Revised Redactions in Compliance with 3-27-15 Order

RECEIVED
04-06-2015
CLERK OF SUPREME COURT
OF WISCONSIN

REDACTED

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.

REPLY BRIEF OF PETITIONER, UNNAMED MOVANT #6,

[redacted]

Michael J. Bresnick
Julie O'Sullivan
Robert Gilmore
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
pobeirne@steinmitchell.com

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

Dated: March 19, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

Movants' position is very clear: the Special Prosecutor is seeking to criminally sanction them for exercise of their core Constitutional rights to speech, assembly, and association, without even arguable statutory authority and in violation of their Constitutional rights. Chapter 11's regulation, and in particular the critical "political purposes" language, is restricted to express advocacy. The issue advocacy groups under investigation have not, by definition, made statutory contributions or disbursements for political purposes and are not regulated committees. The statutory sections the Special Prosecutor now cites as governing "coordination" therefore do not, by their explicit terms, apply. At bottom, then, the Special Prosecutor is asking this Court to override the Wisconsin legislature's considered choices and to create a new campaign finance regime governing coordinated issue advocacy — all in obvious contravention of the most fundamental Constitutional protections, including guarantees of due process.

Attempting to discern particulars of the Special Prosecutor's current position is more challenging, in part because the mischaracterization of statutory provisions upon which the Prosecutor attempts to hang his case seem to change

with every brief, as does his proposed definition of regulated "coordination." Indeed, reading the Special Prosecutor's response is like entering a funhouse, with each turn of the page revealing a new distortion of reality. Facts, statutory text and structure, controlling precedents, and relevant regulations are twisted beyond recognition, sometimes to assume mythic proportions (when they help the Special Prosecutor) and other times to disappear (when they do not). This stems from the Special Prosecutor's mere desire to win, even if that requires the fabrication of an alternate – and seriously misleading – reality for the consumption of this Court.

For example, the Special Prosecutor dismisses the clear import of the Court's controlling decision in *Elections Board v. Wis. Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999) (*WMC*) – that the critical statutory term "political purposes" is restricted to express advocacy - and gives it two paragraphs in his 274 page brief. *See* Special Prosecutor's Brief In Response ("Response") at 114, 157. By comparison, the Special Prosecutor devotes at least 8 pages of his brief, *see id.* 91-92; *see also id.* at 88, 91-91, to a Wisconsin Court of Appeals decision, *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 670, 605 N.W.2d 654 (1999), that, for the reasons discussed in

Movants' briefs, has been entirely discredited. *See* Movant's Principal Brief ("Brief") at 26 n.13.

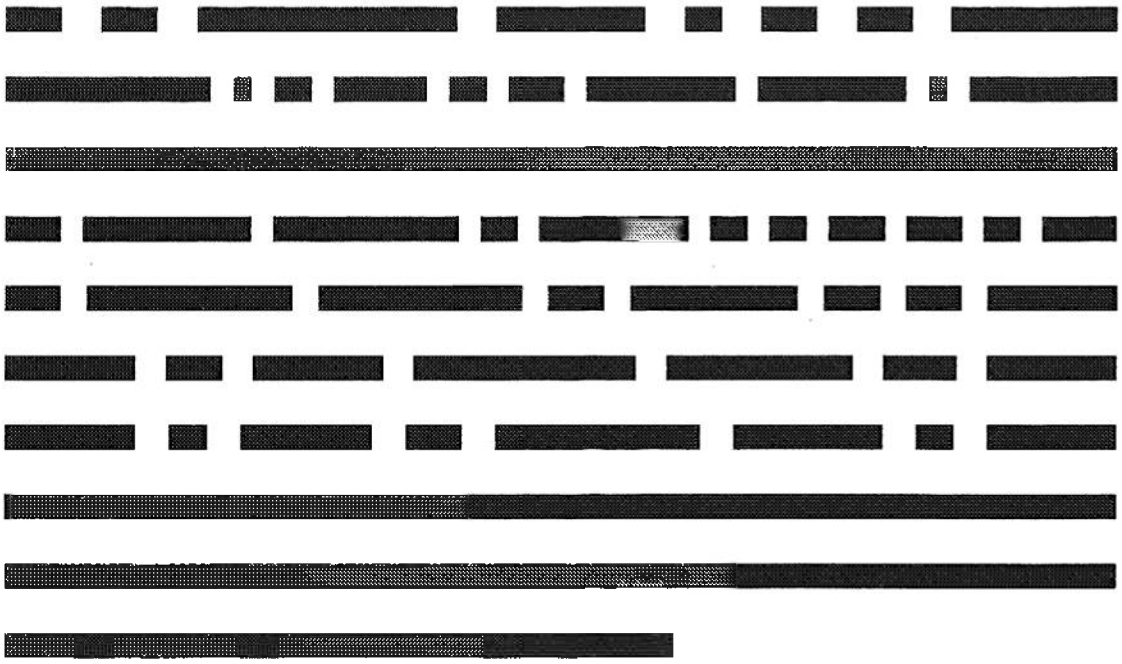
Similarly, the Special Prosecutor elevates one GAB "*advisory opinion*" (El. Bd. 00-2) to near sacred status, while denying that status to the GAB Advisory Opinion dated May 3, 2005 that conceded the indeterminacy of "coordination" standards. *See* App. to Brief of Unnamed Movants #6 and #7 at 102-106; Brief at 63-64; Response at 191. At the same time, the Special Prosecutor ignores a duly promulgated GAB *regulation* that defines the critical term "political purposes" as restricted to express advocacy. *See* Wis. Admin. Code GAB §1.28.

