REDACTED **CORRECTED** REDACTED

SUPREME COURT OF WISCONSIN
Case No. 2013AP2504 - 2508-W
Case No. 2014AP296-OA
Case No. 2014AP417 - 421-W

STATE OF WISCONSIN *ex rel.* THREE UNNAMED PETITIONERS,

Petitioner,

v. Case Nos. 2013AP2504 - 2508-W

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

Respondents,

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

[CAPTION CONTINUED ON FOLLOWING PAGE]

BRIEF OF THE RESPONDENT SPECIAL PROSECUTOR (REDACTED)

Francis D. Schmitz
Special Prosecutor
Wisconsin Bar No. 1000023
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

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

Petitioner,

v. Case No. 2014AP296-OA

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

Respondents,

L.C. Nos. 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

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

Petitioner,

v. Case Nos. 2014AP417 - 421-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,

Respondent,

and

EIGHT UNNAMED MOVANTS,

Interested Parties.

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the Director of State Courts had lawful authority to appoint reserve judge, Barbara Kluka, as the John Doe judge to preside over a multi-county John Doe proceeding. (*See* Sec. X, at 201)

ANSWERED BY THE COURT OF APPEALS: In its order dated November 22, 2013, the court of appeals denied the Writ on the ground that, in light of Wis. Stat. § 753.075, the claim "plainly lack[ed] merit."

2. Whether the Chief Judge of the First Judicial District had lawful authority to appoint reserve judge, Gregory A. Peterson, as the John Doe judge to preside over a multi-county John Doe proceeding. (*See* Sec. XI, at 202)

ANSWERED BY THE COURT OF APPEALS: The court of appeals did not address this issue.

3. Whether Wis. Stat. § 968.26 permits a John Doe judge to convene a John Doe proceeding over multiple counties, which is then coordinated by the district attorney of one of the counties. (*See* Sec. XII, at 204)

ANSWERED BY THE COURT OF APPEALS: The court of appeals did not address this issue.

4. Whether Wisconsin law allows a John Doe judge to appoint a special prosecutor to perform the functions of a district attorney in multiple counties in a John Doe proceeding when (a) the district attorney in each county requests the appointment; (b) but none of the nine grounds for appointing a special prosecutor under Wis. Stat. § 978.045(1r) apply; (c) no charges have yet been issued; (d) the district attorney in each county has not refused to continue the investigation or prosecution of any potential charge; and (e) no certification that no other prosecutorial unit was able to do the work for which the special prosecutor was sought was made to the Department of Administration. (*See* Sec. XIII, at 207)

ANSWERED BY THE COURT OF APPEALS: The court of appeals held that the John Doe Judge exercised her authority under *State v. Carlson* and *State v. Cummings* in appointing the Special Prosecutor.

5. If, arguendo, there was a defect in the appointment of the special prosecutor in the John Doe proceedings at issue in these matters, what effect, if any, would that have on the competency of the special prosecutor to conduct the investigation; or the competency of the John Doe judge to conduct these proceedings? *See, e.g.*, *State v. Bollig*, 222 Wis. 2d 558, 569-70, 587 N.W.2d 908 (Ct. App. 1998). (*See* Sec. XIV, at 228)

ANSWERED BY THE COURT OF APPEALS: As it relates to Wis. Stat. § 978.045, in light of *State v. Bollig,* the court of appeals held that what is essential for a special prosecutor appointment is only that either a district attorney or circuit court has authorized the appointment and a defect in an order appointing a special prosecutor does not deprive the court of competency to proceed on actions initiated by the special prosecutor.

6. Whether, with regard to recall elections, Wis. Stat. § 11.26(13m) affects a claim that alleged illegal coordination occurred during the circulation of recall petitions and/or resulting recall elections. (*See* Sec. VII, at 171)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe Judge did not answer this question.

7. Whether the statutory definitions of "contributions," "disbursements," and "political purposes" in Wis. Stat. §§ 11.01(6), (7) and (16) are limited to contributions or expenditures for express advocacy or whether they encompass the conduct of coordination between a candidate or a campaign committee and an independent organization that engages in issue advocacy. If they extend to issue advocacy coordination, what constitutes prohibited "coordination?" (*See* Sec. II, at 77; Sec III, at 102)

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

i. The candidate's campaign committee; or

ii. An independent political committee. (*See* Sec. VIII, at 180)

b. Whether Wis. Stat. § 11.10(4) operates to transform an independent organization engaged in issue advocacy into a "subcommittee" of a candidate's campaign committee if the independent advocacy organization has coordinated its issue advocacy with the candidate or the candidate's campaign committee. (*See* generally Sec. III at 102)

c. Whether the campaign finance reporting requirements in Wis. Stat. ch. 11 apply to contributions or disbursements that are not made for political purposes, as defined by Wis. Stat. § 11.01(16). (*See* Sec. III. at 102; Sec. V, at 153)

d. Whether *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999), pet. for rev. denied, 231 Wis. 2d 377, 607 N.W.2d 293 (1999), has application to the proceedings pending before this court. (*See* Sec. II C, at 94; Sec. IV, at 141)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe Judge ruled that ch. 11 was limited to regulation of express advocacy only. The John Doe Judge did not address the issue of committees and subcommittees Wis. Stat. § 11.10(4). The John Doe Judge did not follow *Wisconsin Coalition for Voter Participation* because the case in his view was distinguishable and because First Amendment law in the area of campaign finance had developed since the decision.

8. Whether fundraising that is coordinated among a candidate or a candidate's campaign committee and independent advocacy organizations violates Wis. Stat. ch. 11. (*See* Sec. VIII, at 180)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe Judge ruled that ch. 11 does not regulate coordinated fundraising.

9. Whether a criminal prosecution may, consistent with due process, be founded on a theory that coordinated issue advocacy constitutes a regulated "contribution" under Wis. Stat. ch. 11. (*See* Sec. VI, at 158)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe Judge did not address this issue in his written decision.

10. Whether the records in the John Doe proceedings provide a reasonable belief that Wisconsin law was violated by a campaign committee's

coordination with independent advocacy organizations that engaged in express advocacy speech. If so, which records support such a reasonable belief? (*See* Sec. XV, at 240)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe Judge concluded that the investigation did not embrace aspects of express advocacy and believed that all entities involved were issue advocacy groups and not Voluntary Oath entities under Wis. Stat. § 11.06(7).

11. If Wis. Stat. ch. 11 prohibits a candidate or a candidate's campaign committee from engaging in "coordination" with an independent advocacy organization that engages solely in issue advocacy, whether such prohibition violates the free speech provisions of the First Amendment to the United States Constitution and/or Article I, Section 3 of the Wisconsin Constitution. (*See* Sec. VI, at 158)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe Judge did not expressly address this issue in his written decision.

12. Whether pursuant to Wis. Stat. ch. 11, a criminal prosecution may, consistent with due process, be founded on an allegation that a candidate or candidate committee "coordinated" with an independent advocacy organization's issue advocacy. (*See* Sec. VIII, at 180)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe Judge did not address this issue in his written decision.

13. Whether the term "for political purposes" in Wis. Stat. § 11.01(16) is unconstitutionally vague unless it is limited to express advocacy to elect or defeat a clearly identified candidate? (*See* Sec. V, at 153)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe judge did not expressly so conclude.

14. Whether the affidavits underlying the warrants issued in the John Doe proceedings provided probable cause to believe that evidence of a criminal violation of Wis. Stat. §§ 11.27, 11.26(2)(a), 11.61(1), 939.31, and 939.05 would be found in the private dwellings and offices of the two individuals whose dwellings and offices were searched and from which their property was seized. (*See* Sec. XVI, at 246)

ANSWERED BY THE JOHN DOE JUDGE: The John Doe judge, having concluded that ch. 11 is limited to express advocacy, held that the search warrants did not state probable case.

STATEMENT ON ORAL ARGUMENT

The Special Prosecutor is aware the Court has already scheduled oral argument in these proceedings. The Court's decision, pursuant to the Court's established practice, should be published.

STATEMENT OF THE PROCEEDING

On August 10, 2012, the State of Wisconsin filed a petition requesting the commencement of a John Doe proceeding in Milwaukee County pursuant to Wis. Stat. § 968.26 to investigate suspected Campaign Finance crimes.[1] [2] The Honorable Barbara Kluka, Reserve Judge, was appointed to hear the proceeding.[3] By her order as the John Doe Judge, the investigation was commenced on September 5, 2012.[4]

Evidence adduced during the early stages of the Milwaukee County investigation suggested criminal campaign finance violations may have been committed by residents of Columbia, Dane, Dodge and Iowa Counties.

On January 18, 2013, in a meeting in Madison, Milwaukee County District Attorney John T. Chisholm offered the John Doe investigation to Attorney General J.B. Van Hollen and the Wisconsin Department of Justice.[5]

---

[1] In this brief, the Dane County record will be referenced as "D:1," where "D" stands for "Dane" and "1" is the number of the record item. The Milwaukee County record will be referenced as, *e.g.*, "M:1." Unless required by context, references will be to the Dane County record only.

[2] *See* M:2 (Petition for Commencement); M:3 (Affidavit in Support of Petition); App. 9-49.

[3] M:8; App. 307.

[4] M:4 (Order for Commencement); App. 1.

[5] App. 113.

On June 5, 2013, District Attorney Chisholm received a letter from Attorney General Van Hollen declining involvement. He cited conflict of interest principles and the potential appearance of impropriety due to his status as a partisan, elected official. He suggested that other state officials had equal or greater jurisdictional authority to investigate this matter, specifically the Government Accountability Board [GAB].[6]

This is a criminal investigation. Regardless of where any crimes may have occurred, Wis. Stats. §§ 11.61(2) and 978.05(1) mandate that local district attorneys handle any criminal prosecution. *See State v. Jensen*, 2010 WI 38, ¶ 2, 324 Wis.2d 586, 782 N.W.2d 415 (county of residence is proper for prosecution of all allegations "arising from or in relation to . . . any matter that involves elections . . . under chs. 5 to 12."). On June 26, 2013, following the Attorney General's decision not to assist in the investigation, the GAB met with the District Attorneys of Columbia, Dane, Dodge, Iowa and Milwaukee Counties. These District Attorneys considered the need for one overall investigation overseen by a single judge and managed by a non-partisan special prosecutor.[7] [8]

---

[6] M:116 at 5; App. 114, 121-24.
[7] In this brief, references to the Appendix are noted as "App. 1" where "App." is the appendix, and "1" references the page number.
[8] App. 121-24

The presiding judges for the Counties of Columbia, Dane, Dodge and Iowa were next consulted. The need for the commencement of the John Doe proceedings in the four additional counties, the need for a single judge and the need for a single prosecutor to oversee the investigation were all issues discussed with the judges.[9]

After consultation with the presiding judges and the District Attorneys from Columbia, Dane, Dodge and Iowa Counties, each prosecutor filed separate petitions for the commencement of a John Doe investigation.[10] Though fractionated by operation of Wis. Stat. §§ 11.61(2) and 978.05(1), this is one overall investigation. The petitions and supporting affidavits filed by the district attorneys in the four "additional" counties (Columbia, Dane, Dodge and Iowa) alleged the same subject matter as in the Milwaukee County proceeding.[11]

Working together, the presiding judges, the chief judges and the Office of the Director of State Courts, appointed Reserve Judge Barbara A. Kluka to hear the petitions in Columbia, Dane, Dodge and Iowa Counties.[12]

---

[9] App. 114, ¶ 7.
[10] D:1; App. 32-50. These documents are part of the record.
[11] *See* D:3; App. 32-50; *see also* the Milwaukee Affidavits incorporated by reference into the respective Affidavits commencing the John Doe Proceedings (M:12 and M:49; App. 448 through App. 523.)
[12] App. 81-85.

On August 21, 2013, the John Doe Judge authorized the commencement of a proceeding in each of the four "additional" counties.[13]

As set forth in the Petitions for Commencement in each of the five involved counties, the investigation was commenced on the basis of a reason to believe that violations of Wis. Stat. §§ 11.26 (contribution limits), 11.27 (false campaign finance reports) and 11.38 (corporate contributions) had occurred. Wis. Stat. § 11.61 provides for criminal penalties for the intentional violation of these statutes. Of these three potential violations, non-disclosure of reportable campaign contributions is at the heart of this investigation.

The District Attorneys jointly submitted a letter to the John Doe Judge, dated August 21/22, 2013. The letter cited the statewide nature of the criminal investigation and the need to conduct a unified, efficient, and effective proceeding that could only be facilitated by the appointment of a special prosecutor.[14]

As part of the Order appointing a special prosecutor, the Judge found:

- The Attorney General declined to assume responsibility for this investigation, citing a conflict of interest and the appearance of impropriety;
- A Special Prosecutor will eliminate any appearance of impropriety;

[13] App. 443-47.
[14] D:10; App. 86-89.

- A John Doe proceeding run by five different local prosecutors, each with partial responsibility for what is and should be one overall investigation and prosecution, is markedly inefficient and ineffective; and

- A Special Prosecutor with jurisdiction across the severally affected counties is required for the efficient and effective conduct of the investigation.[15]

The John Doe Judge appointed a former federal prosecutor, Attorney Francis D. Schmitz, as Special Prosecutor in all five counties. The order was dated August 23, 2013. The Order was based upon *State v. Carlson*, 2002 WI App 44, 250 Wis.2d 562, 641 N.W.2d 451, and *State v. Cummings*, 199 Wis.2d 721, 546 N.W.2d 406, 411 (1996). Under date of August 26, 2013, the State Prosecutors Office was forwarded a copy of these Orders by United States Mail.[16]

[redacted]

[15] D:11; App. 94-103.
[16] App. 76, ¶9.

[redacted]

On October 23, 2013, the Special Prosecutor received notice from Judge Barbara A. Kluka that she needed to recuse herself.[22] The Special Prosecutor subsequently learned that the Honorable Gregory A. Peterson

---

[17] It should be noted that the Affidavit of Dean Nickel dated September 28, 2013 supporting the request for search warrants incorporated by reference the prior affidavits and papers in the John Doe proceedings, specifically identifying the December 10, 2012 Affidavit. *See* D:20; D:19; M:49. This would have included the September 5, 2012 Affidavit. *See* M:12.

[18] D:51-55.

[19] Despite being characterized as paramilitary style pre-dawn raids, the search warrants were carried out professionally pursuant to standard law enforcement protocols at or near 6:00 a.m.

[20] The petitioners purposefully create an inaccurate impression that millions of documents were needlessly seized. What they fail to disclose is that the evidence that was recovered was primarily in an electronic format that included computers. Forensic images were created of nearly all of this evidence, with the contents returned to the owners. To have reviewed every computer file at the scene would have been impracticable.

[21] D:72; D:75; D:77; D:80; D:96.

[22] App. 76, ¶10.

was assigned as the John Doe Judge.[23] Judge Peterson was assigned to the proceedings in all five counties.

[redacted]

[23] D:97-98; M:185, 205.
[24] D:149 and D:189 (originally filed in Dodge County on December 4, 2013).
[25] D:163, at 1.
[26] D:192.
[27] D:218.

[redacted]

Earlier on November 14, 2013, a petition for a Supervisory writ had been filed by Unnamed Movants Nos. 2, 6 and 7 ([redacted], [redacted] and [redacted].) challenging the appointment of the Special Prosecutor and appointment of a reserve judge to oversee the five John Doe proceedings. The Wisconsin Court of Appeals denied the challenges of the Unnamed Movants in decisions dated November 22, 2013 and January 30, 2014.[28] The Unnamed Movants subsequently filed a petition for review dated February 19, 2014, in *State ex. rel Three Unnamed Petitioners v. Peterson et al.*, Case Nos. 2013AP002504W – 2013AP002508W. The Three Unnamed Petitioners sought review of the orders previously issued by the Wisconsin Court that denied a challenge to the appointment of the Special Prosecutor in the John Doe proceedings, among other issues.

A petition for a supervisory writ dated February 21, 2014 was filed by the Special Prosecutor in *State ex rel. Schmitz v. Peterson, et al.*, Case Nos. 2014AP000417W – 2014AP000421W. [redacted]

[28] *See* Decision and Order of November 22, 2013 (App. 2-13) and January 30, 2014 (App. 14-22).

[redacted] and [redacted]. Subsequently, [redacted] and other Unnamed Movants filed a Petition to Bypass dated April 14, 2014 seeking direct review by the Supreme Court.

A petition for the commencement of an original action dated February 6, 2014 was filed by [redacted] and [redacted] in *State ex. rel Two Unnamed Petitioners v. Peterson et al.*, Case No. 2014AP000296 OA. The two unnamed petitioners requested that the Supreme Court exercise its original jurisdiction in a review of Chapter 11 of the Wisconsin Statutes addressing campaign finance issues, without the benefit of the record in the captioned John Doe proceedings.

Contrary to assertions in several of the Movants' briefs, (*e.g.*, [redacted] at 43, 98) the GAB has recently passed a resolution calling upon the legislature to "undertake a comprehensive review and revision" of ch. 11.

Any statement that the final resolution contained language that ch. 11 was "convoluted" is not true.[29]

The Movants claim that the Special Prosecutor should acknowledge a stipulation in an unrelated federal case styled as *Citizens for Responsible Government Advocates, Inc. v. Thomas Barland et al.*, Case No. 14-CV-01222 (Eastern District of Wisconsin). There, it was agreed that ch. 11 would not be enforced against the plaintiffs unless they expended funds for communications that amounted to express advocacy. This was a pre-enforcement action brought by Citizens for Responsible Government Advocates, Inc. (CRGA) against the Government Accountability Board and the Milwaukee County District Attorney. It was based on a distinct set of averments that have no relation to the facts thus far developed in this action, facts which suggest a control relationship – or at least a very, very close interaction – between the candidate's committee and the third party entity. The story behind that litigation is interesting, but beyond the scope of discussion required here. The Office of the Governor refused to employ lawyers already familiar with related issues of fact and law based upon their

[29] The history of the composition of the GAB, from the time of the Special Prosecutor's appointment to the present, and its effect on this investigation, is beyond the scope and purpose of this brief. The resolution was submitted by two of the board members (Judges Froehlich and Barland) proposing the "convoluted" language. It did not pass with that language surviving. *See* App. 62.

success defending the Special Prosecutor and the Milwaukee County District Attorney in a Title 18, § 1983 lawsuit brought by [redacted][30] Instead, the Office of the Governor hired a new lawyer. This lawyer represented the GAB and the District Attorney in their "official" capacities and told the District Attorney that *Barland II* controlled the disposition of that case. Given the facts as pleaded in *CRGA*, the lawyer might be right. Indeed, given the facts as pleaded, the interaction between CRGA and certain named candidates might even be permissible under El. Bd. Op. 2000-02. In any event, that stipulation was effective only between the parties in that litigation. *See* Movants' Joint Appendix at JA398, ¶ 5. The Stipulation in no way affected the rights of the State to advance any legal theory. *Id.* ¶ 6. Finally, it was always contemplated that *CRGA* would, during the pendency of the federal action, petition the Wisconsin Supreme Court to commence an original action. It did, and the Petition was "held in abeyance" pending the court's consideration of these proceedings. Order, 2014AP2586-OA, December 16, 2014.

