REDACTED PER 3/27/15 ORDER

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,

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

REPLY BRIEF OF UNNAMED MOVANT NO. 2, [redacted]

(ISSUES 7, 9, 11-13)

FOX, O'NEILL & SHANNON, S.C.
Matthew W. O'Neill
State Bar No. 1019269
Diane Slomowitz
State Bar No. 1007294
622 North Water Street, Suite 500
Milwaukee, WI 53202
(414) 273-3939
mwoneill@foslaw.com
dslomowitz@foslaw.com

GRAVES GARRETT LLC
Todd P. Graves, Mo. Bar 41319
Edward D. Greim, Mo. Bar 54034
Dane C. Martin, Mo. Bar 63997
1100 Main Street, Suite 2700
Kansas City, MO 54105
(816) 256-3181
tgraves@gravesgarrett.com
edgreim@gravesgarrett.com
dmartin@gravesgarrett.com

Counsel for Unnamed Movant No. 2

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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,

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

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.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

If the Special Prosecutor's 267-page opus proves anything, it is the wisdom of the Supreme Court's recent observation: "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney...before discussing the most salient political issues of our day." *Citizens United v. FEC*, 558 U.S. 310, 324 (2010).

At its core, the Special Prosecutor's argument is that it *must* be illegal for an outside group to collaborate with an officeholder about issue speech, because the very fact of coordinated conduct means the subsequent speech, regardless of its content, is "for the benefit of" the elected official and "for the purpose of influencing" an election.

If that is correct, this is not merely a case about "reporting" and "disclosure." SP 132. No; for groups [redacted] which engage in issue advocacy—including ads, mailers, events, and webpages that never mention any candidate—it spells the end of any "issue" communication with elected officials. It is the end of hosting elected officials to speak at events; it is the end of a whole host of free speech activities that could trigger subpoenas into whether an issue communication was made at an officeholder's "request" or "suggestion." Groups like [redacted] are corporations. When a corporate communication transforms into a "contribution," we have more than a reporting event: we have a crime. SP 80.

This scenario is not extreme. As is now chillingly clear, the Special Prosecutor locates few limits in Chapter 11. He reads Wisconsin law to mean, "once elected...always a candidate." SP 173. An officeholder's "request" or "suggestion" is sufficient to trigger the Special Prosecutor's coordination theory. SP 161. An issue group's payment to anyone, for a communication that can be characterized as "suggested" by an officeholder, is now a "service" and therefore an illegal in-kind contribution. SP 132. And the communication's content is irrelevant (SP 166)—even though the Special Prosecutor, in a moment of candor, asks "how

an ad not mentioning the candidate at all would ever be construed as a campaign contribution to the candidate." SP 167. Yet that is the Special Prosecutor's theory.

If this really is Wisconsin law, one might reasonably wonder why no Wisconsin statute or regulation clearly spells it out. One might also reasonably wonder, as [redacted] does, whether this reading of the law is not only overbroad, but also based on a tortured construct of vague, undefined terms that fail to provide the "precision of regulation" required when criminalizing free speech activities. *Buckley v. Valeo*, 424 U.S. 1, 41 (1976).

For this reason, [redacted] opening brief laid down two challenges. First, it asked the Special Prosecutor to identify the Wisconsin statute or regulation that criminalizes coordinated issue advocacy; second, through two hypothetical scenarios [redacted] challenged him to show that the law (as he construes it) is not fatally overbroad and vague. We now have his answer.

As to [redacted] first challenge, the Special Prosecutor's multiple, evolving theories of the criminality of coordinated issue advocacy fail to pinpoint a specific statutory or regulatory basis. The closest he gets is Wis. Stat. §§ 11.06(4)(d) and 11.10(4), but these sections first require the speaker to act for a "political purpose." And to clear the "political purpose" hurdle, the Special Prosecutor weaves a labyrinthine trail through decades of federal precedent, none of which overcomes this Court's short and plain statement 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.'" *Elections Board v. WMC*, 227 Wis. 2d 650, 669, 597 N.W.2d 721, *cert. denied* 528 U.S. 969 (1999) (quoting *Buckley*, 424 U.S. at 80).