The Special Prosecutor quibbles about the relevance of the Seventh Circuit's decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 833, 834 (7th Cir. 2014) (*Barland II*) – a case exploring the scope of the precise Wisconsin code section central to this case – because it rejected the position he pushes here, holding instead that "political purposes" means express advocacy. *See* Response at 129-130. Yet the Special Prosecutor devotes seemingly endless pages of his brief to discussion of federal cases in which courts are ruling on the constitutionality, scope, and application of a federal regulatory scheme that differs in vital respects from the Wisconsin laws that are dispositive

in this case.

One of the Special Prosecutor's most egregious distortions of applicable law is his repeated assertion that an "advisory opinion" issued by the GAB has the "full force and effect of law." Response at 88; *see also id.* at 168, 184, 194. In aid of this fiction, he relies upon a statute, Wis. Stat. §5.05(6a), which creates a safe harbor for those who act in good faith reliance upon an "advisory opinion" issued by the GAB. The statute provides that, to have the "legal force and effect" of providing such a safe harbor in civil or criminal prosecutions, the "advisory opinion" must meet the statutory requirements. *Id.* It is simply impossible – except perhaps in the Prosecutor's alternative reality – to read this statute as providing GAB advisory opinions with an independent legal potency outside of the safe harbor context, much less as granting the GAB the ability to, as the Special Prosecutor suggests, dictate standards enforceable through criminal sanctions.

The extent of the Special Prosecutor's willingness to read every event, every exchange, indeed every word, as nefarious takes on a paranoid tinge when he asserts that [redacted]



Perhaps the Special Prosecutor's most disturbing distortion concerns his attempt to mislead the Court about the fundamental stakes in this case. Thus, he tells the Court that disclosure obligations are "at the heart of this investigation," and that the lowest standard of scrutiny applies. *See id.* at 104, 132-136. The alleged crime under investigation, the Special Prosecutor assures this Court, is a simple failure to report. *See id.* at 163.

This case is not about purportedly de minimus disclosure requirements. In actual fact, the Special Prosecutor's regulatory theory, if adopted, would present Wisconsin issue advocacy groups with a stark choice between two types of grievous and direct First Amendment harms. Non-profit issue advocacy corporations may exercise their First Amendment

rights by associating with a candidate, but if they cross some vague threshold into coordination, they will be completely barred from engaging in further issue advocacy and their very existence may be imperiled by a resultant ban on corporate contributions to the issue advocacy groups. *See, e.g.*, Brief at 71-74. And the Special Prosecutor would argue that any "contributions" made by virtue of the coordination between targeted nonprofit corporations and candidate/officeholders would be independently illegal, not just reportable. *See* Response at 171, 171 n.207 (recognizing that corporate contributions remain illegal).

