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STATE OF WISCONSIN

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

2013AP2504-2508-W

IN THE MATTER OF JOHN DOE PROCEEDING

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,

Petitioner,

v.

The HONORABLE GREGORY A. PETERSON, John Doe Judge, the HONORABLE GREGORY POTTER, Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

John Doe Investigative Proceeding in Five Counties,
Hon. Gregory A. Peterson, Presiding
Columbia County No. 13-JD-011; Dane County
No. 13-JD-009; Dodge County No. 13-JD-006; Iowa County
No. 13-JD-001; Milwaukee County No. 12-JD-023

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[redacted] PRINCIPAL BRIEF IN SUPPORT OF JOHN DOE JUDGE'S [redacted] DECISION

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[redacted]

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.

2014AP417-421-W

STATE OF WISCONSIN ex rel. FRANCIS D. SCHMITZ,

Petitioner,

v.

HONORABLE GREGORY A. PETERSON, John Doe Judge,

Respondent,

EIGHT UNNAMED MOVANTS,

Interested Parties.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In its December 16, 2014 order, this Court identified at least 14 principal issues and four subsidiary issues in these procedurally-consolidated matters, asking the parties—individually or collectively—to address them in their briefs and at oral argument. While those issues need not be restated here, they cumulatively involve the John Doe process under Chapter 968, the state's campaign finance law in Chapter 11, and the related regulations and practices of the Government Accountability Board (the "G.A.B."). They also directly implicate First Amendment rights of speech and association.

[2] In this regard, one of the concurring opinions suggests that the issues fall into at least "two separate" categories. This brief addresses "the interpretation and constitutionality of campaign finance statutes" and not those involving the appointment and multi-county jurisdiction asserted by the John Doe prosecutor and judge. December 16, 2014 Order ¶ 8 (Prosser, J., concurring).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court already has set aside two potential dates, April 17 and April 20, 2015, for oral argument. Given the issues at stake and the public interest in them, the Court should hear argument and publish its decision.

RELEVANT STATUTORY AND ADMINISTRATIVE PROVISIONS

The directly relevant statutory and administrative materials are collected in the Joint Appendix, on which the responding parties have collaborated. Each responding party will emphasize particular materials and statutory provisions in its own briefs.

SUMMARY OF ARGUMENT

These matters potentially present an array of administrative, statutory and constitutional issues that arose, directly or indirectly, during three years of tumultuous political and legal events in this state. The Court itself has

identified a large number of those issues, and two concurring justices have identified the potential difficulties in confronting them.

This litigation needs to end, but it need not end with a constitutional duel that requires this Court to do what no other institution has. Not the U.S. Supreme Court nor a host of other federal courts, not the G.A.B., not the state legislature, not even the Federal Election Commission (FEC)—no one has ever established a clear standard determining the government's ability to regulate, let alone criminally prosecute, " impermissibly coordinated" issue advocacy, as distinct from regulated express advocacy.

Rather, the unusual circumstances here present a series of alternatives for this Court to bring all of this to a clear and satisfactory conclusion far short of a sweeping constitutional declaration on impermissible coordinated spending and issue advocacy. The black letter law that no court should reach

constitutional issues unless it is necessary to do so nowhere has more applicability or wisdom than in these remarkable consolidated proceedings.

At its heart, this is a preliminary criminal investigative matter, [redacted] exercising both independence and unreviewable discretion. No criminal charge has been filed. No facts have been adjudicated. No stipulation accompanied the petitions for original jurisdiction, for mandamus, for bypass or for any of the other procedural mechanisms employed here. Indeed, there are only two sets of judicial decisions even suggested for review: the John Doe judge's [redacted] decision (as supplemented) and the Court of Appeals' analysis of some, though hardly all, aspects of that decision.

To conclude this matter, [redacted] the Court need only

turn to its own precedent and its own first principles. Prosecutorial decisions like those of the John Doe judge are not reviewable, even if the five-county, five-district attorney, one-special prosecutor, one-judge structure is legally tenable. If the decisions are reviewable, they are reviewable under the demanding standards of mandamus, not met here.

Whatever that standard, [redacted], the state cannot prosecute anyone without due process and fair warning—as this Court held in a seminal campaign finance case 16 years ago—that the speech and conduct at issue are subject to regulation, let alone to prosecution. *See Elections Bd. v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999) ("*WMC*"). And, on the question of coordinated issue advocacy, the only certainty is uncertainty.

That uncertainty infects virtually every procedural and substantive level, acknowledged repeatedly by federal courts,

the legislature itself, and state and federal administrative agencies. This Court could assume, as the special prosecutor suggests, that some provisions of Chapters 5 and 11, somehow and under some circumstances and academic constructions, might preclude some form of coordination between a candidate committee and an independent organization. But one prosecutor's untested theory is insufficient to sustain [redacted] insufficient to sustain prosecution, insufficient to sustain conviction—and even insufficient to sustain civil enforcement, for no agency has even accomplished that.

Without reaching, this Court can and should dismiss the petitions before it. Indeed, under its supervisory authority, the Court should dismiss the entire proceeding and end the investigation.

STATEMENT OF THE CASE

These procedurally-consolidated matters potentially present constitutional and statutory construction issues integral to two statutes unique to this state. The John Doe procedure in Chapter 968 is unique because it serves the role of the grand jury process found in federal law and most other states.[3] The state's campaign finance law in Chapter 11 is unique because of its repeated application over more than 40 years by the courts and state agencies. This is a "political" case, moreover, in that it involves the rights of speech and association in a political context, a context that in Wisconsin in the last few years also has been unprecedented.

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[3] The John Doe proceeding has been a part of the state's criminal procedure since it was a territory. *See State v. Unnamed Defendant*, 150 Wis. 2d 352, 358-59, 441 N.W.2d 696 (1989). One or two other states may use a similar approach, *see, e.g.*, *In re Investigation into the Homicide of T.H.*, 932 P.2d 1023 (Kan. 1997), but the John Doe process here is sufficiently remarkable that—constitutional issues aside—the precedent from other jurisdictions is unhelpful, except to the extent it reflects the wholesale uncertainty and ambiguity surrounding the question of coordinated campaign spending.

In a span of little more than four years, the Governor has been elected three times, once in a recall election, and more than a dozen state senators have been subject to recall elections. [redacted] Only two sets of decisions, one by a John Doe judge, JA 14-16 and 29-30, and one by the Court of Appeals, JA 2-13, 20-28, are before the Court. But they are proxies for much more. By what this Court holds and says, by what it declines to hold and say, it will help shape the rules for the democratic process. And it

will do so at a time when the legislature, the G.A.B., and the U.S. Supreme Court are again trying to revisit those rules as well.

Procedural Status[4]

[redacted]

In its December 16, 2014 order, this Court procedurally consolidated three separate proceedings, venued individually or collectively in five different counties, with

[4] Some of the responding parties may adopt, by reference, this section and the Statement of Facts that follows to avoid duplication. The Court invited this procedure, approving it in a January 7, 2015 order. Each responding party's brief elaborates on particular events or proceedings consistent with their particular involvement and arguments.

overlapping and intertwined issues: a petition for review of the Court of Appeals' order dated January 30, 2014; the special prosecutor's own supervisory writ proceedings subject to petitions for bypass; and, an original action—all arising from [redacted] and all involving associated motions for sealed pleadings and records. Yet, even the limited public record already discloses a complex procedural path that has involved every branch of the state and the federal court system.[5]

[redacted]

[redacted]

[7] In its December 16, 2014 order, this Court expressed the question in terms of whether the appellate record "provide[s] a reasonable belief" that a campaign committee's coordination with independent advocacy organizations violated state law. Issue No. 10, Order, p. 4.