[30] *See O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014).

STATEMENT OF FACTS

A. Introduction

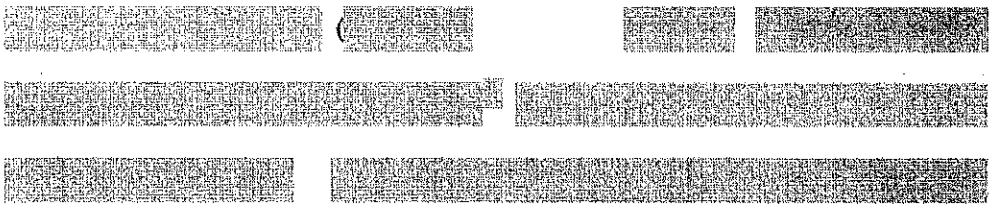
Because this investigation was halted before all evidence was examined, and because further examination was prohibited by order of Judge Peterson, including, in particular, the evidence gained through the search warrants issued by Judge Kluka, the facts regarding coordination are limited to the evidentiary level of reasonable suspicion (commencement of the John Doe) and probable cause (issuance of search warrants). Admittedly, there are gaps in the investigation. No charges have yet been filed, nor could they be filed at this point. The issue is whether the known facts bear investigation and inquiry. The Special Prosecutor submits that they do.

The investigation is premised upon a reasonable belief that intentional violations of campaign finance law have taken place, especially relating to campaign finance reporting and disclosure requirements under ch. 11. The legal basis for the investigation is founded on principles first articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976) and subsequently made part of Wisconsin law in state statutes, the regulations of the Government Accountability Board (GAB), the GAB decision in El. Bd. Op. 2000-02 and

Wisconsin Coalition for Voter Participation v. SEB, 231 Wis.2d 670, 605 N.W. 2d 654 (Ct. App. 1999).

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

The timeframe of the investigation is the 2011 and 2012 Recall Elections. During this timeframe, there is good reason to believe the



[31] *See* text accompanying notes 38 and 39; *see also* Figure 2. Karl Rove is a political strategist known as "The Architect" of President George W. Bush's 2000 and 2004 campaigns. He also served as Senior Advisor to President Bush from 2000–2007 and Deputy Chief of Staff from 2004–2007. *See* Karl Rove. www.rove.com.

[redacted] made multiple expenditures in this time frame "to influence the election," as that phrase is understood under in *Buckley*, 424 U.S. 1. [redacted] did not disclose any such expenditures as contributions on any campaign finance report. To the extent that these expenditures involved publication of [redacted], the investigation seeks to determine whether the public was misled into believing that a genuinely independent entity, rather than the campaign committee itself, was making positive comments about [redacted] on issues of the day. We believe that the court should review this brief from the perspective that, because of the relationship of [redacted] and the candidate committees, particularly [redacted] such candidate committees had an obligation to disclose that financial support to the public. The extent to which ch. 11 may impose other obligations on any of the Movants is not the present focus of the Special Prosecutor.

The investigation involves expenditures for both express advocacy and non-express advocacy. The express advocacy aspect of this investigation involves [redacted] ([redacted]) and [redacted]. ([redacted]). The non-

[32] *See infra*, Statement of Facts, Section D.3.

express advocacy included an investigation of money flowing from [redacted] to third parties, coordinated though dual agents of the candidate committees and [redacted] The non-express advocacy aspect also involved direct coordination through dual agents of the candidate committees with third parties.

The main focus of this investigation is upon the actions of [redacted]

Because [redacted] was "under the control" of [redacted] a premise of the investigation is that the expenditures of [redacted] made for the benefit of the campaign were reportable as In-Kind contributions to [redacted] The failure to report such contributions, then, makes the [redacted] campaign committee a main focus of the investigation as well.

Of course, since the investigative status of any one individual changes as evidence is collected and reviewed, it is difficult to classify the remaining individuals and entities. The Special Prosecutor believes it is appropriate to classify as "subjects" of the investigation, based upon the

fact their actions fall within the scope of the investigation, the following: [redacted], and [redacted]. The Special Prosecutor hesitates to characterize [redacted] even at the level of "subject." [redacted] his recent notoriety on behalf of [redacted] seems – at least to the Special Prosecutor – to be designed to obscure the fact that in 2011 and 2012 [redacted] and [redacted] ran the organization.

At this juncture in this investigation, the Special Prosecutor presumes that other organizations, such as those pictured at the bottom of Figure 1 below, worked with [redacted] and/or [redacted] in good faith.

B. Media Chart

Because [redacted] went public with secret John Doe information in the *Wall Street Journal*, and [redacted], a significant amount of information about this investigation found its way into the public domain. Various media outlets have analyzed and reported on this public information. Indeed, charts regarding the role of the various

actors and the flow of money have been widely published. Although they lack the detail that will be shared with the Court, they are fair pictorial representations of the evidence publicly disclosed.[33]

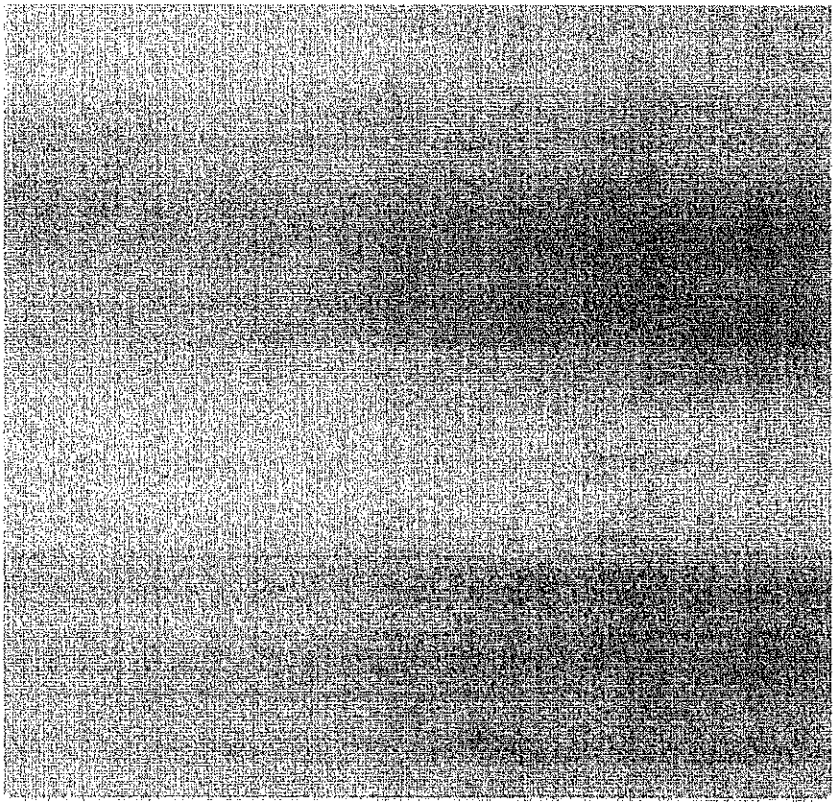


Figure 1 [34]

---

[33] [redacted] D:20 ¶ 17; App. 535-536.

C. Parties Involved

1.

Principal political operative directing activities of , and a campaign committee. Ran .

2.

Secondary political operative directing activities of , , and assisting with respect to . Business partner with

3.

A "tax exempt social welfare organization" under 26 U.S.C 501(c)(4), under the control of and involved in political activity during the elections. is the "titular" director.

:20 ¶ 18; App. 536.

4. [redacted] ([redacted]

A "tax exempt social welfare organization" under 26 U.S.C 501(c)(4), under the control of [redacted] and [redacted] involved in political activity during the [redacted] elections. [redacted] was primarily used as a "conduit" for the distribution of money from [redacted] to other organizations and entities. [redacted], [redacted] was the treasurer.

5. [redacted]

Through the [redacted], sponsored ads supporting [redacted] while critical of his opposition during the [redacted] elections; recipient of over $[redacted] from [redacted] in 2012. [redacted] was [redacted] of [redacted].

6. [redacted] / [redacted]

Director of [redacted] who with her staff, coordinated fundraising for [redacted] to be used by [redacted] and [redacted] for political activities during the [redacted] elections.

7. [redacted]

[redacted] candidate during 2011-2012 recall elections.

Fundraiser for the political activities of [redacted] and other entities during the [redacted] elections [redacted].

8. [redacted] ([redacted]

[redacted] campaign committee for [redacted] during the election [redacted]. Campaign operations primarily directed by [redacted]. Other agents for the campaign included [redacted] among others.

9. [redacted]

[redacted] for [redacted] and [redacted] (with [redacted] during the [redacted] elections.

10. [redacted]

Advertising and media agencies placing media for [redacted] Wisconsin state senate candidates, [redacted], and [redacted], among other entities during [redacted] campaigns.

11. [redacted] ([redacted])

Designated [redacted] campaign committee permitted to work in conjunction with the individual Wisconsin state senate candidate committees during the [redacted] elections. [redacted] was the treasurer.

D. Dual Agents,

1. and

and were Key Principals of during the elections. They were political operatives directing both and [35]

[35] M:49 ¶ 19 & fn. 9; App. 492.
[36] M:49, Ex. 72.2.
[37] M:49 ¶ 17; App. 491.
[38] M:49 ¶ 31, Ex. 21.2; App. 499;
M:49 ¶ 31, Ex. 21.2; App. 499.

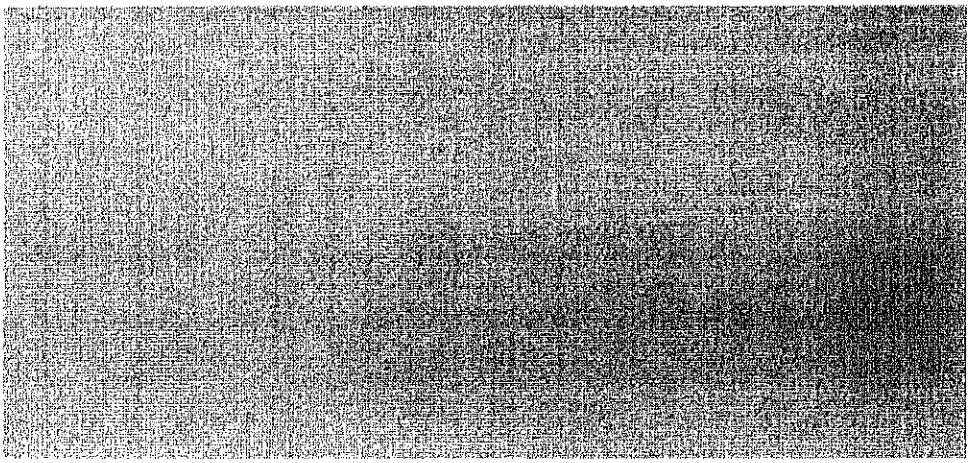


Figure 2

[redacted]

[40] App. 534, ¶ 12

[41] [redacted] D20: ¶ 15.

[redacted]

2. [redacted] **and** [redacted]

[redacted][45]

3. [redacted],

[redacted]

---

[42] D:20 ¶ 11; App. 533-34.
[43] M:49 ¶ 71; App. 514-15.
[44] *See* note 41.
[45] M:49 ¶¶ 16, 29; App. 491, 498; D:20 ¶¶ 50-52, App. 545; M:49 ¶ 16; App. 491, M:49 ¶¶ 29-35; App. 498-500; M:49 ¶ 41; App. 502-03; M:49 ¶ 78, App. 516-17; M:49 Ex. 22-24.1, Ex. 31.1, Ex. 37, Ex. 58-61.

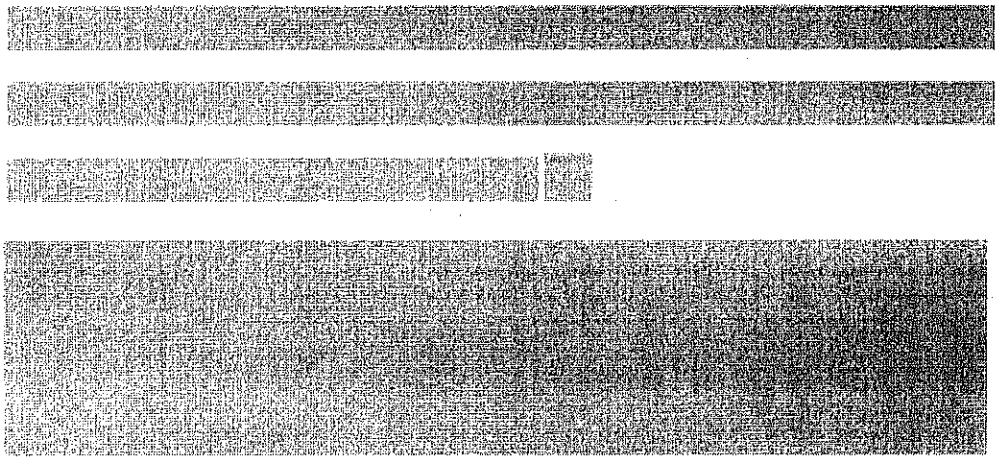
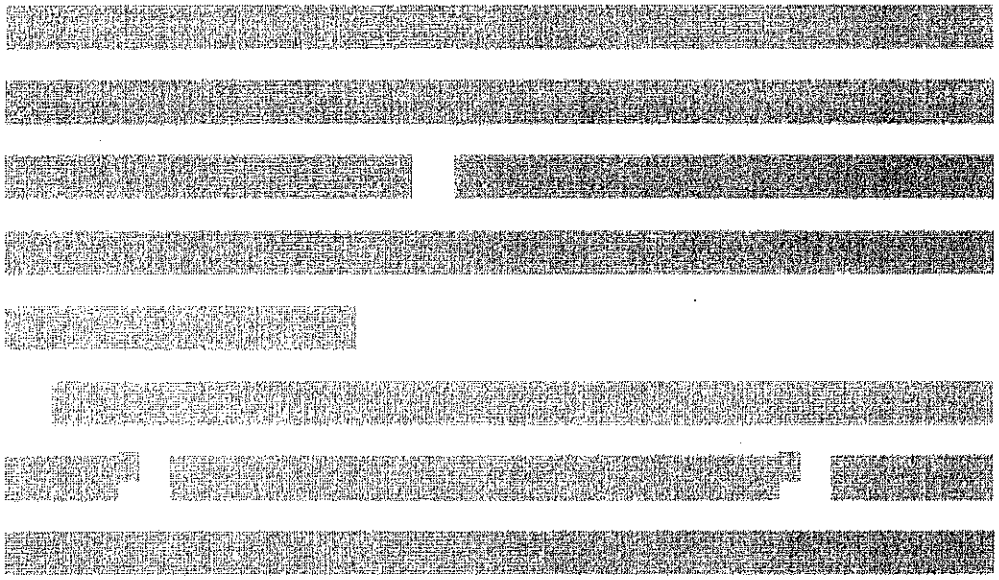


Figure 3



[46] M:49 ¶ 19 fn.9, Ex. 12; App. 492.
[47] M:49 Ex. 13.
[48] D:20 ¶ 12, D:19 Ex. 2.1: App. 534; M:49 ¶ 69; App. 513-14. .

The extent of these sums is not presently in the record.

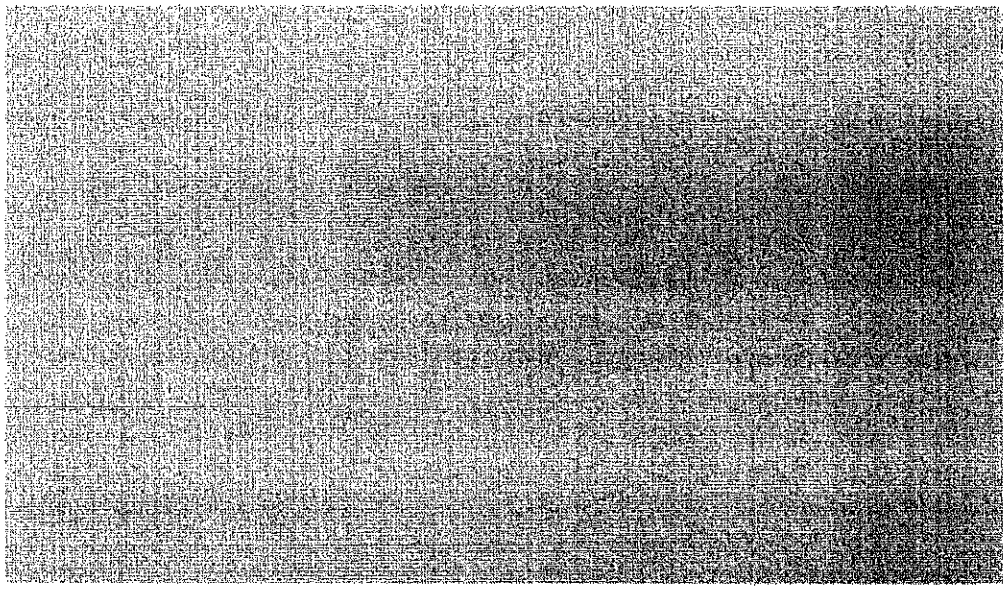


Figure 4

[49] M:12 Ex. 16; D: 20 ¶ 43; App. 542-43; D:19 Ex. 21.2; *See* note 41.
[50] M:49 ¶¶ 14-15; App. 490-91.