In light of this reality, it is incredible - and deeply troubling — that the Special Prosecutor represents to this Court that his treatment of coordination "does not *invade* an area of protected speech at all" because "[t]he candidate and the candidate committee remain free to engage in as much speech in the form of issue advocacy as he, she or it pleases." *Id.* at 164.

Movants' ability to respond to all of the Special Prosecutor's distortions is limited by space constraints. Accordingly, in this Reply, Movants will concentrate on pointing out the multiple, fundamental, and mortal difficulties inherent in the Special Prosecutor's efforts to read the limiting phrase "political purposes" to include

coordinated issue advocacy. Movants will then turn to establishing the obvious inapplicability of the provisions that the Special Prosecutor identifies as imposing "coordination" regulation on issue advocacy. Finally, Movants will address the glaring due process problems with the Special Prosecutor's invitation to this Court to rewrite the statute to his policy specifications.[1]

ARGUMENT

A. Because for "Political Purposes" Means for "Express Advocacy," None of the Chapter 11 Provisions the Special Prosecutor Has Relied Upon to Justify His Investigation Apply to the Movants

The parties agree that a critical question in this case concerns the scope of the "political purposes" limitation, defined in Wis. Stat. §11.01(16). Movants have demonstrated that the definition of "political purposes" is restricted to express advocacy. Accordingly, issue advocacy — whether coordinated or not — is not subject to regulation as a "contribution" or "disbursement." *See* Brief at 19-35. Further, Movants have established that Chapter 11 does not regulate coordinated advocacy of any kind as a "contribution" for political purposes. *See id.* at 35-70.

The Special Prosecutor agrees that an act is for

[1] Unnamed Movant #6 joins in the reply of Unnamed Movant #7 and Unnamed Movant #1.

"political purposes" when it is done "for the purpose of influencing" an election. Wis. Stat. §11.01(16). But he argues that, on its face, the "influencing" language in §11.01(16) applies to issue advocacy. Discarding the truism that a statute's scope is fixed at the time of enactment, the Prosecutor contends that, unless a limiting construction of that language is constitutionally required, issue advocacy can qualify as for "political purposes" under the statute. *See* Response at 72-76. The Special Prosecutor then argues that issue advocacy can be "for the purpose of influencing" an election within the meaning of the statute, and thus be made for "political purposes," when it is coordinated with a candidate (and thus in the Special Prosecutor's view is a "contribution") but not when it is conducted independently of a candidate.

Finding no basis in Chapter 11's actual text for this argument, the Prosecutor instead turns to a revisionist reading of *Buckley v. Valeo*, 424 U.S. 1 (1976). He repeatedly points to the fact that the *Buckley* Court narrowed the definition of "for the purpose of influencing" to express advocacy in its discussion of "expenditures," but it did not explicitly so limit the same "influencing" language in the context of contributions. *See* Response at 114, 116-118; *see also id.* at 75. Relying on *Buckley*, the Special Prosecutor

believes that he can take the position that Chapter 11's "for the purpose of influencing," and the definition of "political purposes," need only be narrowly read when applying to independent issue advocacy but not to coordinated issue advocacy. This belief is grievously misplaced for at least four reasons.

First, as demonstrated in our Brief at 66-70, the Special Prosecutor misreads *Buckley*.[2] The correct reading of *Buckley* is that where a contribution is said to arise from coordinated "*expenditures*," the limited reading of "for the purpose of influencing" applied to "*expenditures*" – that is, the limitation to express advocacy – applies with full force. As the FEC and Congress read *Buckley* shortly after it was decided, then, only coordinated express advocacy could potentially be regulated. This was certainly the Wisconsin legislature's understanding, as is reflected in the limitation of its

[2] The Special Prosecutor explains that *Buckley* concluded that all contributions can be treated differently from expenditures – in that they do not need to be confined to spending for express advocacy – because, the Court concluded, contributions are necessarily "campaign related" and thus their limitation is consistent with the First Amendment. *See* Response at 175; *see also id.* at 155. It should be noted, however, that the Special Prosecutor takes the seemingly irreconcilable position that regulation of the alleged contributions in this case can, consistent with the Constitution, be applied "entirely independent of any election." *Id.* at 173. In his view, if coordination "conduct gives rise to a reportable contribution, it does not matter when that conduct occurs." *Id.*

coordination provision, Wis. Stat. §11.06(7), to express advocacy. *See* Brief at 69-70.