In decisions on November 22, 2013 and January 30, 2014, JA 2-13, 20-28, the Court of Appeals denied the supervisory writ petitions, but it granted the petitioners' "largely unopposed request to unseal a number of the documents…" filed with the petition. JA 22. "What has occurred here," the Court of Appeals wrote, "is that five separate John Doe proceedings were initiated by the district attorneys of five counties as the result of a joint investigation

into conduct that could potentially result in criminal charges...[against individuals or organizations] residing or headquartered in each of those counties." *Id.* No consolidation order had ever been entered, the appellate court concluded, and the "parallel" proceedings advanced judicial efficiency. JA 23, 26. Nor, it held, did the initial John Doe judge violate any plain duty in appointing the special prosecutor. JA 23-26. Rather, the judge had "inherent power to appoint a special prosecutor when necessary...." JA 25.

The Court of Appeals specifically noted the Attorney General's decision, which preceded the expanded John Doe proceedings, to decline to conduct a multi-jurisdictional investigation.[8] JA 25. And, the Court of Appeals concluded, the fact that the special prosecutor was appointed, not elected,

[8] In a preliminary decision, issued on November 22, 2013, the Court of Appeals had dismissed some of the petitioners' procedural claims and established a process for addressing the remaining issues raised by the writ petitions. JA 2.

has "no legal significance." JA 26. In its December 16, 2014 order, this Court granted the supervisory petition addressed to this Court (February 21, 2014) to review this appellate decision.

On February 7, 2014, two unnamed petitioners filed a petition for an original action challenging the entire John Doe process (Case No. 2014AP296-OA). Two weeks later, the special prosecutor filed a Petition for Supervisory Writ and Writ of Mandamus with the Court of Appeals to review [redacted] decision. (Case Nos. 2014AP417-W – 421-W.) By then, several responding parties themselves had filed a petition for review of the Court of Appeals' writ decision. Several responding parties on April 14, 2014 also filed petitions to bypass the Court of Appeals for the special prosecutor's writ petition and related matters, which stayed them automatically under Wis. Stat. § 809.60(3). All of this litigation is now before this Court.

The Federal Litigation

For eight months, this dispute was the province—though not exclusively—of the federal courts. On February 10, 2014, [redacted] filed an action under the Civil Rights Act against the special prosecutor and the five district attorneys. The U.S. District Court for the Eastern District of Wisconsin issued a series of orders and judgments that, on the plaintiffs' motions, enjoined the John Doe proceeding and addressed questions of prosecutorial immunity. *O'Keefe v. Schmitz*, 19 F. Supp. 3d 861 (E.D. Wis. 2014). After hearing argument, the U.S. Court of Appeals vacated the decisions and the judgment, remanding the federal case for dismissal. *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014).[9] Applying principles of federalism and abstention, the three-judge panel found the federal district

[9] The plaintiffs filed a petition for a writ of certiorari with the U.S. Supreme Court on January 21, 2015 (No. 14-872).

court's injunction an abuse of discretion and the prosecutors entitled to qualified immunity.

While that federal appellate decision is not binding on this Court, it made several relevant observations:

- The subpoena[s] issued...[are] extraordinarily broad, covering essentially all of the groups' records for several years.
- The [United States] Supreme Court has yet to determine what "coordination" means.
- With respect to coordinated fundraising for issue advocacy, "the claim to constitutional protection...has not been established 'beyond debate.'"
- There is no federal precedent that "establishes ('clearly' or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue advocacy groups—let alone that the First Amendment forbids even an *inquiry* into that topic."

Id. at 938, 941, 942 (emphasis in original).[10]

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[10] With respect to the question of public access to some of the records filed with it, the U.S. Court of Appeals said "Wisconsin, not the federal judiciary, should determine whether, and to what extent, documents gathered in a John Doe proceeding are disclosed to the public." 769 F.3d at 943.

Earlier last year, the U.S. Court of Appeals issued another decision that provides relevant—though, again, not binding—precedent. In *Wisconsin Right to Life, Inc. v. Barland*, the U.S. Court of Appeals addressed a wholesale challenge to the state's statutory framework for campaign finance. It found unconstitutional on First Amendment grounds a series of provisions, among them: the ban on political spending by corporations in section 11.38(1)(a)(1), the limitations on the amount a corporation can spend on fundraising for an affiliated committee, and the administrative regulation in G.A.B. § 1.28(3)(b) on issue advocacy during the pre-election period provided it mentions a candidate by name. 751 F.3d 804, 843-44 (7th Cir. 2014) ("*Barland II*").

Written by Judge Sykes, the opinion includes an extensive discussion of the campaign finance laws in Chapter 11 and the litany of federal court decisions in the wake of *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

The opinion characterized Wisconsin's statutes as "labyrinthian and difficult to decipher without a background in this area of the law." *Barland II*, 751 F.3d at 808. "Part of the problem," the court observed, "is that [Chapter 11] has not been updated to keep pace with the evolution in Supreme Court doctrine marking the boundaries on the government's authority to regulate election-related speech." *Id.*

Remanding the case for a permanent injunction, the Court of Appeals declared that the definition of "political purposes," the keystone of Chapter 11 and the G.A.B's administrative regulations, is wholly inapplicable to independent groups unless those definitions "are limited to express advocacy and its functional equivalent[s]...." *Id.* at 844. On January 30, 2015, the district court entered that injunction, declaring the definitional statutes and rules "unconstitutionally vague" and unenforceable against independent groups. *Wisconsin Right to Life, Inc. v. Barland*,

No. 10-C-669, slip. op. at 4 (E.D. Wis. Jan. 30, 2015). G.A.B. now stands enjoined by a federal court order "from administering or civilly enforcing...or criminally investigating or prosecuting (or referring for investigation or prosecution) any person under this law...," other than candidates, candidate committees and political parties. *Id.*, slip. op. at 5. Chapter 11 may be applied "only" to organizations that are "'under the control of a candidate' or candidates in their capacities as candidates" or "organizations that have the 'major purpose' of 'express advocacy.'" *Id.*, slip op. at 5, 6. The district court also required the G.A.B. to post hyperlinks to its decision and to the preceding U.S. Court of Appeals' decisions on G.A.B.'s website and to keep them there for at least four years after the state changes its campaign finance law and regulations to comply with the federal court decisions.

STATEMENT OF FACTS

Like most cases on appeal, the "facts" necessarily include a description of the parties in the litigation and their acts or omissions, stipulated or alleged.[11] The parties here define themselves below or in their individual briefs. Without disclosing the special prosecutor's specific allegations, the responding parties' acts or omissions are in no small part undisputed. It is the *legal* significance of those acts and omissions that divide the special prosecutor and those he would prosecute.

To greater or lesser and differing degrees, the responding parties are involved in the state's political life. Some lobby. Some engage in issue advocacy. Some sponsor conduits. Some are interested in federal and state issues and, separately, campaigns; some only in state campaigns. Only

[11] The two members of the Court who concurred in its December 16 order expressed particular concern in this regard. Order, pp. 7-12 (Abrahamson, C.J., and Prosser, J., concurring).

one is a candidate committee. Some engage in many of these activities while some engage in only one or two of them. Some of the responding parties sponsor a political action committee ("PAC") or may make state-regulated independent disbursements through a registered committee, but *those* regulated PACs or independent committees are *not* at issue here.

All or virtually all of the responding parties have some documents that, in theory, [redacted]

Responding Parties

[redacted]

One unnamed movant (No. 1)

registered with the G.A.B.

Two unnamed movants (Nos. 6 and 7)

[redacted]

The John Doe Proceedings/The Special Prosecutor

This is not the only recent John Doe proceeding [redacted] in a political context. In 2010, the Milwaukee County District Attorney initiated a John Doe proceeding to investigate potentially illegal campaign activities conducted by Milwaukee County employees then on the staff of the County Executive—at that time, Scott Walker.