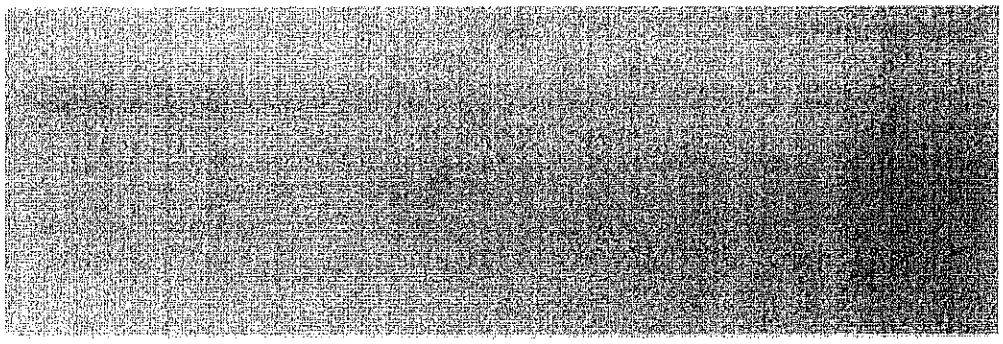


Figure 5

E. The Corporate "Conduit" run by

(" was a "pass-through" for funds given to other organizations. This is depicted in the bottom of Figure 1 above. is another 501(c)(4) organization.

[51] D:20 ¶ 17; App. 535; M:49 Ex. 62; M:12 ¶ 64.

[52] D:20 ¶ 16; App. 535; M:49 Ex. 5; D:19 Ex. 4.

[redacted] [55]. [redacted] [56] [redacted] [57].

[53] D:20 ¶ 16; App. 535.
[54] D:20 ¶ 17; App. 535-36.
[55] M:49 ¶ 15; App. 491.
[56] D:20 ¶¶ 16-19; App. 535-37; D:19 Ex. 3-4; D:20 ¶ 77; App. 516; D:19 Ex. 3; M:49 Ex. 74.2, 74.3, 74.4.
[57] D:20 ¶¶ 17-18; App. 535-36.

[redacted]. [58]

It is unclear at this juncture why [redacted] did not contribute money directly to organizations like [redacted] rather than using [redacted] to pass the funds through to the recipient.[59]

Though not available in September 2013, [redacted] publicly available 2012 Form 990 reflects revenue of $[redacted] of which $[redacted] came from [redacted]

F. Timeline Overview

[redacted] Shortly thereafter, in response to proposals for what would become Act 10, there was a substantial public reaction. There were demonstrations at the Capitol. Senators fled the jurisdiction to avoid legislative action on the proposed bills. Talk of Recall Elections began.

[58] D:20 ¶ 18; App. 536.
[59] *See* Figure 11 *infra*. [redacted]

[redacted].[60]

In June 2011, the GAB certified the Recall Petitions and ordered elections, which were held in July and August 2011.

[redacted].[61] The GAB subsequently certified the Petitions for Recall and ordered elections ultimately held on June 5, 2012.

On November 4, 2011, the first registration statement for the Recall of Governor Walker was filed. A second was filed on November 15, 2011. On January 17, 2012, a Petition for Recall was offered for filing. On March 30, 2012, the GAB certified the Petition and set a Recall Election for June 5, 2012.

G. January 2011 to September 2011

[redacted]

---

60 [redacted] *See* D:20 at 5; App. 528.

61 [redacted] *See* D:20, at 5; App. 528.

[redacted][62]

[redacted][63]

[redacted][64]

[62] M:49 ¶ 23, Ex. 15; App. 493-94.

[63] Press Release, [redacted] (last visited Feb. 26, 2015). *See* M:49 ¶ 23, Ex. 15; App. 493-94.

[redacted]

[redacted][66]

Returning to the timeframe of 2011, it is clear that the candidate[67] [redacted]

[redacted] And indeed, he was true to his word.

[65] *Id.*
[66] *Id.*
[67] The fact of election does not alter one's status as candidate. All officeholders are also candidates. Wis. Stat. § 11.01(1)("A person does not cease to be a candidate for purposes of compliance with this chapter or ch. 12 after the date of an election and no person is released from any requirement or liability otherwise imposed under this chapter or ch. 12 by virtue of the passing of the date of an election.")

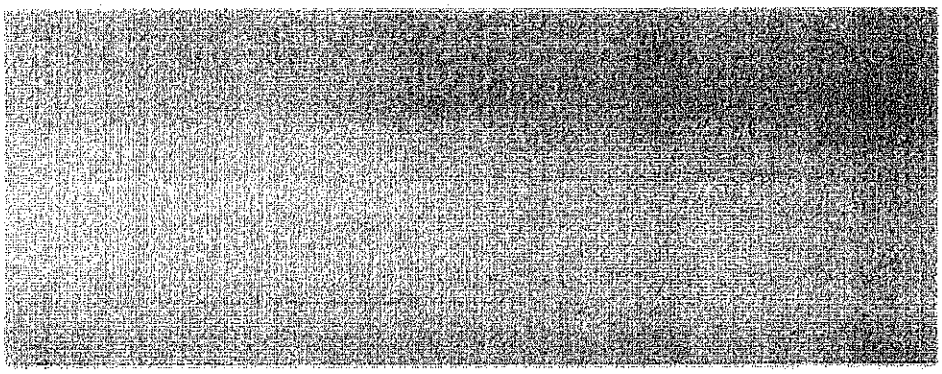


Figure 6

[redacted] [68]

It is appropriate to note, even in this Statement of Facts, that the Special Prosecutor is *not* claiming that [redacted] should *not* have remained active in the [redacted] debate. Indeed, if [redacted] he *was* a *former* advisor (and then a truly independent speaker), it was his right to participate and there would be nothing to pursue here (with respect to [redacted] because truly independent speakers do not have any registration, reporting or disclosure requirements under ch. 11. That is clear after *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014) (*Barland*

[68] M:49 ¶ 40; App. 502 [redacted]

[redacted]

[redacted][69]

[69] *See* M:49 ¶ 32-35, Ex. 22-23; App. 499-500; *see also* [redacted]" within Exhibit 23.

REVISED REDACTED
APRIL 22, 2015

[redacted][70] [redacted]

[redacted]

[redacted][71] [redacted]

[redacted]

[redacted]

[redacted][72]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted][74] [redacted]

[redacted][75] *See* Figure 7.

---

[70] *See* M:49. Ex. 23 ("Talking Points Memos").
[71] *Id.*
[72] M:12 ¶ 23, Ex. 10; App. 461.
[73] *Id.*
[74] [redacted]
M:49 ¶ 24, Ex. 16.: App. 494-95.

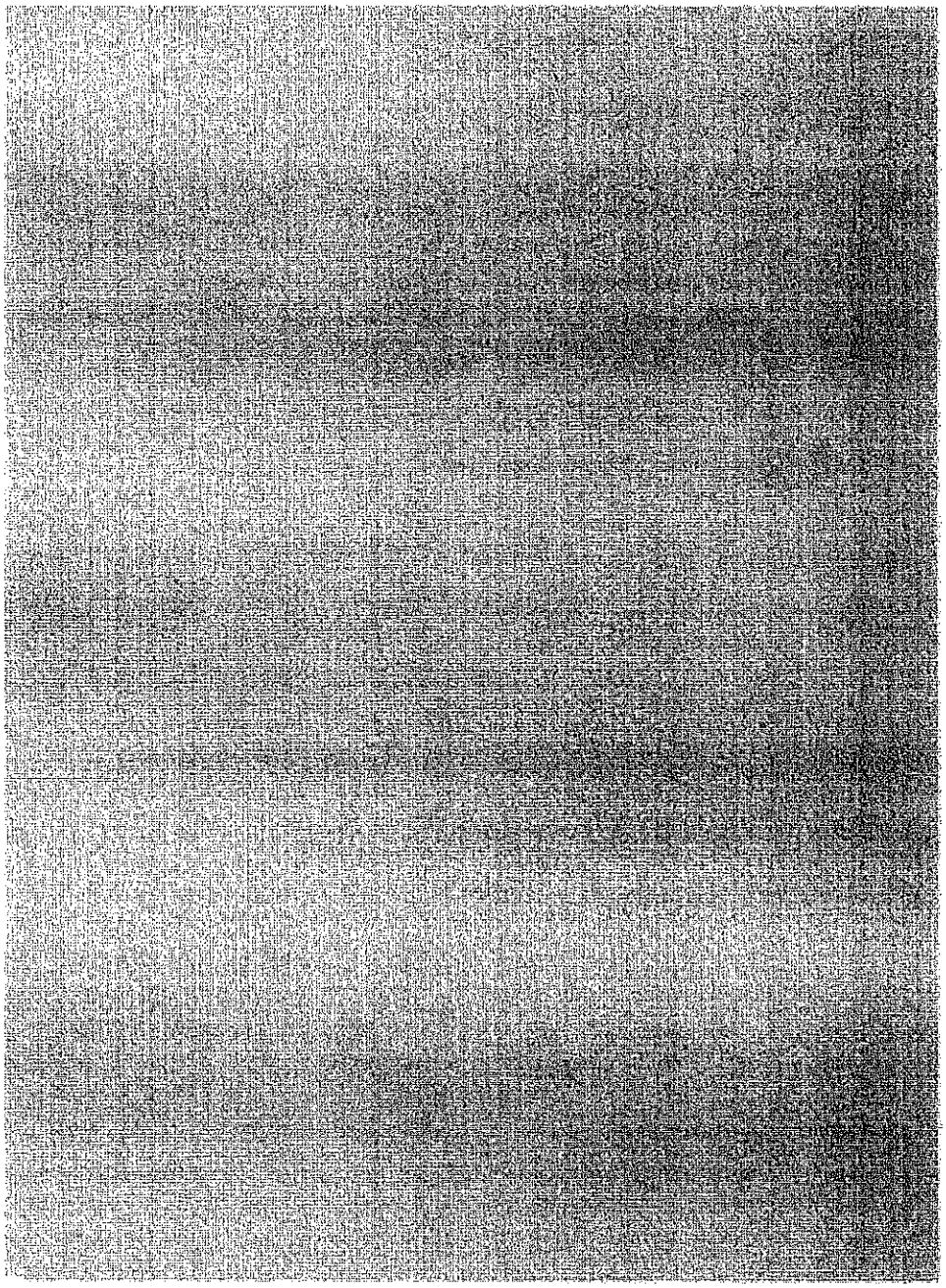


Figure 7

[redacted]

[redacted] [76]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] *See* Figure 8[77]

[76] [redacted]
M:49 Ex. 2.

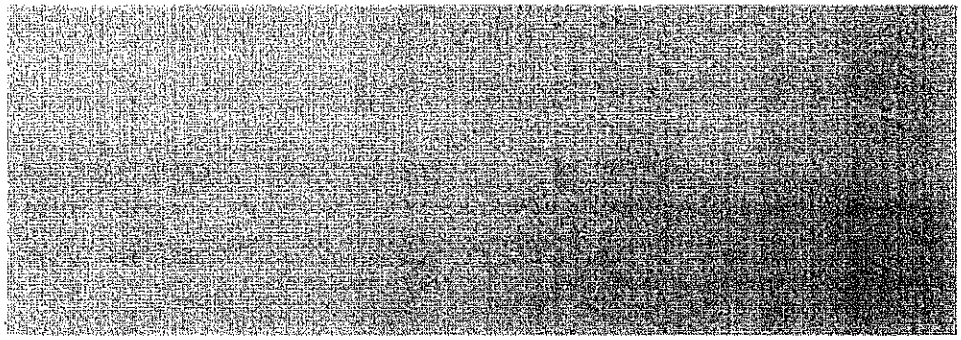


Figure 8

",[79](emphasis added).

[80]

[79] *Id.*
[80] *Id.*

[redacted] *See* Figure 9.

[redacted]

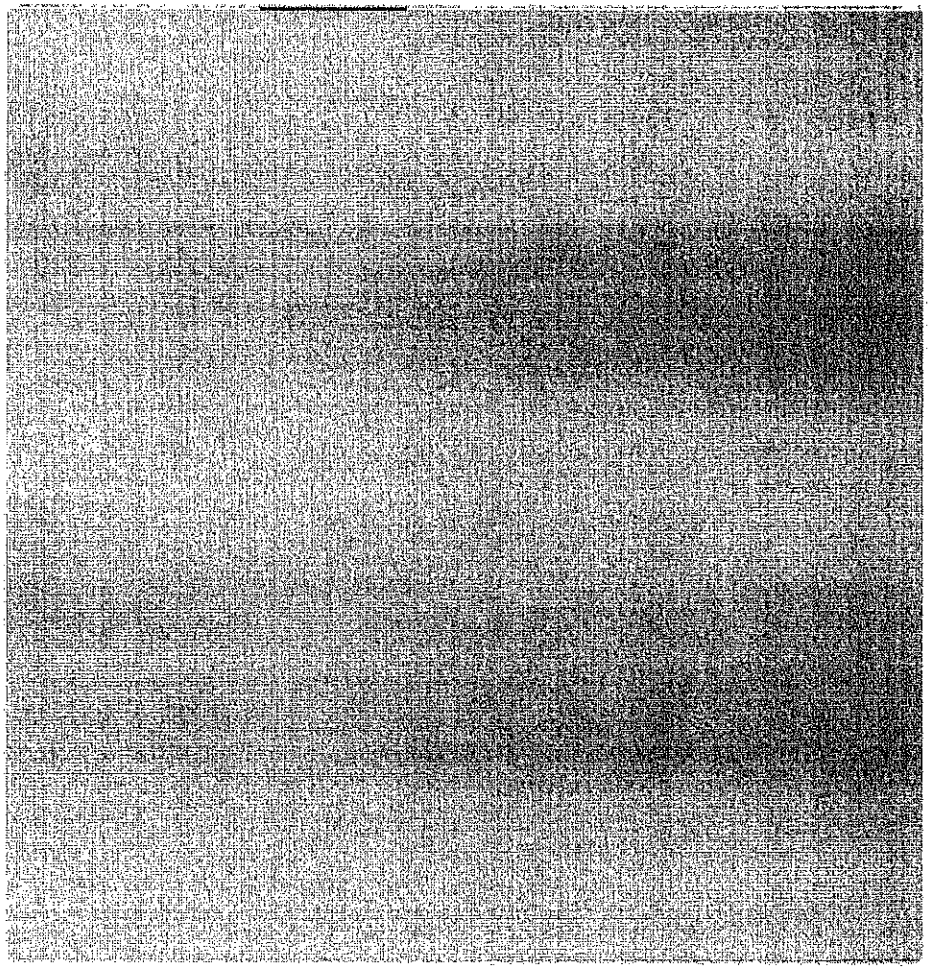


Figure 9 (partial e-mail text)

The investigation was halted before evidence was examined and/or obtained that might indicate the full extent of the communications

There is, however, further reason to believe that messaging was controlled between the and ostensibly "independent" organizations, including

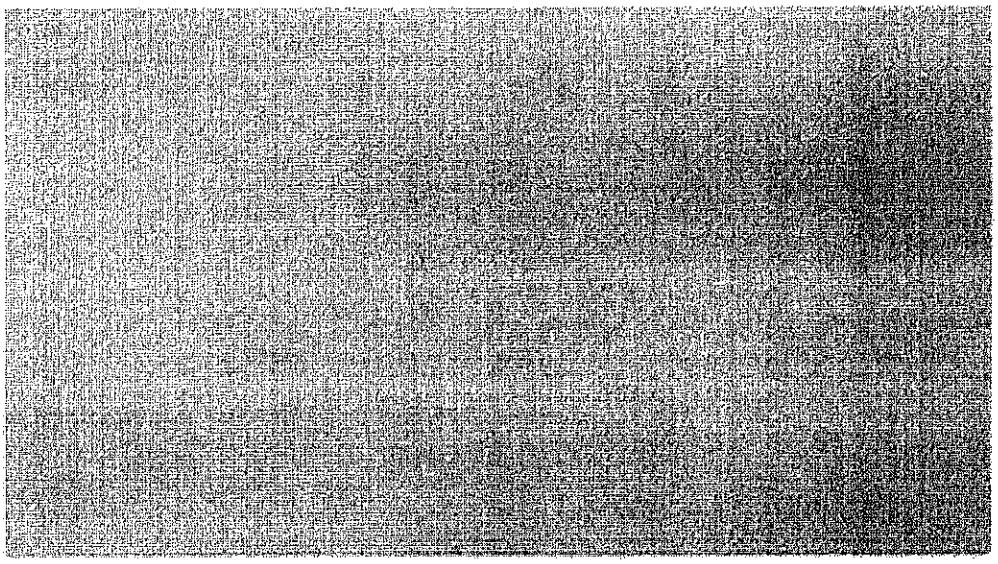


Figure 10

[81] *See* Figure 10.

[81] *See*

[redacted][82]

By the time the Summer 2011 Senate Recall elections were over, [redacted][83], [redacted]

[redacted]",[84]

[redacted]

[82] M:49 ¶ 29, Ex. 20; App. 498.
[83] M:49 ¶ 38; App. 501-02.
[84] M:49 ¶ 37, Ex. 24.3; App. 501.

[redacted] [85]

[redacted]. *See* Figure 9 above.

H. September 2011 to July 2012

[redacted] [86]

[85] M:49 ¶ 39, Ex. 28; App. 502.
[86] *See* text accompanying notes 41 and 44.

See Figure 11.[87]

[88]).

[87] M:49 ¶ 41. Ex. 30; App. 502-03
[88] M:49, Ex. 22-23 ("Talking Points Memos").

