *See* Wisconsin Government Accountability Board, "Campaign Finance Reports: Senate Dists. 2, 8, 10, 14, 18, 32 (Republican Incumbents)," *available at* http://gab.wi.gov/elections-voting/2011/recall/july-12; Wisconsin Government Accountability Board, "Campaign Finance Reports: Senate Dists. 12, 22, 30 (Democratic Incumbents)," http://gab.wi.gov/elections-voting/2011/recall/july-19. Indeed, under Wisconsin election law the recall efforts could not begin until the filing of registration forms with the GAB by the recall committees for each race. Wisconsin Government Accountability Board, "Recall of Congressional, County and State Officials," at 3 (June 2009), http://gab.wi.gov/sites/default/files/publication/\65/recall_manual_for_congressiona_county_and_state__82919.pdf. The first recall committee to file and begin seeking petition signatures did not file its Form GAB-1 until February 22, 2011. "Jim Holperin Recall Committee," http://gab.wi.gov/node/1657 ("GAB-1 Filing Date: February 22, 2011"). Furthermore, the senators facing recall in 2012 and the Governor were not required to file campaign finance reports regarding their recall elections until April 30, 2012. *See* Wisconsin Government Accountability Board, "Campaign Finance Checklist: Candidate Committees Special Election Governor, Lt. Governor & Senate Districts 13, 21, 23, and 29," http://gab.wi.gov/sites/default/files/page/campaign_finance_checklist_candidate_committees__16123.pdf. Therefore, the warrants' authorization for the seizure of documents from 2009 and 2010 did not cover a reasonable period of time relative to even the alleged misconduct of filing false campaign finance reports regarding the recall elections in 2011 and 2012.

[4] The last campaign finance reports regarding the 2011 Senate Recall campaigns were due in September 2011. *See* Wisconsin Government Accountability Board, "Campaign Finance Reports: Senate Dists. 2, 8, 10, 14, 18, 32 (Republican Incumbents)," http://gab.wi.gov/elections-voting/2011/recall/july-12; Wisconsin Government Accountability Board, "Campaign Finance Reports: Senate Dists. 12, 22, 30 (Democratic Incumbents)," http://gab.wi.gov/elections-voting/2011/recall/july-19. The final reports for the 2012 recall candidates were due July 20, 2012. *See* Wisconsin Government Accountability Board, "Campaign Finance Checklist: Candidate Committees Special Election Governor, Lt. Governor & Senate Districts 13, 21, 23, and 29," http://gab.wi.gov/sites/default/files/page/campaign_finance_check

[redacted]

list_candidate_committees__16123.pdf. Because the warrants extended to materials created long after the final campaign finance reports were due, they cannot in any way be said to be limited in scope to the relevant time periods as required under Wisconsin law and the federal and state Constitutions.

[5] [redacted]

[redacted]

[redacted]

[redacted]

Before the Prosecutor filed his petition for a supervisory writ, however, Movants filed a petition for an original action with this Court on February 7, 2014, seeking clarification of a number of issues relating to the scope of Wisconsin's campaign finance laws. *See State ex rel. Two Unnamed Petitioners v. Hon. Gregory A. Peterson, John Doe Judge, Francis D. Schmitz, Special Prosecutor*, 2014AP296-OA (Wis. Feb. 7, 2014). On February 21, 2014, the Special Prosecutor filed his petition for supervisory writs of prohibition and mandamus in the state court of appeals, challenging the John Doe judge's order [redacted]. *See State ex rel. Francis D. Schmitz v. Hon. Gregory A. Peterson, John Doe Judge*, Case Nos. 2014AP417W-21W (Ct. App. Feb. 21, 2014). And on April 9, 2014, the Movants filed with this Court a petition to stay or, alternatively, bypass the prosecutor's petition for a supervisory writ.

[redacted]

[redacted]

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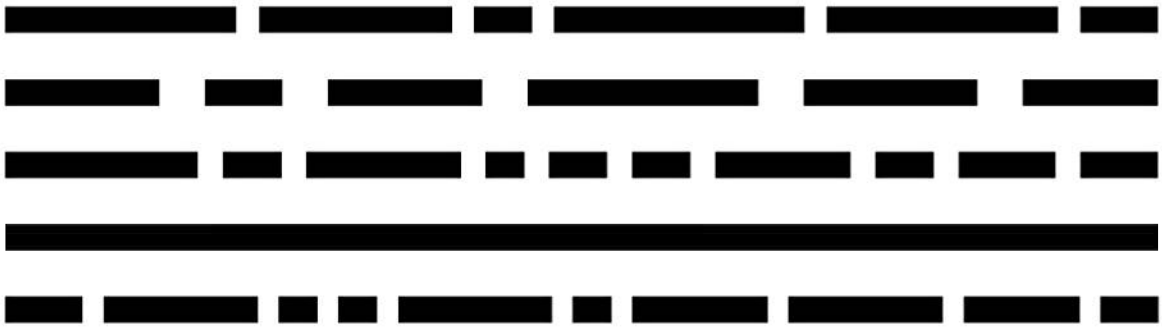
[7] [redacted] may be responsive to a question raised in Chief Justice Abrahamson's concurrence to this Court's order granting the Movants' petition. *See* Dec. 16, 2014, Order, ¶4 (Abrahamson, C.J., concurring). Movants believe, however, that [redacted] was correct under this Court's caselaw. "[A] John Doe proceeding is a criminal investigative tool," and thus the statute governing subpoenas for documents in Wisconsin Criminal Procedure, Wis. Stat. § 968.135, applies to the issuance of subpoenas for documents in John Doe proceedings, as does its requirement that the government show probable cause before the subpoena will issue. *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 277 Wis.2d 75, 77, 689 N.W.2d 908, 909 (2004). Because the purpose of a John Doe proceeding is to find probable cause of a crime, however, the probable cause standard for issuance of a John Doe subpoena is more forgiving than that applied in other contexts. To obtain a John Doe subpoena for data, the government must make a showing first "that the investigation is for a lawfully authorized purpose," and second that "the documents requested are relevant to the inquiry." *Id.* at 77-78, 689 N.W.2d at 909 (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946)). Further, to meet constitutional standards, the subpoena must, *inter alia*, "limit requested data to the subject matter described in the John Doe petition," "specif[y] the data requested with reasonable particularity," and "cover[] a reasonable period of time." *Id.* at 78, 689 N.W.2d at 909-10. For the reasons discussed within, none of these criteria — whether statutory or constitutional — are satisfied in this case. In any event, the Judge was clear that the subpoenas should have been quashed even if probable cause were not the correct standard.

As to the Chief Justice's query regarding the probable cause standard applicable to John Doe warrants, the U.S. Supreme Court has held that a higher standard of probable cause need not be applied where a warrant would threaten First Amendment values, *see New York v. P.J. Video*, 475 U.S. 868 (1986), but it also requires



This finding of historical fact is reviewed under a deferential standard, reversible only if clearly erroneous, while the application of constitutional law to the facts is subject to independent scrutiny in this Court. *State v. Robinson*, 327 Wis.2d 302, 318, 786 N.W.2d 463, 471 (2010). And Judge Peterson's conclusion regarding the scope and meaning of Chapter 11, or the GAB's regulations, is a question of law that is subject to this Court's *de novo* review. *See, e.g., Stuart v. Weisflog's Showroom Gallery*, Inc., 308 Wis.2d 103, 113-15, 746 N.W.2d 762, 767-68 (2008); *Seider v. O'Connell*, 236 Wis.2d 211, 225-226, 612 N.W.2d 659, 666 (2000).

On December 16, 2014, this Court granted Movants' petition for an original action (Case No.2014AP296-OA), assuming jurisdiction over that action, as well as petitions seeking review of a court of appeal's order of January 30, 2014 (Case Nos. 2013AP2504-2508-W), and multiple petitions

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that the constitutional particularization requirement be applied with "scrupulous exactitude" in such cases. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). As developed in *infra* section II(G), the warrants in this case fail to meet constitutional requirements.

for bypass of the court of appeals in the supervisory writ proceeding filed in the court of appeals by the Special Prosecutor (Case Nos. 2014AP417-421-W).

Cognizant of the burdens imposed on this Court by the number of parties and issues presented, Movant #6 adopts: the brief of Movant #7 with respect to issues 1 through 5 and issue 14 articulated in this Court's order of December 16, 2014; and the brief of [redacted] with respect to issues 6 and 8. Movant #6 will address in this brief the following issues: 7, 9, 11, 12, 13, and 14. With respect to issue 10, Movant notes that [redacted] that there was no probable cause to issue the search warrants, as discussed below. Movant will respond to any additional arguments offered by the prosecutor in the reply brief.

I. INTRODUCTION

This criminal John Doe investigation into alleged campaign finance violations finds no authorization in a hopelessly confusing statute and purports to apply standards invisible to law-abiding citizens. Indeed, it is an unfortunate but undeniable reality that, as the Seventh Circuit recently noted in frustration, Wisconsin's campaign finance system "is labyrinthian and difficult to decipher …" *Wisconsin Right to Life, Inc. v. Barland*, 751 F.2d 804, 808

(7th Cir. 2014) ("*Barland II*"). Even Kevin J. Kennedy, Director and General Counsel of the Wisconsin Government Accountability Board ("GAB"), recently conceded that "the language of the statutes is convoluted and difficult for the average person to read and understand." App. at 71. Thus, at the GAB's January 13, 2015, Board meeting, Mr. Kennedy proposed a GAB resolution that would "urge[] the Legislature to undertake a comprehensive review and revision of [Chapter 11] …" *Id.*

Yet during the years-long existence of this investigation into core First Amendment-protected conduct, Movants' privacy has been irreparably invaded [redacted] and their reputations and livelihoods have been seriously compromised. The root of their misfortune — indeed, the foundation of the prosecutor's investigation — is the prosecutor's insistence that Wis. Stat. ch. 11, Wisconsin's campaign finance system, regulates constitutionally-protected issue advocacy. As this Brief demonstrates below, opinions of the United States Supreme Court and this Court, Chapter 11's plain text and legislative history, an opinion from the Wisconsin Attorney General, and advisory opinions from the GAB all reveal that issue advocacy is purposefully omitted from Chapter 11's reach.

In fact, as this Court will see, the legislative history of Chapter 11 demonstrates that the Wisconsin Legislature acted against the backdrop of *Buckley v. Valeo*, 424 U.S. 1 (1976), discussed *infra*, to limit campaign finance regulation to express advocacy. This Court definitively adopted this construction of Chapter 11 in *Elections Bd. of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999) ("*WMC*").

Moreover, Chapter 11 simply does not regulate coordinated advocacy, whether issue or express advocacy, as a contribution. A thorough reading of Chapter 11 from beginning to end reveals a complete absence of any provision defining coordinated advocacy of any kind as a contribution. The Wisconsin Legislature's decision not to include such a definition – which has clearly and explicitly been included in other jurisdictions' campaign finance statutes with which the Legislature was familiar – conclusively demonstrates the Legislature's decision not to regulate coordinated advocacy as a "contribution." And, in any event, where coordination is regulated in Chapter 11 – through disclosure requirements rather than contribution limits – it is only with respect to express advocacy.

Chapter 11's regulation of "coordination," moreover, does not provide the public with the clarity required under

the Due Process Clause as to what is permitted and what is proscribed. The Attorney General, in declining to become involved in this investigation, explained that Wisconsin's "coordination" campaign finance law "is not a model of statutory precision or consistency." App. at 55. Further, the GAB's predecessor, the State Elections board, conceded in an "advisory" opinion subsequently adopted by the GAB – and frequently cited by the Special Prosecutor – that what constitutes regulated "coordination" is undefined by statute or judicial decision and is functionally a "slippery slope"; ultimately, it could only opine as to what the relevant standards "probably" were. App. at 98. In 2005, the GAB reiterated its conclusion that the term "'coordinated expenditures' is not found anywhere in Wisconsin's statutes, and is not defined and only minimally discussed in Wisconsin case law." App. at 102-03. This 2005 advisory opinion concluded as a result that "any opinion about coordinated expenditures is principally conjectural because of the limited precedent. … Without it, there is no clear direction …" App. at 103.

The GAB's assessment is both refreshingly frank and legally fatal to this investigation. It is beyond dispute that what Chapter 11 regulates is core First Amendment speech and association, and thus that the normal requisites of due

process - sufficient notice to prevent the chilling of constitutionally-privileged activity and sufficient definition to avoid the possibility of arbitrary enforcement – must be applied with exacting precision. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 41 (1976). It is also clear that Chapter 11 is a classic form of *malum prohibitum* (wrong because prohibited), not a *malum in se* (wrong because evil), regulation. No amount of moral intuition can tell individuals where the line lies between acts that are essential to a vibrant democracy and acts that may subject one to a prison term for campaign finance violations. Where the state seeks to put someone in jail for failing to hew to a line founded only in ill-defined public policy preferences and not morality, and where the line, if not scrupulously drawn, will cause irreparable constitutional injury, it is the state's due process obligation to create explicit, crystal clear, and rigorously applied standards to guide the political conduct of its citizens. Chapter 11 utterly fails to meet this standard if, as the Special Prosecutor demands, a criminal penalty is to be affixed as a result of the targeted entities' alleged coordination of issue advocacy with candidates.

Finally, it would be a perversion of the plain language and intent of Chapter 11 – as well as a radical and dangerous precedent – to accept the Special Prosecutor's desperate

argument that autonomous and longstanding 501(c) issue advocacy groups, which are expressly excluded from regulation under Chapter 11, have somehow become highly regulated personal campaign subcommittees by virtue of alleged coordination. And, in any event, it would be unconstitutional under the First Amendment to the U.S. Constitution and Article I, Sections 3 and 4 of the Wisconsin Constitution, to construe coordinated issue advocacy as a reportable contribution subject to campaign finance limitations.

As the U.S. Supreme Court exclaimed in *WRTL*, in granting an as-applied challenge to the constitutionality of a federal regulation purporting to restrict issue ads, "[e]nough is enough." 551 U.S. at 478. This constitutionally unsustainable assault on Movants' core First Amendment rights has done more than simply chill Movants' – and a multitude of others' – exercise of fundamental rights to free speech, association, and petition; it has acted as an arctic blast, freezing them into a state of paralysis.

II. ARGUMENT

Chapter 11's definitions of "contribution" and "disbursement" are the ultimate touchstones for determining what is regulated under Wisconsin campaign finance law. *See Barland II*, 751 F.3d at 815. The Legislature used these terms explicitly and consistently to define the reach of regulation.