That investigation resulted in criminal charges and convictions for several individuals—though not necessarily for violations of Chapter 11. *See State v. Rindfleisch*, 2014 WI App 121, ___ N.W.2d ___ (Wis. Dec. 12, 2014), *petition for review filed.* A central issue in at least one of those cases

was the constitutional validity of search warrants for computers and electronic records.[12]

[redacted]

[12] That appeal also involved documents filed under seal, which the Court of Appeals ultimately unsealed. JA 390-95. It did so after giving the defendant an opportunity to identify specific records that raised particular privacy concerns. In unsealing the records, the appellate court noted that this first John Doe proceeding had concluded, citing *State ex rel. Unnamed Persons v. State*, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260, for its decision. *See State v. Rindfleisch*, Order (February 10, 2013), JA 392.

[redacted]

The Elections, Act 10 and the Recall Process

Scott Walker was elected Governor on November 2, 2010, taking office on January 3, 2011. The state then enacted several proposals that limited the collective bargaining rights of public employees, including 2011 Wis. Act 10. That led, in turn, to almost daily public protests at the state capitol in February 2011 and to the filing of recall petitions against 16 state legislators, including legislators of both parties. *See* Wis. Const. art. XIII, § 12. Later that year,

a committee registered with the G.A.B. to gather petition signatures to recall Governor Walker.

Presented with serial recall petitions, the G.A.B. conducted the process to certify that each of the petitions contained the requisite number of signatures. The state then conducted recall elections, pursuant to Wis. Stat. § 9.10, in 2011 and 2012. Of the legislators subject to recall, all but three were elected.

On March 30, 2012, the G.A.B. certified the 540,000 petition signatures, gathered within a statutory 60-day period, necessary to conduct a recall election for Governor Walker. That election took place on June 5, 2012, and the Governor won.

Under state law, any campaign associated with a recall election—whether favoring or opposing a public official's recall—did not begin until the necessary petition signatures had been certified. Wis. Stat. § 9.10(3)(c). At that,

moreover, recall candidates have fewer fundraising restrictions than candidates in regularly-scheduled elections. *See*, *e.g.*, Wis. Stat. § 11.26(13m) (contribution limits inapplicable during the petition circulation period).

The Government Accountability Board

Established in 1973, and reconstituted and renamed in 2008, the G.A.B. has oversight responsibility for the state's election process and the administration of the campaign finance and lobbying laws, including their civil enforcement. The G.A.B. is not a party to any of these proceedings, and its role—direct or indirect—will be addressed in individual briefs.

Without doubt, however, the G.A.B. has the statutory and statewide authority to refer potential campaign law violations to the appropriate district attorney, Wis. Stat. § 5.05(2m)(c)11, consistent with the venue provisions for campaign finance law violations, *see* Wis. Stat.

§ 5.05(2m)(c)15. That power supplements its civil investigative authority, providing an alternative recourse—including referral to the Attorney General—if a district attorney in her discretion declines to proceed with a criminal investigative referral. *See* Wis. Stat. §§ 5.05(2m)(c)16, 11.61(2).

The G.A.B. has not initiated any civil proceedings in connection with any of the conduct at issue here. Indeed, it appears to have closed any investigation it had undertaken by declining to authorize the investigation's continuation. *See* Wis. Stat. § 5.05(2m)(c)5.

At its January 13, 2015 meeting, the G.A.B. adopted a resolution that, among other things, provided in its preamble: "Whereas, Wisconsin's campaign finance laws…have not undergone a thorough legislative review or revision since 1978…" and "[w]hereas, the language of the statutes is convoluted and difficult for the average person to read and

understand…." The preamble also noted that a "number of federal court cases…have made the practical application of the law difficult." JA 379-81.

The resolution itself then called upon the legislature to address comprehensively a series of campaign finance issues, including "[w]hat coordination between a candidate and other committees should be permissible and what should be prohibited." JA 379. The G.A.B. resolution urged the legislature to revise the "definition of political purposes [in Wis. Stat. § 11.01(16)] so as to be consistent with court rulings…." *Id.*

G.A.B. Precedent/Practices

On June 21, 2000, the G.A.B. issued a formal opinion "establishing guidelines for voluntary associations and other non-registrants [like some of the responding parties] who wish to spend money for the purpose of publishing and distributing… communications that raise voter awareness

about candidates and campaign issues...." El. Bd. Op. 00-2, 1 (Wis. Elections Bd. 2000), reaffirmed Mar. 26, 2008. JA 327-42. The opinion addressed issues directly relevant here, including: "with respect to a communication that would otherwise be unregulated, what kind of 'contacts' between officers or agents of [a group] and officers or agents of the campaign that 'benefits' from the communication would constitute 'coordination' between the two entities causing the communication (and the expenditures for it) to be subject to campaign finance regulation...." JA 328-29.

While the Elections Board opinion included an extended discussion of the distinction between express advocacy and issue advocacy, it also focused on "the necessity of regulating expenditures that were so 'coordinated' with a campaign that they ceased to be independent...." JA 334. Candidate-controlled or "coordinated" disbursements, the opinion observed, *could* be

treated as contributions—but only depending on the character and extent of the candidate control, coordination or prearrangement. Referring to section 11.06(7), the G.A.B. said any "outright ban" on candidate-committee "consultation, cooperation or action in concert" may be "unenforceable." JA 336, relying in large part on *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997).[14] JA 334-36.

There have been only two notable G.A.B. proceedings applying its opinion to "coordination," both matters of public record and both dismissed. In the first, a complaint alleged that a citizen had received two mailers on the same day regarding a state assembly race—one from a candidate for that office and another from an independent organization. *See In the Matter of All Children Matter, Brett Davis, and Brett Davis for State Assembly*, No. 2008-28 (G.A.B.

[14] In 2005, the G.A.B.'s staff found the law surrounding impermissible coordination no more discernible: "any opinion about coordinated expenditures is principally conjectural...." JA 319.

Mar. 30, 2008) (Preliminary Findings of Fact and Conclusions), JA 343-48. The two mailers each contained "similar criticism" of a health care plan supported by the candidate's opponent. JA 343. In deciding the matter, the G.A.B. staff reiterated the principles of its 2000 opinion.

The G.A.B. concluded that a candidate and an organization impermissibly coordinate only "if the communication of the voluntary committee is made at the *request* or *suggestion* of the campaign or if the cooperation, consultation or coordination...is such that the candidate or his agents can exercise *control* over, or where there has been *substantial discussion* or negotiation between the campaign and the spender over, a communication's (1) contents; (2) timing; (3) location, mode or intended audience; or (4) volume." JA 344 (emphasis added). The G.A.B. dismissed the complaint. *Id.*

In the second complaint, a registered PAC was solely funded by a prominent supporter of a candidate for the state senate, who previously had held the office. *See In the Matter of Keep Our North Strong PAC, Holperin for Senate, and Jim Holperin*, No. 2008-40 (G.A.B. June 22, 2009) (Preliminary Findings of Fact and Conclusions), JA 349-54. The PAC paid for independent disbursement advertisements supporting the candidate. JA 349.

Again, to analyze the complaint, the G.A.B. relied on the principles from its 2000 opinion, noting the importance of ensuring that "independent" communications not be disguised campaign contributions in violation of sections 11.06(4) or (7) or 11.26. JA 349. The spending did not qualify as a contribution or disbursement, subject to regulation, in part because there had been no discussion between the candidate or campaign and the group about the PACs spending.

JA 352-54. Again, the G.A.B. dismissed the complaint.[15]

JA 349-50.

STANDARD OF REVIEW

Normally, a conclusion of law is subject to *de novo* review but, to affirm a decision, an appellate court need not

[15] On May 30, 2014, Eric O'Keefe and the Club for Growth filed a complaint against the G.A.B. in Waukesha County Circuit Court. Case No. 14-CV-1139. They contend that to the extent the G.A.B. has been involved in the John Doe proceedings, it has exceeded its statutory authority.

use or adopt the rationale used in the lower court's decision. The unavoidable threshold question here is whether the John Doe judge's decision [redacted] is even reviewable at all. If it is, the decision is reviewable under the exacting standards of mandamus. Even were it reviewable under a forgiving standard, moreover, the decision can stand on a variety of substantive grounds.