To be sure, § 11.06(7) and GAB 1.42 address coordinated *express* advocacy. But no similar provisions exist as to issue advocacy. Why? Because Wisconsin lawmakers have not seen fit

to prohibit the speech the Special Prosecutor seeks to criminalize, whether coordinated or not.

As to [redacted] second challenge, the Special Prosecutor cannot explain why his theory does not criminalize a vast swath of conduct that most of us know as political speech, association, and petitioning one's elected officials. It is time to stop this insidious attack on the expressive activities of Wisconsin citizens before others are made to suffer the same fate as [redacted] and its political associates.

ARGUMENT[1]

I. The Special Prosecutor's Attempt to Make New Law with "Bad Facts" Must Fail

[redacted]

But strangely missing from the Special Prosecutor's campaign epic is the raw material of his alleged theory: the allegedly coordinated communications. A review of the advertisements actually run by [redacted] and their timing belies

[1] [redacted] adopts the other Unnamed Movants' reply briefs and makes the following arguments regarding Issues 7, 9, 11-13.

his claims.[2] [redacted] issue ads referenced Senate candidates; some had nothing to do with elections at all. There is no showing that any agent simultaneously worked for both [redacted], or that [redacted] coordinated with [redacted] "One wonders how an ad not mentioning the candidate at all would ever be construed as a campaign contribution to the candidate" (SP 167)—yet this is the basis of the Special Prosecutor's theory.

In short, in reviewing the Special Prosecutor's theory, this Court should distinguish evidence [redacted] In a context demanding regulatory "precision," one cannot blend candidates, races, and years indiscriminately.

II. Wisconsin Does Not Regulate Coordinated Issue Advocacy (Issue 7)

The Special Prosecutor's brief fails to identify any provision in Chapter 11 or the GAB's administrative rules stating that the act of coordinating an issue ad—which by itself has no "political purpose" and thus is neither a "contribution" nor a "disbursement"—transforms that issue ad into an illegal "contribution."

Instead, the Special Prosecutor's response brief outlines three distinct theories:

(a) The Subcommittee Theory;

(b) The Control/Authorization Theory;

(c) The *WCVP*/In-Kind Contribution Theory.

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[2] This material remains available on wispolitics.com. *See* Reply Brief of Unnamed Movant No. 1, at 23.

These theories are distinct in that, on the surface, they rely on different statutes, are supported by different authorities, lead to different results, and require different levels of proof. But in fact, the Subcommittee and Control Theories require that "disbursements" and "contributions" have been made, and the only way to get there is through the *WCVP* Theory.

A. The Special Prosecutor's Subcommittee Theory Is Incorrect

The latest version of the Special Prosecutor's "subcommittee" theory is no more valid than the version he first used [redacted] That is because [redacted] made no contributions [redacted] it therefore cannot be a "committee" in the first instance [redacted]

The Special Prosecutor's argument to the contrary is a brand-new innovation concocted specifically for [redacted]. None of the authorities the Special Prosecutor claims provide "notice" gives any hint that entities should be guided in their conduct by a "subcommittee" theory rather than, say, his "coordinated expressive communications" analysis snatched from the 1999 case *FEC v. Christian Coalition*, 52 F.Supp.2d 45 (D. D.C.). As shown below, the Special Prosecutor continues to shift his position even on the "subcommittee" theory, and now admits that, before this new theory can apply, he must first prove his original "in-kind contributions" theory.

The Subcommittee Theory is found at pages 78-84, and the logic is as follows:

> [redacted] Under § 11.10(4), [redacted] may be deemed a "subcommittee" of a candidate committee if it acts "with the cooperation of or upon consultation with," or "in concert with or at the request or suggestion of," a candidate or a candidate's agent. SP 78. [redacted]

2. However, [redacted] must first have been a "committee." SP 78 (citing § 11.10(4)).

   a. To qualify as a "committee," [redacted] must have made "contributions" or "disbursements." [redacted] (citing § 11.01(4)).

   b. To have made a "contribution" or "disbursement," [redacted] must have acted for "political purposes." SP 81 (citing § 11.01(6) and (7)).

   c. To have acted for "political purposes," [redacted] need not have engaged in express advocacy, because this limiting construction *only* applies to "disbursements"; [redacted] could therefore be deemed to have made a contribution "for the purpose of influencing the election," if it was "controlled" by a candidate committee. SP 83-84. [redacted]

This theory fails as a matter of law precisely at point 2.c. There, the Special Prosecutor finally admits that even the Subcommittee Theory requires something beyond a mere showing of "cooperation or consultation." At bottom, it must show at least one other thing is true: that [redacted] was *already a committee* when it acted in "cooperation" with a candidate committee, and that it became a committee by having previously made "disbursements" or "contributions."

