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IN THE SUPREME COURT OF WISCONSIN

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

Case Nos. 2013AP2504 - 2508-W

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,
Petitioner,
v.
THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor
Respondents,

[Caption continued on following page]

BRIEF OF UNNAMED MOVANT NO. 2, [redacted]

(ISSUES 7, 9, 11-13)

Concerning John Doe Proceedings in Five Counties
Hon. Gregory A. Peterson, Presiding
Columbia County No. 13-JD-011; Dane County No. 13-JD-09; Dodge County No. 13-JD-06; Iowa County No. 13-JD-01; Milwaukee County No. 12-JD-023

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Case Nos. 2014AP296-OA

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

v.

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

Case Nos. 2014AP417 - 421-W

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

v.

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

and

EIGHT UNNAMED MOVANTS,
Interested Parties.

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ISSUES PRESENTED FOR REVIEW

Unnamed Movant No. 2's brief addresses the following issues as framed by the Court in its December 16, 2014 Order:

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?"

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.

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.

[redacted]

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).

[redacted]

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.

[redacted]

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.

[redacted]

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 of the United States Constitution and/or Article I, Section 3 of the Wisconsin Constitution.

[redacted]

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 candidate committee "coordinated" with an independent advocacy organization's issue advocacy.

[redacted]

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

With respect to the balance of the issues identified by the Court, Unnamed Movant No. 2 will be adopting the arguments set forth by other Unnamed Movants, as specified in the brief.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented have statewide importance, and warrant oral argument and publication of the Court's opinion.

STATEMENT OF THE CASE

I. Nature of the Case

Respondent [redacted] is a recognized 501(c)(4) social-welfare corporation formed under Wisconsin law. [redacted]

During the time periods relevant to this proceeding, [redacted]

[redacted]

[redacted]

But the blinds were eventually opened. [redacted] This Court now has the power to end this nefarious activity once and for all.

II. Procedural Posture

[redacted]

[redacted]

[redacted]

[redacted] The Special Prosecutor sought review of that decision on February 21, 2014, by filing a Petition for Supervisory Writ and Writ of Mandamus (with accompanying Suggestions in Support) in the Wisconsin Court of Appeals (Case Nos. 2014AP417-421-W). The Petition sought to require [redacted] Shortly thereafter, on April 14, 2014, [redacted] filed a Petition to Bypass the Court of Appeals in this Court.

On November 14, 2013 [redacted] three unnamed petitioners filed a Petition for Supervisory Writs of Mandamus and Prohibition in the Wisconsin Court of Appeals (Nos. 2013AP2504-2508-W). [redacted] These challenges were quickly addressed by the Wisconsin Court of Appeals in an order dated November 22, 2013. In the order, the Wisconsin Court of Appeals denied relief on two of the six claims for supervisory relief and ordered briefing by the Special Prosecutor on the remaining claims. The Wisconsin Court of Appeals eventually denied relief for the remaining claims on January 30, 2014, and the litigants timely petitioned this Court for review.

In yet another distinct proceeding, two unnamed petitioners filed a petition to commence an original action in this

Court on February 7, 2014. The two unnamed petitioners requested that this Court to declare the Special Prosecutor's interpretation of Chapter 11, Wis. Stats., invalid and unenforceable. (No. 2014AP296-OA).

On December 16, 2014, this Court assumed jurisdiction over the writ proceedings concerning [redacted] (Nos. 2014AP417-421-W) and [redacted] (Nos. 2013AP2504-2508-W), and also granted the petition to commence the original action (No. 2014AP296-OA). The Court ordered the cases consolidated for purposes of briefing and oral argument and ordered briefing by the parties on fourteen separate issues relating to the [redacted].

III. Statement of Facts

A. The Genesis of [redacted]

[redacted] John Doe I officially began on May 5, 2010 as an investigation into county staffers' possible misuse of a veteran's fund called Operation Freedom. The concern was reported by then-Milwaukee County Executive Scott Walker, who was also the founder of Operation Freedom. Over the next three years, John Doe I expanded almost twenty times and evolved into an ongoing, statewide audit of nearly all of the political activities of [redacted].

Under the auspices of John Doe I, the Milwaukee County District Attorney issued scores of subpoenas related to the 2011 and 2012 Senate and gubernatorial recall elections. All the while, prosecutors sifted volumes of confidential political and campaign-related communications between [redacted]. John Doe I eventually

came to an end on February 21, 2013 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. [redacted]

[redacted]

[redacted]

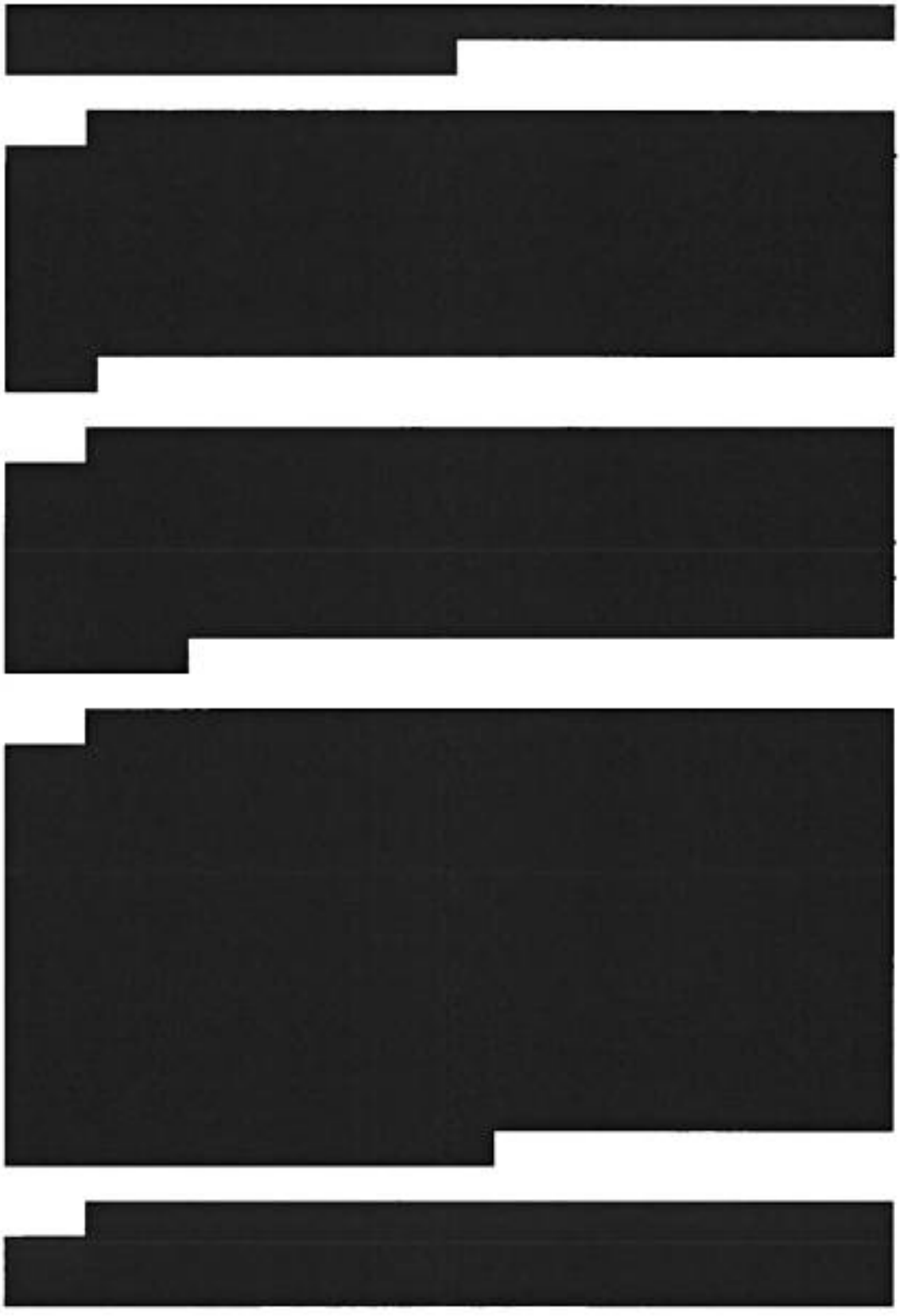
[redacted]

[redacted]

[redacted]

C. [redacted]

[redacted]



[redacted]

[redacted]

D. [redacted]

[redacted]

[redacted]

[redacted]on February 10, 2014, Mr. O'Keefe and the Club initiated a civil rights action in federal court against [redacted]

[redacted] *See O'Keefe v. Schmitz*, Case No. 2:14-cv-00139 (E.D. Wis. Feb. 10, 2014). The complaint detailed the one-sided and contiguous nature of [redacted]

The Special Prosecutor filed his Petition for Supervisory Writ and Writ of Mandamus with the Court of Appeals on February 21, 2014.[1] [redacted] filed its responsive brief on March 31, 2014, and timely filed its Petition to Bypass the Court of Appeals on April 14, 2014.