To sustain the John Doe judge's decision, this Court need not agree that express advocacy is an indispensable component of *any* attempt to punish criminally, or even to regulate civilly, disbursements arguably "coordinated" between a campaign committee and an independent organization. There is no need to revisit, let alone to decide, the overarching constitutional questions on the definition or dimensions of the express advocacy-issue advocacy divide that have so vexed the courts and the legislature, not to mention the G.A.B. itself. Accordingly, this brief focuses on

basic due process and campaign finance law, on the constitutional limits on government intrusion, and on the "evidence" affecting [redacted]

Here, while this is a case about the [redacted] it necessarily encompasses the very nature and character of the underlying acts and omissions for which [redacted] "evidence"— evidence, that is, to sustain a criminal charge. These proceedings present a question, in other words, of both means and ends. For both procedural and substantive reasons, the Court should not permit [redacted] hat pursue conduct which itself cannot be subject to criminal prosecution.

ARGUMENT

In 1999, this Court decided one of the first civil enforcement actions in the country involving issue advocacy and campaign finance law. *Elections Bd. v. Wisconsin*

Manufacturers & Commerce, 227 Wis. 2d 650. It was one of the first because the very concept of issue advocacy and its practice, in a statutory and constitutional context, was then only beginning to develop. For all of the U.S. Supreme Court and other judicial decisions since 1999, however, the fundamental principle of due process that led to this Court's decision more than 15 years ago should guide its hand now:

> [W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited....Such notice is a basic requirement of due process....Because First Amendment freedoms need breathing space..., government may regulate in this area only with narrow specificity.

Id. at 676-77 (citations and quotation marks omitted); *accord*, *Barland II*, 751 F.3d at 835.

Here there is neither specificity nor certainty. Indeed, if there is anything certain about the law of impermissible "coordination" in campaign finance law, it is its uncertainty. The G.A.B. itself confirmed that, once again, with its January 15, 2015 resolutions urging the legislature to

overhaul the campaign finance law for clarity's and consistency's sake. *See supra* at 43-44.

That uncertainty precludes not only a viable criminal charge against the responding parties, but it precludes a

chargeable offense. Based on the facts alleged here, none can be charged let alone permitted to proceed beyond a charge.

Since the *WMC* decision in 1999, neither the G.A.B. nor the legislature has made any significant changes in the relevant campaign finance law and administrative structure.[16] Both the legislature and the G.A.B. have proposed—and they

[16] In 2010, the G.A.B. modified the definitions of "express advocacy" and "political purpose" in its administrative rules, Wis. Admin. Code § GAB 1.28, attempting to expand the regulation of some pre-election communications. Challenged in three separate lawsuits, one by a responding party here, this Court enjoined the G.A.B. in an original action from enforcing the rule. It ultimately dismissed the petition and vacated the injunction. *Wisconsin Prosperity Network v. Myse*, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356 (by an equally divided court). Subsequently, the G.A.B. agreed not to enforce the expanded provision. *See Barland II*, 751 F.3d at 838; *but cf.* 2013 Act 153 (modifying restrictions on lobbyist campaign contributions and increasing the amount a corporation can spend on PAC support).

continue to discuss—wholesale changes. *See, e.g.*, JA 379-81. Yet the state's law has remained frozen in time and, indeed, frozen in another time both politically and legally, as the federal courts since 1999 have issued decision after decision narrowing the permissible First Amendment boundaries for the regulation of political speech and association.[17]

Express advocacy is subject to state campaign finance regulation. Issue advocacy is presumptively not. The U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, and in a litany of decisions since, has left no doubt about that constitutional categorization of speech. There is no express advocacy here and no regulated speech under state law—no PAC involvement, no independent disbursements under

[17] The examples of the legislature's refusal to modify the campaign finance laws are legion. *See, e.g.*, 2005 Assembly Bill 1005, JA 434-35 (prohibition proposed to limit elected officials' involvement in fundraising by and for independent groups).

section 11.06(7). And, accordingly, the John Doe judge held, no possible criminal conduct.

The special prosecutor contends, however, that impermissibly "coordinated" issue advocacy—that is, the financial sponsorship of issue advocacy in conjunction or in consultation with a candidate or campaign—somehow *transforms* protected and unregulated speech into regulated speech that can be prosecuted criminally. In the 11th numbered paragraph of its order, this Court expressed the question appropriately: "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?" The answer is no.

I. THE JOHN DOE JUDGE'S DECISION [redacted] SHOULD STAND.

Issue Nos. 7, 10, 12

On several fundamental legal principles, there should be no doubt. A John Doe judge is not a court. *See State ex rel. Doe v. Davis*, 2005 WI 70, ¶¶ 19, 24, 281 Wis. 2d 431, 697 N.W.2d 803. The decisions of a John Doe judge are not appealable. *In re John Doe Proceeding*, 2003 WI 30, ¶ 23, 260 Wis. 2d 653, 660 N.W.2d 260. However, some of a John Doe judge's decision are reviewable—but not all and only in limited circumstances. When reviewable at all, John Doe decisions are reviewable only through a petition for a supervisory writ. *Id.* ¶ 48.

Here, the special prosecutor brought a writ proceeding because he wanted appellate review of the John Doe judge's decision [redacted] The special prosecutor could have tried to proceed with the "evidence" he already

had assembled.[18] He could have tried to [redacted]. He chose, however, to file his writ petition. Having done so, he is bound by the rigorous requirements for writ proceedings. Yet he cannot meet any of the writ requirements, established in a long line of this Court's decisions, let alone all of them.

The special prosecutor's first challenge is not "probable cause" or "reason to believe" or "proof beyond a reasonable doubt." His first challenge is the standard of review for "reversing" a John Doe judge's decision by means of a writ proceeding or, at the threshold, any proceeding. The writ standard aside, there is no doubt that the John Doe judge has the discretionary power [redacted], and that authority brings with it the ability [redacted] *State ex rel. Robins v. Madden*, 2009 WI 46, ¶ 28,

[18] The secrecy order limits the ability of the responding parties to address the evidence that might apply to them—other than that disclosed by the special prosecutor in *his* writ petition to the Court of Appeals.

317 Wis. 2d 364, 766 N.W.2d 542. That decision not only is discretionary; by statute, it is not even reviewable.

A. The John Doe Judge's Decision Is Not Subject To Review—Either Through Mandamus Or Any Other Procedure.

The John Doe statute is a unique (and controversial) process "to determine whether a crime has been committed in the court's jurisdiction." Wis. Stat. § 968.26(1) (2013-14).

He reached that discretionary decision—"discretionary" in the plain language of Chapter 968— . But the context did not change his discretion. Like the John Doe judge four years ago in *Naseer v. Miller (In re Doe)*, 2010 WI App 142, ¶ 12, 329 Wis. 2d 724, 793 N.W.2d 209, he saw no

need—indeed, he had no ability—to proceed any farther. And if he could not [redacted] he surely could not issue any criminal complaint because, by definition, there would be no "sufficient credible evidence to warrant a prosecution" under section 968.26(2) based on the information [redacted]

Having very broad discretion in connection with the investigation, the John Doe judge makes threshold decisions no different than a prosecutor's threshold decisions. Unlike a judge in a criminal proceeding, who has no role until charges are filed, a John Doe judge participates intimately in an "inquest for the discovery of crime in which [he] has significant powers." *State v. Washington*, 83 Wis. 2d 808, 822, 266 N.W.2d 597 (1978). Subsection (3) of the John Doe statute gives him unlimited "discretion." Wis. Stat. § 968.26(3).

[redacted] Precisely. And, in that manner, the judge (like a state district attorney or a federal grand jury) made the same kind of unreviewable decision that state and federal prosecutors make every day.