But the only route for making *that* showing travels through the Special Prosecutor's third theory, which attempts to read into Wisconsin law an "issue advocacy coordination" provision. Under this theory, [redacted] the Special Prosecutor must prove that they constitute "contributions." This makes the "subcommittee" theory nothing new after all.

The Special Prosecutor closes his discussion of the Subcommittee Theory with the pronouncement: [redacted]

[redacted] SP 83. [redacted] disagrees. Importantly, Wisconsin does not allow a prosecutor to determine whether a group "feels like" a committee, examining, perhaps, whether associates or agents of a group subjectively hope to influence an election, or boast in retrospect that they have influenced it. This Court made clear in *WMC* that it would be "profoundly unfair" to subject speakers to a test not plainly articulated in the statutes and rules, and it is up to the legislature or the GAB—not a court or a prosecutor—to create a bright line standard. 227 Wis. 2d at 679-81.

B. The Special Prosecutor's Control/ Authorization Theory Fails

The Special Prosecutor's second theory is that if any spending is made under the direction or control of a candidate committee, it is reportable by the candidate committee. It proceeds as follows:

1. [redacted] must have made "disbursements" that were "for the benefit of" [redacted]. SP 83 (citing § 11.06(4)(d)).

2. [redacted] disbursements or contributions must have been made "with the authorization, direction or control of or otherwise by prearrangement with" [redacted]. SP 84, starting with "Likewise..." (implicitly citing to § 11.06(4)(d)).

    a. The Special Prosecutor argues that the same facts that satisfy the test under § 11.10(4) also satisfy the test under § 11.06(4)(d), which contains three levels of conduct (control, authorization, and prearrangement) covering the field. SP 77 (implying the lowest level of cooperation, "prearrangement," equals the "joint venture" standard allegedly adopted by Wisconsin).

Like the Subcommittee Theory, this theory contains a content-based element: it requires "disbursements" or

"contributions."[3] From the discussion above, we know that both terms require "political purposes." It thus fails for the same reason: "political purposes" can only be proved if one accepts the third theory—[redacted] As shown below, that theory has no basis in Chapter 11 or the GAB regulations.

Additionally, the Control/Authorization Theory introduces a new element that is also fatal to the Special Prosecutor's claims: the contribution or disbursement must be made "for the benefit of a candidate" before it "is reportable by the candidate..." *See* § 11.06(4). In 267 pages, the Special Prosecutor cites no fact [redacted] it is not even a question of "express" or "issue" advocacy.

The Special Prosecutor's second theory thus fails on its own terms.

C. The Special Prosecutor's *WCVP*/In-Kind Contribution Theory Fails

The Special Prosecutor's third theory proceeds as follows:

1. An entity makes an "in-kind contribution" when it makes a "disbursement...to procure a thing of value or service for the benefit of a registrant who authorized the disbursement." SP 85-86 (citing GAB 1.20(1)(e)).

2. A candidate's authorization or consent means an expenditure is a "thing of value" to that candidate, and

[3] Unlike the Subcommittee Theory, though, the Control/Authorization Theory treats [redacted] as distinct entities.

also means that the expenditure is for "political purposes," which converts the expenditure into a "disbursement." SP 87-96.

a. The same facts that satisfy the § 11.10(4) and § 11.06(4)(d) tests also satisfy the *WCVP*/in-kind contribution test.

If any lawyer had been told in 2011 or 2012 that [redacted] into coordinated issue advocacy, she would have been dumbfounded. If forced to predict a supporting legal theory, however, her research would likely have led to the *WCVP*/In-Kind Contribution Theory. It is based on a rough amalgamation of two historical sources: the Court of Appeals decision in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999) ("*WCVP*"); and Election Board Opinion 00-2 (the "2000 Opinion") (reaffirmed by GAB March 26, 2008).