On May 6, 2014, the Honorable Rudolph T. Randa of the U.S. District Court for the Eastern District of Wisconsin issued a preliminary injunction against the federal defendants. Decision and Order, *O'Keefe v. Schmitz*, 19 F.Supp.3d 861 (E.D. Wis. 2014). The court made specific findings and concluded that John Doe II had "devastated" the ability of Mr. O'Keefe and the Club to undertake issue advocacy and fundraise for that purpose. *Id.* at 867. It further found that the plaintiffs had made the requisite showing of a constitutional deprivation. *Id.* at 869.

The Seventh Circuit eventually reversed Judge Randa's decision. *See O'Keefe v. Chisholm*, 769 F.3d 936, 939 (7th Cir. 2014), *petition for cert. filed* Jan. 21, 2015. The Court cited federalism concerns, reasoning that "principles of equity, comity, and federalism counsel against a federal role here." *Id.* In addition, the Court found qualified immunity applicable to the constitutional claims because they were not yet established "beyond debate." *Id.* at 942. The Court never addressed the scope of ch. 11, Wis. Stats., but did find [redacted] to be "extraordinarily broad, covering essentially all of the group's

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[1] The Special Prosecutor's Petition and Memorandum failed to address the alternative constitutional arguments raised by [redacted], including: (1) the First Amendment vagueness and overbreadth of the Wisconsin statutes relied upon by the Special Prosecutor; (2) the constitutionality of [redacted]; and (3) the constitutionality of [redacted] under the Fourth Amendment and First Amendment Privilege.

records for several years[.]" *See id.* at 938. A Petition for Writ of Certiorari is pending before the Supreme Court of the United States.

[redacted]

STANDARD OF REVIEW

I. The Standard of Review Applicable to *Schmitz v. Peterson* (Issues 7, 9, 11, 12, and 13)

A supervisory writ is an extraordinary and drastic remedy issued only upon some grievous exigency. *State ex rel. Dressler v. Circuit Court for Racine County,* 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). It will not be granted unless: "(1) an appeal is an utterly inadequate remedy; (2) the duty of the court is *plain*; (3) its refusal to act within the line of such duty or its intent to act in violation of such duty is *clear*; (4) the results of the circuit court's action must not only be prejudicial but must involve extraordinary hardship; and (5) the request for relief was made promptly and speedily." *Id.* (emphasis in original).

The burden of proof remains on the Special Prosecutor, the party seeking a writ. *See, e.g., State v. Buchanan*, 2013 WI 31,

¶ 17, 346 Wis.2d 735, 745, 828 N.W.2d 847 (considering requirement of "extraordinary hardship," and finding that the petition "has not met the criteria to grant a supervisory writ.").

The Special Prosecutor claims that [redacted] violated a "plain" legal duty in two ways: first, [redacted] and second, [redacted] In other words, [redacted] had a plain legal duty to find that Wisconsin has made coordinating issue advocacy with issue groups a crime, and to "appreciate" the import of evidence showing express advocacy.

On a supervisory writ, the standard is not whether [redacted] should have found reason to believe that a crime was committed, but rather, whether his [redacted] were so far outside his clear legal duty that grave hardship and irreparable harm resulted. *See Dressler*, 163 Wis. 2d at 630. This is consistent with the general rule that the extent to which a John Doe Judge may proceed with an investigation is within the judge's discretion. Wis. Stat. § 968.26(3). Further, it is within the discretion of the judge not only to determine whether such proceedings shall be instituted, but also to decide the scope and extent of any inquiry. *State v. Doe*, 78 Wis. 2d 161, 165, 254 N.W.2d 210 (1977).

The rulings [redacted] ultimately made called for him to exercise this discretion. On a motion to quash, a John Doe Judge applies Wis. Stat. § 968.135. *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, ¶ 53, 277 Wis. 2d 75, 77, 689 N.W.2d 908. "Section 968.135 requires a showing of probable cause to believe that the documents sought by the subpoena duces tecum will produce evidence relevant to potentially criminal activity." *Id.* This kind of "probable cause" means that the investigation must be "lawfully authorized"

(which in turn means that the initial showing must lead to an objectively reasonable belief that a crime was committed) and the documents requested must be "relevant to the inquiry." *Id.* at ¶¶ 53-54, 277 Wis. 2d at 77-78 (internal citations omitted).

Under the first prong of § 968.135, [redacted] Because [redacted] had discretion "to decide the scope and extent of any inquiry," *State v. Doe*, 78 Wis. 2d at 165, he was entitled to "give the benefit of any doubt to protecting speech and association" when he considered [redacted]. He was also entitled to "appreciate" and interpret the facts regarding "express advocacy" as they appeared to him; he was under no plain legal duty to construe facts in any particular way. Finally, [redacted]

II. The Standard of Review On Issues of Statutory Interpretation and on Constitutional Review of Statutes Considered Independently of Judge Peterson's Exercise of Discretion (Also Issues 7, 9, 11, 12, and 13)

The statutory and constitutional issues briefed in Section III (Issue 7) and Section IV below (Issues 9, 11, 12, and 13) were all raised in *Schmitz*, and in the context of the Special Prosecutor's request for a writ, should all be considered now pursuant to the rigorous standard described above. However, this Court may (and, for the reasons suggested below, should) also reach these same issues outside of the context of [redacted] For example, [redacted]

[redacted] the standard of review for statutory interpretation and constitutional review is *de novo*, although this Court "benefit[s] from the analyses of the lower courts." *See, e.g., Buchanan*, 346 Wis. 2d at 742-43, ¶¶ 11-12 (applying one standard of review to request for supervisory writ, and different standard of review to portion of opinion that interpreted statute in exercising court's superintending powers). The Court's standard rules of statutory construction apply to whether Chapter 11 regulates coordinated issue advocacy, *see In re July 25, 2001 Doe*, 272 Wis. 2d at 219-20, ¶ 12, including the maxim that "the court cannot read words into [a statute] that are not found therein either expressly or by fair implication, . . . because this would be legislation and not construction." *In re Doe Petition*, 2008 WI 67, ¶ 70, 310 Wis. 2d 342, 371-372, 750 N.W.2d 873 (Butler, J., concurring) (quoting *Mellen Lumber Co. v. Indus. Comm'n of Wisconsin*, 154 Wis. 114, 120, 142 N.W. 187 (1913)).

Even applying a *de novo* standard of review to Issues 7, 9, 11, 12, and 13, however, the result remains the same. As discussed below, Wisconsin has not brought coordinated issue advocacy within its campaign finance laws (Section III), and multiple constitutional or other grounds [redacted] (Section IV).