Second, the Special Prosecutor's misreading of *Buckley* is irreconcilable with the relevant provisions of Chapter 11: neither Wis. Stat. §11.01(16) nor the definitions of "contribution" or "disbursement" reflect the Special Prosecutor's distinction. *See id.* §§ 11.01(6), (7). The structure and text of §11.01(16) prove that the Wisconsin legislature assuredly did not employ the bifurcated definition of "for the purpose of influencing" that the Special Prosecutor now seeks to attribute to it retroactively.

The Federal Election Campaign Act (FECA) included separate provisions governing contributions and expenditures, and it used the "for the purpose of influencing" language in each. The Wisconsin legislature did not adopt this approach. Instead, the legislature created a single limiting term — "political purposes" — not employed in the federal statute. And it used the "for the purpose of influencing" language to define the one phrase, "political purposes," *which limits contributions and disbursements equally* (as well as limiting many other provisions of the statute).

Even assuming that the Wisconsin legislature accepted the distinction the Special Prosecutor now draws from *Buckley*, which it did not, it would have known that the "for the

purpose of influencing" language of Wis. Stat. §11.01(16) would be, under *Buckley*, construed narrowly to encompass only express advocacy at least as applied to independent disbursements. By using the "influencing" language in a single definition *that applied to both contributions and disbursements*, the legislature would have understood (had it agreed with the distinction drawn by the Special Prosecutor) that it was codifying the narrowest reading. It would have had to equate the "for the purpose of influencing" language with "express advocacy" because a failure to do so would ensure the invalidation of §11.01(16) in cases of independent disbursements.

Presumably the Special Prosecutor would posit an alternative theory: that the Wisconsin legislature in fact intended that the "influencing" language in Wis. Stat. §11.01(16), and thus the phrase "political purposes," to have different meanings depending on whether the issue advocacy was independent or coordinated. But it would have been completely impractical to identify one universal limiting term – "political purposes" – and to give that provision a single definition, while at the same time expecting that term and definition would mean different things in different sections of the statute. Given the extent to which the legislature relied in Chapter 11 upon the "political purposes"

limitation to define the scope of campaign finance regulation,[3] such a course could only ensure electoral chaos and Constitutional invalidation.

In short, if the Wisconsin legislature had intended to treat coordinated issue advocacy as distinct from independent issue advocacy for purposes of campaign finance regulation, it would have so provided. It did not.

Third, the controlling question is not what would in theory have been constitutionally possible based on a revisionist reading of *Buckley*. Rather, the question is what the Wisconsin legislature understood and intended at the time it drafted Wis. Stat. §11.01(16). The Prosecutor focuses only on the *Buckley* Court's distinction between contributions and expenditures, but that Court drew an even more fundamental and lasting Constitutional distinction between express and issue advocacy. It is clear that the universal — and entirely reasonable — understanding of *Buckley* at the time that the Wisconsin legislature amended its code to comply with that decision was that campaign finance regulation had, at the

---

[3] *See, e.g.*, Wis. Stat. §§11.01(2), 11.01(6)(a)(1), (3), 11.01(6)(b)(1), (3), (5), (7), (8), 11.01(7)(a)(1), (3), (5), (6), (7), 11.01(7)(b)(2), (4), 11.05(7), (8), (10), 11.06(1)(f), (2), (6), (13)(b), 11.17(1), (2), (4), 11.18(4), 11.19(1), 11.25(1), (2)(a), (3), 11.29, 11.30(1), (3)(b), 11.32(2), 11.33(2), (3), 11.36(1), (2), (5), 11.40(1)(b).

very least, to be restricted to express advocacy to pass First Amendment muster.