Thus, for example, "committee" status under the statute "triggers substantial and continuous organizational, registration, and recordkeeping requirements." *Id.* at 815. But to be a regulated "committee" or "political committee" (or a "group" or "political group"), a group of persons or an entity must, at a minimum, make or accept "contributions" or make "disbursements." Wis. Stat. §11.01(4), (10).

The meaning and application of "contribution" and "disbursement" — and other provisions of Chapter 11 — are limited by "the all-important phrase": "made for political purposes." *Barland II*, 751 F.3d at 815. The Wisconsin Legislature defined a "contribution," in relevant part, as a "gift, subscription, loan, advance, or deposit of money or anything of value … *made for political purposes*." Wis. Stat. §11.01(6)(a)(1)(emphasis added); *see also id.* at §11.01(6)(b)(7). Chapter 11 defines a "disbursement," in relevant part, as "[a] purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value … *made for political purposes*. *Id.* at §11.01(7)(a)(1) (emphasis added). In short, for an expenditure of funds to be considered a "disbursement" or a "contribution" regulated by Wisconsin campaign finance law - and subject to Chapter 11's reporting requirements and contribution limits - such expenditure must be made "for political purposes." "Chapter 11 is structured

so that political-committee status is determined indirectly, by the making or acceptance of 'contributions' or the making of 'disbursements,'" which ultimately is determined by the phrase "for political purposes." *Barland II*, 751 F.2d at 812.

One critical question before this Court, then, is whether the phrase "*for political purposes*" is limited to *express advocacy*, as this Court, the Wisconsin Attorney General, the GAB (at least episodically), and the Seventh Circuit have concluded, as Due Process and the First Amendment require, and as the legislative history demonstrates, or whether it extends as well to *coordinated issue advocacy*, as the Special Prosecutor would like to believe. As will be discussed *infra* in sections II(A), (B), (D), and (E), the answer to this query is self-evident: Chapter 11 does not regulate issue advocacy at all. A second and even more fundamental question, explored *infra* in section II(C), is whether Chapter 11 regulates as a "contribution" coordinated advocacy of any sort. Again, the answer is obvious based on the plain language of the statute: The Wisconsin Legislature has not provided that coordinated advocacy – issue *or* express – constitutes a regulated "contribution." Nor can the Special Prosecutor succeed in his desperate attempt to recast, through alleged coordinated advocacy, autonomous 501(c) groups exempt from Chapter 11 regulation into campaign

subcommittees. Finally, in Section II(F), *infra*, Movant demonstrates that if Chapter 11 is read to regulate coordinated issue advocacy, that regulation would violate Due Process, as well as First Amendment, guarantees.[8]

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[8] Article I, §8 of the Wisconsin Constitution is "virtually identical to its federal counterpart, the Fifth Amendment to the United States Constitution." *State v. Knapp*, 285 Wis.2d 86, 116, 700 N.W.2d 899, 914-15 (2005). The text of Art. I, section 11, of the Wisconsin Constitution also tracks the federal Fourth Amendment. *See State v. DeSmidt*, 155 Wis.2d 119, 130, 454 N.W.2d 780, 784 (1990). Where there is a coincidence in language and no difference in intent is discernible, this Court normally has construed the state's constitution consistent with its federal counterpart. *See, e.g., State v. Jennings*, 252 Wis.2d 228, 247, 647 N.W.2d 142, 151 (2002) (quoting *State v. Agnello*, 226 Wis.2d 164, 180, 593 N.W.2d 427 (1999)); *DeSmidt*, 155 Wis.2d at 130, 454 N.W.2d at 784. "Wisconsin courts consistently have [also] held that Article I, §3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment of the United States Constitution." *Kenosha Co. v. C&S Management, Inc.*, 223 Wis.2d 373, 389, 588 N.W.2d 236, 244 (1999).

But Wisconsin state courts "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this Court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *State v. Doe*, 78 Wis.2d 161, 172, 254 N.W.2d 210 (1977). Indeed, "[i]n many instances the Wisconsin Supreme Court has afforded constitutional protections long before the United States Supreme Court has seen fit to make those standards mandatory upon the states." *State v. Taylor*, 60 Wis.2d 506, 523, 210 N.W.2d 873, 882 (1973). Movants submit that it is uniquely appropriate for the Wisconsin Supreme Court to rely on the Wisconsin Constitution's due process, Art. I, §8, free speech, Art. I, §3, petition, Art. I, §4, and search and seizure, Art. I, §11, guarantees in this case because the answers to the questions presented will have a significant impact on how Wisconsin citizens may participate in the democratic functioning of their own state government.

A. The Definition Of "For Political Purposes" Must Be Construed To Extend Only To Express Advocacy Or Be Judged Void For Vagueness[9]

To begin, then, with the crucial first question – concerning what constitutes a "political purpose" – Wis. Stat. §11.01(16) provides the controlling definition. It initially states, in relevant part, that "[a]n act is for 'political purposes' when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, [or] for the purpose of influencing the recall from or retention in office of an individual holding a state or local office. … " *Id.* §11.01(16). Subsection 11.01(16)(a) then clarifies that "[a]cts which are for 'political purposes' include but are not limited to":

> 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum....

Id. at §11.01(16)(a); *see also id.* at §11.01(1)(definition of "candidate"), §11.01(3) (definition of "clearly identified"). This "express advocacy" language was added by the Wisconsin Legislature to comply with *Buckley v. Valeo*, as this Court and the Seventh Circuit have found. *See WMC*, 227 Wis.2d at 662-63, 597 N.W.2d at 727-28; *Barland II*, 751 F.3d at 815.

[9] The discussion herein is responsive to Issues 7, 7(c), 7(d), 9, 12, and 13 posed in this Court's Order of December 16, 2014.

"The effect of this limiting language was to place issue advocacy – political ads and other communications that do not expressly advocate the election or defeat of a clearly identified candidate – beyond the reach of the regulatory scheme." *Barland II*, 751 F.3d at 815.

The Special Prosecutor has argued, however, that the general definition of "for political purposes" in the main body of Wis. Stat. §11.01(16) – any act done "for the purpose of influencing" an election – is capacious enough to include issue advocacy. He has contended that the express advocacy definition in §11.01(16)(a)(1) is not, in fact, a limitation, but rather only an example, because §11.01(16)(a) provides that acts "for political purposes" "include but are not limited to" express advocacy. Thus, the logic of the Special Prosecutor's reading means that *any* expenditure made "for the purpose of influencing" an election, including all manner of issue advocacy, falls within the statutory definition of a "contribution."

The Special Prosecutor's reading fails both as a matter of due process and free speech. The due process vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 461 U.S. 352, 357 (1983); *see also State v. Popanz*, 112 Wis.2d 166, 173, 332 N.W.2d 759, 754 (1983).[10] The vagueness doctrine must be applied with special rigor given the circumstances of this case because the U.S. Supreme Court has decreed that courts must conduct a particularly "[c]lose examination of the specificity of the statutory limitation … where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley*, 424 U.S. at 40-41; *see also FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2317 (2012).

There can be no doubt that the language "for the purpose of influencing" is unconstitutionally vague on the Special Prosecutor's reading. *See Barland II*, 751 F.3d at 832-834. The U.S. Supreme Court, in *Buckley*, held that this precise language, "for the purpose of influencing," in this precise context, a campaign finance regulation seeking to impose disclosure requirements on expenditures by non-candidate groups, was unconstitutionally vague unless read as

[10] The rule of lenity also demands this limiting construction. Where there are two reasonable readings of the statute that compete for primacy, the rule of lenity insists that in criminal cases the less harsh - and more defense-favorable - reading prevail. *See United States v. Univ. C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). Thus, to the extent that this Court determines that Wis. Stat. §11.01(16)'s general language is ambiguous, that language must, under the rule of lenity, be read as limited to communications of express advocacy, as stated in §11.01(16)(a)(1). And, for the reasons discussed throughout this brief, even such a reading of Chapter 11 would not save the prosecutor's investigation.

restricted to express advocacy. *See* 424 U.S. at 76-80. That due process determination controls in this case as well. In fact, this Court, and many other courts, has adopted just such a limiting reading based on due process imperatives. *See WMC*, 227 Wis.2d at 664-66, 597 N.W.2d at 728-29; *see also Minn. Citizens Concerned for Life v. Kelley*, 698 N.W.2d 424, 430 (Minn. 2005); *Virginia Society for Human Life, Inc. v. Caldwell*, 500 S.E.2d 814, 817 (Va. 1998); *Barland II*, 751 F.3d at 833; *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-64 (5th Cir. 2006); *Virginia Society for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 273 (4th Cir. 1998) *("VSHL")*; *cf. North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008).

In *Buckley*, the Supreme Court was called upon to pass on the constitutionality of various provisions of the Federal Election Campaign Act of 1971 ("FECA"), as amended in 1974. One of those provisions was 2 U.S.C. §434(e), which required an individual who, or a group (other than a political committee or candidate) that, made more than $100 in contributions or expenditures in one year "for the purpose of … influencing" the nomination or election of candidates for federal office to file a statement disclosing the amount contributed or spent. *See Buckley*, 424 U.S. at 61-64; *see also WMC*, 227 Wis.2d at 664 n.16, 597 N.W.2d at 728 n.16. The

Buckley Court explained that §434(e) raised "serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." 424 U.S. at 76-77. The Court was also concerned about constitutional overbreadth. In particular, the Court worried that the phrase "for the purpose of … influencing" an election has the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79.

Accordingly, to "insure that the reach of [the relevant definition] is not impermissibly broad," the Court read the phrase "for the purpose of … influencing" narrowly to apply only to those expenditures "used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

This same limiting analysis also must apply to Chapter 11's definition of "disbursement," which is the analog to an "expenditure" under federal law. Notably, the *Buckley* Court also held that statutory language limiting "any expenditure … relative to a clearly identified candidate" was unconstitutionally vague absent a limiting gloss. *Id.* at 41-44. Thus, the Court ruled that, to save this clause from invalidation, it had to be construed to apply only to

expenditures for express advocacy communications. *Id.* at 44. Similarly, in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 245-49 (1986) ("*MCFL*"), the Supreme Court, relying on *Buckley*, determined that another section of the federal campaign finance chapter that defined expenditures as the provision of various things of value "in connection with any election" would be unconstitutionally vague if not strictly construed. Accordingly, it held that such an "expenditure" must constitute express advocacy in order to be regulated by the provision at issue. *Id.* at 249.[11]

This Court's decision in *WMC*, 227 Wis.2d 650, 597 N.W.2d 721, clearly endorsed this reading of *Buckley*, *MCFL*, and the Wisconsin statute. In *WMC*, this Court concluded that, consistent with *Buckley* and *MCFL*, Chapter 11's "political purpose" limitation on the definitions of "contributions" and "disbursements" meant that these terms were restricted to "express advocacy." *See id.* at 661-70, 597 N.W.2d at 727-31. The question the Court then took up was how "express advocacy" ought to be defined. Ultimately, the *WMC* Court did not have to endorse a particular standard because, it held, the Elections Board had improperly applied retroactively a

[11] In both cases, however, even this limiting gloss did not save the regulations at issue; strict scrutiny was fatal with respect to legislative efforts to regulate "expenditures" even for express advocacy in *Buckley* and in *MCFL*.

context-based standard for express advocacy, thus violating WMC's due process rights.[12] But the Court did offer guidance regarding the permissible scope of regulation.

First, the *WMC* Court explained that, "[i]n our view, *Buckley* stands for the proposition that it is unconstitutional to place reporting or disclosure requirements on communications which do not 'expressly advocate the election or defeat of a clearly identified candidate.'" *Id.* at 669, 597 N.W.2d at 731. Second, the Court acknowledged that express advocacy "may encompass more than the specific magic words in *Buckley* footnote 52," but asserted that regulation must be "limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 682, 597 N.W.2d at 737 (internal quotation marks omitted).

WMC controls and requires that the "for the purpose of influencing" language embedded in Wis. Stat. §11.01(16)'s general definition of "for 'political purposes'" be held unconstitutionally vague unless it is narrowed to encompass only communications that "expressly advocate[] the election,

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[12] Indeed, the very definition of express advocacy is so unclear and riddled with trapdoors that the average citizen would not understand with precision and clarity that which is regulated, thus making any criminal law -- with the threat of time in jail -- based on that concept violative of basic due process rights.

defeat, recall or retention of a clearly identified candidate" under §11.01(16)(a)(1).[13] *See also VSHL*, 152 F.3d at 273.

Although the GAB's position on this issue appears to have shifted in relation to this investigation, the GAB has publicly endorsed *WMC*'s reading on numerous occasions. For example:

--In a 2008 advisory opinion that the GAB and Special Prosecutor rely heavily upon in this case because it purports to define "coordination," El. Bd. Op. 00-2, the GAB affirmed the *WMC* Court's understanding and indeed indicated that its equation of "political purpose" with "express advocacy" predated this Court's judgment in *WMC*: "[u]nless (and until) the legislature enacts legislation [to the contrary], … the standard applicable in Wisconsin is the one that was applicable before the *WMC* case: expenditures are subject to regulation on the basis of the message they purchase only if the message expressly advocates the election or defeat of a clearly identified candidate. The Board believes that the

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[13] In seeking to find some textual purchase for his investigation, the Special Prosecutor relies on *Wisconsin Coalition For Voter Participation, Inc. v. State Elections Board*, 231 Wis.2d 670, 605 N.W.2d 654 (1999) ("*WCVP*"), a case decided by the court of appeals on an expedited basis and without briefing. *Id.* at 674, 605 N.W.2d at 657. In *WCVP*, the court, relying on the "for the purposes of influencing" language, held that the term "for political purposes," as defined in Wis. Stat. §11.01(16), is not restricted to acts of express advocacy and permitted an investigation into an alleged coordinated mailing to go forward. The court's conclusion is obviously incorrect under this Court's and the U.S. Supreme Court's precedents. First, as demonstrated above, under *Buckley*, the language of §11.01(16) upon which the *WCVP* court relied — "for the purpose of influencing" — is unconstitutionally vague absent a construction limiting it to express advocacy. Second, the court disregarded this Court's earlier, controlling ruling in *WMC* that *Buckley* had to be read to confine constitutional campaign finance regulation to express advocacy. *WMC*, 227 Wis.2d at 669, 597 N.W.2d at 731. Moreover, the Seventh Circuit in *Barland* II recently recognized that the "'influence an election' language … raises the same vagueness and overbreadth concerns that were present in *Buckley*. The [U.S. Supreme] Court held that this kind of broad and imprecise language risks chilling issue advocacy, which may not be regulated …" *Barland II*, 751 F.3d at 833.

standard means that, even without a rule, a message that does not include some form of the 'magic words,' or their equivalents, is not subject to campaign finance regulation." App. at 92.