ARGUMENT

I. Adoption of Arguments and Relief Requested (Issues 1-6, 8, 10, and 14)

[redacted] expressly adopts the arguments and briefs of [redacted]

As detailed by [redacted] on Issues 1 through 5, serious defects exist regarding the formation and structure of [redacted]. However, simply resolving those defects – as severe as they are – will not cure the substantial harms that continue to plague the parties here. [redacted] Those harms also need to be addressed.

[redacted], there is good cause for this Court to address the Special Prosecutor's interpretation of the law and declare it invalid. Even on potentially moot issues, this Court may grant relief if the issues are of "great public importance" or if they are "likely to arise again and a decision of the court would alleviate uncertainty." *In re John Doe Proceeding*, 2003 WI 30, ¶ 19, 260 Wis. 2d 653, 660 N.W. 2d 260. Either of these standards would be met here. Without critical guidance from this Court, campaign groups, regulators, prosecutors, and the public at large will lack much-needed certainty regarding the scope of campaign finance law in Wisconsin. In addition, an overzealous district attorney could easily [redacted] This Court should foreclose this possibility once and for all by definitively striking down the Special Prosecutor's invalid theory of coordination.

Accordingly, [redacted] respectfully requests that this Court issue a decision finding that: (1) [redacted]

[redacted] (Issues 1-5); (2) the [redacted] (Issues 7 and 14); and (3) Wisconsin campaign finance law does not criminalize cooperation on public policy issues between officeholder-candidates and non-profit issue advocacy organizations, as discussed in Section III (Issues 7 and 14). If the Court agrees with the Special Prosecutor that Chapter 11 can reach coordinated issue advocacy, it should then take up and consider the constitutional arguments presented in Section IV (Issues 9, 11-13).

II. First Principles: Free Speech

Before delving into what the Seventh Circuit Court of Appeals has described as Wisconsin's "labyrinthian" campaign finance laws,[3] it is important to remember the context in which this case arises: political speech protected by the First Amendment. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Indeed, "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Id.* (citations and quotations omitted).

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[2] [redacted] notes that, even if this Court determines [redacted], a John Doe Judge still has authority to issue subpoenas and later quash them. *See In re Doe Petition*, 2008 WI 67, ¶ 34, 310 Wis. 2d 342, 359, 750 N.W.2d 873 ("[T]he John Doe judge has authority to issue subpoenas, examine witnesses, adjourn the proceedings, . . . and issue and seal warrants." (quotations omitted)). [redacted] also notes that [redacted]

[3] *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 808 (7th Cir. 2014) ("*Barland II*").

Accordingly, when construing and applying the law, the First Amendment requires the Court "to err on the side of protecting political speech rather than suppressing it," "the benefit of the doubt [goes] to speech, not censorship," and "the tie goes to the speaker...." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 457, 470, 474 (2007) ("*WRTL II*").

From the outset of his investigation, the Special Prosecutor has had it backwards – seeking to twist any statutory ambiguity or absence to support his convoluted theory of criminal liability against those engaging in political speech. This is anathema to the First Amendment and due process.

III. Wisconsin Campaign Finance Law Does Not Regulate Coordinated Issue Advocacy (Issue 7, including subparts)[4]

Issue advertisements, by definition, do not include express advocacy. As such they are not regulated—as "disbursements," "contributions," or any other term—under Wisconsin campaign finance law, regardless of whether the ads are coordinated with a candidate's campaign. This fact is confirmed by the definitions of regulated conduct crafted by the Wisconsin legislature. Simply put, irrespective of whether the Wisconsin legislature *could* have regulated "coordinated" issue advocacy, it has not done so. Accordingly, the theory of criminal liability pursued by the Special Prosecutor is invalid and [redacted]

[4] The standard of review for Section III is set forth at pp. 13-14 above. In sum, the standard for the review of [redacted] exercise of discretion [redacted] is the high standard applicable for supervisory writs, as to which the Special Prosecutor bears the burden of proof. The standard for the interpretation of statutes is *de novo*.

A. Only Express Advocacy Communications Qualify as Regulated "Disbursements" or "Contributions"

Four terms stand at the threshold of the campaign finance law in Wisconsin: "committee," "disbursement," "contribution" and "political purposes." All Wisconsin campaign finance disclosure requirements, source requirements, limits, and prohibitions arise from the definition of the first three terms, which are linked together by the defined term "political purposes." As seen below, communications are made for "political purposes" only when they "expressly advocate[] the election, defeat, recall or retention of a clearly identified candidate...." Wis. Stat. § 11.01(16)(a). As a result, such "express advocacy" communications qualify as regulated "disbursements" and/or "contributions" because they are made for "political purposes." Wis. Stat. §§ 11.01(6)(a), 11.01(7)(a). And a person or organization only becomes a "committee" when they "make or accept" "contributions" or "disbursements." Wis. Stat. § 11.01(4).

There is no statute or valid GAB rule, however, that regulates the type of communications at issue here: issue advocacy communications made by [redacted] allegedly in "coordination" with [redacted]

First, to the definitions.[5] In relevant part, Wisconsin defines "contributions" as follows:

> (6)(a) Except as provided in par. (b), "contribution" means any of the following:
> 1. A gift, subscription, loan, advance, or deposit of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and

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[5] For the Court's convenience, the entirety of Wis. Stat. Chapter 11 and Wis. Admin. Code Ch. 1 are appended to this brief.

> regulations in the ordinary course of business, ***made for political purposes.*** In this subdivision "anything of value" means a thing of merchantable value.

Id. at § 11.01(6)(a) (emphasis added). Similarly, in relevant part, "disbursements" are defined as:

> A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, ***made for political purposes***. In this subdivision, "anything of value" means a thing of merchantable value.

Id. at § 11.01(7)(a)1 (emphasis added). "Committee," meanwhile, is defined by reference to "contributions" and "disbursements":

> "Committee" or "political committee" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a "committee" does not include a political "group" under this chapter.

Wis. Stat. § 11.01(4).

These provisions, then, beg the question: what is for "political purposes?" The statutes provide the answer. To begin, an "act is for 'political purposes' when it is done . . . for the purpose or influencing the recall from or retention in office of an individual holding a state or local office . . . ." Wis. Stat. § 11.01(16). For good reason, the statutory definition does not

stop with this unconstitutionally vague formulation. *See Buckley v. Valeo*, 424 U.S. 1, 77 (1976) ("It is the ambiguity of this phrase that poses constitutional problems."). The definition continues: "Acts which are for 'political purposes' include but are not limited to... The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate...." Wis. Stat. § 11.01(16)(a). *See also Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 834 (7th Cir. 2014) ("*Barland II*") (noting that "'[t]he not limited to' language holds the potential for regulatory mischief" requiring a limiting construction that "the statutory definition of 'political purposes' in section 11.01(16)...[is] limited to express advocacy and its functional equivalent....").[6]

Thus, under existing Wisconsin law, a communication can qualify as a "disbursement" or "contribution" ***only*** if it contains express advocacy or its "functional equivalent."[7] [redacted]