The chapter 968 proceeding, once commenced, cannot move forward without the John Doe judge—just as a state criminal complaint cannot move forward without an elected prosecutor speaking for the state. At the initial stage, the immense power vested by law in state and federal prosecutors—whether to charge or not—is not reviewable. Indeed, not every step in the criminal justice process is (or should be) reviewable. *E.g.*, *Kaley v. United States*, 571 U.S. ___, 134 S. Ct. 1090, 1097-98 (2014) (probable

cause finding by a grand jury may not be reviewed to determine whether it was "founded upon sufficient proof," and any challenges to the reliability or competence of the evidence supporting the finding "will not be heard." *Id.* (internal citations omitted)).

Prosecutors have extraordinary discretion. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969). A prosecutor's decision to charge (or not) rests on a finding of probable cause; it is a finding that a court cannot revisit at the charging stage. A decision by a prosecutor to charge a defendant with one specific crime, for example, rather than another, is not reviewable. *See State v. Karpinski*, 92 Wis. 2d 599, 616, 285 N.W.2d 729 (1979) (deciding whether to prosecute and under which statute falls within prosecutorial discretion); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (the charge to file or the potential charges to bring before a grand jury generally rest within the

prosecutor's discretion); *In re United States*, 345 F.3d 450, 453-54 (7th Cir. 2003). To be sure, once charged the defendant has a range of due process rights including the right to trial by jury but, at the threshold, the charging decision itself is beyond review.

So, too, here. The John Doe judge did not merely decide [redacted] Procedure aside, writ petition or not, what does the special prosecutor ask this Court to "review" in light of the John Doe judge's unique statutory authority and extraordinary discretion?

In this proceeding, the special prosecutor finds himself in the position of a victim, real or perceived, of someone's conduct brought to the attention of the criminal justice system. If a district attorney decides not to bring charges for the conduct, the victim and the public might well be

troubled—injury without redress—but the victim cannot question the decision not to charge (except, ironically, through a John Doe petition). The John Doe judge here had no mandatory obligation to proceed, [redacted], and there is no ability to "appeal" that decision by any mechanism.[19]

Prosecutors have been given a "great portion of the power of the state...in the furtherance of justice," and justice does not require prosecution in all cases, even if it appears that the law may have been violated. *Kurkierewicz*, 42 Wis. 2d at 378; *Karpinski*, 92 Wis. 2d at 607-08. The duty of any prosecutor *and* any John Doe judge is to administer

[19] When the Court of Appeals sustained the appointment of the special prosecutor, it relied on the John Doe judge's "inherent authority," denying the writ petition filed by several responding parties. JA 24. The judge, said the Court of Appeals, did not violate a plain duty. *Id.* Yet, ironically, the special prosecutor would now find the writ requirements somehow satisfied by the failure of a John Doe judge from the same proceeding, in the exercise of explicit statutory discretion, [redacted]

justice rather than to simply and ineluctably seek charges and convictions.

B. Even [redacted] Decision Is Reviewable, The Standard For A Mandamus Petition Is Extraordinarily Demanding And Unmet Here.

The special prosecutor would treat the mandamus procedure as if it were a synonym for "appeal." But statutes and words matter. This is not an appeal. It cannot be treated as an appeal—if, indeed, the John Doe judge's decision is reviewable at all.

A supervisory writ "invokes [judicial] authority, [and] it 'is considered an extraordinary and drastic remedy that is to be issued only upon some grievous exigency.'" *State ex rel. Kenneth S. v. Circuit Court*, 2008 WI App 120, ¶ 8, 313 Wis. 2d 508, 756 N.W.2d 573 (citation omitted). "An act which requires the exercise of discretion does not present a clear legal duty and cannot be compelled through

mandamus." *In re John Doe Petition*, 2010 WI App 142, ¶ 5, 329 Wis. 2d 724, 793 N.W.2d 209. The John Doe judge's authority is quintessentially discretionary.

It is not enough to contend that the John Doe judge has misapplied the law. That is not the standard. If it were, there would be no difference between a writ proceeding and an appeal. Every disappointed litigant believes the judge misapplied the law and misperceived the facts, but that hardly warrants mandamus. A judge—or, for that matter, a court—that misapplies the law has not, by definition, failed "to perform his duties."[20]

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[20] The standard for review in a writ proceeding is whether the judge has clearly violated a plain duty. *In re John Doe Petition*, 329 Wis. 2d 724, ¶ 5. Only a writ challenging a judge's very constitutional authority could require a different standard because, in that isolated instance, his duty itself is in question, not the exercise of it. *See e.g.*, *In re John Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 65, ¶ 24, 272 Wis. 2d 208, 680 N.W.2d 792 (rejecting a challenge to a John Doe judge's authority to issue a subpoena for legislative documents on separation of powers and state constitutional grounds), *modified, on denial of reconsideration*, 2004 WI 149, 277 Wis. 2d 75, 689 N.W.2d 908. Constitutional considerations may influence a judge's decision or a party's decision to pursue a writ, but none of this triggers *de novo*

In the John Doe cases before the Court of Appeals in 2010, it denied one writ petition because the judge had no obligation to "conduct further proceedings," let alone refer the matter to a district attorney, once he had reviewed a prisoner's allegations. *In re John Doe Petition*, 329 Wis. 2d 724, ¶ 8. The judge concluded that the alleged facts, even if true, "did not constitute a criminal act." *Id.* ¶ 8. In the companion case, however, the court granted the writ because the judge had considered extraneous evidence—the prisoner's propensity for unsubstantiated complaints—to conclude there was no evidence that "establish[ed] reasonable cause to believe that a crime was committed." *Id.* ¶ 13. The judge had exceeded his statutory authority altogether. Not so here.

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review. *See State ex rel. Dressler v. Circuit Court for Racine County*, 163 Wis. 2d 622, 631-32, 472 N.W.2d 532 (Ct. App. 1991) (constitutional right to counsel raised by defense motion to withdraw, but this Court did not review the decision *de novo*). Unless the very authority of the judicial branch is at issue, courts review writ petitions under the longstanding standard of whether the judge clearly violated a plain duty.

Other than filing his petition in a timely manner, the special prosecutor has not met any part of the five-part mandamus test established in *Dressler*, 163 Wis. 2d at 630. The John Doe judge exercised his "discretion" under the statute, and that exercise of discretion is reviewable, if at all, under the demanding standards of mandamus.

The special prosecutor's focus always has been the perceived error in the John Doe judge's reading of state law and the Constitution. But both the focus and the recommended remedy—[redacted]—overlook the errors inherent in the [redacted] notwithstanding the First Amendment, and in the limitations on judicial review, writ or no writ.

One day, perhaps, the state legislature will change the campaign finance law. One day, perhaps, the G.A.B. will

change its own administrative code and its interpretation of the law, or the U.S. Supreme Court will change its First Amendment construction. Until then, there is no "plain duty" because, even if the special prosecutor is correct in his own conclusions of law, the law is anything but plain.

Due process requires more than guesswork about the nature, or even the existence, of potential criminal charges. It requires "a reasonable opportunity to know what is prohibited." *WMC*, 227 Wis. 2d at 677.[21] And mandamus requires far more than that.

A writ proceeding is not the place to [redacted] the relief expressly sought by the special prosecutor. A writ provides neither the time nor the appellate reach and

[21] Referring to Chapter 11, the U.S. Court of Appeals said the law "must be clear and precise enough to give a person of ordinary intelligence fair notice....Regulations on speech, however, must meet a[n] [even] higher standard of clarity and precision." *Barland II*, 751 F.3d at 835.

flexibility to "clarify" any law. That is particularly true in a constitutionally bound, statutorily- and administratively-complex area of law and in the absence of a developed appellate record. A statute like Chapter 11, which requires clarification even by the special prosecutor's own account, can hardly give rise to a plain duty.