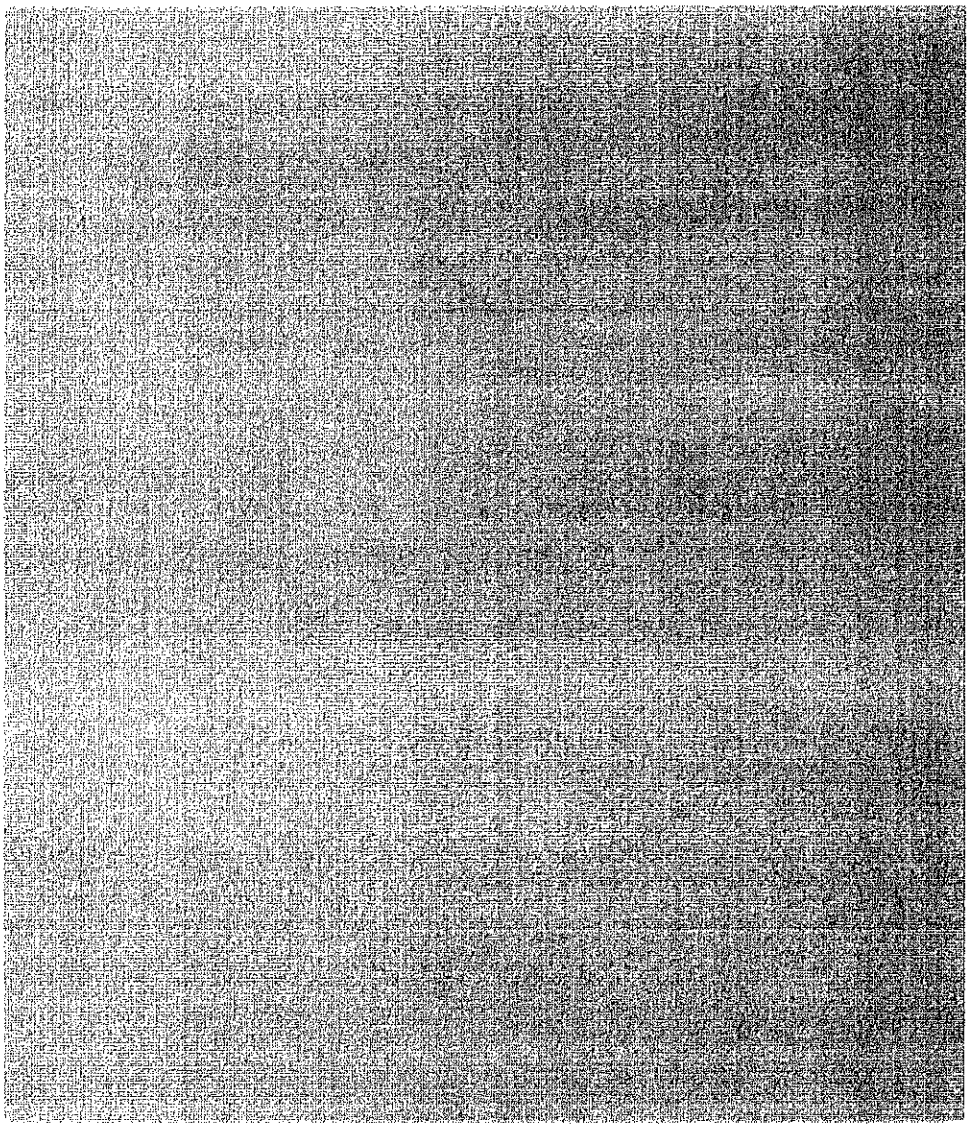
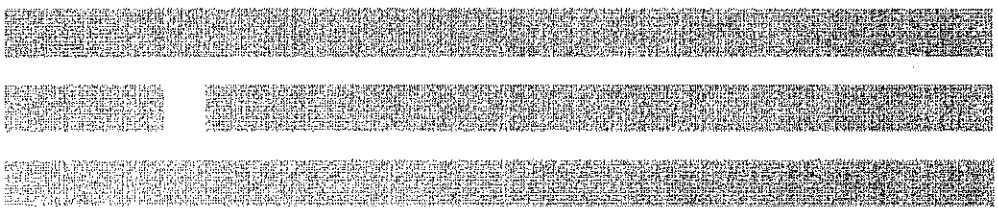


Figure 11 (partial e-mail)



[redacted][89]

[redacted][90] [redacted]

[redacted][91] [redacted]

[redacted] It goes without saying that a candidate, dealing with a truly independent organization, does not get to finally decide whether donor money goes to the campaign or the "independent" entity – this is true whether or not the candidate takes steps to encourage donations to a truly independent entity. [redacted]

[89] M:49 ¶ 41, Ex. 30; App. 502-03.
[90] M:49 ¶ 43 Ex. 31.2: App. 504-05.
[91] *See* the *Christian Coalition* discussion of the "anonymity premium" at text accompanying note 202.

[redacted] ,,[92]

I. Fundraising [redacted] for [redacted] 501(c), [redacted]

[redacted] argues at length in its brief that "coordinated fundraising" is not prohibited by ch. 11. As noted in Section VIII, the Special Prosecutor takes no issue with candidates or candidate committees appearing at a fundraiser for a "like-minded" yet nevertheless independent group. Indeed, he does not object to any form of candidate interaction with an entity that is truly independent. Many examples of interaction between a candidate committee and a third party entity that maintains its independence of the candidate can be imagined, as the Movants have done. The facts here, however, tip the scales at the opposite end of the spectrum. We do not deal here with interaction in the form of discussion and exchange of ideas. We deal here

[92] M:49 ¶ 43 Ex. 31.2; App. 504-05.

with a candidate who was sent by his committee and by specifically to collect substantial amounts of cash for to be used to the benefit of his campaign, all by a design .

[redacted][93]

[redacted],[94]

[redacted][95]

[redacted][96]

[redacted][97]

[redacted]

[93] M:49 ¶ 41, Ex. 30; App. 502-03.
[94] M:49 ¶ 70, Ex. 69; App. 514.
[95] M:49 ¶ 41, Ex. 30, App. 502-03.
[96] M:49 ¶ 43, App. 504.
[97] M:49 - Ex 20-23; App. 499-500.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] ,,[99] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [100]

[redacted]

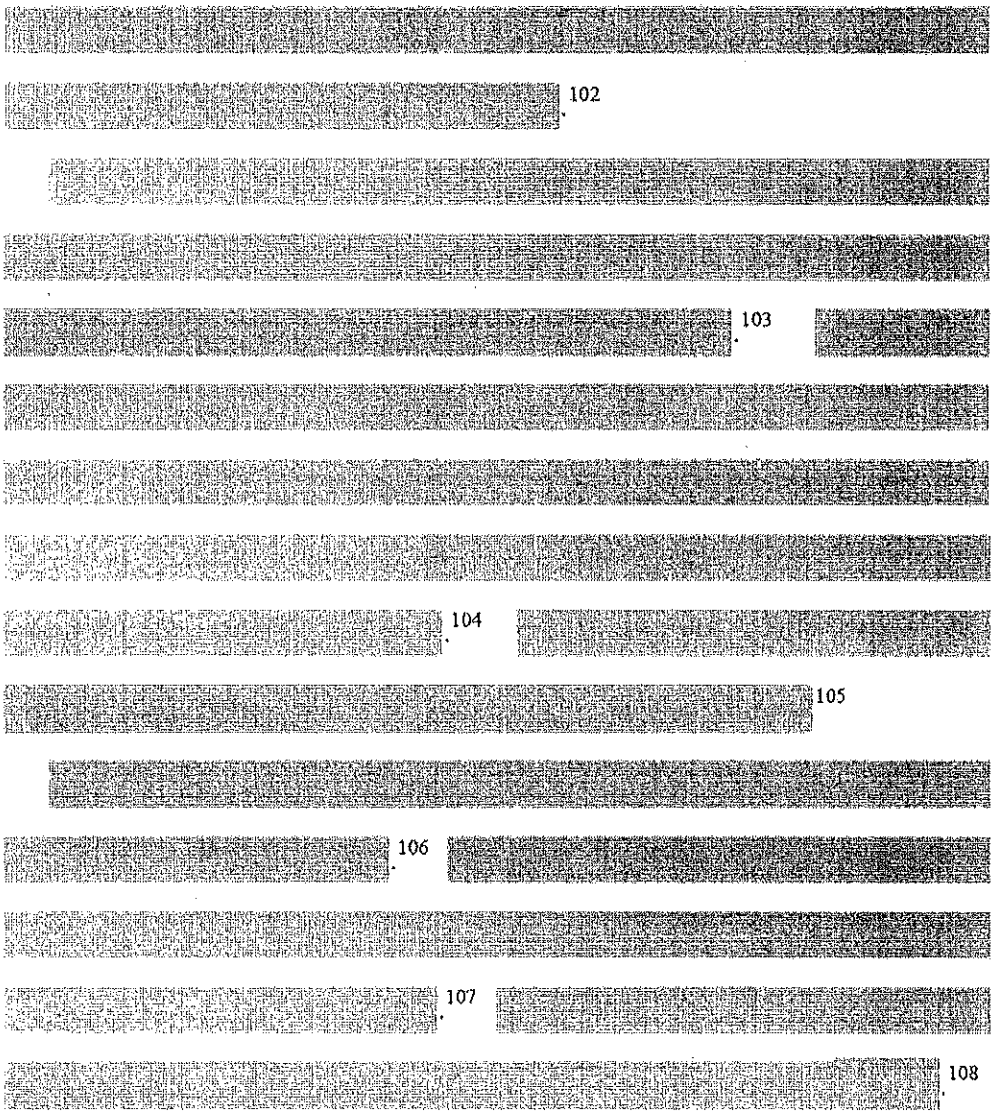
[redacted]

[redacted] [101] [redacted]

[redacted]

[redacted]

[98] M:49 ¶ 34, Ex. 23; App. 500.
[99] M:49 ¶ 37; App. 501.
[100] M:49 ¶ 47-67; App. 506-12.
[101] M:49 ¶ 51, Ex. 42; App. 507.



[102] M:49, Ex. 100, fifth line.
[103] M:49 ¶ 52, Exhibit 44; App. 507.
[104] M:49 ¶ 52; App. 507.
[105] M:49 ¶ 56, Ex. 100 (sixth line); App 595.
[106] M:49 Ex. 44, App. 507. ¶52.
[107] M:49 ¶ 52; App. 507.
[108] M:49 ¶ 56, Ex. 47; App. 452.

[redacted] [redacted]t[109] [redacted]

[redacted].[110] [redacted][111] [redacted].[112]

[redacted]

[109] M:49 ¶¶ 54, 56, Ex. 47; App. 507-08
[110] M:49 ¶ 57 and Ex.48; App. 508.
[111] M:49 ¶ 57, Ex. 49.1; App. 508.
[112] M:49 ¶ 57, App. 508.

[redacted][113]

[redacted][114] [redacted]

[redacted][115]

[redacted][116]

[redacted],,[117]

[redacted][118] [redacted]

[redacted][119]

[redacted]

---

[113] M:49 ¶ 60, Ex. 52; App. 510-11.
[114] M:49 ¶ 61, Ex. 54; App. 511.
[115] M:49 ¶ 61, Ex. 55; App. 511.
[116] M:49 ¶ 62, Ex. 54; App. 511 .
[117] M:49 ¶ 62, Ex. 100 (third from last line); App 595.
[118] M:49 ¶ 63, App. 511.
[119] M:49 ¶ 63, Ex. 57; App. 511.

[redacted][120]

[redacted][121]

[redacted][122]

[redacted]

[120] M:49 ¶ 64, Ex. 58; App. 511-12.
[121] M:49 ¶ 64, Ex. 59; App. 512.
[122] M:49 ¶ 65, Ex. 60; App. 512.

[redacted][123] [redacted]

[redacted][124]

[redacted]

[redacted][125] [redacted]

[redacted]

[redacted]"[126]

J. Disbursements / Expenditures Controlled by Dual Agents

1. [redacted] Disbursements

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted][127] [redacted]

---

[123] M:49, Ex. 60 (emphasis added.)

[124] M:49, ¶ 66, Exhibit 100 (eighth line); App 512.

[125] M:49, Ex. 47.

[126] [redacted]

[127] *See Infra* , Statement of Facts, Section J.3. (entitled "[redacted]").

[redacted]

See Figure 12[128] and Figure 13.[129] [redacted]

[redacted] *See* Figure 13.

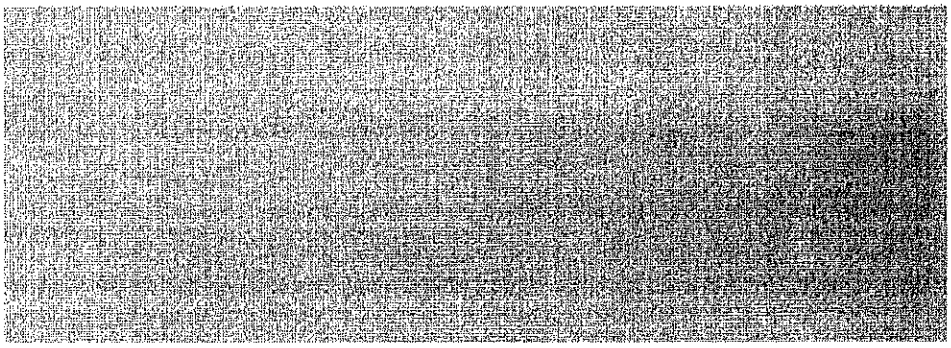


Figure 12

[128] D:20 ¶ 46a, Ex. 23; App. 543-44.
[129] *Id.*

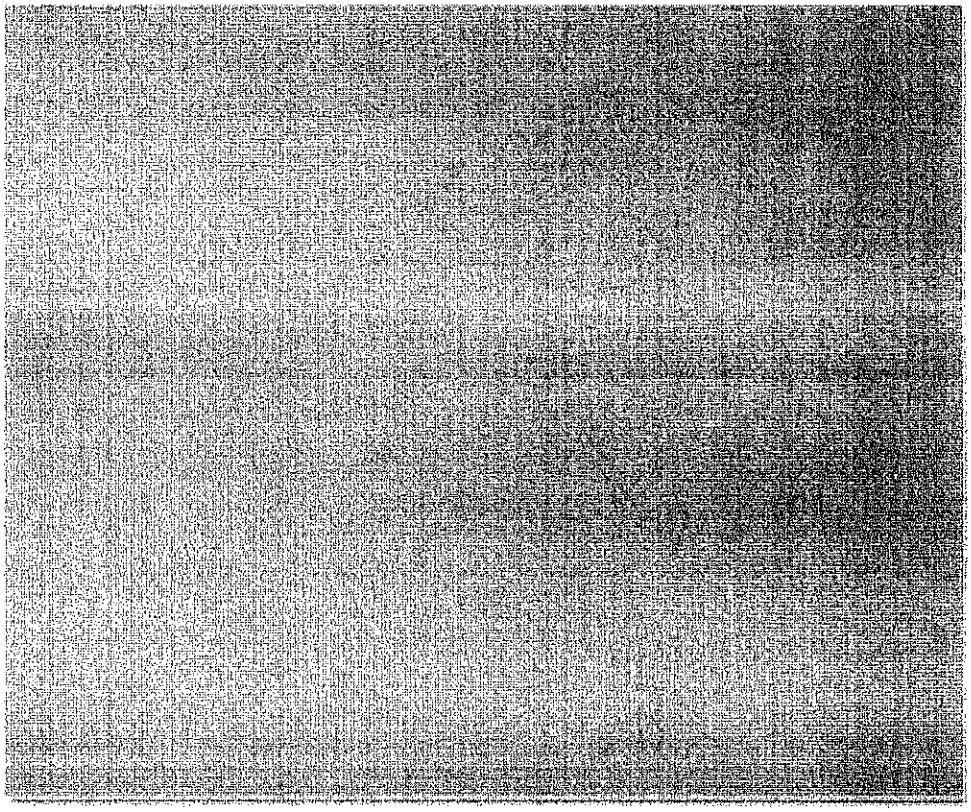


Figure 13

[redacted] [130]

[redacted]

[130] M:12 ¶ 36, Ex. 24; App. 466.

[redacted][131]

[redacted] *See* Figure 14.[132]

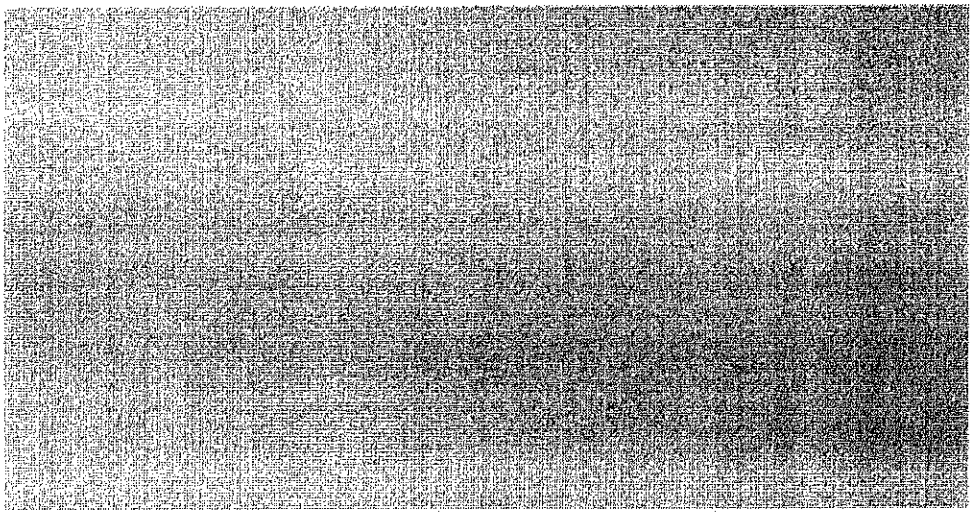


Figure 14

[131] M:12 ¶ 36, Ex. 25; App. 466.
[132] D:20 ¶ 46c, Ex. 25; App. 544.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]133

[redacted]

[redacted]

[redacted]134

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

See Figure 15.[135]

---

[133] D:20 ¶ 46d, Ex. 26; App. 544.
[134] D:20 ¶ 46f, Ex. 28; App. 545.
[135] D:20 ¶ 45, D:19, Ex. 22; App. 543.

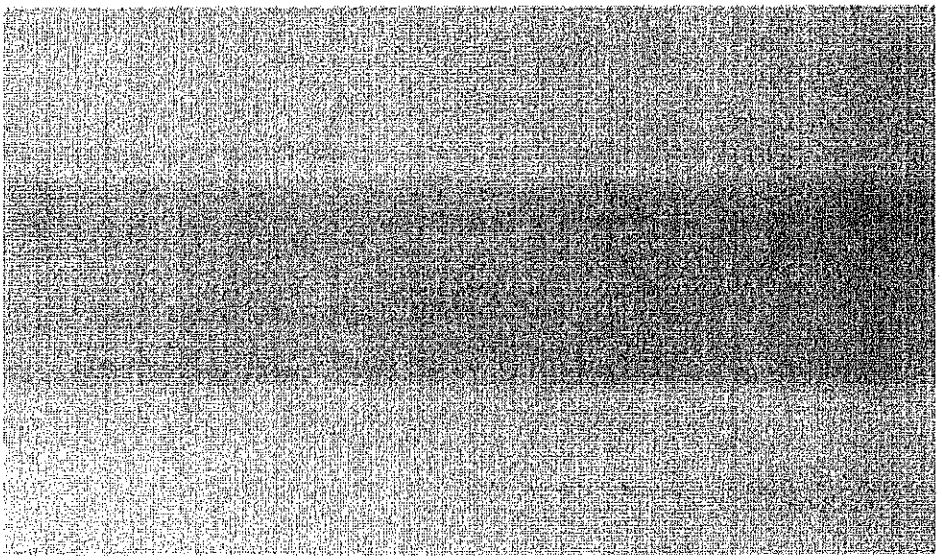


Figure 15

[redacted] [136]

[136] M:12 ¶ 43, Ex. 36; App. 469. D:20 ¶ 73; D: 19 Ex. 72.1; App. 515.