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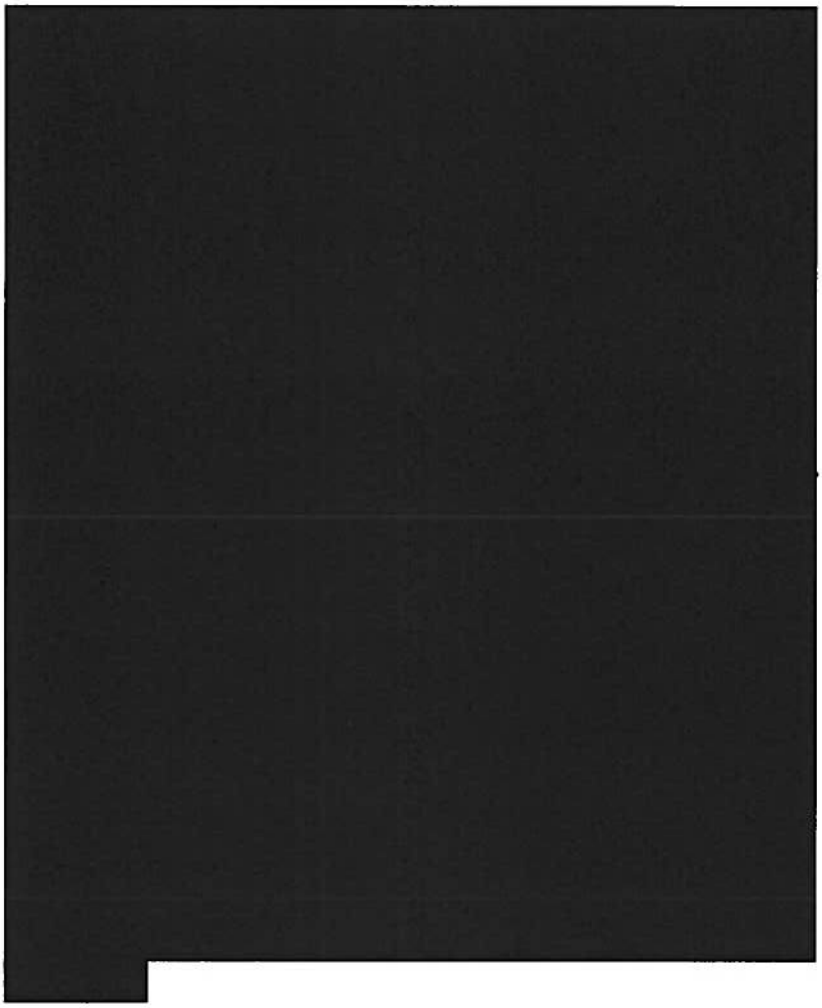
[6] Wisconsin Administrative Code § GAB 1.28(3)(a) lists the so-called *Buckley* "magic words" of "express advocacy" in defining "communication for a 'political purpose.'" Enacted in 2010, subparagraph (b)(3) of that section sought to expand this definition beyond the scope of express advocacy to encompass a wide variety of communications in close proximity to elections. This expanded definition of "communication for a 'political purpose'" was challenged by [redacted] in federal court. In response to the lawsuit, the GAB represented that it would not enforce this attempted regulatory expansion of communications beyond express advocacy, *Wisconsin Club for Growth v. Myse*, 2010 WL 4024932, at *8 (W.D. Wis. 2010)), and the offending second sentence of (b)(3) has subsequently been struck down as unconstitutional. *See Barland II*, 751 F.3d at 838. In any event, the Special Prosecutor has never relied upon GAB § 1.28 in an effort to support its theory of criminal liability in this case.

[7] This is consistent with Wisconsin's laws regulating disbursements by groups (potentially [redacted]) who pay for their own communications and advertisements surrounding a candidate election. Wisconsin requires such groups to file an "oath" that they do not "act in cooperation or consultation with" a candidate, a candidate committee, or its agents. *See* Wis. Stat. § 11.06(7). Notably, this requirement extends only to groups who ([redacted]) "advocate the election or defeat of any clearly identified candidate or candidates in any election..." *Id.* It does not extend to issue advocacy groups.

[redacted]



[redacted] (emphasis added).

Because [redacted] communications do not contain express advocacy, they do not constitute "disbursements" or

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Thus, Wisconsin has extended its primary reporting requirements for independent communications only to groups engaging in the equivalent of express advocacy—not to groups engaging in issue advocacy or the species of issue advocacy recognized at the federal level as electioneering communications.

"contributions." [redacted] This also means that [redacted] does not qualify as a "committee" under Wisconsin campaign finance law. Wis. Stat. § 11.01(4).

Moreover, even as to non-"primary purpose" committees as defined in Wis. Stat. § 11.06(2), an "indirect disbursement" need only be reported if it (1) is a "contribution" or (2) expressly advocates the election or defeat of a clearly identified candidate. Neither reporting requirement applies to [redacted], because no [redacted] communication expressly advocated the election or defeat of a clearly identified candidate—thereby disqualifying the communications as either "express advocacy" communications or "contributions."

In short, before there may be a "committee" or any regulated outlay of funds under Wisconsin campaign finance law, there must be a "disbursement" or "contribution." Before there is a "disbursement" or "contribution" ("coordinated," "in-kind," or otherwise), there must be a "political purpose." And in the case of ***communications***—the conduct at issue here—before there is a "political purpose," there must be "express advocacy." Simply put, absent express advocacy, there can be no "political purpose," "disbursement," "contribution," "committee," or otherwise regulated communication. None exists here. Accordingly, the Special Prosecutor's theory of criminal liability lacks any lawful basis under Chapter 11.

B. The Special Prosecutor's Theory of Criminal Liability Is Incompatible With Chapter 11

Disregarding this straightforward textual analysis of Wisconsin law, the Special Prosecutor disavows any effort to limit its investigation to express advocacy communications, [redacted]

[redacted] To support its troubling (and largely circular) conclusion, the Special Prosecutor attempts to patch together a hodgepodge of statutory and regulatory provisions, in a wishful effort to establish what simply does not exist under Wisconsin campaign finance law: regulation of "coordinated" issue advertisements by non-committee entities.

1. Coordinated Issue Advocacy Communications Are Not "In-Kind" Contributions

[redacted] This argument fails before it begins.

"In-kind contribution" is a term defined only by regulation. According to GAB § 1.20(e), it means "a ***disbursement*** by a contributor to procure a thing of value or service for the benefit of a registrant who authorized the ***disbursement***." (emphasis added). Thus, by definition, an "in-kind contribution" requires a "disbursement." And, as explained above, a "disbursement" requires "political purposes,"[8] which, in the case of communications, is limited to express advocacy. Wis. Stat. § 11.01(16)(a).

Accordingly, the statutory and regulatory definitions of "political purposes" and "in-kind contributions" defeat the Special

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[8] Under the definition of "disbursement," there is one exception to the "political purposes" requirement: for the outright "transfer of personalty" to a candidate's committee, "including but not limited to campaign materials and supplies." Wis. Stat. § 11.01(7)(a)(2). That provision has no application here.

Prosecutor's expansive theory of criminal liability. The Special Prosecutor's "in-kind contribution" theory is a dead end.

2. GAB § 1.42 Does Not Apply to Non-Committee Issue Advocacy

The Special Prosecutor also relies on GAB § 1.42, but that provision does nothing to convert coordinated issue advocacy communications—by otherwise independent entities—into regulated "contributions."

Titled "Voluntary committees; scope of voluntary oath; restrictions on voluntary committees," GAB § 1.42 merely provides guidance to "committees" that make "expenditures" (both independent and coordinated), providing guidelines as to how such "expenditures" are to be reported.[9] For example, GAB

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[9] In briefing below, the Special Prosecutor argued [redacted] This is curious for several reasons. First, it directly contradicts the GAB's filings before the Seventh Circuit in *Barland II*. There, the GAB was required to answer the court's written question, "What specific duties and restrictions do the Wisconsin statutes and GAB rules impose on organizations that make independent political expenditures?" 2013 WL 600720, *2 (GAB Brief). The GAB corrected the court: "The Court's...order uses the words, 'independent political expenditures'; however, independent 'disbursements' is the term of art used in Wisconsin campaign finance law..." *Id.*, n 2. Further, the GAB told the court that GAB § 1.42 simply "interprets Wis. Stat. 11.06(7) and provides guidance regarding when *disbursements* relating to candidates are independent under Wisconsin law." 2013 WL 600720, * 26 (emphasis added). The GAB also stated: "GAB 1.42(6) is also relevant to organizations making independent *disbursements* because it helps them determine whether their speech is considered independent under Wisconsin law." *Id.* at 28 (emphasis added). Thus, the GAB plainly equates the term "expenditure" with "disbursement." Second, if "expenditure" were to mean something "broader" than "disbursement," it would present *ultra vires* problems—at least as to non-committees. "Only the Wisconsin Legislature, acting through its lawmaking powers, can change Wisconsin law or expand the scope of an agency's regulatory authority." Wis. Attorney Gen. Opinion OAG-05-10, p. 12.