C. The Subpoena Standard Is Probable Cause: An Honest Belief, Supported By Facts, That Some Crime Has Occurred.

In a criminal investigation in this state, a search warrant and a subpoena for documents both require a showing of probable cause before they can issue. *See* Wis. Stat. § 968.12(1) ("A judge shall issue a search warrant if probable cause is shown"); § 968.135 ("Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents..."). "Probable cause exists when the issuing judge is 'apprised of sufficient facts to

excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.'" *State v. Swift*, 173 Wis. 2d 870, 883, 496 N.W.2d 713 (Ct. App. 1993) (quoting *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)) (addressing criminal subpoenas for documents).[22]

"Because a John Doe proceeding is a criminal investigative tool," this Court has turned to section 968.135 to evaluate a subpoena issued in the context of a John Doe investigation. *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, ¶ 1, 277 Wis. 2d 75, 689 N.W.2d 908. In any John Doe proceeding, "Section 968.135 requires a showing of probable cause to believe that the

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[22] *Accord State v. Tate*, 2014 WI 89, ¶ 36, 357 Wis. 2d 172, 849 N.W.2d 798 (addressing search warrant), *cert. denied*, 2015 WL 232058 (U.S. Jan. 20, 2015) (No. 14-7491). "The probable cause that § 968.12(1) speaks to is comparable to probable cause under the Fourth Amendment." *Id.* ¶ 43; *see infra* sec. III.B.

documents sought by the subpoena duces tecum will produce evidence relevant to potentially criminal activity." *Id.*

To make that showing to obtain a subpoena, as a threshold matter, the special prosecutor must establish facts that give rise to "an objectively reasonable belief that a crime has been committed" and, then, "any document requested, in order to be relevant to the inquiry, must focus on the factual assertions made to the judge at the commencement of the proceeding." *Id.* Probable cause can be found only once the "necessary link between the documents requested and the suspected criminal activity under investigation is...shown." *Id.*

[redacted]

Neither state law, nor the G.A.B.'s own precedent, nor finally the Constitution permits the acts and omissions alleged to be criminally prosecuted.

II. REGARDLESS OF THE STANDARD, THERE CAN BE NO EVIDENCE OF A CRIME WITHOUT ANY CRIME TO CHARGE.

Issue Nos. 6-10

Even were this an appeal, not a writ proceeding, even were "probable cause" not the standard of review

It is for the special prosecutor in his responsive brief to try to explain his theory of Chapter 11's application to the responding parties. It is for the special prosecutor to try to redefine the dispositive statutory terms "political purpose," "contribution," "disbursement" and "independent

disbursements" and committees in a way that makes unregulated organizations subject to regulation and prosecution—all with the clarity and precision required by the Constitution. *See* Wis. Stat. §§ 11.01(6), (7), (16); 11.06(4)(d); and, 11.10(4). It is for the special prosecutor to acknowledge the G.A.B.'s stipulation that Chapter 11 can only be applied to express advocacy. JA 396; *see Barland II*, 751 F.2d at 832-34. In his submissions to the Court of Appeals and the John Doe judge, however, his theory required an application of statutory provisions that ignored their plain language, the construction of those provisions by the courts and the G.A.B. itself, and the Constitution.

A. Under Any Standard, The Decision [redacted] Was Correct.

The special prosecutor maintains that the John Doe judge's decision was wrong. He did not, in the special prosecutor's view, properly apply [redacted]

[redacted] The gap between the special prosecutor's perception of state campaign finance law and the facts is both deep and wide. It is nowhere more apparent, moreover, than with respect to [redacted]

The secrecy order here, whatever its propriety or breadth, prevents [redacted] from reviewing all of the special prosecutor's evidentiary affidavits. But [redacted] knows what *it* is and what it did and did not do, and this Court will find those facts in the affidavit submitted with [redacted] motion to quash. JA 161-80.

[redacted]

On this point, there is no dispute: [redacted] has *never* sponsored express advocacy communications in state campaigns, whether through an independent committee under section 11.06(7) or in coordination with any campaign. Rather, [redacted] mission is advancing public policy—issue advocacy. JA 163-64. Tellingly, the special prosecutor does not allege that [redacted] ever engaged in express advocacy.

Moreover, coordinated "strategy" and "fundraising" have never been impermissible. And, for that, there is no less authority than the G.A.B. itself. *See* El. Bd. Op. 00-2, JA 327-42. Nor is there an allegation, never mind evidence, of the candidate "control" or "prearrangement" that the

G.A.B. has required to establish impermissible coordination. *Id.*

The express advocacy generalizations in the special prosecutor's petition and memorandum reflect the guilt by association tendency that lurks, none too subtly, throughout his submissions. Indeed, his materials repeatedly allege "[redacted] as if that were all the support [redacted]. But massive generalization is not enough—[redacted]

B. Impermissible Coordination, Even As The Special Prosecutor And The G.A.B. Define It, Requires Far More Than The Activities Alleged To Support [redacted]

[redacted]

Promulgated by the G.A.B. itself, three fundamental tenets of campaign finance law collide with the state's theory and its three disparate facts. First, an independent organization has an absolute right to communicate with its own members and with *other organizations* (including political parties and political committees) *about* issues, public officials, candidates, and campaigns. El. Bd. Op. 00-2, 13-14, JA 339-40. Communication alone—with anyone, including a campaign—does not subject an organization to campaign finance regulation. Second, impermissible coordination at the least requires communication *about a disbursement* by that independent organization *with a candidate* (or that candidate's agent) for the benefit of that candidate. *Id.* Third, organizations can communicate with public officials about public policy—whether or not the official is also a

candidate for office—because holding public office is not tantamount to perpetual candidacy. *Id.*; *see* Wis. Stat. §§ 11.01(6), (7), (16).

Impermissible coordination[23] by definition involves two parties, one of which has to be a political candidate or his campaign, who are in communication. Impermissible coordination also requires a specific disbursement by the organization at the campaign's request or suggestion—*i.e.*, the product of the impermissible coordination, almost always a purchased message—that benefits the candidate. *Id.* Finally, in the absence of a specific request or suggestion, it requires candidate control over the issue communications on which the organization's funds are spent.

[redacted]

The special prosecutor also misstates the law regarding the point in time a public official becomes a registered candidate and misapprehends the right to communicate with public officials about public policy even *after* his or her candidacy has been declared. El. Bd. Op. 00-2, 13, JA 339. In the absence of a candidate, *plus* a disbursement by the organization to benefit the candidate, *plus* communication between a candidate *as a candidate* and the organization about the disbursement, there can be no impermissible coordination.

C. The Specific Allegations About [redacted] Conduct And Speech Cannot Sustain [redacted]

The special prosecutor's case for the [redacted] is limited to a single page in the writ petition filed with the Court of Appeals. JA 221. There is no specific discussion or reference in the memorandum supporting the petition. On page 17, in a handful of sentences, the special prosecutor's

The sentences are breathtaking in their reach and misperception of the difference between protected speech on public issues and the right to lobby government, on one hand, and impermissible conduct, on the other. There is nothing conceivably inappropriate, even piling inference on inference, never mind cause and effect, in the special prosecutor's narrative about

are tax-exempt public policy organizations, not registered political committees. As such, they are permitted to engage in direct and grassroots lobbying

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[24]

and to sponsor unregulated issue advocacy. They are permitted to associate with other organizations and public officials and to receive unrestricted funds from individuals and other groups. They are permitted to choose to spend their funds to address the issues and policies important to their members. Neither is a political committee precisely because their primary purpose is public policy.

Remarkably, the special prosecutor's probable cause argument seems fundamentally premised on a bare fact that [redacted] Indeed, this is a fact. But it is also legal. [redacted]

Put bluntly, there is nothing conceivably illegal about any of that under the state's campaign finance law. The special prosecutor alleges no facts suggesting that the financial support from any group was anything other than a permissible grant from one tax-exempt organization to another, unregulated under state campaign finance law. The special prosecutor identifies no facts that would otherwise connect program activities in 2011 or 2012 to any other organization, let alone to actual spending to benefit a candidate at the actual request or suggestion of that candidate or his or her agent.