The theory's patent flaws have now made this the Special Prosecutor's third-place argument. As shown below, the *WCVP*/In-Kind Contribution Theory—which argues that, on a case by case basis, a given level of coordination on a specific communication may convert it into a contribution, regardless of its content—is unsupportable under Wisconsin law.

1. The Sources of the *WCVP*/In-Kind Theory Are Unreliable and Incorrect

As [redacted] first brief showed, *WCVP* is distinguishable and is unreliable precedent because it uses circular logic and was unnecessary; the plaintiff was already subject to the voluntary oath requirement under GAB 1.42. The Special Prosecutor's argument that GAB 1.42 was *dicta* is unconvincing. Indeed, the very inquiry the *WCVP* court allowed the Elections Board to pursue—whether WCVP acted in "cooperation or consultation" with a campaign—was explicitly based upon the language and authority of GAB 1.42. *WCVP*, 231 Wis. 2d at 686 n.10.

The Special Prosecutor is perhaps more correct than he knows when he argues that the GAB 1.42 "discussion" was unnecessary and even mistaken, given GAB 1.42's application to only express advocacy. SP 98. It is exactly correct that GAB 1.42 cannot apply to issue advocacy, and only further demonstrates the disconnect between the *WCVP* court's search for a provision reaching issue advocacy, and its ultimate reliance on a "conduct" standard that, by its terms, applies only to express advocacy.

Additionally, the Special Prosecutor promises but utterly fails to address the circularity of the *WCVP* court's reasoning. SP 98-99. The *WCVP* court notes that contributions do not require "express advocacy" (after all, most contributions are financial transactions), and notes the broad "for the purpose of influencing the election" provision within the definition of political purposes. 231 Wis. 2d at 680. Notably, the court does not assume that this language, by itself, is sufficiently precise to answer its question; it returns to the question of what acts might be for "political purposes." *Id.* Turning to GAB 1.28—[redacted]—the court finds that "political purposes" include "contributions made to a candidate or committee," including in-kind contributions. *Id.*

At this point, the court stops, having progressed no further than its starting point: the definition of "contribution." Yet had it read GAB 1.20, as shown below, it would have seen that the rule requires a "disbursement," a term which requires a "political purpose." And so the cycle begins again, still with no reference to issue advocacy, a content standard, or a standard of conduct. Without a concrete standard describing issue ads or the conduct of coordination, Chapter 11 and the GAB's regulations form an endless maze, a circularity exemplified by the *WCVP* court's analysis. In short, the *WCVP* decision is wrong.

Nor can the 2000 Opinion bear the weight the Special Prosecutor places on it. First, GAB advisory opinions cannot expand substantive campaign finance law; they have the "force

and effect of law" only as to those who rely on them in good faith.[4] Second, the Opinion admits at the outset that "'issue' advocacy... [is] so fact intensive that the Board's opinion is virtually limited to the facts upon which the opinion is predicated." Opinion at 2. Third, the Opinion relies on only two provisions of law that on their face (and as the Special Prosecutor now admits, as discussed below) relate only to express advocacy—not issue advocacy. Incredibly, the major part of the *WCVP* decision cited in the Opinion is its treatment of GAB 1.42—the part of the decision the Special Prosecutor now claims was "unnecessary" and of questionable "relevance." SP 98. Finally, the Opinion simply engrafts the judicially-created standard in *Christian Coalition* onto Wisconsin provisions that the Opinion recognizes do not relate to issue advocacy.

The 2000 Opinion is not reliable, and is not controlling law.[5]

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[4] The Special Prosecutor's suggestion that the 2000 Opinion has the same "force and effect of law" as a properly promulgated GAB rule (SP 168) is baseless. Only the person requesting an advisory opinion may rely on it, if the material facts are as stated and the opinion is supported by specific authority. Wis. Stat. § 5.05(6a). The opinion provides no protection to anyone else. Nor does it bind the GAB—much less prosecutors—to apply the same standard to anyone else.