[redacted] [138] [redacted] [139] [redacted]. *See* Figure 16.[140]

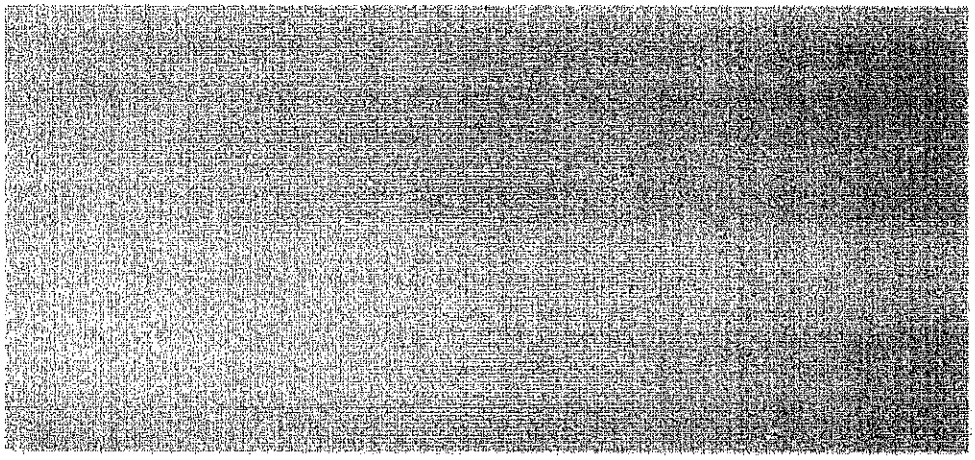


Figure 16

[redacted] [141] [redacted]

---

[137] [redacted] D:20 ¶ 46b, D:19 Ex. 24, App. 544.

[138] D:19, Ex. 24 and Ex. 27.

[139] D:19, Ex. 24.

[140] D:19, Ex. 27.

[141] *See* text accompanying note 49.

[redacted] [142].

2. [redacted] expenditures made to and through [redacted] and

[redacted]

See Figure 17.[143]

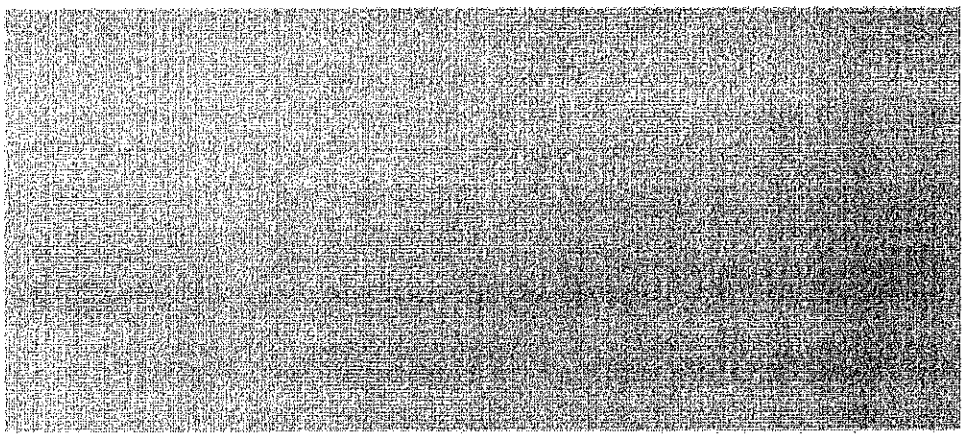


Figure 17

142 [redacted] For further detail, *see* D:20 ¶ 15, Ex. 2.2 and 2.3; App. 535. M:49 ¶ 70, Ex. 69; App. 514.

[redacted] [144] *See*

Figure 18.

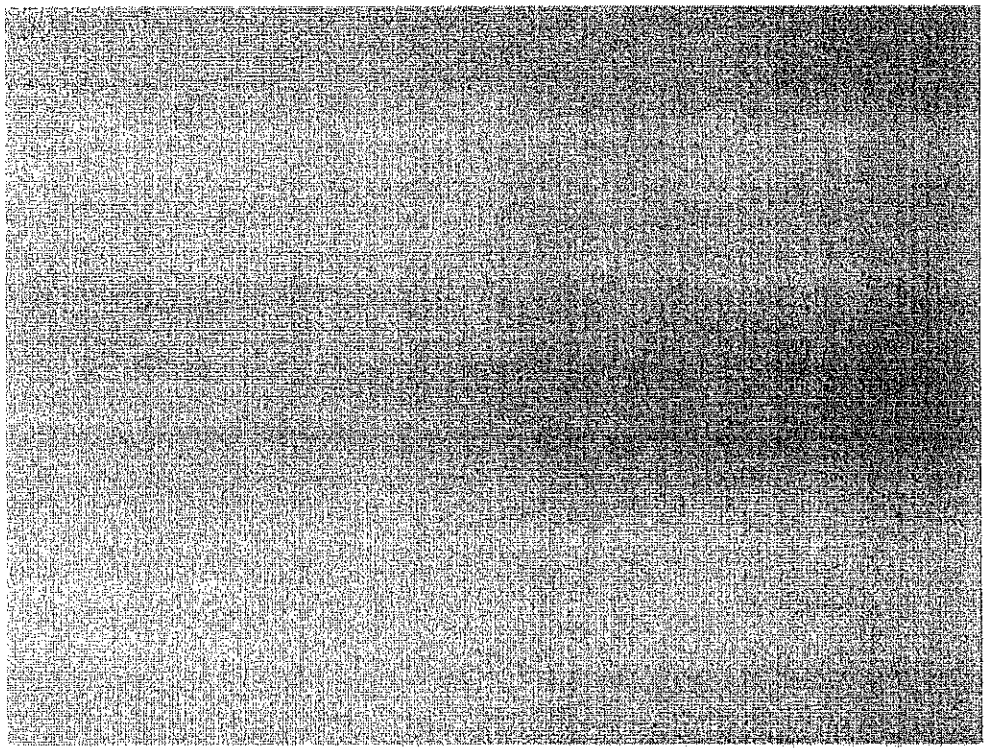


Figure 18

[144] D:49, Ex. 72.2. App. 515 (emphasis added).

[redacted]

[redacted][145] Figure 19 [redacted]

[redacted]

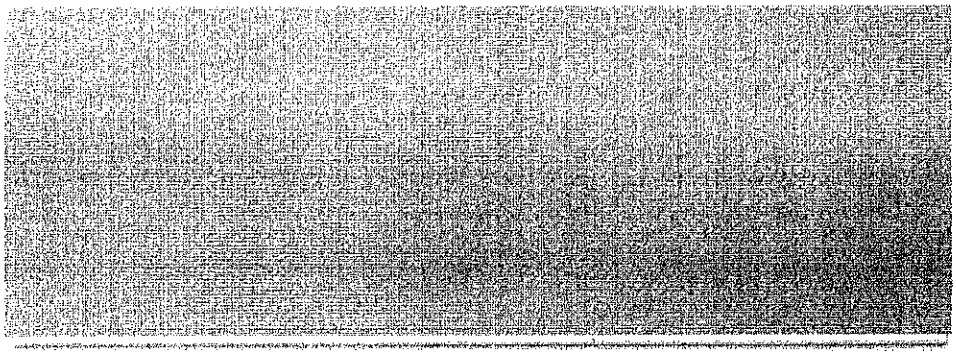


Figure 19

a. [redacted]

[redacted][146] [redacted]

[redacted]

[redacted][147]

[145] M:49 ¶ 74, Ex. 73.2; App. 515.
[146] D:20 ¶¶ 16, 18, 24, App. 535-37 (At least $4.6 million).
[147] D:20 ¶ 17, App. 535-36.

b. [redacted]

[redacted][148]

[redacted][149]

[redacted][150]

[redacted]

[redacted][151]

[redacted]

[redacted] *See* Figure 20.

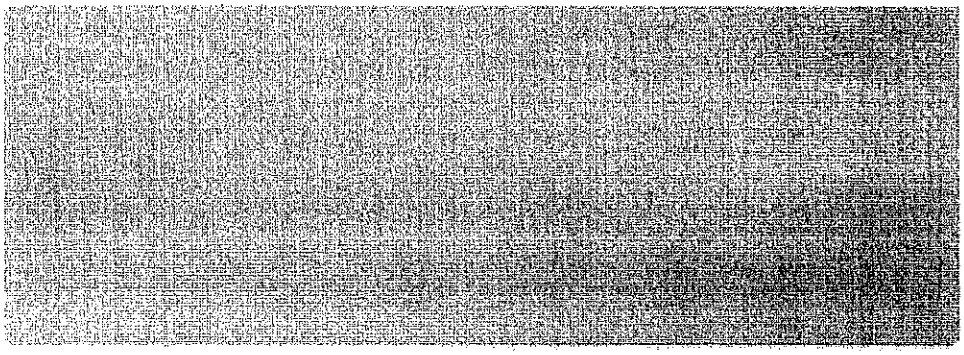


Figure 20

[redacted]

[redacted][152]

[redacted]

[148] D:20 ¶ 41-42, App. 542.
[149] D:20 ¶ 43 (fn. 42), D:19 Ex. 21.1; App. 542-43.
[150] D:20 ¶ 43, Ex. 21.1; App. 542-43.
[151] D:20 ¶ 43, App. 543.
[152] D:20 ¶ 41; App. 542; M:49 ¶ 67-69, Ex. 62; App. 512-13.

[redacted]

[redacted][153] [redacted]

[redacted]

3. [redacted] discussed timing and content of the [redacted] ad campaign [redacted]."

[redacted]

[153] D:20 ¶ 43, D:19 Ex.21.2; App. 542-43.

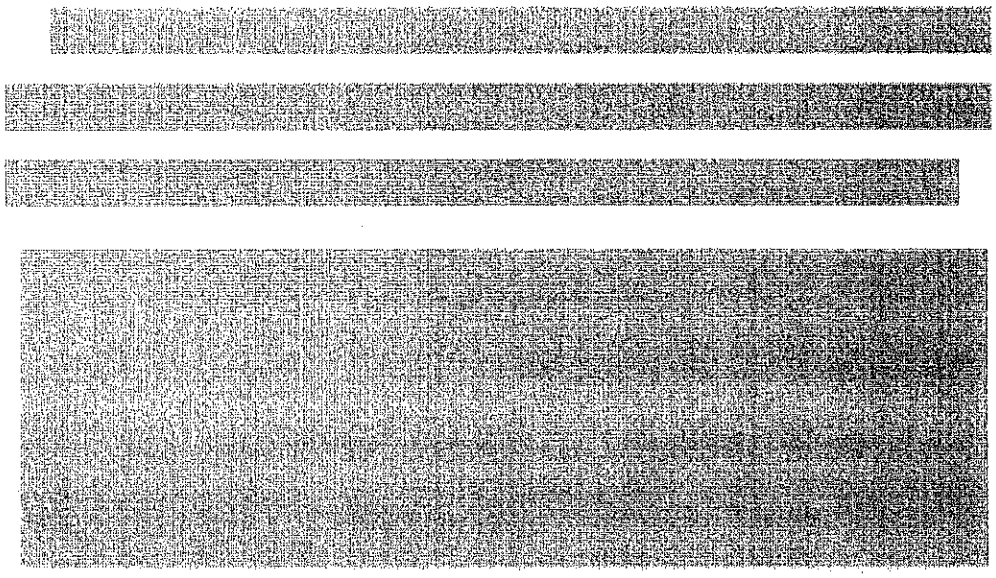
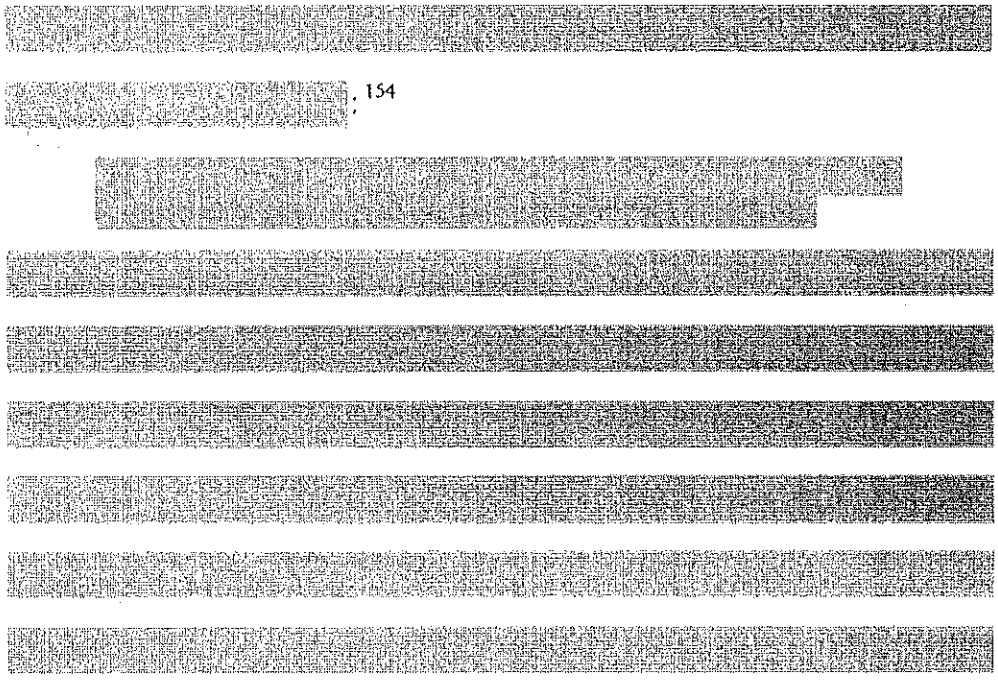


Figure 21



[154] D:20, ¶ 46f; D:19 Ex.29; App. 545 (emphasis added).

K. Expenditures Made for the Purpose of Influencing the Election.

There is no dispute that the expenditures influenced the election; the primary issue before the Court in this regard is whether such expenditures were properly a reportable contribution under the principles articulated in *Buckley*.

:

.[155] ,,[156]

[155] M:49, Ex. 28 (emphasis added).

[156] M:49, Ex. 28; D:20, at 5, n. 3; App. 528.

[redacted][157]

L. Quid Pro Quo Corruption or its Appearance

Transparency in campaign finance regulation is critical because contributions received without the light of disclosure can have a corrupting influence – or the appearance thereof – on those that benefit from these contributions (*i.e.*, in the context of this investigation, disbursements made by a third party: (1) under the control of the campaign committee; (2) at the request or authorization of the campaign committee; or (3) to use the *Buckley* phrase, "otherwise by prearrangement").

[redacted][158]

[redacted][159]

[157] M:49, Ex. 28.
[158] D:20 ¶ 42; App. 542.
[159] M:49 ¶ 46, Ex. 35; App. 505.

[redacted]

[redacted][160]

[redacted][161]

[redacted]

[redacted]

[redacted][162]

[redacted]

[redacted]

[redacted][163]

[redacted]

[redacted]

[redacted][164]

[redacted]

[redacted]

[redacted]

---

[160] M:49 Ex. 20.

[161] M:49 ¶46, Ex. 36; App. 505.

[162] D:20 ¶ 41, D:19 Ex. 17 and Ex. 18; App. 542; M:49 ¶ 68, Ex. 64; App. 513.

[163] *See* [redacted]

D:20 ¶ 27, n.32, D:19 Ex.7.2 and Ex. 7.3; App. 539. [redacted]

[redacted] [165]

M. Express Advocacy

[redacted] [166]

[redacted] [167]

[redacted] [168]

[redacted] [169]

---

[165] [redacted] D:19, Exs. 7.2, 7.3.

D:19 Ex. 33.

[167] D:19 Ex. 34; M:49 ¶ 36, Ex. 24.1; App. 500-01.

[168] D:20 ¶ 25; D:19 Ex. 7.1; App. 538.

[169] M:12 ¶28; App. 463.

[redacted] [170] [redacted]

[redacted] [171] [redacted]

[redacted] [172]

[redacted] [173] [redacted]

[redacted] [174] [redacted]

[redacted] [175]

[redacted] [176]

---

[170] [redacted] *See* D:19 Ex. 8.2 and Ex. 8.3. D:20 ¶ 31-32; App. 540; D:19, Exs. 8.2, 8.3.

[172] D:20 ¶ 34-38; D:19 Ex. 11.1– Ex.15; App. 540-42.

[173] D:20 ¶ 38; D:19, Ex. 15; App. 541.

[174] D:20 ¶ 35; D:19, Ex. 11.2; App. 541. D:20 ¶ 37; D:19 Ex. 13; App. 541. M:49 Ex. 79, Ex. 98.

[175] D:20 ¶ 33; D:19, Ex. 9; App. 540.

[176] *See* campaign finance reports [redacted]

ARGUMENT

I. INTRODUCTION

These matters before the court concern an investigation which was halted in its early stages by Judge Gregory A. Peterson. It is based on a reason to believe that [redacted] acting through [redacted] and [redacted] interacted with certain campaign committees such that the nature of the interaction gave rise – on the part of the campaign committees – to a duty to report the financial support they directly or indirectly received from [redacted] on campaign finance reports as contributions.

It is also based on a reason to believe that certain express advocacy groups, *viz.* [redacted], acted contrary to "voluntary oath" sworn statements indicating they acted independently of campaign committees. This aspect of the investigation is described in the brief at Section XVII beginning at page 256. There is no real legal dispute that express advocacy by a so-called Voluntary Oath committee under Wis. Stat. § 11.06(7) violates ch. 11 in a manner that is beyond constitutional debate.