The special prosecutor has cited no specific disbursement by and no specific communications with any campaign that involve impermissible coordination, even (or especially) by the G.A.B.'s contradictory definitions.

Instead, for its probable cause argument, the state relies solely on [redacted] open relationships and associations with other independent organizations and alleged conference calls about public policy *issues*. Organizational relationships and communications with a public official not only are not impermissible, they are commonplace. *See* El. Bd. Op. 00-2, JA 327-42. Indeed, the special prosecutor does not even allege that any calls or communications occurred at a time when a specific public official was also a recall candidate.

[redacted]

[redacted] *See* El. Bd. Op. 00-2, 13-14, JA 339-40, citing 52 F. Supp. 2d 45, 91 (D.D.C. 1991).

No bright line governs how much a campaign may share—"[p]roviding a committee with campaign literature or an 8x10 glossy picture is one thing, but providing a committee with an itinerary of media purchases and appearances, including text, is another," *id.* at 13, JA 339. But the special prosecutor presents no evidence that any line was crossed or even approached.

D. The Speech And Conduct Identified By The Special Prosecutor Are Constitutionally-Protected.

Issue Nos. 11-13

"[S]pending money on one's own political speech is an act entitled to constitutional protection of the highest order." *FEC v. Christian Coalition*, 52 F. Supp. 2d at 91. The First Amendment similarly "protects the right of associations to engage in advocacy on behalf of their members." *Smith v. Arkansas State Highway Emps.*, 441 U.S. 463, 464 (1979).[25]

The First Amendment prohibits the regulation of an expenditure "made independently, without coordination with any candidate," except for disclosure requirements. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608, 615 (1996). Given the First Amendment concerns here,

[25] There is no reason to believe this Court's application of the state constitution in article I, section 3, would (or could) differ materially from the federal courts' jurisprudence. If anything, the state constitutional standards would provide even greater protection. *See McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 139, 121 N.W.2d 545 (1963).

the government has to show "a compelling interest in obtaining the sought-after material" plus "a sufficient nexus between the subject matter of the investigation and the information they seek." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009). The special prosecutor must also "make an additional showing that" he "actually needs the disputed information" for the subpoenas to be enforced despite the "legitimate First Amendment concern" that they raise. *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. 570, 572 (W.D. Wis. 2007).

Where a subpoena implicates First Amendment rights, the government always faces the heaviest burden. "While what is reasonable depends on the context, it is clear that a subpoena may be quashed if it cannot withstand constitutional scrutiny." *In re Grand Jury Investigation*, 706 F. Supp. 2d at 14. Claims of overbreadth and violations of the First and

Fourth Amendments "must be considered together, because the first amendment context...heightens the concern...." *In re Grand Jury Subpoena*, 829 F.2d 1291, 1295-96 (4th Cir. 1987). "[T]he context of the first amendment intensifies the fourth amendment concerns that may be present in a sweeping subpoena duces tecum." *Id.* at 1297, citing *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972).

Specifically, in the campaign finance context, "the First Amendment does not allow coordination to be inferred merely from" an organization's "possession of insider knowledge from a...campaign. Some more overt acts of coordination are required." *FEC v. Christian Coalition*, 52 F. Supp. 2d at 95.

The decision most often cited by the special prosecutor to overcome all of these obstacles is *Wisconsin Coalition for Voter Participation v. Wis. Elections Bd.*("*WCVP*"), 231 Wis. 2d 670. Not only has that decision been eclipsed by

half a dozen U.S. Supreme Court decisions, but it also has been superseded by the G.A.B.'s own opinions. *See* El. Bd. Op. 00-2 (coordination guidelines), JA 327-42. Even were that not the case, the Court of Appeals in *WCVP* itself said any investigation into allegedly impermissible coordination must rely on a showing that an independent organization had made an *actual* disbursement in coordination with a candidate (that is, at his or her actual request or suggestion) for the benefit of that candidate. *WCVP*, 231 Wis. 2d at 681. Unlike the special prosecutor, the appellate court did not ignore the distinction between impermissible coordination and permissible contact.[26]

More than 25 years after *Buckley* and four years after *WCVP*, the U.S. Supreme Court addressed the question of whether the First Amendment allows government to enact

[26] Whether the Court of Appeals was right or mistaken in 1999, its decision does not bind this Court now any more than it did 16 years ago. *See Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997).

any laws that impact issue advocacy communications. The Court revisited the issue in a series of cases following attempts by Congress to regulate independent speech, including both express advocacy and issue advocacy, through the Bipartisan Campaign Reform Act of 2002 ("BCRA"), applicable to federal candidates.

The result: what was true after *Buckley* remains true today—issue advocacy may not be regulated under campaign finance law as if it is express advocacy. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Citizens United v. FEC*, 558 U.S. 310 (2010). Sponsors of issue advocacy may not be treated like a political committee or forced to operate or to report like one. For issue advocacy communications, the law only permits regulation limited to disclosures, including sponsorship disclaimers. *Citizens United*, 558 U.S. at 339-41, 368-69. And, even then, limited disclosures may be required only if adopted legislatively. *Id.*

Absent a constitutional statute, issue advocacy remains wholly unregulated. *Barland II*, 751 F.3d at 834-35. That is the case here, of course, where Chapter 11 campaign finance regulations apply only to express advocacy communications. *Id.* at 835; Wis. Stat. § 11.01(16)(a). The G.A.B. already has stipulated on the public record to precisely that. JA 396-400.

After *WCVP*, the U.S. Supreme Court has spoken repeatedly to issues directly applicable to the questions asked by this Court. Had the Court of Appeals in *WCVP* the benefit of those U.S. Supreme Court decisions, the outcome of *WCVP* would have been different. The rules governing independent speech today are vastly different than they were when *WCVP* was decided and, as such, the special prosecutor cannot rely on it to support his theory of impermissible coordination.

The interdependence of money and speech in the political context may be regrettable, but it is unavoidable.

"All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech." *Citizens United*, 558 U.S. at 351. Accordingly, the Constitution protects the funding and fundraising that supports political speech. "[T]he government's interest in preventing actual or apparent corruption—an interest generally strong enough to justify *some* limits on contributions to candidates—cannot be used to justify restrictions on independent expenditures." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011). Yet expenditures by [redacted] in the context of the public policy debate in Wisconsin are precisely the kind of information [redacted] and they are precisely the kind of speech protected by the First Amendment.

III. ON BOTH DUE PROCESS AND FOURTH AMENDMENT GROUNDS, [redacted]

Issue Nos. 12, 13

This brief can end where it began—with this Court's decision in the *WMC* case 16 years ago. Due process requires notice. A criminal charge, before it can even be brought, assumes that the acts or omissions are at least potentially criminal. Here, even were it possible to put aside the constitutional issues, there is doubt and shadow at every turn.

Ignorance of the law rarely excuses a criminal act. *State v. Collova*, 79 Wis. 2d 473, 488, 255 N.W.2d 581 (1977); *see also United States v. Monteleone*, 804 F.2d 1004, 1009 (7th Cir. 1986). But if the law itself is not discernable, a criminal prosecution cannot be sustained. *State v. Zwicker*, 41 Wis. 2d 497, 508-09, 164 N.W.2d 512 (1969); *Town of E. Troy v. A-1 Service Co.*, 196 Wis. 2d 120, 132-33, 537 N.W.2d 126 (Ct. App. 1995).

The issue here is not statutory vagueness *per se*, although Chapter 11 is replete with that and unconstitutionally so, but a theory of law that is unsettled and opaque. If the "law" itself is a moving target, depending not on explicit statutory language but on a theory of inference and convergence, then no liability of any kind can attach to conduct. The responding parties here are not unschooled or uncounseled in the law of campaign finance. They do know the law as it has been interpreted and applied, and they can be fairly held to follow it—as they have. But the special prosecutor's theory of law is not one that has been acknowledged or enforced. It cannot be found in statutes, administrative rules or case law. Surely, it cannot support a criminal prosecution.