§ 1.42(1) provides that expenditures over $25 "in support of or opposition to a specific candidate" may not be made unless they are either (1) reported as in-kind contributions or (2) incurred by a "committee filing the voluntary oath specified in Wis. Stat. 11.06(7)." Notably, this subsection references "expenditures" made "in support of or opposition to" a specific candidate. This makes sense, as the next subsection, GAB § 1.42(2), makes clear that an "expenditure" is something that "committees" filing the § 11.06(7) oath make, and only "committees" engaging in express advocacy must file that oath. Wis. Stat. § 11.06(7).

Similarly, subsections 3 and 4 of GAB § 1.42 relate to the reporting of spending by "committees," and the ability of "committees" to make both independent "expenditures" and "contributions," respectively. Neither section regulates or purports to regulate coordinated issue advocacy communications by non-committees.

The same is true of GAB § 1.42(6), which purports to establish a presumption for when "expenditures made on behalf of a candidate"—where a candidate is "supported or opposed"—are treated as "in-kind contributions." Again, by definition, issue advocacy does not and could not constitute an "in-kind contribution," because as seen above, an "in-kind contribution" requires a "disbursement," which in turn requires "express advocacy."

GAB § 1.42 therefore confirms that Wisconsin's campaign finance law does not regulate issue advocacy communications, regardless of whether the communications are coordinated with a candidate.

3. Coordinating Issue Advocacy Does Not Convert an Independent Organization into a "Subcommittee" of a Candidate

Citing to Wis. Stat. § 11.10(4), the Special Prosecutor presents an alternative (and inconsistent) theory: that any organization that "coordinates" with a candidate campaign committee, by virtue of that coordination, becomes a "subcommittee" of the campaign committee, such that every activity is reportable and the "candidate's campaign treasurer" is the treasurer of the organization. Section 11.10(4) states:

> 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.

Read without reference to any other part of the campaign finance law, this could convert almost every independent corporation, union, or church that could be deemed to have at some point acted "in concert with" or at the "suggestion of" a candidate, into a subcommittee of the candidate's principal committee. Since few Wisconsin campaigns have ever filed such a "subcommittee" report, felony convictions could be harvested as low-hanging fruit, virtually at will and limited only by the peculiar political interest of prosecutors.

The statute itself, however, is not so broad. Instead, it is limited by the same foundational definitions that define the scope of Chapter 11. In this instance, the term "committee" limits the statute's reach. By its plain language, § 11.10(4) applies only to a "***committee***" which is "organized or acts with the cooperation of or upon consultation with a candidate..." *Id.* (emphasis added). And, as described above, to be a "committee," an entity or person must first make or accept "contributions" or "disbursements:"

> (4) "Committee" or "political committee" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, ***which makes or accepts contributions or makes disbursements***, whether or not engaged in activities which are exclusively political, except that a "committee" does not include a political "group" under this chapter.

Wis. Stat. § 11.01(4), Stats. (emphasis added).

Section 11.10(4) is not a trap door in Wisconsin's campaign finance law, making any cooperation with a campaign committee a transformative event. It simply describes the legal effect of coordination in the peculiar circumstance where an existing "committee" coordinates its disbursements or contributions with a candidate's committee. It does not apply to [redacted] a non-committee,[10] which has not made any "disbursements" or

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[10] Even as to an existing "committee," the Special Prosecutor's proffered interpretation of § 11.10(4) is inconsistent with other provisions of Wisconsin's campaign finance law and would render the provision overly broad. For example, voluntary committees filing the oath described in § 11.06(7) are expressly permitted to make ***both*** independent and coordinated disbursements, so long as coordinated disbursements are properly reported as "in-kind contributions" where appropriate. *See* Wis. Stat. § 11.06(7); GAB § 1.42. Under the Special Prosecutor's argument, any such coordinated disbursement would automatically convert the voluntary committee into a wholesale "subcommittee" of the candidate, placing it under all restrictions and limitations applicable to the candidate's committee and

"contributions" under Wisconsin law. Thus, yet again, the definition of "political purposes" defeats the Special Prosecutor's proffered theory of criminal liability. Section 11.10(4) cannot, as a matter of law, be applied to [redacted]

4. *WCVP* Does Not Apply, and If It Does, Should be Overruled

The Special Prosecutor has relied upon a single Court of Appeals case, *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App.), *pet. for review dismissed,* 231 Wis. 2d 377, 607 N.W.2d 293 (1999) ("*WCVP*"), to support its expansive theory of criminal liability. For several reasons, however, *WCVP* cannot carry the weight the Special Prosecutor places upon it, and either does not apply or should be overruled.

WCVP was a group that materialized eighteen days before a Supreme Court election to send out hundreds of thousands of mailers specifically urging citizens to vote in the election. Significantly, WCVP did not deny it was a "voluntary committee" under GAB § 1.42. *WCVP*, 231 Wis. 2d at 681 n.8. This is significant. Such committees must swear a statutory oath

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requiring it to share the candidate's campaign treasurer. It also begs the question: why would the GAB have bothered to define "in-kind contributions" at all if any act of coordination converted a committee into a subcommittee of the candidate?

Moreover, § 11.06(4)(d) provides that 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." Thus, under the Special Prosecutor's reading of the broader "coordination" language of § 11.10(4), "committees" could be converted into "subcommittees" even when their coordinated activities are not reportable as "contributions" to the candidate's committee.

generally stating that they do not coordinate with campaign committees, Wis. Stat. § 11.06(7); if they violate the oath, GAB § 1.42(2) requires the expenditure at issue to be treated as a contribution. *Id.*[11]

Setting aside for now the constitutionality of this scheme, as a matter of Wisconsin law, WCVP was arguably subject to some level of civil investigative review by the Elections Board[12] to determine whether it had complied with the oath. WCVP had, after all, come into existence just before the election; printed and mailed thousands of cards with a "nearly identical" message of the campaign's, comparing two candidate's records and asking voters to vote "next Tuesday, April 1st." *WCVP*, 231 Wis. 2d at 675-76. And, [redacted], WCVP failed to identify itself as having paid for the cards. Here, in contrast, [redacted]

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[11] The underlying statutory authority for GAB § 1.42 (which uses the term "independent expenditures") is Wis. Stat. § 11.06(7), which only applies to "independent disbursements". The statute requires an oath "that the committee or individual does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported, that the committee or individual does not act in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported, that the committee or individual does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who benefits from a disbursement made in opposition to a candidate, and that the committee or individual does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate who benefits from a disbursement made in opposition to a candidate."

[12] At the time of *WCVP*, the GAB was still known as the Wisconsin Elections Board.

Despite the sufficiency of the Election Board's showing under GAB § 1.42, the *WCVP* court unnecessarily attempted to outline a second, alternative theory for bringing WCVP's mailings within the statutory definition of "contribution." The court's alternative analysis, however, failed to follow its own reasoning to its logical conclusion. Had it done so, it would have confirmed there is a circle of self-reference between Chapter 11's definitions of "political purpose" and "contribution."

At the top of its logical circle, the *WCVP* court began on correct footing. Some things that are not themselves express advocacy can still be "contributions" (for example, a gift of "354,000 blank postcards...allowing [the candidate committee] to put whatever message it wished on them...."). *WCVP*, 231 Wis. 2d at 682. But that is because the postcards (or pizza for campaign workers, a new office printer, or book of stamps) would meet § 11.01(6)(a)(2)'s definition of "contribution" which does ***not*** require "political purposes" and only requires a "[a] transfer of personalty, including but not limited to campaign materials and supplies, valued at the replacement cost at the time of transfer."