--As the GAB's Staff Counsel explained in a public document issued in March 2010, "[u]nder the existing statute, §11.01(16)(a)1., Stats., and rule § GAB 1.28(2)(c), individuals and organizations that do not spend money to expressly advocate the election or defeat of a clearly identified candidate, or to advocate a vote 'Yes' or vote 'No' at a referendum, are not subject to campaign finance regulation under ch. 11 of the Wisconsin Statute." App. at 73.[14]

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[14] In 2010, the GAB attempted to amend its regulation defining "for political purposes," Admin. Code § GAB 1.28, to include issue advocacy communications made during electioneering periods. This Court enjoined the GAB from enforcing this amendment from August 13, 2010 through March 19, 2012. *See Wisconsin Prosperity Network v. Myse*, 339 Wis.2d 243, 245-46, 810 N.W.2d 356, 356-57 (2012). During this period, then, the GAB's definition of the phrase "for political purposes" that controlled was the 2001 version, Clearinghouse Rule 99-150, which restated the *Buckley* "magic words" definition of express advocacy. *See Buckley*, 424 U.S at 44 n.52. Ultimately, the GAB conceded that its efforts to extend the coverage of "for political purposes" to issue advocacy exceeded the bounds of the authorizing statute. The GAB has taken the position that the portion of the 2010 amendment to § GAB 1.28 that added the U.S. Supreme Court's definition of the "functional equivalent of express advocacy" from *WRTL*, 551 U.S. at 469-70, is still controlling, but that the portion of the 2010 amendment that purported to extend "for political purposes" to issue advocacy during electioneering periods was invalid and would not be enforced. *See* App. at 79-85. To summarize, then, the 2001 version of § GAB 1.28, which restricts the term "for political purposes" to express advocacy as defined by *Buckley*'s "magic words," controlled by order of this Court from August 13, 2010, through March 19, 2012. After March 19, 2012, the relevant definition included the *Buckley* formulation and the *WRTL* functional equivalent of an express advocacy standard.

Because at all relevant times GAB regulations limited the scope of the term for "political purposes" to express advocacy or its functional equivalent, due process prohibits the State from now attempting to prosecute Movants and others for their reasonable reliance on this official interpretation. *See, e.g., WMC*, 227 Wis.2d at 679-80, 597 N.W.2d at 735; *see also United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655, 674-75 (1973); *Cox v. Louisiana*, 379 U.S. 559, 571-72 (1965); *Raley v. Ohio*, 360 U.S. 423, 426 (1959).

--Thereafter, before the Seventh Circuit in the recent *Barland* litigation, the GAB acknowledged the constitutional vagueness of the "influence an election" definition of political purpose "and suggest[ed] a limiting construction to confine the definitions to express advocacy and its functional equivalent," which was, the Seventh Circuit noted, "how the Attorney General and the state supreme court have understood the statute." *Barland II*, 751 F.3d at 832-33.

Finally, the Seventh Circuit, after surveying Wisconsin campaign finance legislation, regulation, and litigation, squarely held that Wis. Stat. §11.01(16)'s definition of "political purpose" is unconstitutionally vague unless restricted to express advocacy. *See id.* at 833-34. In so doing, the court recognized that federal judges must exercise restraint in adopting narrowing constructions of state statutes, but it reasoned:

> We're confident that the proposed narrowing construction is reasonable, readily apparent, and likely to be approved by the state courts. The state's highest court and its Attorney General have acknowledged that when Chapter 11 is applied beyond candidates, their committees, and political parties, it must be narrowly construed to comply with *Buckley*'s express-advocacy limitation; the administration of the state's campaign-finance system has generally reflected this understanding for many decades. Accordingly, we accept the proposed narrowing construction. As applied to political speakers other than candidates, their committees, and political parties, the statutory definition of "political purposes" in section 11.01(16) and the regulatory definition of "political committee" in GAB § 1.28(1)(a) are limited to express advocacy and its functional equivalent as those terms were explained in *Buckley* and [*WRTL*].

Id. at 834.

This Court has decreed that if a statute is open to more than one reasonable construction, a court should generally adopt the interpretation that will avoid unconstitutionality. *Town of Beloit v. City of Beloit*, 37 Wis.2d 637, 643, 155 N.W.2d 633, 636 (1968); *Betthauser v. Medical Protective Co.*, 172 Wis.2d 141, 150, 493 N.W.2d 40, 43 (1992). This Court's and the U.S. Supreme Court's precedents demand that the constitutional avoidance canon be applied in construing Chapter 11 to mean that only those "disbursements" and "contributions" – coordinated or independent – that are for express advocacy are regulated under the language of Wis. Stat. §11.01(16).[15]

[15] Indeed, given the clarity and long-standing nature of these precedents, the Special Prosecutor's attempt to impose his novel reading of Chapter 11 on Movants violates fundamental fairness. "[A] deprivation of the due process right of fair warning can occur not only from vague statutory language, but also from unforeseeable and retroactive interpretation of statutory language." *WMC*, 227 Wis.2d at 679-80, 597 N.W.2d at 735. As this Court has recognized, a "due process violation resulting from retroactive interpretation of statutory language is actually worse than a vague statute because it 'lulls the potential defendant into a false sense of security, giving him no reason even to suspect' that he might be subject to the statutory prohibition." *Id.* at 680, 597 N.W.2d at 735 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)).

B. The Legislative History Demonstrates That Chapter 11 Was Amended To Restrict Its Regulation To Express Advocacy After The U.S. Supreme Court's Decision In *Buckley v. Valeo*[16]

The Wisconsin Attorney General issued an opinion in 1976, shortly after the Supreme Court decided *Buckley v. Valeo*, 424 U.S. 1. *See* App. at 107-114. As noted, Wisconsin's statutory definition of "political purpose" at that time had a broad meaning that arguably covered issue advocacy. In the Attorney General's view, the implications of *Buckley* were "clear": "Either the sweep of this section must be narrowed by construction or it must fall as unconstitutional." *Id.* at 111. The Attorney General therefore directed that "the 'express advocacy' standard should be applied by the Board to all phases of political activity regulated under ch. 11." *Id.* In short, the Wisconsin Attorney General opined that Wis. Stat. §11.01(16)'s definition of "political purpose" is constitutional only if narrowly construed to apply exclusively to acts of express advocacy.

In 1979, the Wisconsin Legislature enacted extensive changes to the State's campaign finance laws. The legislative history demonstrates that the changes were made to bring the law "into better conformity with recent federal court

[16] The discussion herein is responsive to Issues 7, 7(c), 7(d), 9, 12, and 13 posed in this Court's Order of December 16, 2014.

decisions, including *Buckley v. Valeo*, 424 U.S. 1 (1976)." App. at 117-18; *see also WMC*, 227 Wis.2d. at 662-63, 597 N.W.2d at 727-28. In particular, in 1979, the Legislature revised Wis. Stat. §11.01(16) to read as follows:[17]

> (16) An act is for "political purposes" when ~~by its nature, intent or manner it directly or indirectly influences or tends to influence voting at any election. Such an act includes support or opposition to a person's present or future candidacy or to a present or future referendum~~ it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, or for the purpose of influencing the outcome of any referendum. . . .
>
> (a) Acts which are for "political purposes" include but are not limited to:
> 1. The making of a communication which expressly advocates the election or defeat of a clearly identified candidate or the passage or defeat of a referendum.
> 2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office.

§ 27, ch. 328, Laws of 1979 (Wis. May 19, 1980).

Thus, the Legislature deleted the prior language — which arguably would have included issue advocacy — and instead chose to use the federal statute's "for the purpose of influencing" language. The fact that the legislature was acting to bring Chapter 11 "into better conformity" with

[17] The portions of the text that are struck through represent the text of the previous iteration that was eliminated; those portions that are underscored reflect the language the legislature chose to adopt to respond to *Buckley*.

Buckley, App. at 115, 117-18, demonstrates that although the structure of its definition might have been inartful, the Legislature clearly meant the general language of Wis. Stat. §11.01(16) "parrot[ed]" from *Buckley* – "for the purpose of influencing" an election – to be construed narrowly, as the *Buckley* Court required, to "communications which expressly advocate[] the election or defeat of a clearly identified candidate," as codified in §11.01(16)(a)(1). *WMC*, 227 Wis.2d at 680 n.26, 597 N.W.2d at 736 n.26 (noting that §11.01(16) "parrots the language used in *Buckley*"); *see also Barland II*, 751 F.3d at 812 ("Chapter 11 was amended [after *Buckley* and the Wisconsin Attorney General's opinion] … to incorporate *Buckley*'s express-advocacy limiting principle").

To construe the "for the purpose of influencing" language otherwise – that is, to include issue advocacy – is to assume that the Wisconsin Legislature purposely sought to flout the Supreme Court decision it was seeking to implement and wished to create a definition it knew would be held unconstitutional.

It is also notable that, in the same 1979 post-*Buckley* legislation, the Wisconsin Legislature chose in Wis. Stat. §11.06(2) to affirmatively exclude individuals (other than candidates) and groups organized primarily for, and engaging exclusively in, issue advocacy from Chapter 11's regulation.

Subsection 11.06(2) was added to Chapter 11 in the post-*Buckley* 1979 amendments and it currently reads as follows:

> **Wis. Stat. §11.06(2) DISCLOSURE OF CERTAIN INDIRECT DISBURSEMENTS.** … [I]f a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee or group, the disbursement or obligation is required to be reported only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum. …

See also id. §11.01(6)(b)(7) ("A gift … of anything of value received by a committee or group not organized exclusively for political purposes that the group or committee does not utilize for political purposes" is not a "contribution"). The Legislature nowhere specified that the expenditures exempted from regulation in §11.06(2) had to be "independent" to be carved out, as it easily could have had it wished to follow the federal model.

Wis. Stat. §11.06(2), then, applies to exclude Movants and the targeted entities from the reporting requirements contained in the balance of §11.06. They are not primarily organized or operating for "political purposes" (to engage in express advocacy), they do not make "contributions" for "political purposes" (in aid of express advocacy), and their expenditures were not for express advocacy. And, by its plain terms, §11.06(2) dictates that qualifying individuals and

entities remain unregulated regardless of whether they act independently or in concert with candidates.

The reporting exemption afforded in Wis. Stat. §11.06(2) to individuals and public interest groups seeking to make their voices heard on issues of public importance — coordinated or not — is important as well because this provision is used in many other sections of Chapter 11 to exempt such individuals and groups from other statutory obligations. Thus §11.06(2) individuals and groups: (i) are exempt from registration with the GAB, *see id.* §11.05(11); (ii) do not need to abide by the reporting requirements of §11.06, *see id.* §11.06(2); (iii) need not provide communications attributions as required in §11.30, *see id.* §11.30(2)(a); and (iv) are not bound by §11.12(1)(a), which states that no contributions or disbursements may be made other than through the candidate's campaign treasurer or through an individual or committee registered under §11.05 and filing a statement under §11.06(7). *See id.* §11.12(1)(d); *see also id.* §11.16(1)(d).

In sum, the Wisconsin Legislature, in revising its campaign finance regulations in 1979 to bring them into conformance with *Buckley*, confined the meaning of "for political purposes" to express advocacy and affirmatively carved out public interest advocacy groups from contribution

and spending limits, as well as registration and reporting requirements. Only those "contributions" or "disbursements" made for express advocacy are regulated by Chapter 11. Issue advocacy – whether coordinated or not – is not subject to Chapter 11's regulation.

C. Chapter 11 Does Not Treat "Coordinated" Advocacy Of Any Kind As A "Contribution"[18]

Presumably to avoid the inevitable invalidation of any attempt to argue that *independent* issue advocacy expenditures satisfy the "for political purposes" test and therefore are regulated as "contributions" or "disbursements" by Chapter 11, as the logic of the Special Prosecutor's reading of §11.01(16)'s "for the purpose of influencing" language demands, the Special Prosecutor has invented an invisible caveat to his phantom definition. Not content with expanding the definition of "for political purposes" to include one unwritten subject – that is, issue advocacy – the Special Prosecutor asks this Court to build upon the mirage, adding an unwritten qualification – that is, that only *coordinated* issue advocacy is "for political purposes." There is, quite simply, *no* basis in text, law, or logic for the Special Prosecutor's contention that the definition of regulated

[18] The discussion herein is responsive to Issues 7(a), 7(b), 9, and 12 posed in this Court's Order of December 16, 2014.

"contributions" includes coordinated issue advocacy communications.

First, as the extensive analysis above conclusively demonstrates, all issue advocacy – whether coordinated or not – was excluded from Chapter 11 quite consciously by legislators who sought to confine Wisconsin's campaign finance regulation to express advocacy. Issue advocacy is not done "for political purposes" and it cannot, therefore, be a regulated "contribution" or "disbursement."

Second, and more fundamentally, Chapter 11 nowhere provides - as does federal law and many other state laws – that coordinated advocacy of any kind constitutes a "contribution." This means that the Special Prosecutor's belated attempt to salvage his investigation by claiming that he is in fact looking into coordinated *express* advocacy is unavailing. [19] No manner of coordination constitutes a "contribution" for political purposes under Chapter 11.

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[19] The litigation before the John Doe judge was conducted, in its entirety, on the understanding that the Special Prosecutor was investigating only coordinated issue advocacy. [redacted] Only when later seeking review of the John Doe judge's adverse decision through a supervisory writ in the Wisconsin Court of Appeals did the Special Prosecutor assert for the first time that he was also looking into coordinated express advocacy.