One reason advisory opinions are not binding on others is the GAB's decision-making process is not public. By contrast, the FEC's formal advisory opinions do have the force of law. Unlike the GAB, the FEC publicizes both the requests for advisory opinions and its initial draft opinions, and accepts comments by the public before issuing its final advisory opinions. *See* 52 U.S.C.A. § 30108; 11 C.F.R. § 112.3.

The GAB could have made a rule regarding issue advocacy communication. It has not.

[5] Tellingly, the Special Prosecutor does not list the 2000 Elections Board Opinion in his Table of Authorities.

2. The Special Prosecutor's New Gloss Fails to Resuscitate this Theory

The Special Prosecutor now attempts to rely on a combination of rules, statutes, and even federal case law to "fix" *WCVP* and the 2000 Opinion. This admixture of authority adds nothing new.

(i) GAB 1.20

First, the Special Prosecutor now relies heavily on the GAB's regulatory definition of "in-kind contribution." This requires a "disbursement," not merely a payment of money, and the "disbursement" is what the candidate must "authorize." *See* GAB 1.20(1)(e). We know that Wisconsin's definition of "disbursement" requires "political purposes," and that, at least with respect to disbursements, "political purposes" must be narrowed to require express advocacy; it does not reach issue advocacy. *See Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 832-834 (7th Cir. 2014) ("*Barland II*"). Tellingly, the 2000 Opinion that the Special Prosecutor claims provides notice of the "in-kind" theory does not once cite GAB 1.20. And the *WCVP* opinion cites GAB 1.20 exactly once in passing, only to observe that contributions can be "in-kind." *See WCVP*, 231 Wis. 2d at 680. It does not view GAB 1.20 as a stand-alone provision sweeping all coordination within the scope of Chapter 11.

(ii) GAB 1.42

The only GAB rule that purports to address coordination of any kind is GAB 1.42, which was addressed in *WCVP* and the 2000 Opinion. GAB 1.42 was drafted on the authority of § 11.06(7), which requires a "voluntary" oath for groups that make independent disbursements. Note that this "coordination" statute, like GAB's in-kind contribution regulation, operates using the statutory term, "disbursements." That is no accident. As the Special Prosecutor admits, both the regulation and statute are "understood as...applying only to express advocacy entities."

SP 98. What is true for § 11.06(7) and GAB 1.42 is also true for GAB 1.20(1)(e). "Disbursement" does not mean issue advocacy.

(iii) Wis. Stat. § 11.01(6)

Finally, the Special Prosecutor relies on an *exception* to the definition of "contribution," a provision not cited in *WCVP*, the 2000 Opinion, or in his briefing below. SP 84-85, 132. The Special Prosecutor observes that "'contribution' does not include" certain items, including "services for a political purpose by an individual on behalf of a registrant [candidate or committee] who is not compensated specifically for the services." SP 85; § 11.01(6)(b)(1). But this proves nothing: the exception is a safe harbor for "individual" volunteers who, for example, answer phones at campaign headquarters or knock on doors. Volunteer services are not contributions.[6] This statute tells us nothing about what types of communications are to be considered for purposes of the "in-kind contribution" rule, or what level of coordination, if any, is necessary to convert other groups' expenditures into "contributions." Further, by its terms, it applies to "services" rendered by "individuals," not goods or other things of value, like commercials, produced and paid for by "persons" or entities.

(iv) *Buckley v. Valeo*

Beyond these rules, no other statutory or regulatory text converts a group's issue advocacy spending (coordinated or not) into a "contribution" to a candidate campaign. The Special Prosecutor argues at length that *federal* case law recognizes this concept, but that is not the same as locating a valid provision in Wisconsin law.

For example, the Special Prosecutor claims that *Buckley* "endorses" a re-reading of Chapter 11 to support his theory (SP 97), or that Chapter 11 must now be extended to issue advocacy "precisely because *Buckley* said so." (SP 152). But *Buckley*

[6] The definition of "disbursement" includes an analogous exception for the use of real or personal property "in rendering voluntary personal services on the individual's residential premises." *See* § 11.01(7)(b)1.

construed federal, not Wisconsin, statutes, and it stands for two things. First, two vague phrases related to expenditures needed to be limited to "express advocacy"—the phrase "relative to a clearly identified candidate," which applied to the federal cap on expenditures, 424 U.S. at 42-44, and the phrase "for the purpose of influencing elections," which applied to expenditure disclosure rules. *Id.* at 80. Second, having narrowed the definition of "expenditure" to express advocacy, *Buckley* read the text of the federal statute to treat coordinated expenditures as contributions. *Id.* at 46-47.