Instead of relying on the subsection that was clearly applicable, however, the *WCVP* court tried to rely on § 11.01(6)(a)'s other definitions of "contribution," which, in turn, forced it to stretch the definition of "political purposes" to cover WCVP's mailers. In so doing, the court jumped from definition to definition until it had almost come full circle.

First, the court observed that the statutory definition of "political purposes" begins with the formulation "purpose of influencing the election..." *WCVP*, 231 Wis. 2d at 680. The court, however, did not simply apply this phrase (whatever it means) to WCVP's mailers, and conclude its analysis. Rather, it turned to one of GAB's regulatory "political purposes" definitions under GAB § 1.28, the rule that defines when "persons other than committees" are subject to the campaign finance law. GAB § 1.28(1)(b) provides that "'contributions for political purposes'

means contributions made to...a candidate." The *WCVP* court concluded that because the mailers could be a "contribution," they might also be "for political purposes," and therefore, the investigation should continue in order to determine whether the mailers were, in fact, contributions. *Id.*

The *WCVP* court's analysis fails to recognize that these parts of the definitions are circular. One cannot logically determine whether something is a "contribution" by deciding whether it meets the definition of "political purposes," but then use as the key criterion for finding "political purposes" the existence of a "contribution" – the very question triggering the analysis.

Nor does swapping the concept of "in-kind contribution" for "contribution" break this cycle of self-reference. As discussed above, the GAB's regulatory definition of "in-kind contribution" requires a "disbursement," which again requires a "political purpose." *See* GAB § 1.20(e), Wis. Stat. § 11.01(7). At most, the introduction of yet another self-referential term twists the logical circle into a figure eight. It does not provide a clear, independent criterion for classifying an entity's conduct as either inside or outside of the campaign finance law.

At any rate, this was an alternative theory, and it was only the beginning of the Elections Board's investigation. The *WCVP* court did not need to grapple with the logical conclusion of its reasoning or peer down the road to predict the manner in which its reading of the definitions would ultimately have to be applied to whatever facts the investigation uncovered. Indeed, had another appellate court been able, *after* the investigation, to consider the sufficiency of *WCVP*'s "in-kind contribution" alternative to the "voluntary committee" theory, it would have found that the only way to apply *WCVP*'s logical figure-eight is to

tether the definitions to concrete conduct that occurs outside of the figure-eight.[13]

As discussed above, in the case of a communication, the only categories of concrete "contributions" are: (1) coordinated express advocacy communications or (2) a direct gift of personalty (such as post cards, yard signs, etc.). The Special Prosecutor does not rest its theory upon either category. Accordingly, *WCVP* cannot sustain the Special Prosecutor's theory of criminal liability as to [redacted]

To the extent *WCVP* can be read to hold that coordination of issue advocacy represents an in-kind contribution to a campaign committee—that is, the very act of coordination creates the "political purpose" that makes the advocacy a "contribution"—this Court should expressly overrule the opinion.

As established above, Wisconsin's campaign finance law—which the GAB just this month acknowledged has not been revised since 1978, is "convoluted," has been held unconstitutional in multiple respects, and should be legislatively overhauled, *see* Kennedy Memorandum for the January 13, 2015 GAB Meeting, ([redacted])—does not support the *WCVP*'s court's apparent conclusion. And as set forth below, if it did, the statute would be unconstitutional.

IV. Stretching Chapter 11 to Reach Coordinated Issue Advocacy Communications Would Render the Statute Unconstitutional (Issues 9, 11-13)[14]

As described above, a plain textual analysis of Wisconsin campaign finance law reveals that coordinated issue advocacy

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[13] The targets of the investigation ultimately settled with the Elections Board. Of note, the Petition for Review in *WCVP* was "dismissed," not denied. 2000 WI 2, 231 Wis. 2d 377, 677 N.W.2d 293.

[14] The standard of review for these issues is set forth above at pp. 13-14.

communications are not regulated as "contributions." This conclusion alone extinguishes the Special Prosecutor's theory of criminal liability in this case. Assuming *arguendo*, however, that the relevant statutes and regulations could be construed to reach such conduct (as argued by the Special Prosecutor), the law would be unconstitutionally overbroad and vague.

First, if the law was construed to convert ***any*** communication (irrespective of its content) coordinated with a candidate as a regulated "contribution," the law would be overbroad because it would prohibit vast amounts of protected political speech that poses no threat of corruption or the appearance of corruption.

Second, if the law were to be construed to provide a "content" standard by which coordinated communications are converted into regulated "contributions," that standard must be clear and objective—providing clarity to persons engaging in political speech. No such standard exists, however, making such law unconstitutionally vague. The result of both constitutional defects is that protected speech would be chilled and prosecutors would wield virtually unfettered discretion to decide when and where to apply the law, raising the realistic specter of politically motivated and retaliatory investigations and prosecutions.

A. Absent a "Content" Standard, the "Conduct" of Coordination Cannot Convert Communications Into Campaign Contributions

[redacted]

Any such application of Chapter 11 would render it unconstitutional, because it would ban speech and conduct far beyond the legitimate sweep of any campaign finance law.

1. Contribution Limits Are Unconstitutionally Overbroad if not Closely Drawn to Government Interest

Overbreadth encompasses two related concepts. To justify the significant burden that contribution limits place on political speech and to "avoid unnecessary abridgment of associational freedoms," such limits must be "closely drawn" to further the government's interest in preventing *quid pro quo* corruption and its appearance. *Buckley*, 424 U.S. at 25. *See also Randall v. Sorrell*, 548 U.S. 230, 253–62 (2006) (Breyer, J.) (striking down contribution limit that "disproportionately burdens numerous First Amendment interests" and so was "not narrowly tailored"). Applying this "rigorous standard of review," if a contribution limit is not sufficiently tailored to the government's interest, it is overbroad. *Buckley*, 424 U.S. at 29. "Or to put it another way, if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1446 (2014) (internal citation omitted).

Relatedly, "[i]n the First Amendment context...a law may be [facially] invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal citations omitted). *See also Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012) ("Under this overbreadth doctrine, 'a statute is facially invalid if it prohibits a substantial amount of protected speech.'" (citation omitted)). Among the dangers "inherent in overbroad statutes is that such statutes provide practically unbridled administrative and prosecutorial discretion that may result in selected prosecution based on certain views deemed objectionable by law enforcement." *State v. Stevenson*, 2000 WI 71, ¶ 13, 236 Wis. 2d 86, 93, 613 N.W.2d 90. Although the overbreadth doctrine is to be used sparingly, "[i]n light of the critical significance of First Amendment rights, challengers may champion the free

expression rights of others when their own conduct garners no protection." *Id.* at 92-93, ¶ 12.

2. Untethered to a "Content" Standard, Converting Coordinated Communications Into Contributions is Unconstitutionally Overbroad

At least some laws relating to "coordination" would likely pass constitutional scrutiny: it may be that third parties cannot disguise their making of what campaign finance law clearly defines as a "contribution" by coordinating with the candidate to make and distribute the same communication that a direct contribution would have paid for. The Special Prosecutor's interpretation of Wisconsin law, however, goes far beyond this potentially legitimate sweep by seeking to limit and/or prohibit "coordination" regarding any and all communications, since, according to the Special Prosecutor [redacted]

"In the First Amendment context, fit matters." *McCutcheon*, 134 S.Ct. at 1457.[15] This is particularly true in cases such as this, where the government restriction at issue constitutes a 'prophylaxis-upon-prophylaxis'"[16] approach,

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[15] "Wisconsin courts consistently have 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." *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999).

[16] The regulation of any communication coordinated with a candidate is precisely the kind of "prophylaxis-upon-prophylaxis approach" rejected in *WRTL II*, 551 U.S. at 479, and *McCutcheon*, 134 S.Ct. at 1450. Contribution limits themselves are prophylactic, "because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357. Regulation of coordinated communications is yet another prophylaxis, to prevent circumvention of prophylactic contribution limits. *Buckley*, 424 U.S. at 46–47.

requiring that courts be "particularly diligent in scrutinizing the law's fit." *Id.* at 1458. As noted above, the United States Supreme Court has "identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *Id.* at 1450. Moreover, the Court has explained that this governmental interest is limited to "a specific type of corruption—'*quid pro quo* corruption.'" *Id.* ("That Latin phrase captures the notion of a direct exchange of an official act for money").