Shortly after *Buckley* was decided, the Wisconsin Attorney General issued an Advisory Opinion in which he did *not* draw from *Buckley* that which the Special Prosecutor seeks to read into it. Instead, he read *Buckley* to require that "contributions" and "disbursements" made "for political purposes" be confined to express advocacy, leaving unregulated expenditures for issue advocacy, coordinated or not. The legislature undoubtedly relied upon the Wisconsin Attorney General's opinion in amending Chapter 11 to comport with *Buckley*, just as courts have done since. *See, e.g., Barland II*, 751 F.3d at 833-834; *see also WMC*, 227 Wis.2d at 663 n.12, 597 N.W.2d at 728 n.12.

The Special Prosecutor attempts to minimize the importance of this Court's controlling opinion in *WMC*, *see* Response at 114, 157, just as he dismissed the value of the Wisconsin Attorney General's opinion in tracing legislative purpose, *see id.* at 82, 114, 115. This is, of course, because this Court did not draw the Special Prosecutor's hoped-for distinction, instead recognizing that "*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.'" *WMC*, 227 Wis.2d at 669, 597 N.W.2d at 731 (quoting *Buckley*, 424 U.S. at 80).

Most recently, the Seventh Circuit, consistent with *Buckley*, ruled that the "influencing" language in Wis. Stat. §11.01(16) is unconstitutionally vague and overbroad absent a limiting construction. The court thus held that "for political purposes" means express advocacy and its functional equivalent. *Barland II*, 751 F.3d at 834. In so doing, the Seventh Circuit confirmed, based on the Attorney General's opinion and *WMC*, that this reading of the scope of Chapter 11 has been longstanding and consistent: "*the administration of the state's campaign-finance system has generally reflected this understanding for many decades.*" *Id.* at 834 (emphasis added).[4] It was clearly this understanding of *Buckley*, not the Special Prosecutor's revisionist reading, that informed the Wisconsin legislature's campaign finance statutes.

---

[4] The Special Prosecutor seeks to distinguish *WMC* and *Barland II* by contending that these cases concerned independent advocacy and thus did not treat the question of the meaning of "political purpose" in coordination cases. Neither *WMC* nor *Barland II* mentioned this distinction because whether advocacy is coordinated or independent is, quite simply, irrelevant to Wis. Stat. §11.01(16). The Wisconsin legislature decreed that the definition of the limiting term "political purposes" would turn only on whether the speaker acted with the purposes of influencing an election. Presumably the legislature could also have made independence or coordination relevant to the scope of the "political purposes" definition but it chose not to do so.

Fourth, the GAB – whose opinions the Special Prosecutor attempts to give canonical status when it serves his purposes, but discounts when it does not – has time and again signaled its understanding that the Wisconsin legislature intended to limit the scope of regulation under Chapter 11 to express advocacy and its functional equivalent. *See* Brief at 26-28.[5] More importantly, although the Special Prosecutor chooses not to mention it, Wis. Admin. Code GAB §1.28 clearly limited the term "for political purposes" to express advocacy throughout the period presently under investigation. *See* Brief at 27 n.14.

The Special Prosecutor's omission in this respect is jarring, in that this litigation could be resolved in Movants' favor on the basis of §1.28 alone: 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 Special Prosecutor from now attempting to prosecute Movants and others for their reasonable reliance on this official interpretation. *See,*

[5] The GAB has, at various times, strayed from this understanding but it always returns to an equation of "political purposes" with express advocacy. *See* Brief at 27 n.14; *see also Barland II*, 751 F.3d at 833.

e.g., *WMC*, 227 Wis.2d at 679-80, 597 N.W.2d at 735; *see also* Brief at 27 n.14.[6]

B. None of The Subsections of Chapter 11 Identified by the Prosecutor Apply to Issue Advocacy Or Mean that Coordination of Advocacy Results in a Regulated Contribution

It is crystal clear that the GAB believed that Wis. Stat. §11.06(7) was the source of any power it had to regulate coordinated expenditures as contributions. *See* Wis. Admin. Code GAB §1.42. And even the Special Prosecutor concedes that the opinion he asserts has the force of law and provides the reigning standard for coordination, El. Bd. 00-2, was promulgated on the authority of Wis. Stat. §11.06(7). *See*