With respect to [redacted] however, issues of constitutional dimension have been raised by the Movants. The evidence developed thus far relates in large part to the relationship of [redacted] and [redacted] Evidence concerning the interaction between [redacted] and the [redacted] candidate committees is less developed.

Because [redacted] and [redacted] shared principals who acted at the same time on each other's behalf, where these principals functioned at control levels in each organization, there is reason to believe that the financial expenditures made by [redacted] were – in effect – financial transactions executed by [redacted] itself. As such, these were campaign related transactions required to be reported by [redacted] as contributions. The intentional failure to disclose such contributions is a violation of Wisconsin criminal law. *See* Wis. Stat. §§ 11.27 and 11.61(1)(b).

The key question relating to this aspect of the investigation is this: Was the interaction between [redacted] and [redacted] as it is known to this point, such that [redacted] received a "contribution" within the meaning of both First Amendment jurisprudence and Wisconsin law.

This leads directly to the question of whether Wisconsin law and the definition of "political purposes" can *ever* mean more than express

advocacy. It does. "Political purposes," includes all conduct "intending to influence the election." Since there is no question of fact here – at least at this stage of the investigation – that [redacted] did intend to influence Wisconsin elections with its expenditures, the issue becomes whether that standard, *i.e.*, the "influencing the election" standard, is consistent with First Amendment jurisprudence.

The answer is "yes." The "influencing the election" standard, when applied in the context of *contributions* versus expenditures, is entirely appropriate under the First Amendment, and the authority for this proposition is no less than the landmark case *Buckley v. Valeo,* 424 U.S. 1 (1976).

The Movants stake their arguments on an equation: "political purposes" equals "express advocacy." They want the court to "write-out" of the statute that portion that says "political purposes" means acts intending to influence the election "including but not limited to" express advocacy.

There is room for greater meaning for the phrase "influencing the election" than the Movants allow. *Buckley* provides that room where contributions (versus expenditures) are concerned, both under *Buckley* and under the Wisconsin Statutes, when a third party makes an expenditure

under one of at least three "levels" of circumstances. The first *Buckley* level, and the easiest to understand, is where the third party is controlled by a candidate committee [redacted]. Since all campaign related transactions are reportable by law, a transaction directed and controlled by a candidate committee certainly should be reported. The second *Buckley* "level" is where the candidate requests a third party to make an expenditure on its behalf. This too is easy to understand as a reportable transaction; the campaign committee achieves it goals by requesting a third party to do something. The third *Buckley* level is what *Buckley* describes as "coordinated" or "pre-arranged" interaction between the candidate committee and the third party.

But what of express advocacy? How are we to understand the series of Supreme Court decisions, beginning with *Buckley*, the case where the express advocacy rule originated, and going right on through to *Citizens United v. FEC*, 558 U.S. 310 (2010), each holding that limits placed on independent expenditures are unconstitutional?

By asking the question this way, we also answer it. The answer is that these decisions treat *expenditures* one way and contributions another. Moreover, *Buckley's* progeny deal for the most part with *independent* third

party expenditures. Limits on independent expenditures are disfavored. And the loss of independence is a real game-changer. Lose independence and you are considered to be making expenditures that, for *Buckley* purposes, are treated as contributions.

And for *Buckley* purposes, contributions are "by definition" campaign related and "influence the election." Put another way, if a third party's expenditures are really "contributions" under *Buckley*, they meet the definition of "political purposes" under Wisconsin law.

Can this ever be true for expenditures that are for non-express advocacy advertisements like the ones sanctioned by *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*")? The answer again is "yes," in some circumstances. First, *Buckley* applied its express advocacy rule on independent expenditures; that statutory construction was *not* applied to contributions. There is no constitutional bar to treating an issue ad as a contribution, provided the relationship between the third party and the campaign committee is *not* one of independence. Secondly, where the candidate committee controls the third party, there is no difference between the campaign making the expenditure itself and the third party making the expenditure. The words used in the advertisement should not be the tie-

breaker; few if any campaign funded ads use the express advocacy words anymore. Note, however, under the Movants view, if two identical ads were run, one by the campaign and one by a third party controlled by the campaign, neither of which used express advocacy terms, one (*e.g.*, the [redacted] ad) would be reportable but the other (*e.g.*, the [redacted] ad) would not be reportable. And the only difference would be the last words of the advertisement, "Paid for by [redacted] versus "Paid for by [redacted]." That hardly makes sense. Third, where less than control is involved or when a request is not made, the standards of *FEC v. The Christian Coalition,* 52 F.Supp.2d 45 (D.D.C. 1999) apply. So-called "expressive coordinated expenditures" are reportable by the campaign committee as contributions.

Ch. 11 is phrased in terms which are not improperly vague. Again, *Buckley* itself provides the authority supporting the Special Prosecutor's position on matters of vagueness. Likewise, existing Seventh Circuit precedent supports the conclusion that ch. 11 gives adequate notice to the public as to the conduct subject to regulation.

II. THERE IS NO IMMUTABLE EQUATION BETWEEN "POLITICAL PURPOSES" AND "EXPRESS ADVOCACY" UNDER WISCONSIN LAW OR THE JURISPRUDENCE OF THE FIRST AMENDMENT. (ISSUE 7)

This investigation primarily seeks to determine whether "contributions" within the meaning of Wisconsin law were made to candidates by [redacted] contributions that were never disclosed to the public by the candidate committees on campaign finance reports. These contributions would be required to be disclosed if [redacted] meets the definition of a subcommittee of a "personal campaign committee" under Wis. Stat. § 11.01(15). Similarly, they would have to be disclosed if they met the requirements of § 11.06(4)(d) requiring disclosure of disbursements made by a third party under the direction or control, or with the authorization of, or "otherwise by prearrangement" with the candidate committee or the candidate committee's agent. While these first two categories (control and authorization) might also be considered coordinated expenditures, it is perhaps conceptually clearer to think of the "prearrangement" category as what the Movants have referred to as "coordination." In this "prearrangement" category, disclosures must be made if – under Wisconsin law – [redacted] made these expenditures under circumstances that Wisconsin law considers as

"expressive coordinated expenditures." That is if they functioned as joint venturers or partners.

A central theme of the Movants' arguments is that ch. 11 does not embrace anything but express advocacy, and that to extend it to matters beyond express advocacy violates their First Amendment rights. The Special Prosecutor disputes both of these assertions. The terms of Wisconsin law regulate more than express advocacy; they regulate disbursements of any kind that are made for political purposes, *i.e*, made for the purpose of influencing an election. The core issue in these proceedings is whether such regulation is allowed by the First Amendment, not whether the Wisconsin Statutes embrace such activity. As an initial matter, however, the scope of Wisconsin law must be addressed; if the terms of Wisconsin law do not reach the conduct in question, there is no issue of constitutional dimension.

A. Ch. 11 regulates contributions, including In-Kind Contributions, for "political purposes," and such contributions, unless barred by First Amendment considerations, extend to expenditures made for Issue Advocacy.

Wis. Stat. § 11.10(4) defines the relationship between third party organizations that act in concert with a candidate committee and directs that such entities have a status as a "subcommittee." This statute makes clear

that the candidate committee has a reporting obligation. *See* Wis. Stat. § 11.06(1). Wis. Stat. § 11.10(4), addressing "subcommittees," provides in part:

> No candidate may establish more than one personal campaign committee.... Any committee which is organized or acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate is deemed a subcommittee of the candidate's personal campaign committee.

The phrase "subcommittee of the candidate's personal campaign committee" is further supplemented by the definition of "personal campaign committee" at Wis. Stat. § 11.01(15). A "personal campaign committee" means an entity:

> which is formed or operating for the purpose of influencing the election or reelection of a candidate, which acts with the cooperation of or upon consultation with the candidate or the candidate's agent or which is operating in concert with or pursuant to the authorization, request or suggestion of the candidate or the candidate's agent.

The statute states that the third party entity must be a committee. In this context, [redacted] is that "committee." This is a term that broadly encompasses corporate entities and natural persons who make contributions or disbursements for political purposes; "committee" does not carry any connotation the word might have in common parlance. Wis. Stat. § 11.01(4) provides:

> "Committee" or "political committee" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political . . . .

A *person*,[177] including a 501(c) corporation, is a "committee" under Wisconsin statutes, if engaged in making or accepting contributions or making disbursements, whether or not engaged in activities which are exclusively political. Wis. Stat. § 11.01(4).

Wisconsin law prohibits a corporation from making a contribution to a candidate committee. [redacted] is a corporation. Wis. Stat. § 11.38(1)(a)1 provides:

> No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

Contributions and disbursements must be reported under ch. 11. Wis. Stat. § 11.06(1) requires every candidate committee to "make full reports . . . of all contributions received, contributions or disbursements made, and obligations incurred."

[177] A "person" includes a limited liability company and a corporation. Wis. Stats. §§ 11.01(6L) and 990.01(26).

And, as the Movants repeat many times in their briefs, these definitions themselves turn on the definition of "contributions" and "disbursements." At Wis. Stat. § 11.01(6)(a)1, the definition of "contribution" includes:

> A gift, subscription, loan, advance, or deposit of money or *anything of value*, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, *made for political purposes.*

(Emphasis added.) "Disbursement" is defined at Wis. Stat. § 11.01(7)(a)1 as including:

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

(Emphasis added.)

To continue the statutory analysis, the definitions of "contributions" and "disbursements" depend on the definition of "political purposes." Wis. Stat. § 11.01(16) defines "political purposes" as:

> An act is for "political purposes" *when it is done for the purpose of influencing the election* or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office . . . .
>
> . . .
>
> (a) Acts which are for, "political purposes" *include but are not limited* to:
>
> 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum...

(Emphasis added.) The meaning of "influencing the election," in the context of First Amendment jurisprudence, will be critical to this case, as discussed below. Notably, the "including but not limited to language" language underscored above is language the Movants wish the Court to "write out" of the statute, rather than construe it in the context of the facts presented here. In their view, there is an immutable and insurmountable equation between "express advocacy" and "influencing the election/political purposes," yet this is not what the statute says. To be sure, they claim any other reading is unconstitutional under *Buckley* and a subsequent line of cases. However, this definition was enacted in by the Wisconsin Legislature in 1980; it represented the direct legislative response to the landmark campaign finance decision in *Buckley v. Valeo,* 424 U.S. 1 (1976). It is important to keep in mind that the basic "influencing an election" language adopted by the legislature in 1980 (and the language that remains in effect today in both the state and federal statutes[178]), was taken from the definitions of the Federal Election Campaign Act (FECA) that *Buckley* addressed and – as applied to "contributions" (versus expenditures) – was found to be constitutional requiring no narrowing construction. The

[178] 2 U.S.C. § 431(8)(A)(i) (defining contribution to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election* for Federal office").

Wisconsin Attorney General's August 1976 opinion of the effect of *Buckley* on then existing Wisconsin law does not change this.[179]

Wisconsin law is straight-forward in its requirement that disbursements made under the direction or control of the candidate committee must be reportable by the candidate committee. Wis. Stat. § 11.06(4)(d) requires:

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

In the context of these proceedings, there is no doubt that [redacted] acted, as a matter of fact, for the purpose of "influencing an election."[180]

The point to be made is this: unless there is some constitutionally based reason to apply a narrowing (*i.e.*, express advocacy) construction to Wis. Stat. § 11.01(16), the conduct under investigation was "for the purpose of influencing the election," [redacted].[181] Put another way, unless First Amendment jurisprudence requires otherwise, [redacted] expenditures of [redacted] funds are subject to regulation under ch. 11. And nothing in the language of ch. 11 suggests

---

[179] *See* discussion *supra* at 115-20; Opinion No. OAG 55-76. App. 63-71.
[180] *See* Section J of the Statement of Facts.
[181] *Id.*

that conduct designed to "influence the election" can *never* be subject to regulation, even if it takes the form of Issue Advocacy. Subject to discussion of constitutional issues, *if* a candidate committee *controlled* another entity [redacted] which made expenditures "for the purpose of influencing the election," under the plain, non-narrowed terms of the statutes reviewed above, the candidate committee would have a disclosure requirement. Likewise, even if the candidate committee did not control [redacted] if the candidate committee either authorized or requested [redacted] to make the expenditure, the candidate committee had a reporting requirement. Finally, if the candidate committee functioned as a partner of or joint venturer with [redacted] then under Wisconsin law as interpreted and implemented by the GAB in El. Bd. Op. 2000-02, expenditures give rise to a reporting requirement.

B. Both ch. 11 and GAB regulations regulate contributions in the form of services, such as services in the form of advertising, paid for by a third party which are authorized by the candidate committee and such In-Kind contributions must be reported on campaign finance reports.

It is a common and well-accepted requirement that any "thing" of value provided to the candidate's campaign committee be reported as a contribution. Contributions under Wis. Stat. § 11.01(6) includes services,

in some instances, provided that the individual providing the service is compensated. Wis. Stat. § 11.01(6)(b)1 provides:

> "Contribution" does *not* include any of the following:
>
> Services for a political purpose by an individual on behalf of a registrant under s. 11.05 who is *not* compensated specifically for the services.

(Emphasis added.) Phrased in positive terms, "contribution" includes services performed by an individual who is compensated by a third party for providing a service for a political purpose.

For example, if "Mr. Smith" reports to campaign headquarters and makes Get-Out-The-Vote calls to potential voters, the value of his time in providing his services is *not* a contribution. However, if "Mr. Jones" pays Mr. Smith to go to the headquarters to make these calls, then Mr. Jones' payment for that service is a contribution to the campaign.

Likewise, disbursements include disbursements for services. A disbursement includes any purchase or any "thing" of value made for political purposes. Wis. Stat. § 11.01(7)(a)1.

An In-Kind contribution is defined at GAB § 1.20(1)(e) to "mean[ ] a *disbursement by a contributor* to procure a thing of value or *service* for the benefit of a *registrant [i.e., the campaign committee] who authorized the disbursement.*" (Emphasis added.) Rather than cash, the contributor, Mr.

Jones, provides some "thing" of value, *i.e.*, the services of Mr. Smith, with the authorization and consent of the candidate committee. This of course is consistent with both Wis. Stat. §§ 11.01(6) and 11.01(7), defining contribution and disbursement as the provision of any "thing" of value, including services. And, of course, administrative rules like GAB § 1.20(1)(e) are given the effect of law and subject to the same principles of construction as statutes. *See Law Enforcement Stds. Bd. v. Village of Lyndon Station*, 101 Wis.2d 472, 489, 305 N.W.2d 89 (Wis. 1981).

In the context of these proceedings,

Put another way, these expenditures are standard In-Kind contributions under Wisconsin law. Absent some extraordinary considerations, these services are reportable as In-Kind Contributions by

The foregoing statutes and regulations, on their own, make the payment for services provided by third parties in the form of advertisements reportable as In-Kind contributions. So it is true, as the Movants point out, that nowhere in ch. 11 does the word "coordination" occur. It does not have to; if a third party pays for services for the benefit of the campaign committee with the authorization and consent of the candidate committee, such a payment is an In-Kind contribution to the campaign committee.

And notice that it is precisely the authorization and consent of the candidate committee that makes the payments reportable. Take away that and we have an independent, constitutionally protected expenditure.

But Wisconsin law goes further than control, request and authorization, and it relates to the specific issue of what has been described as "expressive coordinated expenditures."[182] To the extent this investigation involves Issue Advocacy, Wisconsin law relating to "expressive coordinated expenditures" is directly relevant to these proceedings.

[182] *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 85 (D.D.C. 1999) ("An example of such an expenditure would be for a television advertisement favorably profiling a candidate's stand on certain issues which is paid for and written by the contributor, in which the advertisement does "express the underlying basis for his support," and does discuss candidates and issues, but for which the expenditure is done in coordination with, or with the authorization of, the candidate.")

Under Wisconsin law, as interpreted and implemented by the GAB, not every disbursement made after a casual conversation with a candidate gives rise to a reportable In-Kind Contribution. Certain conduct, the conduct of "coordination," or if you will prearrangement, must occur between a candidate committee and a third party before the disbursement is treated as an In-Kind contribution and must be disclosed as such. The State Elections Board ("SEB"), now the GAB, originally issued its Opinion El. Bd. Op. 2000-02 on June 21, 2000. This opinion was specifically reaffirmed by the GAB on March 26, 2008, acting pursuant to 2007 Wisconsin Act 1. (Sep. App. 120.) In fact, Judge William Eich, the author of *Wisconsin Coalition for Voter Participation v. State Elections Board*, 231 Wis.2d 670 (Ct. App. 1999), served on the Government Accountability Board in 2008 and was the Judge who moved the reaffirmation of El. Bd. Op. 2000-02.

Contrary to the assertion of Movants ([redacted] at 62), formal opinions of the GAB have the full force and effect of law. Wis. Stat. § 5.05(6a) provides:

> No person acting in good faith upon an advisory opinion issued by the board is subject to criminal or civil prosecution for so acting, if the material facts are as stated in the opinion request. *To have legal force and effect*, each advisory opinion issued by the board must be supported by specific legal authority under a statute or other law, or by specific case or common law authority.

(Emphasis added.) Indeed, elsewhere in their briefing, Movants acknowledge that the GAB has full authority to implement and interpret the election laws. ([redacted] at 45, n.23)

In El. Bd. Op. 2000-02, the Wisconsin Right to Life organization asked certain questions of the SEB related precisely to matters of Issue Advocacy. As described by the SEB,

> WRL has raised three issues for the Board's consideration and discussion: . . . 2) with respect to a communication that would otherwise be unregulated, what kind of "contacts" between officers or agents of WRL 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 . . . .

Of the three overall issues, Issue 2 is relevant here, asking what "contacts" between the organization and the campaign benefitting from their Issue Advocacy would constitute "coordination" such that otherwise unregulated expenditures would become reportable. In discussing this issue, the SEB began by noting that *Buckley* struck down limits on certain independent expenditures, and contrasted this with restrictions on contributions which *Buckley* in fact upheld because of the potential for *quid pro quo* corruption.