There is simply no "fit" between the government's interest in preventing *quid pro quo* corruption and the regulation of any communication made in "coordination" with a candidate. Suppose that a group like [redacted] believes strongly in Act 10, Governor Walker's signature piece of legislation. It wants to convince the public that Act 10 is good policy, and thereby convince legislators (who may or may not be subjects of recall elections or upcoming regular elections) to pass it[redacted] confers with Governor Walker or his agents regarding the content or timing of advertisements regarding Act 10. Suppose Governor Walker or his opponent is never mentioned in the ads, but legislators are. Because everyone believes Governor Walker will be a candidate for re-election or will be subject to a recall, does this "coordination" with the Governor make every [redacted] communication a contribution to Governor Walker? If content is "immaterial," the answer is, "yes."

Going a step further, even if a communication is about a charitable cause (cancer research, preventing domestic violence, or countless other subjects), coordination with Governor Walker (or any other candidate) would convert a third-party's communication into a campaign "contribution," merely as a result of the "conduct" of coordinating. In the case of non-profit corporations [redacted], such "coordinated" charity-related communications would be flatly prohibited, because Wisconsin law prohibits corporations from making "contributions" to

candidates. Wis. Stat. § 11.38. As to non-corporate speakers, their communications would be strictly limited. Wis. Stat. § 11.26.

What threat do communications promoting charitable causes or specific pieces of legislation pose of *quid pro quo* corruption? Perhaps the candidate will be grateful to the third-party for supporting a cause or piece of legislation he or she also supports, but "gratitude" on the part of a candidate, or "access" resulting from that gratitude, do not constitute corruption. *McCutcheon*, 134 S.Ct. at 1441 ("government regulation may not target the general gratitude that a candidate may feel toward those who support him or his allies, or the political access such support may afford").

Nor is there any logic to treating such coordinated communications as "contributions," as candidates do not typically utilize their campaign committees to pay for communications promoting charitable causes or specific legislation. Such communications do not have "the same value to the candidate as a contribution" and do not "pose similar dangers of abuse." *Buckley*, 424 U.S. at 46. *See also WRTL II*, 551 U.S. at 468-69 (independent issue ads "are by no means equivalent to contributions, and the *quid pro quo* corruption interest cannot justify regulating them. To equate [issue] ads with contributions is to ignore their value as political speech.").

Even as to candidate-related speech, absent any "content" standard, communications coordinated with a candidate that exclusively reference candidates for *other* public offices (even in different jurisdictions) would be swept up and treated as contributions to the candidate with whom the coordination occurred. But such communications pose no threat of *quid pro quo* corruption and are far removed from the "payment of [a] candidate's bills." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 n.17 (2001) ("*Colorado II*").

Simply put, in determining whether a coordinated communication may be properly regulated as a campaign contribution to a candidate – in furtherance of the government's interest in preventing *quid pro quo* corruption – the content of the communication does matter. Communications entirely unrelated to elections and candidates cannot be constitutionally converted into "contributions" under Chapter 11 in order to serve the prophylactic-upon-prophylactic purpose of preventing the circumvention of campaign contribution limits.

Regardless of whether the Wisconsin legislature or GAB *could* have crafted a tailored constitutional "content" standard that could capture [redacted] alleged conduct, [redacted] That is unconstitutionally overbroad. *See, e.g., Stevenson*, 2000 WI 71, at ¶ 12, 236 Wis. 2d at 92-93 (overbreadth arguments are available even to defendants whose conduct is not worthy of First Amendment protection at all).[17]

3. The Scope of the Investigation Into the [redacted] Demonstrates the Overbreadth of the Special Prosecutor's Flawed Theory of Criminal Liability

Given the murky standard for what constitutes "coordination," and given the willingness of certain Wisconsin prosecutors to enforce their interpretation of campaign finance laws by using the criminal justice system instead of the GAB, regulating any and all communications "coordinated" with a candidate would largely muzzle non-profit corporations and other speakers having even a hint of involvement with current officeholders who may later run for re-election or another office.

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[17] On the other hand, regulating coordinated communications that expressly advocate a candidate's election or defeat may well be closely tailored to the government's interest and thereby pass constitutional muster.

Chapter 11 provides no clear guidance for what "conduct" could even constitute "coordination." Despite the lack of statutory guidance, the GAB promulgated a four-part "presumption" for determining when a committee's express advocacy communications could be deemed to be in "cooperation or consultation" with a candidate. *See* GAB § 1.42(6). That test, however, is vague and overbroad. It merely explains who must "take part" in a decision, but does not explain what level or degree of discussion will trigger such a finding, or what topics the two individuals must discuss. Moreover, it fails to "focus on those expenditures of the type that would be made to circumvent the contribution limitations," is not limited to the types of expenditures that provide the candidate "with something of value that she wants or needs" (which necessarily "depends on the circumstances"), and is not limited to sources that the candidate will feel "obliged" to reward by taking "official action that is not in the public interest." *FEC v. Christian Coalition*, 52 F.Supp.2d 45, 91 (D. D.C. 1999).

Even if the standard for "coordination" was a bright enough line, untethered to a "content" standard, it would provide prosecutors virtually unfettered discretion to seek a wide range of an organization's internal data and documents protected by the First Amendment privilege—purportedly in an effort to establish some type of "coordination" between the organization and a candidate's campaign, agents, or allies. This potential for abuse is not hypothetical.

For example [redacted]

[redacted]

18 [redacted]

[redacted]

These communications may establish "coordination" among groups on one side of the legislative and political spectrum, but they have nothing to do with coordination between issue organizations and candidates in furtherance of the candidates' election. [redacted]

"Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), and the compelled "disclosure of internal campaign communications can have [a deterrent] effect on the exercise of [such] protected activities." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2009), *cert. dismissed*, *Hollingsworth v. Perry*, 559 U.S. 1118 (2010). *See also Katzman v. State Ethics Board*, 228 Wis. 2d 282, 296, 596 N.W.2d 861 (Ct. App. 1999) (affirming order enjoining Ethics Board investigation into lobbyist spouse's political contribution because "'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'") (quoting *NAACP*, 357 U.S. at 460-61).

[redacted]

[redacted] has demonstrated in this case, disclosure of such information—[redacted]—would chill [redacted] speech and subject it to harassment and retaliation. [redacted] This violates [redacted] First Amendment privilege. *See Perry*, 591 F.3d at 1160 (citing *Buckley*, 424 U.S. at 64-65) ("A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege*.") (emphasis in original). Yet, the Special Prosecutor has pushed forward undeterred, seeking to [redacted] In short, the overbreadth of the Special Prosecutor's flawed theory of criminal liability under Chapter 11 is illustrated by [redacted]

B. Absent a Limiting Construction, the Definition of Political Purposes is Unconstitutionally Vague

The Special Prosecutor may alternatively argue that criminal liability under Chapter 11 is not solely based upon the conduct of "coordination," but in fact also requires a content-based criterion: the definition of "political purposes." As discussed above, none of the specific "political purposes" conduct identified in Chapter 11 or applicable GAB regulations encompass [redacted] issue advocacy communications. Thus, the only remaining criterion that might apply is the free-floating phrase "for the purpose of influencing" a recall, which resides in the introductory paragraph of Wis. Stat. § 11.01(16)'s definition of "political purposes."