In explaining the types of "coordinated expenditures" that could be treated as "disguised contributions," *Buckley* refers to "media advertisements" and "billboard advertisements endorsing a candidate." *Id.* at 47 n.53. What *Buckley* does *not* do is connect these two concepts—the rule requiring an "express advocacy" construction and the rule regarding coordinated expenditures—into a coherent theory about when (if ever) certain types of issue advocacy can be treated as a "disguised contribution" due to some level of interaction between a candidate and a campaign.[7]

Partly because *Buckley* could not do this with respect to federal law, Congress drafted specific provisions covering coordination and issue advocacy, as did the FEC. This process has been difficult enough that it is fair to describe it as "checkered." SP 151. But certainly *Buckley* does no more for Wisconsin law than it does for still-evolving federal law. And as discussed above, neither the Wisconsin legislature nor the GAB created laws or regulations—as they easily could have—to define issue advocacy and explain what steps would constitute "coordination" transforming such unregulated speech into a potential crime.

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[7] The 2000 Opinion recognizes this: "[T]he *Buckley* court did not distinguish coordinated express advocacy from coordinated issue advocacy or even speak to the question whether one is distinguishable from the other with respect to the government's authority to regulate." Opinion at 8.

(v) *Christian Coalition*

In 1999, a federal district court "surmised" that "the *Buckley* majority left this issue [coordinated issue advocacy] for another case." *Christian Coalition*, 52 F.Supp.2d at 85. "In many respects," it declared, "this is that case." *Id.* Armed with its own view of *Buckley*, including explicit revisions to the statutes construed by *Buckley*, and FEC regulations defining what constituted coordination (*Id.* at footnote 54), the court crafted a 4-part test for determining whether, under federal law, a candidate and political group become "partners" in a communications opposing or supporting that candidate. *Id.* at 92. Also relevant was whether the coordination implicated the "dangers of circumvention." *Id.* at 97.

Regardless of the merits or demerits of *Christian Coalition* as constitutional law or federal statutory interpretation, it is not Wisconsin law and does not engraft an "issue advocacy coordination" provision onto Chapter 11. Those courts that have actually construed Wisconsin law, including the Seventh Circuit in *Barland II*, have explicitly found that issue advocacy is outside the scope of the key definitions—"contribution" and "disbursement"—required to support the Special Prosecutor's theory. Although the *Barland II* court left room for candidate committees or political parties to be subject to a wider view of "political purposes," it did not countenance a communication-by-communication inquiry into whether issue ads were coordinated. *See also Wisconsin Right to Life, Inc. v. Barland*, 2015 WL 658465 at *2 (E.D. Wis. Jan. 30, 2015) ("'[a]s applied to political speakers other than candidates, their campaign committees, and political parties,'" the definition of "political purposes" "reaches *no further* than 'express advocacy and its functional equivalent as those terms were explained in *Buckley*' and *WRTL–II*.") (emphasis in original; citation omitted).

Accordingly, no Wisconsin statute or regulation makes coordinated issue advocacy—and particularly not the coordinated issue advocacy complained of here—a "contribution." The failure of the Special Prosecutor at this last redoubt is significant. The

statutes and regulations he cites are the very laws through which the legislature and GAB explained what would happen when committees spent money that was either "independent" or "in cooperation or consultation with" a candidate or agent. A campaign finance lawyer advising a 501(c)(4) engaged in issue advocacy[8] would read these sections very slowly and carefully, looking for the sentence clearly stating that "issue advocacy" can be regulated if it is coordinated. She would find none. That attorney would then look for a concrete standard explaining what sort of conduct, in the world of issue groups and lobbying, constitutes coordination. She would find none.

These absences speak volumes, and this dooms the Special Prosecutor's multiple theories attempting to criminalize issue advocacy.