A. Neither The Courts Nor The Administrative Agencies Have Found The "Law" On Impermissible Coordination Settled.

The U.S. Court of Appeals has called the state's campaign finance laws "labyrinthian and difficult to decipher." *Barland II,* 751 F.3d at 808. The G.A.B. itself recently agreed that the statutes are "convoluted and difficult for the average person to read and understand." *See* JA 379. The G.A.B.'s board members, all retired judges, have called on the legislature to adopt wholesale changes to the campaign finance law, including the very provisions the special prosecutor would enforce. *See supra* at 43-44. So has the FEC for federal law. Indeed, the FEC's chair recently noted that the agency had dismissed 29 coordination complaints without investigation because of a lack of clear and up-to-date rules. Kenneth P. Doyle, *FEC Has Dismissed 29 Super PAC Cases With No Probes of Coordination, Ravel Says*,

Bloomberg BNA Money & Politics Report (Jan. 23, 2015); *see* JA 403-05 (FEC deadlock on issue advocacy).

Yet in the wake of this uncertainty, the special prosecutor has introduced a new theory of law, both unsupported and untested, to try to criminalize activities for the first time. The responding parties cannot be prosecuted under a theory of the law so uncertain that it has led everyone to wonder precisely what the law is.[27]

No one in this state, at least, has ever been prosecuted for "impermissible coordination," and issue advocacy—however undesirable it might be to some—has been prevalent

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[27] The academic literature also recognizes the uncertainty inherent in the law of coordination and is replete with proposals for improvement. *See, e.g.*, Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 Willamette L. Rev. 603, 620 (2013) ("Developing coordination rules that comport with *Buckley* and make sense as a matter of policy has proven, like so many things, more difficult in practice than in theory."); Meredith A. Johnston, *Stopping "Winks and Nods": Limits on Coordination As A Means of Regulating 527 Organizations*, 81 N.Y.U. L. Rev. 1166, 1201 (2006) (proposing that Congress pass "legislation regulating coordination between outside groups and political campaigns" because "Congress has tried allowing other institutions to handle the coordination problem, and these experiments have failed").

in this state for almost 20 years. Even if any court or the legislature or an agency were to validate someday the special prosecutor's theory of the law (and none has) what gave the responding parties in 2011 and 2012 a "reasonable opportunity to know" what was prohibited? *WMC*, 227 Wis. 2d at 676-77. The special prosecutor can have no answer.

B. The [redacted] Overbreadth Is Fatal.

All of the other authority and arguments aside, [redacted] The vast use and reach of electronic record-keeping has invited Fourth Amendment challenges as that record-keeping has become the pervasive subject of civil discovery and, more significantly from a constitutional standpoint, increased government demands for electronically-stored information for law enforcement.

Even before the explosion of e-mail and electronic storage, the courts placed an emphasis on precision in the government's request for documents. "[T]hose searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *see Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (Fourth Amendment limits the "authorization to search to the specific areas and things for which there is probable cause to search"). It is imperative that the government "describe the items to be seized with as much specificity as the government's knowledge and circumstances allow." *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988).

For more than 100 years, there has been no doubt that the Fourth Amendment applies to subpoenas:

> We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still...the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection.

Hale v. Henkel, 201 U.S. 43, 76 (1906).

In addition, this Court has applied the Fourth Amendment to John Doe subpoenas. In *In re John Doe Proceeding*, 272 Wis. 2d 208, ¶ 34, the Court reviewed whether the subpoena was "overbroad and oppressive, and thus unreasonable," characterizing this question as a "Fourth Amendment" concern. It was overbroad, and the Court quashed it.

According to the Court, any evaluation must focus on the factual assertions made to the judge that led to the investigation under the probable cause standard. The Court said this should show the link between the documents

requested and the suspected criminal activity, "affording probable cause to believe that the documents sought will produce evidence relevant to potentially criminal activity, as required by Wis. Stat. § 968.135." *In re Doe Proceeding*, 277 Wis. 2d 75, ¶ 1.

"Fourth Amendment protections apply to modern computer files." *United States v. Ganias*, 755 F.3d 125, 135 (2d Cir. 2014). "Like 18th Century 'papers,' computer files may contain intimate details regarding an individual's thoughts, beliefs, and lifestyle, and they should be similarly guarded against unwarranted Government intrusion. If anything, even greater protection is warranted." *Id.*; *see also State v. Rindfleisch*, 2014 WI App 121, ¶ 40 ("The Fourth

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Amendment parameters of search and seizure law, largely developed in the context of obtaining tangible evidence, are not necessarily inapplicable to all searches for and seizures of electronic information."). Indeed, "electronic devices could contain vast quantities of intermingled information, raising the risks inherent in over-seizing data" and requiring "law enforcement and judicial officers [to] be especially cognizant of privacy risks when drafting and executing search warrants for electronic evidence." *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013).

Courts have grown wary—and, in some instances, weary—of sweeping government subpoenas and warrants. A year ago, for example, a U.S. District Court refused to issue search and seizure warrants for "data that are outside the scope of [the government's] investigation and for which it has not established probable cause." *In re Black iPhone 4*, 27 F. Supp. 3d 74, 77 (D.D.C. 2014). The government had to

"be more discriminating when determining what it wishes to seize," making clear its intention "to seize *only* the records and content that are...relevant to its present investigation." *Id.* at 78. Similarly, just last month, another federal judge held that a warrant seeking all emails from a specific Google account lacked "the particularity required by the Fourth Amendment" because it failed "to identify the 'particular crime' for which officers were to seek evidence." *United States v. Shah*, No. 5:13-CR-328-FL, 2015 WL 72118, at *14 (E.D.N.C. Jan. 6, 2015).

[redacted]

A thread runs just below the surface of the special prosecutor's materials: if the John Doe decision stands, the law enforcement investigation of the 2011 and 2012 campaigns—whether for the heat or light they brought to this

state—will end. The John Doe judge did not decide that. That decision rests, as it always has, with the special prosecutor and John Doe judge in the first instance and, on matters civil, the G.A.B. and the six retired judges who lead it.[29] Ultimately, however, this Court can and should exercise its own supervisory authority to close the entire matter.

No statutes of limitation loom here. To the extent consistent with good faith and statutory and professional responsibilities, district attorneys and the G.A.B. can continue to try to apply and enforce the campaign finance law—in an appropriate and constitutionally-limited fashion. Or not. That is their decision. It is certainly not the responding parties' decision, but this matter goes to the heart of the criminal justice system and the heart of political speech.

[29] [redacted]

And, for those matters, this Court has the ultimate responsibility.

CONCLUSION

For the reasons stated above, the Supreme Court should enter an order declining to review or, alternatively, affirming the John Doe judge's decision to [redacted]

Dated this 2nd day of February, 2015.

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief and accompanying appendix conform to the rule contained in s. 809.19(8)(b) for a brief and appendix produced with a proportional serif font. The length of those portions of this brief referred to in the Court's December 16, 2014 order and s. 809.19(1)(d), (e), and (f) is 16,093 words.

Dated: February 2, 2015.

By: _____
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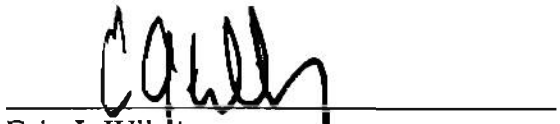
ELECTRONIC FILING CERTIFICATION

I hereby certify, pursuant to Wis. Stat. § 809.19(12)(f), that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: February 2, 2015.



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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a separate document, is a joint appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the relevant findings or opinions of the John Doe judge and Court of Appeals; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the judicial reasoning regarding those issues.

I further certify that the joint appendix has been produced in accordance with the Court's orders dated December 16, 2014, and January 27, 2015. Specifically, two versions of the joint appendix have been produced and filed under seal—an original version with no redactions, and a version with confidential information redacted.

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