---

[6] This reading of the statute does not render the phrase "include but are not limited to" in §11.01(16) meaningless. That phrase was *not* inserted to allow for an unconstitutional extension of the definition of "political purposes" to issue advocacy. Rather, its purpose was to allow the legislature to easily add additional definitions of *express* advocacy as they passed Constitutional muster. *See Barland II*, 751 F.3d at 833 (postulating that the "not limited to" language of §11.01(16) was intended to leave room for regulation of the "functional equivalent" of express advocacy). This is demonstrated by the July 2002 amendment, *inter alia*, to §11.01(16)(a)'s description of "acts that are for political purposes" to include an "electioneering"-related definition of "express advocacy." Because the added language could have extended regulation to issue advocacy, a federal court seriously questioned whether the amendment was consistent with Chapter 11's limitation to express advocacy and *Buckley*'s Constitutional ruling, but it decided to strike the statute on other grounds. *See Wisconsin Realtors Ass'n v. Ponto*, 233 F.Supp.2d 1078 (W.D. Wis. 2002), *appeal dismissed for lack of standing and mootness sub nom. Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485 (7th Cir. 2004).

Response at 89-90, 193. But the Special Prosecutor also is forced to acknowledge that §11.06(7) is applicable only to groups that engage in express advocacy, *see* Response at 89-91, 98, 139, 177, 186-187, 193, and that it is, therefore, not applicable in this investigation. *See id.* at 176-177, 186-187.

The Special Prosecutor attempts to salvage his case by contending without support that the legislature's limitation of Wis. Stat. §11.06(7) to express advocacy does not preclude regulation of coordinated issue advocacy under other provisions of the code. He posits, for example, that the legislature simply "moved" its regulation of coordinated issue advocacy to §11.06(4)(d). Response at 187. What remains a mystery is *why*: Why would a legislature choose to treat coordinated express advocacy in a forthright and specific way in §11.06(7) only to hide the supposed regulation of coordinated issue advocacy in an obscure provision that appears to regulate only the actions of candidates and campaign committees, not advocacy organizations? *See* Brief at 52-55. For Movants there is no mystery to be solved because the reason for the legislature's limitation of §11.06(7) to coordinated express advocacy is perfectly clear: The legislature understood that its capacity to regulate

coordination was, consistent with *Buckley*, restricted to express advocacy.

Nevertheless, the Special Prosecutor relies on a jumble of sources as supposed authority for his investigation, including one cited previously, Wis. Stat. §11.10(4). Although some might argue that a prosecutor should know what code sections serve to justify an investigation at its inception, the Special Prosecutor in this Court argues for the applicability of two code sections that he did not cite before the John Doe Judge and has not relied upon in any court since: §11.01(15) and §11.06(4)(d).[7] Finally, the Special

---

[7] The Special Prosecutor also appears to be arguing that the targeted entities made a contribution by providing "services," which are things of value under Wis. Stat. §11.01(6), and that, under the Wis. Admin. Code GAB §1.20(1), the donation of in-kind services can be a contribution even if it is not for political purposes. Obviously, such an attempt by the GAB to override the statutory "for political purposes" limitation on the definition of contributions in the context of in-kind donations would be *ultra vires* and void. *See Village of Plain v. Harder*, 268 Wis. 507, 511, 68 N.W.2d 47, 50 (1955).

The fact that regulation of the type of "services" alleged by the Special Prosecutor was not intended by the Wisconsin legislature is demonstrated by the specificity with which the legislature addressed issues relating to valuation of other in-kind contributions. For example, Chapter 11 contains a very detailed section concerning valuation of contributions in the form of donated opinion poll or voter survey results, taking into account the timing of the contribution on the assumption that the value of polls or surveys declines over time. Wis. Stat. §11.06(12)(b), (c), (d), (e). It further specifies how these contributions are to be valued when the contribution is made to more than one recipient. *Id.* §11.06(12)(f). No such attempts are made to value coordinated issue communications depending on their timing or the extent to which they might assist more than one candidate, even though the valuation issues involved in coordinated issue advocacy would be similarly complex.