The lack of any reference to coordinated advocacy constituting a "contribution" was not an oversight. Other jurisdictions' experience demonstrates that where legislatures intend to treat coordinated communications as contributions, they are perfectly capable of doing so explicitly and clearly. For example, the federal campaign finance statute provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 52 U.S.C. §30116(a)(7)(B)(i) (formerly 2 U.S.C. §441a(a)(7)(B)(i))(coordinated with candidate).[20]

The Wisconsin Legislature obviously was cognizant of the content of federal law and indeed acted in 1979 in reaction to the Supreme Court's decision in *Buckley*, which itself identified the fact that federal law treated certain coordinated expenditures as contributions. Despite this, the Wisconsin Legislature declined to adopt the federal approach: *nowhere* did it include in Chapter 11 a simple, explicit

[20] *See also id.* §§30116(a)(7)(B)(ii) (coordination with party) (formerly 2 U.S.C. §441a(a)(7)(B)(ii)), 30116(a)(7)(C)(ii) (formerly 2 U.S.C. §441a(a)(7)(C)(ii)) (coordination of electioneering communication). Extensive federal regulations accompany this mandate, including lengthy provisions attempting to detail what content and conduct together can be considered "coordinated communications." *See* 11 C.F.R. §109.21.

definition of "contributions" that might have included coordinated advocacy. In the absence of such a provision, due process forbids the imposition of criminal penalties on First Amendment protected activities.

1. None Of The Subsections Of Chapter 11 That Reference Coordination Mean That Coordination Of Advocacy Results In A Regulated "Contribution"

The Special Prosecutor and the GAB cannot seem to decide which subsection of Chapter 11 gives rise to the supposed requirement that coordinated issue advocacy be treated as a regulated "contribution."[21] The Wisconsin Attorney General, in declining to investigate this case, took pains to note that Wisconsin's "coordination" campaign finance law "is not a model of statutory precision or consistency." App. at 55. To illustrate this lack of clarity, he contrasted two

[21] Surprisingly, before the John Doe judge, the Wisconsin Court of Appeals, this Court, and federal courts in the course of collateral civil rights litigation, the Special Prosecutor, the five county prosecutors, and the GAB have been unable to identify a single statutory provision that unequivocally serves as the basis of their theory. Instead, they have relied on arguments that: "for political purposes," as defined in Wis. Stat. §11.01(16), includes coordinated issue advocacy, citing *WCVP*, 231 Wis.2d 670, 605 N.W.2d 654; the statutory section that controls the role of campaign treasurers and depository accounts, Wis. Stat. §11.10(4), authorizes this investigation; the GAB's treatment of "voluntary committees" under Wis. Admin. § GAB 1.42(2) is entitled to deference; and the GAB's advisory opinion regarding coordination is legally binding (El. Bd. 00-2). The one subsection upon which they do not seem to rely before this Court is the one provision of Chapter 11 that does address express advocacy coordination among "committees" and candidates, Wis. Stat. §11.06(7). They also have not relied upon §11.06(4)(d), which, upon the invitation of the Court, we discuss within.

statutory sections that he believed could be relevant to coordination cases and that use very different terms to describe what could generally be described as "coordination": the "voluntary oath" provision, Wis. Stat. §11.06(7); and the provision that dictates when certain contributions and disbursements are reportable by candidates, §11.06(4)(d). Before this Court, however, the Special Prosecutor has not relied on these two subsections as the source of the supposed requirement that coordinated advocacy constitutes a "contribution." He instead argues that Wis. Stat. §11.10(4) is the foundation upon which this criminal investigation rests. So novel is that attribution that the Attorney General did not even cite this subsection as a potential source of the coordination regulation in his declination, *see* App. at 54-57, nor has the GAB relied upon it in issuing its "coordination" regulations or in enforcing them.

The very fact of this confusion - and particularly the reality that those pressing this investigation cannot point with confidence to any statutory section that clearly and explicitly communicates the simple proposition that a coordinated expenditures is a "contribution" — should be sufficient to warrant ending this case on First Amendment and Due Process grounds. *See Buckley*, 424 U.S. at 41. In any event, the following examination of Wis. Stat. §11.06(7), §11.10(4),

and §11.06(4) demonstrates that none of these subsections can serve as the basis for this investigation or for the GAB's *ultra vires* "coordination" regulation, Wis. Admin. § GAB 1.42.

a. The "Voluntary Oath" Provision, Wis. Stat. §11.06(7), Does Not Require That Coordinated Advocacy Be Treated As A Contribution And The GAB "Coordination" Regulation, Wis. Admin. § GAB §1.42, Issued On Its Purported Authority, Is *Ultra Vires* And Void

The provision in Chapter 11 that is designed to address coordinated expenditures is currently entitled "oath for independent disbursements" and was formerly known as the "voluntary oath" provision: Wis. Stat. §11.06(7). *See* § 51, ch. 93, Laws of 1975 (Wis. Oct. 27, 1975) (adding "voluntary oath" title). In Wis. Stat. §11.06(7) the Legislature requires covered individuals and "committees" to file an oath to disavow express advocacy coordination with respect to "disbursements" where such coordination is absent and to identify the candidate consulted when it has occurred. *See* Wis. Stat. §11.06(7)(a) (Where the committee or individual engages in express advocacy independent of some candidates and in coordination with others, the committee or individual "shall indicate in the oath the names of the candidate or candidates to which it applies"). Subsection 11.06(7) nowhere states that those who *do* coordinate express advocacy must treat their coordinated "disbursements" as a "contribution" within the meaning of the statute. Rather, §11.06(7)(a)

mandates only that regulated individuals (other than candidates) and "committees" must disclose the fact of independence or coordination with respect to "disbursements." Wis. Stat. §11.06(7)(a) demonstrates that the Legislature made a deliberate choice to regulate through *disclosure* rather than *limitation* where candidates coordinate express advocacy with individuals or "committees."

The Wisconsin Legislature must have been aware that federal law defines an "independent expenditure" as an expenditure by a person "expressly advocating the election or defeat of a clearly identified candidate … that is not made *in concert or cooperation with or at the request or suggestion of* such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. §30101(17) (formerly 2 U.S.C. §431(17)) (emphasis added). Indeed, the Wisconsin Legislature used some of the federal statute's coordination language, italicized above, in Wis. Stat. §11.06(7)(a). It deliberately did not choose, however, as did Congress, to state that a coordinated expenditure may be considered a "contribution." *See, e.g.*, 52 U.S.C. §30106(a)(7)(B)(i) (coordinated expenditures constitute a contribution). The Wisconsin Legislature, in either §11.06(7)(a) or the definition of "contribution" or "disbursement" in §11.01, could have

provided that coordination between "committees" and candidates generally gives rise to a regulable "contribution," but it chose not to follow the federal path.

The text of Wis. Stat. §11.06(7)(a) forecloses any argument that this section created an obligation to treat coordinated expenditures as reportable "contributions." Its plain language also forecloses its application to Movants and the targeted entities.

First, Movants and the targeted entities are not "committees" within the meaning of §11.06(7)(a). Subsection 11.01(4) defines "committees," in relevant part, as non-natural persons or entities that, *inter alia*, make or accept "contributions" or make "disbursements." Movants, as natural persons, cannot be statutory "committees." *See id.* §11.01(4). The targeted entities, as issue advocacy organizations, do not make "contributions" for political purposes (express advocacy) or "disbursements" for political purposes (express advocacy). *See also Barland II*, 751 F.3d at 834 (holding that due process requires that "the regulatory definition of 'political committee' in GAB §1.28(1)(a) … [is] limited to express advocacy or its functional equivalent"). That the targeted entities are not "committees" and thus are not regulated under §11.06(7)(a) should be uncontroversial: [redacted]

[redacted]

[redacted] That longstanding and very obvious lack of registration has never drawn an objection from the GAB.[22]

Second, Wis. Stat. §11.06(7)(a) applies to those subject to the reporting requirements of §11.06. But Movants and the targeted entities are exempt from §11.06 reporting — and thus the voluntary oath requirements of §11.06(7)(a) — because they are specifically exempted from regulation under §11.06(2). Subsection 11.06(2) exempts them from reporting because the targeted entities are not organized primarily for political purposes (express advocacy), Movants and the targeted entities' expenditures are not "contributions" for political purposes (express advocacy), and their expenditures do not expressly advocate the election or defeat of clearly identified candidates (constituting express advocacy).

Third, because this voluntary oath requirement regulates only "disbursements," that is, expenditures for political purposes (express advocacy), it does not apply to Movants and

[22] As the Seventh Circuit observed in 1993, "[a]lthough Wisconsin's law has been on the books for almost 25 years, the Election Board has not prosecuted any issue-advocacy group such as [Wisconsin Right to Life] for failing to register as a political committee. This is not an accident[,]" given the Attorney General's opinion of 1976 "informing the Board that the approach articulated in *Buckley* should be applied to the state law as well. Every Attorney General of Wisconsin to hold office since 1976 has adhered to this view." *Wisconsin Right to Life v. Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1993).

the targeted entities, which have engaged solely in issue advocacy. Fourth, and finally, Movants and the targeted 501(c) organizations do not "advocate the election or defeat of any clearly identified candidate or candidates in any election" – that is, engage in express advocacy – as required by the plain text of §11.06(7). *See infra*, Parts (D), (E).

Given the above, it is not surprising that the Special Prosecutor and the GAB have not relied before this Court on §11.06(7)(a) as the source of the supposed obligation to treat coordinated advocacy as a contribution. This, however, creates a problem for them. Subsection 11.06(7)(a) is the statutory section that the GAB relied upon as authority for Wis. Admin. § GAB 1.42, the regulation the GAB promulgated to treat coordinated express advocacy as a contribution. *See, e.g.*, App at 65-66 (swearing that Mr. Kennedy revised § GAB 1.42 in 1985 to "comport the rule more precisely with Wis. Stat. §11.06(7)"). The Special Prosecutor and the GAB now rely heavily on § GAB 1.42(2) to legitimate their investigation. Although they cite § GAB 1.42(2) as a source of authority for this criminal investigation, the Special Prosecutor and the GAB forswear reliance on the statutory section that was supposed to authorize that regulation. And

without statutory sanction, § GAB 1.42(2) is, of course, *ultra vires* and void.[23]

[23] Even were the Special Prosecutor and the GAB to reverse course and seek to rely on Wis. Stat. §11.06(7), that subsection does not purport to treat the type of coordination alleged in this case between candidates and Movants and the targeted entities as a regulated "contribution" for the reasons discussed above. Wis. Admin. Code § GAB 1.42(2) therefore exceeds the scope of the GAB's regulatory authority. The GAB's powers are limited to those that are "expressly conferred or can be fairly implied from the statutes under which it operates." *Oneida Co. v. Converse*, 180 Wis.2d 120, 125, 508 N.W.2d 416, 418 (1993). Under state law, the GAB has only the power to issue rules to "interpret[]" or "implement[]" the campaign finance laws, not to alter their substance. Wis. Stat. §5.05(1)(f). The GAB, in extending the statutory definition of "contributions" to coordinated express advocacy, has not just exceeded the bounds of legitimate interpretation, *see id.* §227.11(2)(a), but it has also imposed a rule that is inconsistent with the controlling statute. Accordingly it has exceeded the legitimate scope of agency authority. And "'[a] rule out of harmony with the statute is a mere nullity.'" *Village of Plain v. Harder*, 268 Wis. 507, 511, 68 N.W.2d 47, 50 (1955) (quoting *Manhatten General Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)); *see also* Wis. Stat. §227.11(2)(a)(3).

In any case, the GAB regulation cannot be the basis for a criminal prosecution. The GAB has only civil enforcement powers, and the Wisconsin Legislature has never made the GAB's regulations criminally enforceable by others.

Finally, because this Court did not ask the parties to brief the legitimacy of Wis. Admin. Code § GAB 1.42, we will simply note that were the Court to examine the substance of that provision, it would likely see the need to strike portions of it on other grounds. *See, e.g., Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 620-22 (1996) (rejecting presumption of coordination); Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 634 (2013).

b. The Alleged Acts By Movants And The Targeted Entities Are Not Within The Intention Or Plain Meaning Of §11.10(4) Or §11.06(4), And The Special Prosecutor's Reading Of These Provisions Would Cause Absurd – And Patently Unconstitutional – Results

In terms of statutory support, the Special Prosecutor apparently now attempts to pin his hopes entirely on Wis. Stat. §11.10(4):

> **Wis. Stat. §11.10. CAMPAIGN TREASURERS AND CAMPAIGN DEPOSITORIES** (4) No candidate may establish more than one personal campaign committee. Such committee may have subcommittees provided that all subcommittees have the same treasurer, who shall be the candidate's campaign treasurer. The treasurer shall deposit all funds received in the campaign depository account. Any committee which is organized or acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate is deemed a subcommittee of the candidate's personal campaign committee.

The Special Prosecutor reads this provision to mean that non-"committee" 501(c) groups that coordinate issue advocacy with a candidate must be deemed a subcommittee of that candidate's personal campaign committee, presumably subject to the extensive registration, reporting, and other requirements of the statute that apply to such committees. This theory is both unprecedented and radical in its implications. It is also patently incompatible with the language, structure, and intent of Chapter 11, and accordingly must be rejected.

Wis. Stat. §11.10(4) has never been employed to regulate "coordination" between issue advocacy 501(c) entities and candidates. The GAB, in creating its "coordination" regulation (Wis. Admin. Code § GAB 1.42(2)), issuing the advisory opinion regarding coordination upon which the Special Prosecutor has relied so heavily (El. Bd. Op. 00-2), and enforcing its coordination regulation,[24] had not previously relied on this provision. And the Wisconsin Attorney General, in discussing the Wisconsin statutes relating to "coordination" never thought to mention it. App. at 54-57.

This is likely because Wis. Stat. §11.10(4) and a closely-related provision, §11.06(4)(d),[25] do not regulate,

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[24] The Special Prosecutor has cited three cases that he says were founded, at least in part, on an anti-coordination theory. In none of them was Wis. Stat. §11.10(4) relied upon. In the *WCVP* case, the Court relied on a misreading of §11.01(16)'s definition of "political purpose," as discussed *supra* note 13. In a criminal case, *State v. Chvala*, no authority was cited. Complaint, *Wisconsin v. Chvala*, Case No. 02CF2451 (2002). In the third, a civil proceeding in which the GAB concluded that there was no probable cause to support the complaint, *In re Keep Our North Strong PAC*, GAB Case #2008-40 (June 22, 2009), the GAB relied explicitly on Wis. Stat. §11.06 for the supposition that coordination could result in an in-kind contribution. Preliminary Findings of Fact and Conclusions, Keep Our North Strong PAC, WI GAB Case #2008-40 (June 22, 2009). Petitioners are aware of only one other GAB enforcement action founded on allegations of "coordination"; in that action, the GAB again ultimately held there was no evidence to support the allegations. And, again, the GAB relied explicitly on §11.06(7) as the source of its authority to inquire into coordinated advocacy. *See* Preliminary Findings of Fact and Conclusions, All Children Matter, WI GAB Case #2008-28 (March 31, 2009).