III. The Special Prosecutor Fails to Answer [redacted] Overbreadth and Vagueness Challenges (Issues 9, 11-13)

A. The Law as Envisioned by the Special Prosecutor Would Criminalize Vast Amounts of Core Speech and Association

[redacted] opening brief framed the overbreadth issue simply, and fairly: because this criminal investigation [redacted], it must be "closely drawn" to prevent *quid pro quo* corruption, and will fail if the alleged prohibition would encompass "a substantial amount of protected speech." [redacted] at 34-41, quoting *Buckley*, 424 U.S. at 25, and *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012). [redacted] explained how the Special Prosecutor's [redacted] would reach vast amounts of protected speech.

[8] It is a foregone conclusion that no average person can make any sense of Wisconsin's campaign finance law. As this case and related federal decisions show, it taxes the analytical abilities of even distinguished jurists, let alone lawyers.

In his response, the Special Prosecutor ignores the on-point First Amendment jurisprudence, and instead relies on *United States v. Williams*, 553 U.S. 285 (2008), a child pornography case. Using this inapt precedent, the Special Prosecutor contends the scienter requirement of § 11.61 provides cover for an overbreadth challenge. This may have made a difference in *Williams*, where the federal statute prohibiting pandering of child pornography could potentially apply to persons offering to sell nonpornographic photos of young girls to a pedophile. But it can make no difference here, where the targeted speakers will, in every case, have intended to speak their piece.

Nor does *Williams* speak at all to the corollary danger of an overbroad law targeting speech—the "practically unbridled administrative and prosecutorial discretion that may result in selected prosecution..." *State v. Stevenson*, 2000 WI 71, ¶ 13, 236 Wis. 2d 86, 93, 613 N.W.2d 90. The speech at issue in *Williams* was "categorically excluded from the First Amendment," 553 U.S. at 299, thus carrying no danger of prosecutorial mischief. The speech at issue here, by definition, is speech at or near an election and relating to issues of public concern. The danger of prosecutorial abuse is palpable [redacted] *O'Keefe v. Chisholm*, 769 F.3d 936, 938 (7th Cir. 2014), *petition for cert. filed* Jan. 21, 2015.

The Special Prosecutor's arguments demonstrate the overbreadth of his version of Wisconsin law. As one example, he claims an elected official is always a "candidate." If this is true, any incorporated group that coordinates with an elected official on *any* issue at all becomes a target the moment they speak out on the issue.

[redacted] posited a very real hypothetical about a group, highly supportive of Act 10, conferring closely with the Governor and then running ads touting Act 10 that never mention the

Governor. This involves core associational and free speech rights, and no danger of *quid pro quo* corruption. The Special Prosecutor responds that as long as he could prove the ad was made "for the benefit of" the Governor, it would be a criminal act. SP 167-68. This single concession proves the overbreadth of the shifting prosecutorial theories—they would allow a prosecutor to go after *any* outside group seeking to use free speech to advance policy while also working directly with the policymakers. After all, any speech supporting a policymaker's agenda is arguably "for the benefit of" the policymaker.

The Special Prosecutor has no answer for [redacted] further hypothetical about groups working closely with elected officials to champion cancer research or ending domestic violence. If, for example, the NFL worked with Governor Walker to promote its "No More" campaign during a Packers broadcast, under the Special Prosecutor's theories, the NFL would have made an illegal contribution to the Governor's campaign committee, and the League would be reduced to the status of a state subcommittee.

The Special Prosecutor's final stab at avoiding the overbreadth of his theories is to posit that "no communication is criminalized at all here," and "no one here will be subject to prosecution for speaking out." SP 163. [redacted] This is the purest of sophistry. The act giving rise to potential criminal prosecution [redacted] under any of the theories advanced by the Special Prosecutor, is the airing of the issue ad.[9]

[9] The Special Prosecutor's argument that specific words within § 11.06(4)(d) are not themselves overborad, SP 161-62, misses the point entirely. [redacted] challenge is to the limitless reach of the Special Prosecutor's theory that any coordination with an elected official regarding issues prohibits subsequent advocacy in favor of such issues, at least for corporate speakers.

B. *Buckley, WMC* and *Barland II* are Correct: the Phrase "For the Purpose of Influencing" is Impermissibly Vague

Due process requires that persons be given "a reasonable opportunity to know what is prohibited," so they may "steer between lawful and unlawful conduct." *WMC,* 227 Wis. 2d at 677. *See also Buckley*, 424 U.S. at 77 ("'[N]o man shall be held criminally liable for conduct which he could not reasonably understand to be proscribed.'") (citation omitted).