Prosecutor relies heavily on the GAB's opinion in El. Bd. 00-2 to inform the content of the coordination standard. Cobbling together these sources, the Special Prosecutor comes up with a newly-minted, three-pronged "coordination" standard:

> …[C]ertain expenditures that are made by a third party are considered to be contributions to a candidate, including, (1) expenditures made by a third party entity under the control of the candidate committee (2) third party expenditures authorized or requested by the candidate committee, and (3) in the absence of such direct control, request or authorization, expenditures which are the product of such close interaction that the committee and the candidate may be considered to be partners of [*sic*] joint venturers. The term "coordinated expenditures" may be understood to encompass all three types of interaction, but it is most easily understood to reference the third category.

Response at 13; *see also id* at 77, 84, 87-93, 174-175. The "control" and "authorization" prongs are apparently drawn from §11.06(4)(d). *See id.* at 77. The third, or "joint-venture," category (sometimes referred to as "expressive coordinated expenditures") finds no source in Wisconsin statute or regulation; rather, it is supposedly drawn from *FEC v. Christian Coalition*, 52 F.Supp.2d 45 (D.D.C. 1999), as mediated through El. Bd. 00-2. *See* Response at 77, 87-93, 148, 161, 174-175.[8]

[8] The Prosecutor is not entirely consistent in his description of his three-prong test, which of course underscores its obvious due process difficulties. For different formulations, claiming different provenances, see *id.* at 67, 73-74, 158.

The fatal difficulty with the Special Prosecutor's reliance on Wis. Stat. §11.01(15), §11.06(4)(d), and §11.10(4) is that *none* of them apply – by the express terms of Chapter 11 – to Movants. *See* Brief at 46-58. Section 11.06(4)(d) applies only where "contributions" or "disbursements" for "political purposes" have been made. Because Movants have not engaged in express advocacy, and thus have not acted for "political purposes," §11.06(4)(d) has no purchase in this case. In any event, nowhere does §11.06(4)(d) purport to regulate coordinated expenditures as contributions.

The Prosecutor wishes this Court to adopt a free-floating rule that if a candidate somehow (and it is not clear how) "controls" an independent entity, everything that entity does is essentially an act of the candidate and must be treated that way for purposes of disclosure and campaign contribution limits. But while the legislature understood that candidate "control" over committees required regulation in some instances, it intentionally chose language (the word "committee") that restricted the scope of its "control" regulation to entities that make contributions or disbursements for political purposes. That is, the legislature made a specific choice *not* to regulate issue advocacy organizations in this provision. To adopt the

Prosecutor's theory, then, is to re-write the statute.

Wis. Stat. §11.01(15) requires, not surprisingly, that a "personal campaign committee" be a "committee." Section 11.10(4) also applies only to "committees." *See* Brief at 51-52. The targeted non-profit issue advocacy organizations are not "committees" because they do not make "contributions" or "disbursements" for "political purposes," that is, for express advocacy. *See id.* §11.01(4).[9]

The Special Prosecutor's remaining authority is El. Bd. 00-2, which he attempts to persuade this Court to employ in interpreting the "coordination" standards in Wis. Stat. §11.01(15), 11.06(4)(d), and §11.10(4). The Special Prosecutor concedes, as he must, that El. Bd. 00-2 purports to interpret the scope of a provision that the Special Prosecutor forswears, §11.06(7). *See* Response at 89-90, 193. Even were El. Bd. 00-2 "legally binding," then, it would have no operative force with respect to any provision other than §11.06(7). Recognizing this, the Special Prosecutor argues that using an opinion that interprets a statute that he

[9] If this provision were, despite its plain language, applied to Movants, the resultant regulatory burden on them would clearly violate Constitutional standards. Even the Special Prosecutor concedes this: "The Special Prosecutor does not contend that full-blown registration and reporting regulations may be properly imposed on independent non-express advocacy organizations; clearly *Barland II* holds they cannot stand in the form which that court considered." Response at 136.

concedes does not apply to issue advocacy organizations like those targeted in this case "is not an unreasonable means of interpreting what may or may not constitute 'independence' when it comes to non-express advocacy entities [redacted]" Response at 91; *see also id.* at 193. At bottom, then, even the Prosecutor presses El. Bd. 00-2 on the Court only as an interpretive aid, not as binding law.