Although Wisconsin Right to Life was a non-registrant for purposes of the opinion (*see* El. Bd. Op. 2000-02, at 2), and was not making disbursements advocating for the election or defeat of a candidate (*i.e.*,

Right to Life published issue advocacy and was not an Independent Oath committee engaging in express advocacy under Wis. Stat. § 11.06(7)), the SEB nevertheless referenced Wis. Stat. § 11.06(7). That section requires an entity to file an oath, provided it was making independent disbursements "used to advocate the election or defeat of any clearly identified candidate". The oath affirms that the organization did not consult, cooperate or act in concert with candidates or their committees. The SEB construed that section, to the extent that it can be read as an outright ban on any kind of contact, consultation or cooperation, to allow "[s]ome level of contact between a candidate and a committee making expenditures." El. Bd. Op. 2000-02, at 10. The SEB referenced GAB § 1.42 at page 11 of its opinion. At the time of this opinion (as is still the case), GAB § 1.42(6) provided:

> GUIDELINES. (a) Any expenditure made on behalf of a candidate will be presumed to be made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed and treated as an in-kind contribution if:
>
> 1. It is made as a result of a decision in which any of the following persons take part:
>
> a. A person who is authorized to raise funds for, to spend the campaign funds of or to incur obligations for the candidate's personal campaign committee;
>
> b. An officer of the candidate's personal campaign committee;

> c. A campaign worker who is reimbursed for expenses or compensated for work by the candidate's personal campaign committee;
>
> d. A volunteer who is operating in a position within a campaign organization that would make the person aware of campaign needs and useful expenditures;

Put another way, the GAB reasonably reads the standards of Wis. Stat. § 11.06(7) and GAB § 1.42 to have application in the analysis of relationships between candidate committees and third party entities on questions of "independence." This statute, applying as it does to express advocacy groups [redacted] nevertheless addresses "what it takes" to render a Voluntary Oath committee to be "other than independent." This is not an unreasonable means of interpreting what may or may not constitute "independence" when it comes to non-express advocacy entities [redacted]

In its opinion the SEB discussed the precedents in *FEC v. The Christian Coalition,* 52 F.Supp.2d 45 (D.D.C. 1999), as well as *Wisconsin Coalition for Voter Participation v. SEB*, 231 Wis.2d 670, 605 N.W. 2d 654 (Wis. Ct. App. 1999) ("*WCVP*").

With respect to *WCVP*, the SEB noted the holding that "independent expenditures that do not constitute express advocacy of a candidate are not subject to regulation, [but] ... contributions to a candidate's campaign must

be reported whether or not they constitute express advocacy." El. Bd. Op. 2000-02, at 11 The SEB also noted from *WCVP*:

> *[T]he term "political purposes" is not restricted by the cases, the statutes or the code, to acts of express advocacy. It encompasses many acts undertaken to influence a candidate's election* -- including making contributions to an election campaign. ...(at 8)
>
> Under Wis. Adm. Code s.ElBd 1.42(2), a voluntary committee such as the coalition is prohibited from making expenditures in support of, or opposition to, a candidate if those expenditures are made "in cooperation or consultation with any candidate or ... committee of a candidate ... and in concert with, or at the request or suggestion of, any candidate or ... committee ..." and are not reported as a contribution to the candidate. These provisions are consistent with the federal campaign finance laws approved by the Supreme Court in *Buckley* -- laws which, like our own, treat expenditures that are "coordinated" with, or made "in cooperation with or with the consent of a candidate ... or an authorized committee" as campaign contributions. (at 8-9)

El. Bd. Op. 2000-02, at 11 (emphasis added).

After discussing Wis. Stat. § 11.06(7), GAB § 1.42, *WCVP* and *Christian Coalition* (discussed in this brief in Section VIII), the SEB wrote that expenditures by an organization like Right to Life for advertisements that do not expressly advocate the election or defeat of a candidate may be subjected to campaign finance regulation if two elements are present: (1) the advertisment must be made for the purpose of influencing voting at a specific candidate's election and (2), the advertisement expenditure must

be coordinated with the candidate committee.[183] The standard for coordination was then discussed based on *Christian Coalition*, the case defining the concept of "expressive coordinated expenditure":

> [P]utting the standard established in *Christian Coalition* together with Wisconsin's statutory language one derives a standard as follows: coordination is sufficient to treat a communication (or the expenditure for it) as a contribution if:
>
> The communication is made at the request or suggestion of the campaign (i.e., the candidate or agents of the candidate); or, in the absence of a request or suggestion from the campaign, if the cooperation, consultation or coordination between the two is such that the candidate or his/her 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 (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

El. Bd. Op. 2000-02, at 12. Thus, the announced standard for a "coordinated expenditure," an expenditure which must be reported as a contribution, is one that first must influence voting for a specific candidate's election and second, must be either (a), requested by the candidate or the candidate's agent, or (b), result from substantial interaction measured by a four-pronged test (noted in the quote above) such that the

[183] The exact language is "(2) the speech (and or the expenditure for it?) is coordinated with the candidate or his/her campaign."

candidate (or his/her agents) emerge as "partners" or "joint venturers" with the spender.

C. *WCVP* is a valid interpretation of Wisconsin statutory law holding that expenditures for Issue Ads may, under certain circumstances, be considered as contributions to a candidate committee

In *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Bd.*, 231 Wis.2d 670, 605 N.W.2d 654 (Ct. App. 1999) ("*WCVP*"), the Wisconsin Court of Appeals concluded that conduct – substantially identical to the subject of this investigation (while lesser in scope) – could be a proper subject of investigation under Wisconsin's campaign finance law.

The facts in *WCVP* were undisputed. According to the decision,

> Shortly before the election on April 1 of that year, the Coalition, apparently having raised funds for that purpose, printed and mailed the cards to approximately 354,000 Wisconsin residents. The cards encouraged the recipients to vote in the supreme court election and then stated:
>
> > Your choices for the Supreme Court are:
> >
> > • Jon Wilcox: 5 years experience on the Wisconsin Supreme Court; 17 years as a judge.
> >
> > • Walt Kelly: 25 years as a trial lawyer; ACLU special recognition award recipient.
> >
> > Let your voice be heard! These issues are too important to ignore. Your vote is critical. Please remember to vote next Tuesday, April 1st.

231 Wis. 2d at 675.

The Wisconsin Coalition for Voter Participation (the "Coalition") sued the SEB seeking to enjoin the SEB from investigating connections between the Coalition and the campaign committee for Justice Wilcox. 231 Wis.2d at 674. Relying on *Buckley*, the WCVP argued, as the Movants in this proceeding, that its "speech" was protected by the First Amendment and could not be regulated unless it constituted "express advocacy" on behalf of a particular candidate. 231 Wis.2d at 676-77.

The circuit court rejected the First Amendment argument and the court of appeals affirmed. The court of appeals recognized that under *Buckley* "*independent* expenditures that do not constitute express advocacy of a candidate are not subject to regulation. . . ."(emphasis added.) Recognizing that limitations on contributions under *Buckley* – rather than expenditures – are constitutionally permissible, the court wrote that neither "*Buckley* nor § 11.04 limit the state's authority to regulate or restrict campaign contributions." 231 Wis.2d at 679. This statement is understood as meaning that – unlike expenditures – no narrowing construction was placed by either the *Buckley* court, or § 11.04 on restrictions relating to contributions. The court of appeals identified the issue to be whether or not

the mailing of the postcards constituted a "contribution" under ch. 11. *Id.* In turn, it examined § 11.01(6)(a) and observed that a contribution can be "anything of value" made for political purposes. 231 Wis.2d at 680. In its next step of analysis, the court quoted Wis. Stat. § 11.01(16), the definition of political purposes, referring to the non-narrowed definition of political purposes, *i.e.*, acts done for the purpose of influencing an election. *Id.* Noting that an In-Kind contribution is a "disbursement by a contributor to procure a thing of value or service for the benefit of a [candidate or committee] who authorized the disbursement," the court reasoned that the definition of a politically purposed contribution is not limited to acts of express advocacy. Stated another way, an expenditure made for the benefit of the candidate and with the candidate's consent – even if it involved an expenditure for non-express advocacy – would qualify under ch. 11 and the GAB regulations as a "contribution." Rejecting, as it were, the Movants' argument that Wis. Stat. § 11.01(16), defining "political purposes," is restricted to express advocacy. The court wrote:

> Contrary to plaintiffs' assertions, then, the term "political purposes" is not restricted by the cases, the statutes or the code to acts of express advocacy. It encompasses many acts undertaken to influence a candidate's election—including making contributions to an election campaign. And, political contributions may be made "in kind" as well as in cash. Wisconsin Adm. Code §ElBd 1.20(1)(e) defines an in-kind contribution as a "disbursement by a contributor to procure a thing of

> value or service for the benefit of a [candidate or committee] who authorized the disbursement." And the code requires campaign organizations to report the receipt of in-kind contributions, just as they are required to report cash contributions.

231 Wis.2d at 680.

Not surprisingly, the Movants are highly critical of the decision in *WCVP*. It represents precedent that construes Wisconsin law under *Buckley* and holds an expenditure for a thing of value – including an expenditure for an Issue Advocacy publication – made with the authorization and consent of the candidate can be "for political purposes" as an act done for the purpose of "influencing the election." Discussed in greater detail below, treating a disbursement made with the consent and cooperation of the candidate as a reportable contribution under ch. 11 is entirely consistent with *Buckley*. Indeed, it is *endorsed* by *Buckley*.

The main criticism the Movants direct at *WCVP* is found in Unnamed Movant No. 2's brief at pages 28-32. The criticism first appears to be centered on the fact that the Coalition was a voluntary oath committee subject to the terms and conditions of GAB § 1.42,[186] including the requirement that WCVP file an oath. The Movants argue ([redacted] at 29) that WCVP's status as a "voluntary committee" under §1.42 distinguishes that

[186] *See supra* at 88-89

decision from the facts of this investigation, at least to the extent this investigation involves expenditures for Issue Advocacy.

While it is true that the court of appeals did discuss GAB § 1.42(2) and describes the Coalition as a voluntary committee, such comments were not essential to any analysis of Wisconsin law as it related to the definitions of "contribution," "In-Kind contribution" and "political purpose." Having: (1) concluded that GAB 1.20(1)(e) includes an expenditure for a thing of value other than cash made with the authorization and consent of the candidate (as *WCVP* did *before* the discussion of GAB § 1.42(2)); (2) that such a candidate-authorized expenditure was reportable as an In-Kind contribution (again, as *WCVP* did *before* the discussion of GAB § 1.42(2)); and (3) that issue advocacy publications purchased with expenditures authorized by, and consented to by, the candidate may be considered contributions as acts done for the purpose of influencing the election under *Buckley* (again, as *WCVP* did *before* the discussion of GAB § 1.42(2)), the court's analysis stands on its own on these three premises to support its conclusion that an investigation was warranted. The discussion of GAB § 1.42 and the status of the Coalition as a voluntary committee was unnecessary to the holding. It is also reasonable to respectfully question the relevance of that GAB

§ 1.42 discussion, given the fact that the regulation, as well as Wis. Stat. § 11.06(7), is understood as a regulation applying only to express advocacy entities, which the Coalition was not.

The Movants use terms such as "circle of references," "figure-eights," and "cycles of self-reference" to derogate the reasoning in Judge Eich's opinion. ([redacted] 30-31) They imply – inaccurately – that Judge Eich had a sufficient basis for the Court's holding under Wis. Stat. § 11.01(6)(a)(2) because, under that statute, the transfer of personalty (*i.e.,* 354,000 postcards) is a "contribution." They point out the transfer of personalty is not encumbered by the phrase "for political purposes" and therefore (in their view) it need not be tied to express advocacy. The Movants contend Judge Eich should have limited his decision on that basis, relying on the "personalty" provisions at §11.01(6)(a)(2) which were "clearly applicable." ([redacted] at 30) This argument is based on a misreading of the *WCVP* decision. As recounted above, the facts involved the Coalition printing and mailing the flyers in the days before the election. Even though at the end of the *WCVP* opinion, a hypothetical situation is discussed involving a transfer of 354,000 blank postcards to the Wilcox campaign, the Coalition did not actually give the Wilcox campaign 354,000 blank

postcards for its use. There was no transfer of personal property between the Wilcox campaign and the Coalition. Wis. Stat. § 11.01(6)(a)(2) was not "clearly applicable."

The Movants have convinced themselves of the equation between "political purpose" and "express advocacy." That leads them to claim ([redacted] at 32) that there can only be two types of "contributions:" (1) coordinated express advocacy; and (2) a transfer of personalty which under Wis. Stat. § 11.01(6)(a)(2) is unencumbered, they argue, by the "political purposes" qualifier. Somewhat inexplicably, because nowhere does *WCVP* adopt these two categories, the Movants conclude that, because the Special Prosecutor does not rest his theory upon either category, *WCVP* cannot sustain the Special Prosecutor's theory as to the criminal liability of [redacted] To the contrary, *WCVP* stands for the proposition that an expenditure made with the authorization and consent of the candidate may be understood as an In-Kind contribution under ch. 11, and this is so whether or not the expenditure was related to Issue Advocacy.

The Movants next suggest ([redacted] at 32) that *WCVP* can be read to hold that the "very act of coordination creates the 'political purpose' . . . that makes the advocacy a 'contribution'. . . ." (*Id.*) This assertion has no

basis in the text of the *WCVP* opinion. Noted above, the opinion holds that an expenditure for a thing of value other than cash, made with the authorization and consent of the candidate, may be made for political purposes, *i.e.*, for the purpose of influencing the election and this is true whether or not the expenditure is for issue advocacy publications like that published by the Coalition.

The Movants close by claiming that the GAB recently passed a resolution stating that ch. 11 is "convoluted," in an apparent attempt to support their imagery of "figure-eights" and "circles of self-reference." (*Id.*). The GAB passed no such resolution.[187]

[187] *See* note 29.

III. FIRST AMENDMENT JURISPRUDENCE, UNMODIFIED SINCE *BUCKLEY*, PERMITS THE REGULATION OF THIRD PARTY EXPENDITURES MADE AT THE DIRECTION AND CONTROL OF THE CANDIDATE COMMITTEE OR WITH THE AUTHORIZATION AND CONSENT OF THE CANDIDATE COMMITTEE OR OTHERWISE BY "PREARRANGEMENT" WITH THE CANDIDATE COMMITTEE; SUCH EXPENDITURES ARE REPORTABLE CONTRIBUTIONS, NOT EXPENDITURES, CONSTRUED IN *BUCKLEY* AS "INFLUENCING THE ELECTION" BECAUSE, BY DEFINITION, THEY ARE CAMPAIGN RELATED.

A. First Amendment Standard of Review

Movants generally contend that the court should be guided by the standard of strict scrutiny in its analysis of First Amendment issues before it. They do not discuss the fact that different standards apply to different types of campaign finance regulation, but this is in fact the case. To be sure, *independent* expenditures by a third party entity are entitled to strict scrutiny, but this is not what this investigation concerns. Because of the nature of the conduct between the candidate committee and [redacted] this investigation explores whether [redacted] expenditures (for what they describe as issue ads) are properly treated as contributions under First Amendment jurisprudence.

It is appropriate, as a threshold matter, to address the various standards of review applicable to various types of campaign finance regulation.

Different types of campaign finance regulation give rise to different levels of review. We deal in this investigation with contribution and disclosure regulations, not the regulation of independent expenditures.

By virtue of established precedent, the standard of review under the First Amendment for campaign finance laws is based on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. *See*, e.g., *Federal Election Commission v. Beaumont*, 539 U.S. 146, 161-62 (2003) ("[T]he level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association."); *McConnell v. Federal Election Commission*, 540 U.S. 93, 134-40 (2003) overruled in part on other grounds, *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010). Since *Buckley*, the Court has distinguished between three different types of campaign finance regulations for purposes of judicial review: restrictions on expenditures; restrictions on contributions to candidates, party committees and political committees; and public disclosure requirements. *Buckley,* 424 U.S. at 19-23, 64-65.

First, restrictions on independent expenditures are deemed the most onerous campaign finance regulations and are consequently subject to strict scrutiny. *Buckley*, 424 U.S. at 44-45; *see also FEC v. Wisconsin Right To*

Life, Inc., 551 U.S. 449, 464-65 (2007) ("*WRTL*"). Laws burdening independent expenditures are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United*, 558 U.S. at 312 quoting *WRTL*, 551 U.S. at 464. Laws limiting independent expenditures "usually flunk." *Barland II*, 751 F.3d at 811. As noted throughout this brief, we are not dealing with truly independent expenditures here; we are dealing with non-independent expenditures.

At the second level, in contrast to limitations on truly independent expenditures, there are standards applicable to limits on contributions. These limitations are considered less burdensome of speech, and are constitutionally "valid" if they "satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136 quoting *Beaumont*, 539 U.S. at 162 (internal quotation marks omitted). Contribution limits were most recently discussed in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). The McCutcheon Court wrote:

> [*Buckley*] concluded that contribution limits impose a lesser restraint on political speech because they "permit[ ] the symbolic expression of support evidenced by a contribution but do[ ] not in any way infringe the contributor's freedom to discuss candidates and issues." As a result, the Court focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still "rigorous standard of review." Under that standard, "[e]ven a ' "significant interference" with

> protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."
>
> The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. As for the "closely drawn" component, Buckley concluded that the $1,000 base limit "focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources."

Id. at 1444-45 (citations omitted).

The third and lowest standard relates to disclosure requirements. Disclosure requirements, the requirements at the heart of this investigation, are the "least restrictive" campaign finance regulations, and are subject only to "exacting scrutiny." *Buckley*, 424 U.S. at 64, 96. This standard was affirmed in *Citizens United:*

> Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking . . . ." The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.
>
> In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. There was evidence in the record that independent groups were running election-related advertisements " 'while hiding behind dubious and misleading names.' " The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens " 'make informed choices in the political marketplace.' "

558 U.S. at 366-67 (citations omitted). As the Seventh Circuit has characterized it, "the Supreme Court has consistently distinguished between laws that restrict the amount of money a person or group can spend on political communication and laws that *simply require disclosure of information* by those who spend substantial sums on political speech affecting elections." *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012) (emphasis added).

B. *Buckley* applied the narrowing construction of Express Advocacy to expenditures and *Buckley* does not require that narrowing statutory construction be applied to §11.01(6) "contributions," which "by definition" are always campaign related and are always done "for the purpose of influencing the election."