[25] **Wis. Stat. §11.06. FINANCIAL REPORT INFORMATION; APPLICATION; FUNDING PROCEDURE**

and indeed were never intended to apply to, coordination between candidates and non-"committee" issue advocacy organizations affirmatively sheltered from regulation under §11.06(2). The operative provisions of §11.10(4) and §11.06(4)(d) were together added to Chapter 11 in the same piece of legislation in 1975. At the time, the language of the two provisions tracked each other, making more obvious their connection.[26] Subsection 11.10(4) was designed only to ensure that candidates could only have one campaign "committee," and could not evade that limitation by establishing other "committees" to further their electoral ambitions in a particular race through the acceptance of "contributions" and the making of "disbursements." The

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> **(4) When transactions reportable.**
> (d) A contribution, disbursement or obligation made or incurred to or for the benefit of a candidate is reportable by the candidate or the candidate's personal campaign committee if it is made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent.

Although the Special Prosecutor has not relied upon this provision, Movant includes it at the request of the Court. *See* Order, Issue 7(a).

[26] Wis. Stat. §11.10(4) originally provided that a candidate could only have one committee, and that "any committee which is organized with the encouragement, direction or control of a candidate is deemed a subcommittee of his personal campaign committee." § 57, ch. 93, Laws of 1975 (Wis. Oct. 27, 1975). As first enacted, §11.06(4)(d) provided that a "contribution, disbursement or obligation made or incurred for the benefit of a candidate is reportable by the candidate or his personal campaign committee if it is made or incurred with the encouragement, direction or control of the candidate or his campaign treasurer." § 50, ch. 93, Laws of 1975 (Wis. Oct. 27, 1975).

function of §11.06(4)(d), then as now, was simply to tell candidates and their campaign committees *when* the reports of such committees or subcommittees had to be made. *See id.* §11.06(4)(d) (title).

To the extent that the Special Prosecutor is relying on Wis. Stat. §11.10(4) in aid of his argument that coordinated issue advocacy by the targeted entities constitutes a forbidden corporate "contribution," §11.10(4) (and §11.06(4)(d)) cannot bear that construction. By its plain text §11.10(4) does not purport to modify the statutory definition of a regulated "contribution" in §11.01(6)(a)(1). If §11.10(4) were in fact intended to provide that coordinated issue advocacy, or coordinated advocacy of any kind, is a statutory "contribution," the Legislature could hardly have found a more roundabout and inexplicit way of saying so. Nor could it have put it in a more obscure place. Subsection 11.10(4) rests in a part of the statute that has no obvious connection with the controlling definitional section (§11.01); it resides instead in a provision designed only to describe the responsibilities of "campaign treasurers and campaign depositories" with respect to candidate campaign committees.

Wis. Stat. §11.06(4)(d) likewise only relates to the reporting obligations that Chapter 11 imposes on candidates

and their campaign committees and does not define coordinated advocacy as a contribution, or, indeed, regulate at all coordination between candidates and autonomous 501(c) entities. Subsection 11.06(4)(d)'s evident purpose is strictly to complement §11.10(4) by dictating exactly "[w]hen" "contributions" and "disbursements" are reportable by candidates and campaign committees. Notably it does not define or change what constitutes a "contribution" or "disbursement." *Id.* §11.06(4)(title).

It appears that the Special Prosecutor's ambitions in pointing to this subsection are greater than simply redefining a regulated "contribution": He wishes instead to treat *any* groups (whether or not statutory "committees") that coordinate with candidates as subcommittees of the candidate's campaign committee. He hopes, then, to prosecute criminally such groups for failing to comply with the onerous registration, reporting, operational, and other limitations that accompany that status. But once again, the statutory text forecloses the Special Prosecutor's attempts to re-write the statute to his requirements. Wis. Stat. §11.10(4) and §11.06(4)(d) simply do not apply to Movants and the targeted entities. And due process of course precludes the application of a statute to sanction constitutionally-protected political

activity when the statute, by its express terms, does not apply.

First, Wis. Stat. §11.10(4) explicitly applies only to the acts of "[a]ny *committee*." (Emphasis added). Once again, "committees" cannot be natural persons, thus excluding Movants. *See id.* §11.01(4). And the targeted groups that are alleged to have coordinated issue advocacy with candidates indisputably are not statutory "committees" because, as the John Doe judge has found on two occasions, none of the groups under investigation in this case made "contributions" or "disbursements" for political purposes – that is, for express advocacy.

Similarly, Wis. Stat. §11.06(4)(d) applies only to inform candidates and their "committees" when they must report "contributions" and "disbursements" for political purposes that the candidate has directed or controlled. But the targeted entities, in engaging only in issue advocacy, never made "contributions" or "disbursements" for political purposes within the meaning of §11.06(4)(d), and thus are not regulated by it. In addition, §11.06(4)(d) controls when certain transactions are deemed to be reportable, and that which is reportable is described in the balance of §11.06. But the Wisconsin Legislature excluded from §11.06 reporting requirements – and thus from §11.06(4)(d)'s application –

§11.06(2) individuals and groups, that, like Movants and the targeted entities, are not primarily organized for political purposes, do not make contributions for political purposes (express advocacy), and do not engage in express advocacy. *See id.* §11.06(1).

To summarize, Wis. Stat. §11.10(4) and §11.06(4)(d) do not, in purpose or effect, modify what constitutes a regulated "contribution" or "disbursement." Nor do these subsections apply to contacts between candidates and persons or entities like those targeted in this case, that under no conceivable rationale can be deemed "committees," that do not make "contributions" or "disbursements," and that are in any event excluded §11.06(2) organizations. To so construe these subsections not only would ignore their language, but also would *sub silentio* overrule the carefully-drawn statutory definitions of "committee," "contribution," and "disbursement," and the express statutory exemption for issue advocacy groups reflected in §11.06(2).

Movant's reading of Wis. Stat. §11.10(4) and §11.06(4)(d) also accords with a common sense consideration of their legislative history. The Special Prosecutor asserts that §11.10(4) applies to coordination of issue, as well as express, advocacy; he wishes to use §11.10(4) as a back-door means of regulating that which the Legislature sought to

exclude in the balance of the statute. Brief reference to the legislative record mandates that the Special Prosecutor's ploy be summarily rejected.

In 1979's post-*Buckley* amendments, the Wisconsin Legislature amended the language of both Wis. Stat. §11.06(4)(d) and §11.10(4).[27] *See* §§ 46, 68, ch. 328, Laws of 1979 (Wis. May 19, 1980). In the same 1979 legislation, of course, the Wisconsin Legislature amended the definition of "for political purposes" in §11.01(16) to restrict regulatory "contributions" and "disbursements" to express advocacy. *See supra* II(B); § 27, ch. 328, Laws of 1979 (Wis. May 19, 1980). And the Legislature added §11.06(2) to underscore its intention to exempt from Chapter 11 regulation issue advocacy

[27] The amended language of the provisions no longer track each other. Thus, a "committee" now becomes a subcommittee of the candidate's personal campaign committee if it is "organized or acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate." §11.10(4). But under the amended §11.06(4)(d) a "contribution, disbursement or obligation made or incurred to or for the benefit of a candidate is reportable by the candidate or the candidate's personal campaign committee" only "if it is made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent." §11.06(4)(d). This raises the anomalous possibility, under the Special Prosecutor's reading, that a great variety of coordination can convert the activities of a "committee" into a campaign "subcommittee" under §11.10(4)(cooperation, consultation, in concert with, at the request or suggestion of) but not all of the coordinated "contributions" and "disbursements" need be reported under the more restrictive standard of §11.06(4)(d) (referring to "authorization, direction or control of," "or otherwise by prearrangement with" the candidate).

groups that do not engage in express advocacy. *See* § 47, ch. 328, Laws of 1979 (Wis. May 19, 1980).

Given that Wis. Stat. §11.06(4)(d) and §11.10(4) were amended in the 1979 comprehensive overhaul of Chapter 11 designed to bring Wisconsin's campaign finance regulations into line with *Buckley*, it is ludicrous to suggest that the legislature intended their scope to extend to issue advocacy. In particular, it beggars belief that the Wisconsin Legislature would go to the lengths described above to ensure — consistent with its and the Attorney General's reading of *Buckley*'s constitutional mandate — that only express advocacy was covered by the statute, and to regulate only coordination of express advocacy in Wis. Stat. §11.06(7), and then turn around and provide in very obscure provisions dealing with the responsibilities of campaign treasurers and the timing of campaign committee reporting that which it had declined to do explicitly and in the appropriate place — *e.g.*, regulate coordinated issue advocacy.

The Special Prosecutor's attempt to translate coordinated issue advocacy into campaign subcommittee status is particularly untenable in light of the decisions the Legislature made in drafting Wis. Stat. §11.06(2) and related provisions. Those subsections exempt Movants and the targeted entities, as individuals and groups engaged in issue advocacy,

from the registration, reporting, and other requirements of Chapter 11. *See id.* §§11.05(11); 11.30(2)(a), 11.12(1)(d), 11.16(1)(d); *see also id.* §11.01(6)(b)(7) (definition added in 1979). The Legislature could have, but did not, qualify this exemption by requiring that its beneficiaries act "independently." On its face, then, §11.06(2) exempts issue advocacy groups from regulation *regardless of whether they act independently or in coordination with candidates*. Because this subsection was added to Chapter 11 at the same time that §11.06(4)(d) and §11.10(4) were amended, it makes no sense to infer that the Legislature intended in §11.06(4)(d) and §11.10(4) to negate its newly-minted exemption and to subject issue advocacy groups it specifically exempted from the purview of Chapter 11 to treatment as highly regulated campaign subcommittees.

Finally, if one were inclined, as is the Special Prosecutor, to ignore the carefully-crafted definitions of "committees," "disbursements," and "contributions," the import of Wis. Stat. §11.06(2), and the commonsense reading of the legislative history, the results would raise fatal due process and free speech problems. The Special Prosecutor's theory is a radical expansion of the original allegations in this case: According to the Special Prosecutor *any* group — whether or not the group qualifies as a regulated "committee"

or is otherwise exempt from regulation under §11.06(2) - that acts "with the cooperation of," "consultation with," "in concert with," or "at the request or suggestion of" a candidate suddenly, by virtue of that exercise of free speech and association, becomes a campaign subcommittee subject to the complicated web of campaign finance regulation required of candidates and their committees.

As a consequence, if the Boy Scouts choose to "consult" with a candidate about regulation of camping facilities, if the AARP acts in "cooperation with" a candidate or elected officials in promoting a legislative solution to issues facing the elderly, if the PTA works "in concert with" a candidate to sponsor a public forum on education issues at which the candidate, among others, will speak, or if any other public-minded group otherwise acts in "cooperation" with the candidate or elected official for almost any purpose, the Special Prosecutor would deem it a campaign subcommittee. Thereafter, among other burdens, incorporated public advocacy groups would be prohibited from engaging in expenditures for public issue advocacy (which would be deemed forbidden contributions to the candidate) and from accepting any corporate contributions (because Wisconsin law prohibits such contributions to candidate committees). *See* Wis. Stat. §11.38.

Such patently overbroad regulation would clearly fail First Amendment standards. *See infra* Part F. This, if accepted, would also be a criminally-enforced provision "of alarming breadth," leaving the safety of citizens wishing to engage in issue advocacy to the "mercy of a prosecutor." *U.S. v. Stevens*, 559 U.S. 460, 474, 477 (2010). Movants assume that the Special Prosecutor will attempt to argue that the targeted entities – and, in particular, the primary organizational target of his distaste, [redacted] – are somehow different, and that he can be counted upon to separate what he unilaterally classifies as "bad" coordinating non-"committee" entities from those, like the Boy Scouts, AARP, and PTA, that (perhaps) do not warrant extensive scrutiny. "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* at 480.

In sum, the definitions of "contributions" and "disbursements" made for a political purpose do not include any reference to coordinated advocacy. *See* Wis. Stat. §11.01(6), (7), (16). The only subsection that purports to regulate coordinated disbursements, the voluntary oath subsection, requires disclosure by voluntary oath "committees," but plainly does not regulate coordinated

advocacy, let alone coordinated issue advocacy between a candidate and issue groups, as a "contribution." *Id.* §11.06(7). And those subsections that control the conduct of candidate committees do not purport to regulate coordination among candidates and non-committee issue advocacy groups, much less define any coordination as an in-kind "contribution" within the meaning of Chapter 11. *See id.* §§11.06(4)(d), 11.10(4).

2. Due Process And Free Speech Guarantees Foreclose This Investigation Because Of The Lack Of Statutory Authority And Because The Concept Of "Coordination" Is Too Vague To Pass Constitutional Muster

The Legislature's obvious decision *not* to require coordination of issue or express advocacy to be treated as a regulated "contribution" is conclusive of its intent not to regulate such matters. Allowing the Special Prosecutor to proceed with a criminal investigation on the theory that coordinated issue advocacy is a "contribution" within the meaning of Chapter 11, then, would violate the most basic norms of due process and free speech.

First, as this Court has decreed:

> "Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." Such notice is a basic requirement of due process.

WMC, 227 Wis.2d at 676-77, 597 N.W.2d at 734 (citation

omitted). This Court has identified a second problem that attends this type of regulation:

> "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Popanz, 112 Wis.2d at 173, 332 N.W.2d at 754 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

These concerns are significantly magnified in this case, given the burdens on constitutionally-protected speech and association these amorphous standards impose. As this Court has explained:

> When First Amendment interests are implicated by laws which may result in criminal penalties, imprecise standards "may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked.'"

WMC, 227 Wis.2d at 677, 597 N.W.2d at 734 (citation omitted); *see also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). To permit a criminal investigation to continue based on a phantom statute — one that the Special Prosecutor wishes were in print but that clearly is not — would be to abandon these basic due process norms, especially where, as here, it is incontestable that Movants and their colleagues were exercising core free speech and associational rights in engaging in the conduct alleged to be felonious. Quite simply, Chapter 11 provides *no*

notice that coordinated advocacy of any nature may be treated as a regulated "contribution," much less that issue advocacy is within its scope.

Even assuming that Chapter 11 somewhere stated that coordinated expenditures are regulated contributions, the concept of "coordination" lacks sufficient definition to meet constitutional due process standards. The GAB concedes that not every contact between a candidate and an outside group or individual during an election period can constitute regulated "coordination" consistent with the First Amendment. *See, e.g.*, App. at 95, 98;[28] *see also Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*); *Clifton v. FEC*, 114 F.3d 1309, 1314 (1st Cir. 1997); *FEC v. Christian Coalition*, 52 F.Supp.2d 45, 89-90 (D.D.C. 1999).