Given that the statutory sections the Special Prosecutor cites clearly do not apply to Movants, and that *Christian Coalition* and El. Bd. 00-2 are not governing law in this Wisconsin case, it is clear that what the Special Prosecutor is asking the Court to do is to promulgate a new and, in the Special Prosecutor's mind improved, code and then impose it retroactively. The Special Prosecutor's suggestion that this Court read his preferred campaign finance regulation into Chapter 11, in contradiction of its plain terms, ignores the fact that this is a *criminal* investigation and indeed a criminal investigation that is focused on conduct protected by core First Amendment speech and associational values.

There is a reason that, despite the extent to which Movants relied upon due process in their brief, the Special Prosecutor elected to address that concept only fleetingly. To accept the Special Prosecutor's invitation to disregard statutory limitations and to create out of whole cloth a new

definition of coordination would violate basic due process norms.

The Supreme Court has repeatedly held that there can be no "common law" of crime – that is, the state, in the person of judges, prosecutors, or agencies, cannot make up law as it goes along and seek to apply that law retroactively through the criminal sanction. *See, e.g., United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). This flows in part from "*the* first principle"[10] of criminal law, the principle of legality, which outlaws the retroactive definition of criminal offenses. The legality principle, sometimes referred to as *nulla crimen sine lege* (no crime without law), is a foundational element of American due process guarantees. As the Supreme Court stated in *United States v. Lanier*,

> "The … principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed" … [D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

520 U.S. 259, 265-266 (1997).

Retroactive application of evolving criminal law is condemned because it, by definition, provides no prior notice and thus makes it impossible for people to conform their

---

[10]HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968) (emphasis in original).

conduct to the criminal norm and thereby avoid criminal sanction. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The Supreme Court also tells us that retroactive development of norms through adjudication is problematic for another reason: "Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also Lanier*, 520 U.S. at at 265 n.5. In short, *the legality principle demands advance specification, by the legislature, of norms that are criminally enforceable.*

In the campaign finance area the demands of legality are sharpened by the reality that conduct which may subject individuals to the sting of the criminal sanction is otherwise constitutionally-protected speech and association of the first order. Particularly "[c]lose examination of the specificity of the statutory limitation is required 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 id.* at 77.

The legality principle is, in part, operationalized in U.S. law in the due process vagueness doctrine and the rule of strict construction, sometimes called the rule of lenity. As explained in our Brief, both of these manifestations of the legality principle apply with full force in this case. *See* Brief at 13-14, 20-24, 21 n.10, 39-40, 55-56, 58-65. Here we emphasize that our due process objection is also founded on the legality principle itself. Due process certainly forecloses this investigation because the Special Prosecutor's idiosyncratic concept of "coordination" is too indefinite to pass vagueness muster. But also, more fundamentally, due process requires the termination of this investigation because it lacks the advance, clear, and explicit statutory foundation that the legality principle demands in the First Amendment context. *See id.* at 58-65.

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
Robert Gilmore
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
pobeirne@steinmitchell.com

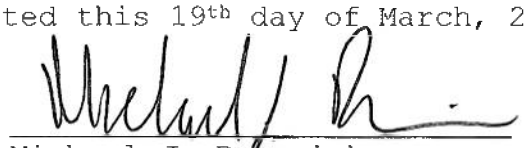
Dennis P. Coffey
Mawicke & Goisman, S.C.
1509 N. Prospect Avenue
Milwaukee, WI 53202-2323
(414) 224-0600
Counsel for Petitioner,
[redacted]

Dated: March 19, 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 26 pages.

Dated this 19th day of March, 2015.

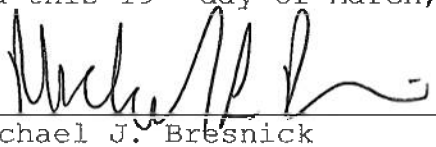


Michael J. Bresnick
Stein Mitchell Muse
Cipollone & Beato LLP
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777
mbresnick@steinmitchell.com

ELECTRONIC FILING OF BRIEF CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. §809.19(12)(f), in that the text of the electronic copy is identical to the text of the paper copy of the brief.

Dated this 19th day of March, 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