This appears to be the approach originally suggested by the GAB in 2000, when it surmised that "coordinated"

communications that do "not expressly advocate the election or defeat of a clearly identified candidate" may still be deemed campaign contributions under Chapter 11, if "the speech is made for the purpose of influencing voting at a specific candidate's election...." El. Bd. 00-02, at 12 [redacted] This approach is unsupported by law, and devolves the "political purpose" definition to the unconstitutionally vague phrase rejected by *Buckley*.

1. "For the Purpose of Influencing" is Unconstitutionally Vague

Standing alone, "for the purpose of influencing" is a purely subjective intent-based standard that is impermissibly vague. As this Court has stated, "[b]ecause we assumed that [persons are] free to steer between lawful and unlawful conduct, we insist that laws given 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." *Elections Bd. of Wis. v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 676-77, 597 N.W.2d 721 (1999) ("*WMC*") (citations and quotations omitted).

This is particularly important where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests," requiring a test of "whether the language... affords the (p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms." *Buckley*, 424 U.S. at 40-41 (1976) (internal citations and quotations omitted). *See also Barland II*, 751 F.3d at 835 ("All laws must be clear and precise enough to give a person of ordinary intelligence fair notice about what is required of him and also to guard against the arbitrary and discriminatory exercise of enforcement discretion. Regulations on speech, however, must meet a higher standard of clarity and precision.") (citations omitted).

As a result, standards of conduct in this arena must "be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," "must eschew [] open-ended rough-and-tumble factors," and "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 551 U.S. at 469 (internal citations and quotations omitted).

The Seventh Circuit recently found (and the GAB conceded) that § 11.01(16)'s "'influence an election' language....raises the same vagueness and overbreadth concerns that were present in federal law at the time of *Buckley*," holding that, "[a]s applied to speakers other than candidates, their committees, and political parties," the definition of "political purposes" must be "limited to express advocacy and its functional equivalent as those terms were explained in *Buckley* and *Wisconsin Right to Life II*."[19] *Barland II*, 751 F.3d at 833-34. The same holds true for third-party communications coordinated with a candidate. Simply put, where speech becomes regulated – subjecting the speaker to criminal penalties – based upon the content of the speech, bright-line objective standards are required:

> "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. 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

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[19] *See WRTL II*, 551 U.S. at 469-70 ("[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

> 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.'" ..."Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Elections Bd. v. WMC, 227 Wis. 2d at 676-77 (1999) (citation omitted).

Thus, to the extent the Special Prosecutor attempts to rely on the amorphous phrase "for the purpose of influencing" to provide some type of a content standard to determine what coordinated communications may be treated as "contributions" under Chapter 11, the statute as applied is unconstitutionally vague.

There is little reason to believe the Wisconsin legislature intended the vague and incomplete phrase "for the purpose of influencing" to be a stand-alone test. After all, it amended the definition to enumerate those activities that fell within "political purposes" using objective criteria, not subjective intent:

> (a) Acts 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.
> 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.

Wis. Stat. § 11.01(16)(a).

Likewise, when the GAB attempted to draft rules (GAB § 1.28(3)(b)) supplementing the definition of "political purposes," it followed the legislature's lead in attempting to use objective (although still unconstitutionally overbroad and, at some level, vague) criteria. When challenged, then GAB stipulated that it would not enforce its definition of a "communication" for "political purpose" beyond express advocacy. *Stipulation for Entry of Preliminary Injunction*, ¶¶ 2-3, *CRGA v. Barland*, E.D. Case No. 14-C-0122, [redacted]

2. Wisconsin Law Does Not Provide Any Objective "Content" Standard Beyond Express Advocacy

Nor does any other provision of Chapter 11 provide an objective "content" standard that could convert issue advocacy communications into "contributions" to a candidate. In fact, the GAB has specifically noted that:

> [T]he 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. That absence of precedent is a double-edged sword. Without it, there is no clear direction that specific conduct or circumstances constitute "coordination," but neither is there any clear direction that conduct or those circumstances do not constitute "coordination."

May 3, 2005 Election Board Informal Opinion re "Request for an Opinion Regarding Coordinated Expenditures." [redacted] (emphasis added). The chilling effect of such a "double-edged sword" is precisely what the First Amendment forbids: "Vague or overbroad speech regulations carry an unacceptable risk that

speakers will self-censor, so the First Amendment requires more vigorous judicial scrutiny." *Barland II*, 751 F.3d at 835.

Similarly, the GAB's rules do not provide any objective "content" standard that could encompass issue advocacy communications. First, as explained above, GAB § 1.42 applies to "voluntary committees," *i.e.* committees who have submitted the "voluntary oath" set out in § 11.06(7), which in turn applies only to organizations making express advocacy communications. Thus, it has no application to non-committee organizations like [redacted] that do not make express advocacy communications. Second, the GAB equates the undefined term "expenditure"[20] to the defined term "disbursement," which encompasses only express advocacy." *See supra* n. 9; Wis. Stat. § 11.01(7), (16). And third, GAB § 1.42(6) provides that coordinated "expenditures" are deemed "in-kind contributions" to a candidate, which by definition require a "disbursement"—thereby including only express advocacy. GAB § 1.20(1)(e); Wis. Stat. § 11.01(7), (16).

In short, as to coordinated communications by non-committee speakers [redacted] GAB § 1.42 does not provide any "content" standard at all, much less a standard that encompasses issue advocacy communications like [redacted]

* * *

In summary, the Special Prosecutor's attempt to pursue theories of criminal liability beyond the plain text of Chapter 11 results in constitutional infirmities. If, as the Special Prosecutor has argued, the "content" of a coordinated communication is "immaterial" in determining whether the communication

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[20] Likewise, even if "expenditure" was construed to incorporate what the Special Prosecutor alleges is the "broader" federal definition of the term, it would not aid the Special Prosecutor. As defined by federal law, "expenditure" includes the vague phrase "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(9)(a), which is unconstitutional absent a limiting construction.

constitutes a contribution to a candidate, the law would be unconstitutionally overbroad, as it would encompass a wide range of communications entirely unrelated to the candidate's campaign that pose no threat of *quid pro quo* corruption. Alternatively, if the Special Prosecutor relies upon the amorphous phrase "for the purpose of influencing" as a "content" standard for coordinated communications, that standard is unconstitutionally vague and cannot be enforced consistent with due process. It is unnecessary for this Court to reach either infirmity, however, because the plain text of Chapter 11 does not regulate issue advocacy communications like [redacted].

CONCLUSION

For the foregoing reasons, as well as the arguments adopted in Section I, [redacted] respectfully requests that the Court: (1) issue writs of mandamus and prohibition finding that [redacted] was improper; (2) uphold [redacted] and dismiss the Special Prosecutor's petition; and (3) declare that Wisconsin campaign finance law does not criminalize cooperation on public policy issues between officeholder-candidates and non-profit issue advocacy organizations. If the Court agrees with the Special Prosecutor that chapter 11 can reach coordinated issue advocacy, it should find the campaign finance law to be unconstitutionally overbroad or unconstitutionally vague.

Dated: February 2, 2015

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of the brief is 13,727 words.

Dated at Milwaukee, Wisconsin this 2nd day of February, 2015.

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ELECTRONIC BRIEF CERTIFICATION

I hereby certify that the electronic version of the appeal brief of Unnamed Movant No. 2 is identical to the content of the paper copy.

Dated at Milwaukee, Wisconsin this 2nd day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2015, pursuant to §§ 809.80(3)(b) and (4), Wis. Stats., and the Court's December 16, 2014 Order, the original and twenty-two (22) copies of the Brief of Unnamed Movant No. 2, as well as seventeen (17) redacted copies of the brief, were filed in the Wisconsin Supreme Court under seal, pending further order of the Court. Three (3) copies of the non-redacted brief and two copies of the redacted brief were served upon counsel of record via first-class mail.

Dated at Milwaukee, Wisconsin this 2nd day of February, 2015.

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ADDENDUM

Wisconsin Statutes – Chapter 11 – Campaign Financing

Wisconsin Admin. Code – Ch. GAB 1 – Campaign Financing