The issue, then, is whether Wisconsin law provides sufficient guidance regarding what constitutes "coordination" to pass constitutional muster. Chapter 11 could not flunk

[28] In this opinion, the GAB concluded that "the outright ban on any 'consultation, cooperation or action in concert' such as appears in Wisconsin Statute, s.11.06(7), Stats. … may be unenforceable. Some level of contact between a candidate and a committee making expenditures is permissible. … [P]rotection of a candidate's right to meet and discuss, with any person (including corporate persons), his or her philosophy, views and interests, and positions on issues (including voting record) is absolute. … Similarly, an independent committee's right to meet and discuss its philosophy, views and interests, and positions on issues, is probably equally absolute to that of the candidate." App. at 95, 98.

this vagueness test more definitively. *See Buckley*, 424 U.S. at 41.

For example, Chapter 11 does not define with any type of clarity the critical concept of "coordination," which, according to the Special Prosecutor, constitutes the difference between constitutionally-protected speech and association and a term in the state penitentiary. Given the lack of consensus regarding which statutory subsection is supposed to be the genesis of the requirement that coordinated expenditures be considered a contribution, we do not even know what *verbs* to construe in attempting to discern the boundary between regulated coordination and unregulated free speech.

Wis. Stat. §11.10(4), like §11.06(7), focuses on "cooperation," "consultation," and "acting in concert with or at the request of the candidate," but, unlike §11.06(7), does not include situations in which "committees" act at the "suggestion" of the candidate. And the language of these two subsections is clearly in conflict with the language of §11.06(4)(d), which dictates that candidates must report contributions or disbursements made with the "authorization, direction or control of or otherwise by prearrangement with" the candidate or the candidate's agent. Confusingly, this subsection makes no reference to "cooperation,"

"consultation," or "acting in concert with or at the request or suggestion of the candidate."

Even were this Court to reach a consensus on what verbs to examine, the above subsections of the statute do not contain terms of sufficient definition to withstand a vagueness attack. *See, e.g., Christian Coalition*, 52 F.Supp.2d at 89-91. The GAB has itself repeatedly conceded this in the course of providing advisory opinions.

In a legally unenforceable advisory opinion upon which the GAB and the Special Prosecutor have relied heavily in this case, El. Bd. Op. 00-2, the GAB conceded that there is no statutory, or even judicial, definition of what constitutes "coordination" sufficient to guide the primary actions of the politically-engaged. *See* App. at 95, 98. The GAB set forth what it believed was "probably" the standard that ought to apply. App. at 98. In this opinion, the GAB noted that the question of coordination created a "slippery slope" that makes it advisable for those seeking to abide by the law to "avoid" or "at the very least, minimize" constitutionally-protected discussions with candidates. App. at 98.

The constitutional infirmity of this "advisory" standard is clear: The GAB advises citizens that, given the lack of clear standards, the only way to ensure that they will avoid

liability is to *forswear* their speech and assembly rights. *See* App. at 98. This, of course, is precisely the kind of indeterminacy that due process forbids in the First Amendment context. Ambiguity and uncertainty that compel a speaker to "'hedge and trim'" "'offers no security for free discussion'" and thus fails the vagueness test. *Buckley*, 424 U.S. at 43 (citation omitted). And the GAB's "solution" to the definitional uncertainty represents the type of chilling of constitutionally-protected speech that violates the First Amendment: "[T]he Government may not suppress lawful speech as a means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *WRTL*, 551 U.S. at 476. "[I]n a debatable case, the tie is resolved in favor of speech." *Id.* at 474 n.7; *see also Citizens United v. FEC*, 558 U.S. 310, 324 (2010).

In 2005, the GAB again gave advice regarding a question that echoes some of those raised in this case: "The question that you are asking the Board is whether a candidate's action in directing a prospective contributor to an issue advocacy organization which engages only in non-express advocacy could result in the contributor's contribution to the issue advocacy organization being treated as an in-kind contribution to the candidate." App. at 102-06. The GAB

responded that there was no clear answer under Wisconsin statutory law or judicial decisions. In so demurring, the GAB made a concession that should alone be sufficient to doom the Special Prosecutor's coordinated issue advocacy enforcement theory as a matter of due process:

> In any discussion of what, for want of a better term, is commonly referred to as 'coordinated expenditures,' the Board's staff has to preface its comments with the caveat that the term 'coordinated expenditures' is not found anywhere in Wisconsin's statutes, and is not defined and only minimally discussed in Wisconsin case law. Consequently, any opinion about coordinated expenditures is principally conjectural because of the limited precedent. … Without it, there is no clear direction that specific conduct or circumstances constitute 'coordination,' but neither is there any clear direction that the conduct or those circumstances do not constitute 'coordination.'" …
>
> Wisconsin's statutes do not define 'coordinated expenditures.' Wisconsin's statutes define what are 'independent disbursements' (expenditures)[in §11.06(7)]. Whether an organization's disbursements (expenditures) which are not independent are, therefore, "coordinated expenditures," is a conclusion not set forth in the statutes or any where else in the law.

App. at 102.

The lack of any effective standard of "coordination" means not only that citizens have no notice of that which may subject them to criminal sanction for exercising their First Amendment rights, but also that arbitrary and discriminatory enforcement is a real danger in this crucial and sensitive area. And both of these realities mean that politically-active persons in Wisconsin — or at least those who have any

sense at all — will choose either to speak to, associate with, and petition their candidates and office holders, or to speak on public issues, but will not do both. Constitutionally-protected and socially salutary speech and association will, without question, be seriously chilled.

In sum, because Wisconsin law "fails to clearly mark the boundary between permissible and impermissible speech," any prosecution is barred by due process. *Buckley*, 424 U.S. at 41. Such a prosecution would also violate the First Amendment because Wisconsin has not "afford[ed] the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

D. Where "Coordination" Is Addressed In Chapter 11, It Is Only Coordinated Express Advocacy That Is Regulated[29]

Even were this Court inclined to accept the Special Prosecutor's invitation to embroider the statutory definition of "contribution" to include coordinated advocacy, and were Chapter 11 to contain any even potentially constitutionally salvageable definition of that concept, the plain language of Chapter 11 requires that such in-kind contributions be limited to coordinated *express* advocacy.

[29] The discussion herein is responsive to Issues 9 and 12 posed in this Court's Order of December 16, 2014.

As noted, the only statutory section that even arguably regulates the type of coordination alleged in this case is the voluntary oath provision, Wis. Stat. §11.06(7)(a). The GAB has recognized this by relying on this subsection as the authority for its "coordination" regulation. *See* Wis. Admin. Code § GAB 1.42. Subsection 11.06(7)(a) requires an oath affirming that there has been no coordination with candidates only from those individuals and committees that wish to make "disbursements" – a term of art that requires an expenditure "for political purposes," meaning express advocacy. Further, it requires only those committees and individuals who wish to make disbursements "which are to be used to advocate the election or defeat of any clearly identified candidates" in any election – that is, for express advocacy – to file a prior registration statement and oath relating to the independence or coordination of their "disbursements." By its explicit terms, this section does not apply to coordinated issue advocacy.

E. The Wisconsin Legislature Acted Against the Backdrop Of *Buckley v. Valeo* In Restricting Any Regulation Of Coordination To Express Advocacy[30]

Although the plain language – or lack of it – of Chapter 11 ought to suffice to foreclose this criminal investigation,

[30] The discussion herein is responsive to Issues 9 and 12 posed in this Court's Order of December 16, 2014.

note also that the legislative history of the statute's coordination provision demonstrates that it was designed to be restricted to express advocacy. To understand the backdrop against which the Wisconsin Legislature acted in 1979, the Court must again consult *Buckley*. In addition to drawing a distinction between express and issue advocacy in construing FECA, the *Buckley* Court drew a distinction for constitutional review purposes between regulation of campaign contributions, which could, in narrowly drawn circumstances, be acceptable, and limitations on independent expenditures, which could not survive constitutional scrutiny. *Buckley*, 424 U.S. at 23.

Those defending expenditure limits had argued that the expenditure limit in 18 U.S.C. §608(e)(1) was necessary to prevent persons from avoiding the contribution limit in 18 U.S.C. §608(b) by "paying directly for media advertisements or for other portions of the candidate's campaign activities." *Buckley*, 424 U.S. at 46. The Court responded by noting that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act," and thus "[s]ection 608(b)'s contribution ceilings rather than 608(e)(1)'s independent expenditure limit prevent attempts to circumvent the Act through prearranged or coordinated expenditures amount to disguised contributions. By contrast, 608(e)(1) limits expenditures for *express* advocacy of

candidates made totally independent of the candidate and his campaign." *Buckley*, 424 U.S. at 46-47 (emphasis added).

It is evident from context that the *Buckley* Court was discussing only coordinated *express* advocacy. The Court had, pages earlier, read the expenditure limits under discussion to be confined to express advocacy so as to avoid constitutional vagueness issues, and it contrasted coordinated contributions with independent *express* advocacy. *Id.* at 39-44, 47. Only coordinated express advocacy expenditures *could* have been a "contribution" under the statute and that was self-evidently what the Court had in mind.[31]

The U.S. Congress had this same understanding. Among the federal 1976 amendments was a new definition of independent expenditures that clearly indicated that coordination was only relevant in the context of express advocacy. *See* Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976). The amendment defined independent expenditures as "any expenditure by a person which expressly advocates the election or defeat of a clearly identified

[31] It is also notable that the danger said to be posed by coordination was groups "paying directly for media advertisements or for other portions of the candidate's campaign activities," all of which would have been in service of express advocacy for the candidate in question. *Buckley*, 424 U.S. at 46. The Court pointed to the legislative history, which again focused on the coordination of "billboard advertisements endorsing a candidate." *Id.* at 46 n.53.

candidate, which is made without cooperation or consultation with any candidate … and which is not made in concert with, or at the request or suggestion of, any candidate…" *See* H.R. Conf. Rep. 94-1057, at 954 (1976), 1976 U.S.C.C.A.N. 946, at 954. In a joint explanatory statement, the conference committee explained that "[t]he definition of the term independent expenditure … is intended to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo*." H.R. Conf. Rep. 94-1057, at 954, 1976 U.S.C.C.A.N. 946, at 954. Finally, "[t]he [Federal Election Commission's ("FEC's")] original position, and one approved by the courts, was that, in order for a communication to be considered a coordinated expenditure, it must contain express advocacy."[32]

The Wisconsin Legislature similarly interpreted *Buckley* to mean that coordination could only be regulated when express advocacy was involved. *See* Wis. Stat. §§11.06(7), (7m); 11.30(2)(d). Section §11.06(7)(a) was amended in response to

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[32] James Bopp, Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION L.J. 209, 220 (2002) (arguing that "Congress intended, and the First Amendment requires, that only express advocacy communications may be considered coordinated expenditures"); *see also Orloski v. FEC*, 795 F.2d 156, 163 (D.C. Cir. 1986) (FEC took the position that for a communication coordinated with a candidate to be deemed an "in-kind" contribution, it must contain express advocacy); *Colorado Repub. Fed. Campaign Comm.*, 839 F.Supp. at 1455.

Buckley to require that groups and individuals who wish to make disbursements "~~in support of or in opposition to~~ which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election" must, prior to making the disbursement, file a registration statement and oath affirming that the disbursement was not made in cooperation or consultation with the candidate." § 56m, ch. 328, Laws of 1979 (Wis. May 19, 1980). Obviously, the Legislature was "parrot[ting] the language used in *Buckley*" to ensure that it restricted its §11.06(7) coordination regulation to express advocacy. *WMC*, 227 Wis.2d at 680 n.26, 597 N.W.2d at 736 n.26.

These provisions demonstrate that Wisconsin legislators chose *not* to mimic in Chapter 11 the federal statutory provision that explicitly provides that coordinated expenditures are regulated "contributions," and chose to regulate only coordination of express advocacy.

F. Construing Coordinated Issue Advocacy As A Reportable Contribution Subject To Campaign Contribution Limitations Would Violate The Movants' Free Speech And Associational Rights Under The First Amendment To The U.S. Constitution and Article I, Sections 3 And 4 Of The Wisconsin Constitution[33]

Were this Court to read the statute as treating coordinated issue advocacy as an in-kind "contribution," the targeted 501(c) entities would be presented with a stark – and patently unconstitutional – choice. Chapter 11 bars them from making "contributions" to candidates or candidates' committees. *See* Wis. Stat. §11.38(1)(a)1; *Barland II*, 751 F.3d at 809. So, to the extent that their expenditures are, due to coordination, deemed "contributions for political purposes," that means that these entities are *totally barred* from engaging in such speech. As demonstrated above, Chapter 11 provides no guidance on the line purportedly drawn between constitutionally-protected speech, assembly, and petition,

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[33] The discussion herein is responsive to Issue 11 posed in this Court's Order of December 16, 2014.

Movants, throughout this litigation, have argued that this Court can decide this case by relying entirely on state law and basic due process guarantees, confident that a fair reading of Chapter 11 precludes this criminal investigation without reliance on the First Amendment. Movants believe that federal First Amendment law should be consulted to reinforce the wisdom of Movants' reading of Chapter 11. *See, e.g., Betthauser*, 172 Wis.2d at 150, 493 N.W.2d at 43 (courts should "avoid construing a statute in such a way as would render that statute unconstitutional"); *see also Pries v. McMillon*, 326 Wis.2d 37, 64, 784 N.W.2d 648, 661 (2010)(this Court decides cases "on the narrowest grounds"); Wis. Stat. §11.002.

and the type of "coordinated" advocacy that may subject citizens to prison time.

Predictably, political operatives will use this vague prohibition as a way to trigger intrusive investigations into opponents' campaign activities that will, by their very nature, require detailed examination of all manner of private conversations between candidates and interest groups. [redacted], such communications, in turn, will expose sensitive discussions of political strategy, fundraising, opposition research, and the like. As a mechanism to harass and wound one's adversaries, an allegation of illegal coordination would be highly effective and therefore nearly irresistible.[34] This investigation demonstrates that virtually any allegations of conversations or contacts among candidates and representatives of 501(c) entities will invite an invasive, damaging, extended, and expensive criminal investigation that severely chills such entities' willingness or ability to engage in constitutionally-protected speech and association.