As [redacted] opening brief demonstrated, the phrase "for the purpose of influencing" in § 11.01(16) is vague. It does not convey to a person of ordinary intelligence when an issue ad would, or would not, be so viewed. This Court so found in *WMC*, 227 Wis. 2d at 669, and the Seventh Circuit recently agreed. *Barland II*, 751 F.3d at 833 ("The 'influence an election' language...raises the same vagueness and overbreadth concerns that were present in federal law at the time of *Buckley*.").

Not so the Special Prosecutor. According to him, "*Buckley* has already answered this question," finding no vagueness problems in connection with its holding that "expenditures placed in cooperation with" a candidate constitute "contributions." SP 153. What the Special Prosecutor fails to appreciate, or ignores, is that the *Buckley* Court already construed the term "expenditures" as limited to those expressly advocating the election or defeat of a candidate. Thus, when it held that "coordinated expenditures are treated as contribution," 424 U.S. at 46, the Court was not speaking at all to issue advocacy.

The Special Prosecutor then takes another leap of logic, declaring his theories are not vague because: "Contributions always are intended to 'influence the election.'" SP 155. Were things so simple, of course, § 11.01(6)(a)1 would be four words shorter, eliminating the key phrase, "made for political purposes."

This is more than a chicken or egg discussion. It is a question of constitutional boundaries; specifically, whether a person of ordinary intelligence would read Chapter 11 and conclude that *any* communication coordinated with an officeholder is a presumptive "contribution," and deemed to be "made for political purposes," because "contributions are always intended to 'influence the election.'" The answer to that question is "no." A person of ordinary intelligence would read the statutes as requiring *something more* to transform a communication into an act that is deemed to be "for the purpose of influencing" an election.[10] This something more, the cases teach, is the narrowing construction of these vague phrases to reach only express advocacy.

Vagueness concerns are "particularly treacherous where, as here, the violation of [the law] carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." *Buckley*, 424 U.S. at 76-77. The Special Prosecutor's novel-length brief, offering three different theories of criminality and relying on dozens of authorities outside of Chapter 11 and the GAB rules, does nothing to dispel these concerns for those engaged in protected issue advocacy.

CONCLUSION

For the foregoing reasons, [redacted] position should prevail.

[10] We know from *WMC* that the "context" of the speech cannot provide this missing element, at least until Wisconsin lawmakers create such a standard, which they have not done. 227 Wis. 2d at 680. *See Barland II*, 751 F.3d at 817-818 (detailing the many failed legislative attempts to amend Chapter 11).

Dated: March 19, 2015

Respectfully submitted,

FOX, O'NEILL & SHANNON, S.C.

MATTHEW W. O'NEILL
State Bar No. 1019269
622 North Water Street, Suite 500
Milwaukee, WI 53202
(414) 273-3939
mwoneill@foslaw.com

GRAVES GARRETT, LLC
Todd P. Graves, Mo. Bar 41319
Edward D. Greim, Mo. Bar 54034
Dane C. Martin, Mo. Bar 63997
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
Tel: 816-256-3181
Fax: 816-817-0863
tgraves@gravesgarrett.com
edgreim@gravesgarrett.com
dmartin@gravesgarrett.com

Counsel for Unnamed Movant No. 2

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this reply 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 5,983 words.

Dated at Milwaukee, Wisconsin this 19th day of March, 2015.

Matthew W. O'Neill
State Bar No. 1019269

ELECTRONIC BRIEF CERTIFICATION

I certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12)(f), as modified by this Court's January 13, 2015 Order. I further certify that the electronic version of the reply brief of Unnamed Movant No. 2 is identical to the content of the paper copies filed with the Court and served on all parties.

Dated at Milwaukee, Wisconsin this 19th day of March, 2015.

Matthew W. O'Neill
State Bar No. 1019269

CERTIFICATE OF SERVICE AND FILING UNDER SEAL

I hereby certify that on this 19th day of March, 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 Reply 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 19th day of March, 2015.

Matthew W. O'Neill
State Bar No. 1019269