[34] *See, e.g., In re: The Coalition*, MUR 4624 (statement of Comm'r Bradley A. Smith), at 2 ("These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing 'corruption or the appearance of corruption.'"); *id.* at 12 n. 18 ("Everyone at [the FEC] … is well aware of a favorite saying of the practicing campaign finance bar: 'The process is the punishment.'").

If the Special Prosecutor's reading of the statute prevails, then, Wisconsin 501(c)(4) organizations will, as a practical matter, be forced to choose: They can spend freely to get their policy messages out through the public media, or they can engage in the democratic process by petitioning and speaking to those who seek to represent them, but in reality they cannot do both. To exercise their rights to speech, association, and petition with respect to candidates, they must foreswear their rights to speech and association through issue advocacy in the public sphere, or *vice versa*. Where the facts demonstrate that what is at stake is not a *de jure* contribution limit, but rather a *de facto* expenditure ban on issue advocacy where advocacy organizations choose to exercise their rights to speech, association, and petition, strict scrutiny must be applied to test the constitutionality of this Hobson's choice. *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972)(applying unconstitutional condition doctrine); *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (same); *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014).

In *Citizens United v. FEC*, the U.S. Supreme Court ruled that "strict scrutiny" applies to "[l]aws that burden political speech," requiring "the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." 558 U.S. at 340

(citation and internal quotation marks omitted); *see also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978). It is clear that "contribution and expenditure limitations both implicate fundamental First Amendment interests." *Buckley*, 424 U.S. at 23. Although the *Buckley* Court applied strict constitutional scrutiny to the statutory limitations on "expenditures" and "only" exacting scrutiny to the "contribution" restrictions at issue in that case, this distinction collapses where, as here, what are clearly "expenditures" are supposedly converted into "contributions" by the imagined operation of the statute.[35]

The government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). Simply recategorizing what is factually and inarguably an "expenditure" for issue advocacy as a

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[35] The U.S. Supreme Court applies "exacting scrutiny" to contribution limits that – unlike the instant case – impose "only a marginal restriction upon the contributor's ability to engage in free communication," *see Buckley*, 424 U.S. at 20-21, and to disclosure requirements. *See Citizens United*, 558 U.S. at 366 (disclosure requirements "impose no ceiling on campaign-related activities and do not prevent anyone from speaking"). "Exacting scrutiny" contemplates an examination that is far more searching that simple reasonableness. *See, e.g., Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981)(striking contribution limit). It requires a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67. Even were this Court to conclude that "exacting scrutiny" is the applicable level of review, the regulation of coordinated issue advocacy argued for in this litigation would fail that test for the reasons discussed within.

"contribution" "cannot (for constitutional purposes) make it one." *Colorado I*, 518 U.S. at 622. Determining which standard applies requires a "functional, not formal" analysis of the extent to which the regulation at issue threatens direct and substantial harm to First Amendment values.[36] *See FEC v. Colorado Repub. Campaign Comm.*, 533 U.S. 431, 443 (2001) (*Colorado II*).

Unlike limitations on donations to a candidate, which involve largely symbolic speech and do not limit the donors' ability to independently speak on issues of importance, *Buckley*, 424 U.S. at 20-21, this expenditure ban disguised as a donation ban would muzzle those who wish to *themselves* engage in the type of First Amendment expression that the U.S. Supreme Court has accorded the most stringent protection: issue advocacy. And the bar on corporate "contributions" would mean that 501(c) groups' freedom to discuss issues is not just limited — it is completely curtailed. "As a 'restriction on the amount of money a person or group can

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[36] "The distinction between contributions or 'speech by proxy' and expenditures has many critics, including members of the Court." *Gard v. Wisconsin State Elections Bd.*, 156 Wis.2d 28, 45 n.10, 456 N.W.2d 809, 817 n.10 (1990); *see also Colorado I*, 518 U.S. at 638 (Thomas, J., joined by Scalia, J. and the Chief Justice, concurring in the judgment and dissenting in part); *id.* at 627-28 (Kennedy, J., joined by Scalia, J., and the Chief Justice, concurring in the judgment and dissenting in part).

spend on political communications during a campaign,' [expenditure limits masquerading as contribution limits] 'necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" *Citizens United*, 558 U.S. at 339 (quoting *Buckley*, 424 U.S. at 19). In such circumstances, were the "contribution" label applied to coordinated "expenditures" in aid of issue advocacy, it would unquestionably "impose direct and substantial restraints on the quantity of political speech" of the type that the *Buckley* Court subjected to strict scrutiny and ultimately outlawed. 424 U.S. at 39.

Strict scrutiny is also required because it is the coming together of candidates and citizens to discuss political advocacy that is target of the Special Prosecutor's concern; thus, the regulation of coordination is by definition the regulation of political association. "There are … some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981). "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which

embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see also Cousins v. Wigoda*, 419 U.S. 488, 547 (1975).

Thus, if the targeted issue groups choose to speak, the coordination regulations under the Special Prosecutor's reading would curtail their associational rights vis-a-vis candidates in ways that require application of "the closest scrutiny." *Buckley*, 424 U.S. at 25 (quoting *NAACP v. Alabama*, 357 U.S. at 460-61); *see also Riley v. Nat'l Federation of the Blind*, 487 U.S. 797, 793-95 (1988) (recognizing unconstitutional chilling effect of state regulation where the uncertainty of the standard put the speaker at risk of having to bear the cost of litigation and the risk of a mistaken adverse finding by the factfinder).[37]

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[37] It is worth underscoring the critical importance of the type of association at issue because, in his papers throughout this litigation, the Special Prosecutor paints "coordination" as an inherently corrupt — even illegal — activity. Yet "[i]n a representative democracy such as this," the legislative and executive branches "act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Limiting contacts with candidates "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." *Clifton*, 114 F.3d at 1314. Conversely, elected officials and candidates are intimately tied to public issues and public debate involving legislative action, government decision-making, and policies or issues of local, state, and national importance. Indeed, "public discussion is a political duty" of candidates and elected officials. *Buckley*, 424 U.S. at 53 (citations omitted). "'The role that elected officials play in our society makes it all the more

Even if organizations chose their petition rights over their speech rights – that is, they elect to exercise their right to discuss issues with the officeholder or candidate and thus have to forgo public issue advocacy – their associational rights still would be burdened, just in a different way. The ensuing bar on issue advocacy would not only "limit political expression 'at the core of our electoral process and of the First Amendment freedoms,'" *Buckley*, 424 U.S. at 39, but also would mean that the targeted entities could not "effectively amplify[] the voice of their adherents," thus impinging on constitutionally-protected freedom of association. *Id.* at 22; *see also FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 493 (1985) ("*NCPAC*"). In such circumstances, strict scrutiny is inarguably the relevant standard of review.

In applying strict scrutiny, one must recognize that "preventing corruption or the appearance of corruption [is]

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imperative that they be allowed freely to express themselves on matters of current public importance." *Repub. Party of Minn. v. White*, 536 U.S. 763,781-82 (2002); *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995)(public has a right to read and hear what government employees have to say). The government simply has no legitimate interest "in limiting its legislators' capacity to discuss their views of local or national policy." *Bond v. Floyd*, 385 U.S. 136, 135-36 (1966). In sum, contacts between citizens and candidates or public officials on the issues of the day are not only guaranteed by the First Amendment rights to speech, petition, and association, but they are also the only way that a representative democracy can retain its legitimacy and effectiveness.

the only legitimate and compelling government interest[] thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97; *see also McCutcheon v. FEC*, 134 S.Ct. 1434, 1450 (2014); *Citizens United*, 558 U.S. at 359. Further, both in *Citizens United* and in its 2014 decision in *McCutcheon v. FEC*, the Supreme Court stressed that "while preventing corruption or its appearance is a legitimate object, Congress may target only a specific type of corruption — '*quid pro quo*' corruption." *McCutcheon*, 134 S.Ct. at 1450; *see also Citizens United*, 558 U.S. at 359-60. *Quid pro quo* bribery contemplates "a specific intent to give or receive something of value *in exchange* for an official act." *United States v. Sun Diamond Growers*, 526 U.S. 398, 404-05 (1999).

The Supreme Court's recent precedents underscore just how restrictive the *quid pro quo* requirement is. "[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support can afford," *McCutcheon*, 134 S.Ct. at 1450-51, because the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. … The government cannot justify First Amendment regulation by reliance on a "'generic favoritism or influence theory.'" *Citizens United*, 558 U.S. at 359 (citation omitted). As the

McCutcheon Court concluded: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to … *quid pro quo* corruption." 134 S.Ct. 1450. Certainly, a candidate and citizens coming together to discuss general principles of governance and policy cannot conceivably be deemed "corrupt"; rather, they are the very foundation of a vital and responsive democratic system.[38]

In applying these foundational principles, it is important to recognize where the burden of persuasion lies: "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based regulations are presumptively invalid and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000).

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[38] The government also cannot justify regulating practices that garner contributors only "influence over or access to" elected officials, *McCutcheon*, 134 S.Ct. at 1451, by citing a compelling interest in avoiding the "appearance" of corruption. "[B]ecause the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of influence or access." *Id.* at 1450-51. And if the line between *quid pro quo* corruption and general influence is vague, the Supreme Court directs that "'[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.'" *Id.* at 1451 (citation omitted).

This Court has in fact noted that although ordinances normally receive a presumption of constitutionality that the challenger must refute, when a law regulates First Amendment activities "'the burden shifts to the government to defend the constitutionality of that regulation *beyond a reasonable doubt*.'" *Kenosha Co.*, 223 Wis.2d at 383, 588 N.W.2d at 242 (citation omitted and emphasis added).[39]

There are no findings in the legislative history of Chapter 11 that coordination of issue advocacy actually results in, or even seriously threatens to result in, *quid pro quo* corruption. In determining whether the government has demonstrated a legitimate interest in preventing *quid pro quo* corruption or its appearance, a court cannot "accept[] mere conjecture as adequate to carry a First Amendment burden." *McCutcheon*, 134 S.Ct. at 1452; *see also Colorado I*, 518 U.S.

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[39] The U.S. Supreme Court has explained that this burden

> is for good reason. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

Playboy Entertainment Group, Inc., 529 U.S. at 817 (citation omitted); *see also McCutcheon*, 134 S.Ct. at 1452.

at 618). "'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. … To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.'" *Nat'l Treasury Employees Union, Inc.*, 513 U.S. at 475 (citation omitted). Obviously, the prosecutor has not and cannot come anywhere close to meeting this burden.

This is also the case for the prosecutor's recent suggestion regarding express advocacy coordination under the circumstances presented in this case. Presumably the he will attempt to piggy-back on federal regulation of coordinated advocacy to meet his burden. The Supreme Court has indicated that coordinated *express* advocacy may, in some circumstances, be deemed a regulable "contribution" but Movants submit that, were it to consider the issue today, the Supreme Court would reject a general assertion that coordinated express advocacy is always subject to restriction as a "contribution."[40]

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[40] In *Buckley*, the Supreme Court did not seriously consider the constitutionality of treating coordinated expenditures as contributions; the *Buckley* Court merely mentioned coordination in the course of rebutting an argument made in favor of expenditure limits. Further, as noted above, the proper reading of *Buckley* is that its discussion of coordination assumed express advocacy. *See supra* section II(E).

The continuing force of the discussion of coordination in *McConnell v. FEC*, 540 U.S. 97 (2003), is likely nil given the many ways in which that decision has been repudiated by the Court. *See, e.g., Citizens United*, 558 U.S. 310 (overruling *McConnell*'s

Turning to first principles, then, coordinated issue advocacy fails strict scrutiny first because of the privileged place that issue advocacy holds in U.S. Supreme Court caselaw. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *WRTL*, 551 U.S. 449. Thus, in the opinion of the Seventh Circuit, the *Buckley* Court emphasized how narrow the government's interest in regulating core

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validation of a provision barring corporations and labor unions from using general treasury funds to engage in independent express advocacy); *WRTL*, 551 U.S. 449 (ruling that electioneering regulation had to be restricted to express advocacy or its functional equivalent). In any case, the *McConnell* Court's discussion focused on conduct, not content; it did not, then, touch on the issue/express advocacy question. *McConnell* also affirmed the regulation of "coordinated disbursements" for electioneering communications," which, after *WRTL*, can only be express advocacy and its functional equivalent. *See McConnell*, 540 U.S. at 202; *see also WRTL*, 551 U.S. at 476 & n.8.

Finally, in *Colorado II*, the Supreme Court upheld limits on coordinated expenditures in the unique context of coordination between candidates and their alter egos, political parties, and of a regulatory scheme that limited but did not ban such contributions. *See* 533 U.S. 431. The District Court had read the "in connection with" language at issue to restrict regulation of coordination to express advocacy. *See FEC v. Colorado Fed. Campaign Comm.*, 839 F.Supp. 1448, 1452-53 (D. Colo. 1993), *rev'd*, 59 F.3d 1015, 1021 (10th Cir. 1995). But the Supreme Court declined to pass on the meaning of the "in connection with" language in its first review of the case, *see Colorado I*, 518 U.S. at 618-19, and reserved the question whether regulation of coordinated spending that was not the functional equivalent of express advocacy might require a higher level of review in its second opinion, *see Colorado II*, 533 U.S. at 456 n.17.

Note, too, that both *McConnell* and *Colorado II* were decided before *Citizens United* clarified that the *only* compelling interest that can justify campaign finance regulation is a desire to thwart *quid pro quo* corruption. *See Speechnow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010). The regulation of coordinated express, much less issue, advocacy suggested by the prosecutor would fail to meet this more demanding standard upon re-evaluation by the Court. In any event, as the John Doe judge found, there is no evidence of express advocacy here.

political speech is, and held that "the government's authority to regulate in this area extends only to money raised and spent for speech that is clearly *election related*; ordinary political speech about issues, policy, and public officials must remain unencumbered." *Barland II*, 751 F.2d at 810-11. Accordingly, noted the Seventh Circuit, the Court held that "the First Amendment forbids the government from regulating political expression that does not 'in express terms advocate the election or defeat of a clearly identified candidate.'" *Id.* at 811 (quoting *Buckley*, 424 U.S. at 44).

The Supreme Court's decision in *WRTL* is instructive. There, the Court struck down in an as-applied challenge some of the same regulations of issue advocacy in electioneering periods that it had earlier upheld against a facial attack in *McConnell v. FEC*, 540 U.S. 97 (2003). The Chief Justice wrote the controlling opinion, *see Citizens United*, 558 U.S. at 324, which reaffirmed with vigor and clarity that the government has a compelling interest - even in electioneering periods - *only* in regulating express advocacy or its functional equivalent, defined as an ad that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 465-72, 477-78.

Indeed, the *WRTL* Court asserted that it "has never recognized a compelling interest in regulating ads … that are neither express advocacy nor its functional equivalent." The Court responded to appeals to permit regulation of issue advocacy during electioneering periods with an emphatic "[e]nough is enough. Issue ads … are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." 551 U.S. at 478-79. The *WRTL* Court nowhere qualified its ringing reaffirmation of the issue/express advocacy divide by indicating that its holding was limited to "independent" advocacy. *WRTL* applies to protect issue advocacy from regulation without regard to whether the issue advocacy is coordinated.[41]

And, even where there is coordination of issue advocacy, such coordination does not permit the necessary inference that persons will regularly use this device to circumvent campaign finance regulations in furtherance of *quid pro quo* corruption. First, issue advocacy need not take place in close proximity to an election; elected officials may consult

[41] The only way that "issue advocacy" may be regulated is through narrowly drawn disclosure requirements because, "[u]nlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities." *Buckley*, 424 U.S. at 64. Hence, in *Citizens United*, the Court refused to limit the challenged disclosure requirements to speech that is the functional equivalent of express advocacy. 558 U.S. at 368-69.

with issue advocacy groups at any point throughout their terms as well as during election cycles. *See, e.g., Shays v. FEC*, 414 F.3d 76, 99 (D.C. Cir. 2005).

The Special Prosecutor's allegations of illegal coordination prove just how distant consultation with respect to issues can be from electioneering. For example, he alleges illegal coordination occurred before the recall elections were even certified by the GAB — that is, before elections were certain to take place. According to the Special Prosecutor, elected officials are in constant campaign mode and thus all coordination regarding issue advocacy, whenever it occurs, results in a "contribution" to an as yet unidentified election effort. Further, the Special Prosecutor contends that public officials improperly coordinated issue advocacy with respect to elections in which they were *not* candidates. Where coordination of issue advocacy has no inevitable nexus with a pending election in which the coordinating candidate has a personal stake, the necessary inference that a public official would trade favors for help in getting elected is entirely absent.

Second, issue advocacy does not have the obvious and certain value in promoting candidates' electoral odds that express advocacy holds, and it is accordingly not even arguably fungible with a contribution. Issue advocacy is, by

definition, *not* speech that can unambiguously be understood to advocate the election of the candidate. Citizens often consider a variety of issues in casting a vote, and even members of the same political party do not share the same views on every issue. To the extent that the issue advocacy communications take positions on issues that reflect those of the candidate, such communications may help the candidate or may not, depending on the policy druthers of the individual voter.

Further, candidates have priorities in terms of messaging that issue advocacy groups may not share, even if they are generally in ideological accord. One cannot infer that a candidate, were he or she to receive a cash contribution, would wish to showcase a contentious issue of central concern to an issue advocacy organization given the political dynamics of the moment. The candidate may "coordinate" in the sense of giving advice on the best media channel to employ in making a communication or opine on the optimal time to debut an ad to ensure that its impact is felt. But that does not mean that the candidate, if left to her own devices, would spend money to air her views on this issue, much less that the candidate would identify the same message or employ the same rhetoric or images in communicating it. In sum, the government simply cannot show the inevitable

election-related value of all issue ads or the fungibility of coordinated issue advocacy and a cash contribution. Coordinated issue advocacy will, in the main, *not* "amount to no more than payment of the candidate's bills" and thus has insufficient nexus to *quid pro quo* corruption. *Colorado II*, 533 U.S. at 456 n.17.

Finally, when one considers the actual conduct of coordinated issue advocacy, it is difficult to discern how coordination of issue advocacy can give rise to *any* inference of the type of corrupt *quid pro quo* the Supreme Court demands. The organizations targeted in this investigation are tax-exempt social welfare organizations, rather than for-profit enterprises that conceivably could seek to persuade candidates to give them some sort of corrupt commercial advantage. And to the extent that these organizations and candidates are "coordinating," it is overwhelmingly likely that such coordination is due to the fact that they are already in ideological accord, rather than that candidates have been "bought" through coordination.

The Supreme Court specifies that *quid pro quo* corruption means that elected officials "are influenced to act *contrary to their obligations of office* by the prospect of … infusions of money into their campaigns." *NCPAC*, 470 U.S. at 497 (emphasis added). It contemplates that consideration is given

to officials in return for "an *effort to control the exercise* of the officeholder's official duties." *McCutcheon*, 134 S.Ct. at 1450 (emphasis added). But there is realistically no likelihood that organizations will seek to coordinate their issue advocacy with candidates for the purpose of earning the candidate's agreement to adopt public policy positions that the candidate would otherwise not support. Thus, the risk that coordinated issue advocacy will lead to corrupt bargains — rather than mutual promotion of agreed public policy goals — is infinitesimally small.[42]

The most one could infer is that coordinated issue advocacy possibly *could* be *helpful* to a candidate *if* an election contest is ongoing, but that simple fact falls woefully short of a demonstrable threat of *quid pro quo* corruption. All political speech helps someone and hurts someone else, to the extent that it succeeds in the

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[42] For example, assume a candidate who is pro-gun control, or even one who has taken no position on the issue: Is it conceivable that the National Rifle Association will seek to coordinate its anti-gun control advocacy with that candidate? Is it conceivable that that coordinated advocacy will somehow help the candidate in the same way a contribution of cash would? Is it conceivable that the candidate will be induced corruptly to change his views because of the benefits secured through coordination? Conversely, assume a pro-choice candidate: If NOW were to coordinate its issue advocacy with that candidate, is it conceivable that such consultation would corruptly induce the candidate to do that which he otherwise would not? No; he already agrees with NOW. To ask these questions is to answer them. Coordination of issue advocacy looks nothing like *quid pro quo* "dollars for political favors." *NCPAC*, 470 U.S. at 497.

marketplace of ideas. Independent express advocacy exhorting citizens to vote for the candidate is both unambiguously election-related and of obvious and direct value to the campaign, yet even it cannot be regulated because the Supreme Court has found no nexus between such expenditures and *quid pro quo* corruption. And, as the D.C. Circuit has pointed out, "[t]he [U.S. Supreme] Court has acknowledged that a citizen's or group's large expenditure — for example, in financing advertisements or get-out-the-vote activities — may confer some benefit on a candidate and thereby give influence to the spender. But the Court nonetheless has consistently dismissed the notion that expenditures implicate the anti-corruption interest." *Emily's List v. FEC*, 581 F.3d 1, 7 (D.C. Cir. 2009); *see also McConnell*, *540 U.S. at* 156-57 n.51.

The Special Prosecutor's theory also fails strict scrutiny in that the supposed regulation he posits is not narrowly tailored to serve the government's interest in preventing *quid pro quo* corruption. Given the weight of the constitutional values at issue in this case, the regulation of "coordination" requires bright-line rules that are as narrowly tailored as possible to target real threats of *quid pro quo* corruption. This, in turn, requires scrupulous identification of the type of *content* and *conduct* that may subject speech, association, and petition to criminal

sanction. The lines must be drawn to ensure that the regulations "give the benefit of the doubt to speech, not censorship." *WRTL*, 551 U.S. at 482. And, as the Supreme Court has definitively ruled, such regulations must be based on specific, objective circumstances; they cannot be intent- or context-based. *Id.* This is because "[n]o reasonable speaker would choose to run an ad covered by [campaign finance regulation] if its only defense to a criminal investigation would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'" *Id.* at 468 (quoting *Buckley*, 424 U.S. at 43).

Limits on contributions are prophylactic. The fact that donations are limited but are not — and cannot constitutionally be — banned demonstrates that not every contribution to a candidate threatens *quid pro quo* corruption. The treatment of coordinated express advocacy as contributions only provides a further layer of prophylaxis. As *Buckley* explained, treating coordinated express advocacy expenditures as contributions "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 47.

But "limiting donations to and spending by non-profits in order to prevent corruption of candidates and officeholders represents a kind of 'prophylaxis-upon-prophylaxis' regulation to which the Supreme Court has emphatically stated, 'Enough is enough.'" *Emily's List*, 581 F.3d at 12 (quoting *WRTL*, 551 U.S. at 478-79). For example, in *WRTL*, the Supreme Court rejected the argument that it needed to adopt an expansive definition of the "functional equivalent" of express advocacy "to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions." The Court held that "such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny. '[T]he desire for a bright-line rule … hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.'" 551 U.S. at 479 (quoting *MCFL*, 479 U.S. at 263).

In light of the fact, discussed above, that there is no ascertainable definition of the content and conduct that could lead to a finding of "coordination," the Special Prosecutor's proposed regulation must be conceived of as a forbidden prophylaxis-upon-prophylaxis-upon-prophylaxis because it discourages *any* type of discussion among

candidates and interest groups. Its overbreadth is obvious and fatal.

The Special Prosecutor's theory also fails the "narrow tailoring" test in that he seeks to regulate issue advocacy coordination that may not be proximate to any election. As noted, the Special Prosecutor believes that office holders are perpetually campaigning, and thus that any consultation that occurs during the course of their tenure in office results in a "contribution." He believes that coordination that occurs before an election is certain, and that occurs between *non*-candidates and issue advocacy organizations with regard to candidates for other offices, is regulated in Chapter 11. Such regulation cannot withstand strict scrutiny given that the only constitutionally-acceptable goal is to prevent *candidates* from trading favors for *electoral advantage*.

G. [redacted][43]

[redacted]

[43] The discussion herein is responsive to Issue 14 posed in this Court's Order of December 16, 2014.

[redacted] First, "[i]n the search context, probable cause requires a '" fair probability"' that contraband or evidence of a crime will be found in a particular place." *Robinson*, 327 Wis.2d at 320, 786 N.W.2d at 472. Having demonstrated that what the Special Prosecutor alleges Movants did is not illegal, there was, by definition, no probable cause that contraband or evidence of a purported crime would be found. Second, these general

[44] A valid warrant must be issued by a neutral and detached magistrate, [redacted]. *See State v. Eason*, 245 Wis.2d 206, 237, 629 N.W.2d 625, 638 (2001). [redacted]

warrants lacked sufficient particularity and thus must be invalidated.

The Fourth Amendment to the U.S. Constitution and Article I, section 11 of the Wisconsin Constitution both require that a warrant be supported by probable cause and that it particularly describe that which is to be seized or searched. In *Groh v. Ramirez*, 540 U.S. 551, 558-59 (2004), the Supreme Court ruled that a search warrant that fails to meet this particularity requirement is invalid and cannot be saved by an unincorporated warrant application or the asserted "reasonableness" of the ultimate execution of the warrant. In so doing, the Court stressed that the particularity requirement is far from a formality, serving as it does to guard the "core" of the Fourth Amendment: "the right of a man to retreat into his own home and there be free of unreasonable governmental intrusion." *Id.* at 557, 558-59. The particularity requirement also ensures that the probable cause requirement is meaningful. The Supreme Court, in *Groh*, warned, "unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." 540 U.S.

at 560; *see also State v. Jackson*, 313 Wis.2d 162, 170-71, 756 N.W.2d 623, 627 (2008).

Under the standards articulated above, [redacted] plainly failed to meet the constitutional particularity requirement as it applies in cases in which First Amendment values are threatened by a search and attendant seizures.[45] [redacted]

[redacted]

[45] Where, as here, First Amendment rights are clearly implicated, the Supreme Court places an enhanced burden on the state to justify seizure of protected materials: The Supreme Court holds that the Fourth Amendment's requirements, especially its particularization mandate, be applied with "scrupulous exactitude." *Stanford*, 379 U.S. at 485; *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978).

[redacted] they fail constitutional standards under this Court's precedents. *See In re Doe Proceeding*, 277 Wis.2d at 78, 689 N.W.2d at 909-910.

III. CONCLUSION

For all these reasons, the John Doe judge's order should be affirmed, the investigation ordered ended with prejudice, and [redacted] to them.

Michael J. Bresnick
Julie O'Sullivan
Edward Meyers
Philip O'Beirne
Margaret Nettesheim
Stein Mitchell Muse
Cipollone & Beato LLP
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777
mbresnick@steinmitchell.com

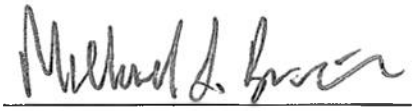
Dennis P. Coffey
Mawicke & Goisman, S.C.
1509 N. Prospect Avenue
Milwaukee, WI 53202-2323
(414) 224-0600
Counsel for Petitioner,
[redacted]

Dated: January 30, 2015

FONT CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), as amended by the Court's December 16, 2014, Order, for a brief produced with a monospaced font. The length of the brief is 97 pages.

Dated this 30th day of January, 2015.



Michael J. Bresnick
Stein Mitchell Muse
Cipollone & Beato LLP
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777
mbresnick@steinmitchell.com

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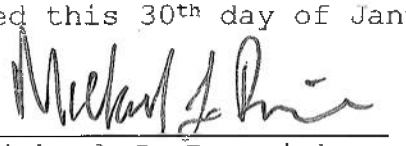

Michael J. Bresnick
Stein Mitchell Muse
Cipollone & Beato LLP
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777
mbresnick@steinmitchell.com

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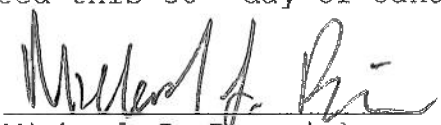

Michael J. Bresnick
Stein Mitchell Muse
Cipollone & Beato LLP
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777
mbresnick@steinmitchell.com

APPENDIX CERTIFICATION

I hereby certify that I have submitted with this brief, as a separate document, an appendix that conforms to the rules contained in Wis. Stat. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the John Doe judge and Court of Appeals relevant to an understanding of the issues raised in the briefs of Unnamed Movants #6 and #7; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the John Doe judge's or Court of Appeals' reasoning regarding those issues.

I further certify that I have redacted portions of this appendix in accordance with the terms of the Court's orders of December 16, 2014, and January 13, 2015, and filed, and served on all parties, both an "original" and a "redacted" version of the appendix.

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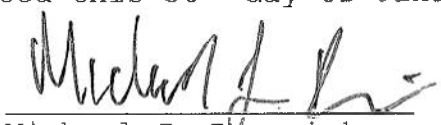

Michael J. Bresnick
Stein Mitchell Muse
Cipollone & Beato LLP
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777
mbresnick@steinmitchell.com