At the core of the issues in these proceedings is whether Wis. Stat. § 11.01(16) is unconstitutionally vague under the First Amendment. The Movants claim it is; saying that a narrowing, saving construction must be applied under *Buckley* to the term "contribution" limiting it to express advocacy. In fact, *Buckley* did not apply a narrowing construction to the term "contribution" under FECA, and the FECA definition is substantially identical to Wis. Stat. § 11.01(16) and its "influencing the election" definition. Indeed, such a narrowing construction is not mandated by the First Amendment. *Christian Coalition*, 52 F. Supp. 2d at 87 ("[T]he

'express advocacy' standard is not constitutionally required for statutory provisions limiting contributions."); *see also Wisconsin Right to Life v. Barland,* 664 F.3d 139, 153 (7th Cir. 2011), quoting *FEC v. National Conservative PAC*, 470 U.S. 480, 497(1985) ("As we have explained, there is a 'fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.'") *Cf. Barland II,* 751 F.3d at 811 (*Buckley* "drew a distinction between restrictions on expenditures for election-related speech and restrictions on contributions to candidates.")

Indeed, the text accompanying the now-famous "magic" words at footnote 52 is cast in terms of *expenditures*, not contributions. The exact text of the Express Advocacy Rule from *Buckley* is "We agree that in order to preserve the provision against invalidation on vagueness grounds, s. 608(e)(1) must be construed to apply *only to expenditures* for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. *Buckley* concluded "that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's

campaign and money contributed to the candidate to be spent on his campaign." *National Conservative PAC*, 470 U.S. at 497.

In *Buckley*, the Supreme Court considered a broadly based challenge to the Federal Election Campaign Act of 1971 (FECA). The Court began with a discussion of the contribution limits imposed under FECA, requiring that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000." 424 U.S. at 23. As noted by the Court, FECA defined "[t]he limitation [as] a gift, subscription, loan, advance, deposit of anything of value, or promise to give a contribution, made for the purpose of influencing a primary election, a Presidential preference primary, or a general election for any federal office. *Id.* citing 18 U.S.C. § 591(e)(1), 18 U.S.C. § 591(e)(2).[188] This is

[188] The actual text of the statute is included in the *Buckley* appendix, 424 U.S. at 181-82 and provides:

> (e) "contribution"
> (1) means a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, which shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or guarantors), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

substantially identical to the "influencing the election" language found at Wis. Stat. § 11.01(16).

The Court noted that the "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association." *Id.* at 24. Noting that neither the right to associate nor the right to participate in political activities is absolute, the Court then set the standard of review for contribution limits writing that "[e]ven a 'significant interference' with protected rights of political association may be sustained *if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.*" *Id.* at 25 (emphasis added). The Court then sustained the regulation of contributions as guarding against quid pro quo corruption or its appearance, writing:

> It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an

---

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;.

> effective candidacy. *To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.* Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.
>
> *Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.*

Id. at 26-27 (citations omitted)(emphasis added). The Court found that the Act's "contribution limitation focuses precisely on the problem of large campaign contributions[,] the narrow aspect of political association where the actuality and potential for corruption have been identified[,] while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* at 28.

Having sustained the regulation of contribution limits on these grounds, the Court ended the discussion of the constitutional permissibility of campaign contribution regulation. In other words, the Court reached its conclusion on contribution regulation without any limiting construction of the FECA statute.

The *Buckley* court went on to discuss limitations on expenditures. The Court began by noting that "[t]he Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech." *Id.* at 39. According to the court, it was "clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates." *Id.* The Court noted that the impact of this expenditure restriction was substantial.

> The plain effect of s 608(e)(1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than $1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper.

Id. at 39-40.

The standard of review for expenditure limits has been recently referred to as exacting scrutiny. "Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." *McCutcheon v. FEC,* 134 S. Ct. at 1444, citing *Sable Communications of California., Inc. v. FCC*, 492 U.S. 115, 126 (1989). In *Buckley's* analysis of whether the government's interest in expenditure limits met the exacting

scrutiny applicable to such limitations, the Court concluded that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify 18 U.S.C. § 608(e)(1)'s ceiling on *independent expenditures*." 424 U.S. at 45 (emphasis added).

To cure the broadly worded language of FECA's limits on expenditures, the court applied the "express advocacy" narrowing construction, which is the same construction that Movants now incorrectly urge the court to apply as well to contributions under ch. 11. The Court wrote:

> The key operative language of the provision limits "any expenditure . . . relative to a clearly identified candidate." Although "expenditure," "clearly identified," and "candidate" are defined in the Act, there is no definition clarifying what expenditures are "relative to" a candidate. The use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of s 608(e)(1) make sufficiently explicit the range of expenditures covered by the limitation. The section prohibits "any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures . . . advocating the election or defeat of such candidate, exceeds, $1,000." (Emphasis added.) This context clearly permits, if indeed it does not require, the phrase "relative to" a candidate to be read to mean "advocating the election or defeat of" a candidate.

424 U.S. at 41-42 (emphasis in original). The Court emphasized that this "expenditure" statutory construction stood in contrast to the Court's analysis of "contributions." "The discussion in Part I-A, supra, [relating to contribution limitations] explains why the Act's expenditure limitations

impose far greater restraints on the freedom of speech and association than do its contribution limitations" *Id.* at 44.

The *Buckley* decision leaves no doubt that the reference to "independent expenditures" in its analysis meant *truly* independent expenditures. In fact, it construed FECA to mean that coordinated expenditures were to be treated as contributions. Discussing whether candidate-controlled expenditures would be used to "end-run" the contribution limits regulations, the Court wrote:

> They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such *[candidate-] controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act*. Section 608(b)'s contribution ceilings rather than s 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, s 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such *independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.*

Id. at 46-47. (emphasis added.) At note 53 of the decision, the *Buckley* court writes that the treatment of controlled or coordinated expenditures as

contributions is based on § 608(e)(1)[189] which does not apply to expenditures "on behalf of a candidate" within the meaning of § 608(c)(2)(B).

The Movants note that the "legislative history" of the 1980 amendments to ch. 11 demonstrates that the changes were made to bring the law "into better conformity with recent federal court decisions, including *Buckley v. Valeo*, 424 U.S. 1 (1976)." ([redacted] at 30-31) The Movants note that the legislature adopted FECA's "influencing the election" language. ([redacted] at 31) The Special Prosecutor agrees with both of these propositions.

However, the Movants go on to claim that "the Legislature clearly meant the general language of Wis. Stat. § 11.01(16) 'parrot[ed]' from Buckley — "for the purpose of influencing" an election — to be construed narrowly, as the *Buckley* Court required, to communications which expressly advocate[] the election or defeat of a clearly identified candidate,' as codified in Wis. Stat. § 11.01(16)(a)(1)." ([redacted] at 32). In this regard, they are plain wrong and this is explained in detail in the paragraphs above. Discussed above, the *Buckley* Court did two things that are clearly and directly responsive to the Movant's argument: (1) *Buckley* applied the

[189] 2 U.S.C.§ 608.

narrowing express advocacy statutory construction to expenditures, not contributions; and (2) *Buckley* considered controlled or coordinated expenditures to be contributions, albeit disguised contributions.

In support of their position ([redacted] at 32), the Movants cite *Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999) ("*WMC*"). The Special Prosecutor is obliged to highlight just how narrow that citation was. While that case at note 26 does say that Wis. Stat. § 11.01(16) "parrot[s]" *Buckley, WMC* certainly is not authority for the proposition that *Buckley* created an equation between ch. 11 and express advocacy. Indeed, to the extent *WMC* contained discussions of *Buckley* principles, it was a discussion of expenditures, indeed *truly* independent expenditures, and not a discussion of contributions.

Movant's also claim that the post-*Buckley*, pre-1980 legislative amendment Attorney General Opinion in 1976, OAG 55-76, is authority for their claim that ch. 11 is limited to express advocacy. ([redacted] at 30) This is a dubious proposition, since it amounts to a claim that the Attorney General was commenting on a statute yet to be enacted as the language at issue here was not passed until 1980. Moreover, while it is in fact the case that the Attorney General made sweeping statements about campaign

finance regulation under ch. 11 as it existed when *Buckley* was decided in 1976,[190] he certainly was not addressing the sort of factual situation of candidate / third party interaction which this investigation presents and which is a highly specialized application of campaign finance law.

C. *Buckley* does not apply narrowing language to "contribution," defined under FECA in terms identical to existing §11.01(16) "influencing the election" language, because "by definition" contributions are always campaign related.

Contributions – including candidate controlled or prearranged expenditures – are treated differently from independent expenditures, which get a narrowing construction under FECA. This is because contributions (and disguised contributions in the form of controlled or prearranged expenditures) are "by definition" campaign related. As such, and without more, they are campaign-related and are within the legitimate scope and purpose of government regulation, or as *Buckley* puts it, they "have a

---

[190] As to the older, broader version of Wis. Stat. § 11.01(16), the Attorney General wrote:

> This section, along with the others cited above, evidences a legislative intent to restrict and regulate a broad scope of political activity, including that which may not be directly related to the electoral process. This sweeping effort to regulate protected First Amendment activity, in light of *Buckley*, may be constitutionally overbroad unless subject to narrow interpretation and application.

OAG 55-76, at 4.

sufficiently close relationship to the goals of the Act." This is explained in the *Buckley* opinion:

> In Part I we discussed what constituted a "contribution" for purposes of the contribution limitations set forth in 18 U.S.C. s 608(b) (1970 ed., Supp. IV). We construed that term to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but *also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.* The definition of "contribution" in s 431(e) for disclosure purposes parallels the definition in Title 18 almost word for word, and we construe the former provision as we have the latter. *So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.*

424 U.S. at 78 (emphasis added); *see also* 2 U.S.C. § 434(e),[191] defining "contribution" in a form substantially identical to the "influencing the election" language found at Wis. Stat. § 11.01(16). 2 U.S.C. § 434(e)[192] provided:

> (e) "*contribution*"
> (1) means a gift, subscription, loan, advance, or deposit of money or *anything of value made for the purpose of*
> (A) *influencing the . . . election,* of any person to Federal office . . . .

(Emphasis added.) Examining this statutory definition of "contribution" under the First Amendment, *Buckley* found that the regulation of coordinated expenditures as contributions was justified because they are connected to the candidate. Put another way, candidate activities are

[191] This section is now numbered 52 U.S.C. § 30101(8)(A).
[192] This section is now numbered 52 U.S.C. § 30101(8)(A).

always done for the purpose of "influencing the election" and the regulation of such contributions by the government in the form of contribution limitations is justified to prevent corruption or the appearance thereof.

This point was reinforced in the context of a discussion of disclosure of candidate expenditures, the Court wrote:

> To fulfill the purposes of the *Act they need only encompass organizations that are under the control of a candidate* or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. *They are, by definition, campaign related.*
>
> . . .
>
> *In summary*, s 434(e), as construed, imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or *authorized or requested by a candidate or his agent, to some person other than a candidate or political committee*, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 79-80 (emphasis added). Campaign contributions in the form of candidate committee controlled, approved or arranged expenditures are "by definition" campaign-related. They are done for the purpose of influencing the election. *See also Center for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012) (Political committees need only encompass organizations that are under the control of a candidate and expenditures of

"political committees" so construed can be assumed to fall under government regulation and are, by definition, campaign related.)

In the context of ch. 11, there is nothing constitutionally infirm about limiting contributions and requiring disclosure of contributions made with the knowledge, authorization or indeed, by virtue of the *control* of the candidate, under such provisions as Wis. Stat. §§ 11.06(4)(d), 11.06(1), 11.10(4) and 11.01(15). Related as they are to candidates and campaigns, these regulations are "by definition" campaign related and done for the purpose of influencing the election. They satisfy the legitimate goals of campaign finance regulation because they are intended to protect against *quid pro quo* corruption or the appearance thereof.

D. No federal court decision subsequent to *Buckley* applies the Express Advocacy narrowing construction to campaign contributions, including coordinated expenditures.

The starting point for this investigation is the premise that the candidate committees and [redacted] were anything but independent. This takes the investigation well outside the scope of any court decision that focuses on the need to protect the First Amendment rights of truly independent speakers. [redacted]

[redacted] [193] [194]

Buckley distinguishes between laws regulating independent expenditures and laws regulating contributions, which include coordinated expenditures. The Supreme Court has consistently recognized a legitimate interest in limiting contributions and coordinated expenditures on the basis of *quid pro quo* corruption or the appearance of such corruption.

In 2001, the Supreme Court decided the case of *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). That case involved a facial challenge to FECA's limitations on expenditures by a political party in connection with congressional campaigns. The court rejected the facial challenge. In so holding, the court wrote:

---

[193] *See* text accompanying notes 77 to 79.

[194] *See* text accompanying note 81 [redacted] ; *see also* text accompanying note 62 *et seq.*

> Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association. But ever since we first reviewed the 1971 Act, we have understood that limits on political expenditures deserve closer scrutiny than restrictions on political contributions. Restraints on expenditures generally curb more expressive and associational activity than limits on contributions do. *A further reason for the distinction is that limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are (corruption being understood not only as quid pro quo agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence). At least this is so where the spending is not coordinated with a candidate or his campaign.*

Id. at 440-41 (citations omitted)(emphasis added). Noting that "recent experience" presented a threat of abuse from unlimited coordinated party spending, the court observed that there was no "serious doubt" that "contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Id.* at 457. Reaffirming that such coordinated expenditures have the same "power to corrupt" as direct contributions, the Court held FECA's restrictions on coordinated expenditures constitutional. *Id.* at 465.

In *McConnell v. Federal Election Commission*, seven justices reaffirmed the premise that coordinated expenditures may be constitutionally regulated as contributions given the increased risk that such spending will guard against *quid pro quo* corruption. 540 U.S. at 219 ("Ever since our decision in *Buckley*, it has been settled that expenditures

by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign' may be treated as indirect contributions."). Affirming *Buckley*'s distinction between contributions and independent expenditures, the Court in *McConnell* struck down one provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA") as "an unconstitutional burden on the parties' right to make unlimited independent expenditures," *id.* at 213-14, while at the same time upholding two provisions of BCRA treating coordinated expenditures for "electioneering communications" as indirect contributions subject to the source and amount limitations imposed by FECA, *id.* at 202-03, 219-23. Quoting *Colorado II*, the *McConnell* Court repeated that a "wink or nod coordinated expenditure" is money in the bank to the candidate.

> [E]xpenditures made after a "wink or nod" often will be "as useful to the candidate as cash." For that reason, Congress has always treated expenditures made "at the request or suggestion of" a candidate as coordinated. A supporter easily could comply with a candidate's request or suggestion without first agreeing to do so, and the resulting expenditure would be " 'virtually indistinguishable from [a] simple contributio[n],'"

540 U.S. 93, 221-22 (citations omitted).

In 2007, the United States Supreme Court decided the case of *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (*WRTL*). This case centered on spending by Right to Life in the form of three advertisements critical of

Wisconsin Senators' participation in a filibuster of judicial nominees. There was no dispute but that this spending was a purely independent expenditure by a non-express advocacy entity. The "*quid-pro-quo corruption interest*," the Court wrote, would only sustain a ban on independent corporate spending insofar as it applied to express advocacy or the "functional equivalent of express advocacy," and it defined the latter narrowly to cover only those ads that were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-71. At no point, however, was there any suggestion that the regulation of contributions and coordinated spending should *also* be limited to express advocacy and its functional equivalent. *See id.* at 478 (noting that the government's anticorruption interest had long "been invoked as a reason for upholding contribution limits").

The decision in *Citizens United v. FEC,* 558 U.S. 310 (2010) does nothing to undercut the established distinction between truly independent expenditures and coordinated expenditures. To the contrary, *Citizens United* affirms this principle. Responding to arguments that the appearance of influence or access resulting from large independent corporate expenditures will cause the electorate to lose faith in the democratic

process, the Court rejected this notion but in the process *affirmed Buckley's* coordinated expenditure principle:

> The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. *By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.*

Id. at 360 citing *Buckley* 424 U.S. at 46 (emphasis added). Noting that the *Buckley* Court sustained limits on direct contributions to ensure against the reality or appearance of corruption, *Citizens United* held that the same rationale does *not* apply to independent expenditures. Again quoting *Buckley*, Justice Kennedy observed, "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 357 quoting *Buckley*, 424 U.S. at 47. There is no mistaking that the holding of *Citizens United* is premised upon truly independent speakers making truly independent expenditures, in stark contrast to the conduct under investigation here.

The recent case of *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), does nothing, by the express language of the opinion itself, to change forty years

of law upholding limitations placed upon *base* contributions.[195] This investigation, relates to base, not aggregate, contributions. In *McCutcheon*, the court visited the issue of limits placed upon an individual making contributions to more than one candidate or committee. These are referred to as aggregate limits. The base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to $2,600 per election to a candidate ($5,200 total for the primary and general elections); $32,400 per year to a national party committee; $10,000 per year to a state or local party committee; and $5,000 per year to a political action committee, or "PAC." 2 U.S.C. § 441a(a)(1); 78 Fed. Reg. 8532 (2013); *see McCutcheon*, 134 S. Ct. at 1442. The aggregate limits in BCRA permitted an individual to contribute a total of $48,600 to federal candidates and a total of $74,600 to other political committees. 2 U.S.C. § 441a(a)(3); 78 Fed. Reg. 8532; *McCutcheon*, 134 S. Ct. at 1442. Of that $74,600, only $48,600 could be contributed to state or local party committees and PACs. *Id.* The Court held that aggregate limits could no longer withstand constitutional

[195] Under federal law base limits restrict how much money a donor may contribute to a particular candidate or committee. Aggregate limits restrict how much money a donor may contribute in total to all candidates or committees. *McCutcheon*, 134 S.Ct. 1434, 1442 (2014), citing 2 U.S.C. § 441a(a)(1) and (3).

scrutiny, concluding "that the aggregate limits do little, if anything, to address that concern [*i.e.*, the circumvention of base limits], while seriously restricting participation in the democratic process." *Id.* In so holding, the Court reiterated the different treatment it has given to the analysis of expenditures versus contributions. Expenditure limits are distinguished from contribution limits by virtue of the degree each encroaches upon First Amendment rights. Expenditure limits require government regulation to promote a compelling state interest in the least restrictive manner. In contrast, contribution limits impose a lesser restraint on political speech because they permit political speech and do not infringe on the contributor's freedom to discuss candidates and issues. The Court in *McCutcheon* repeated that this is a "lesser" standard yet "rigorous." Under this standard, "[e]ven a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 1444, quoting *Buckley*, 424 U.S. at 25.

In *McCutcheon*, the parties and *amici curiae* argued strenuously about whether the distinction that *Buckley* drew between contributions and

expenditures should remain the law. The Court expressly declined "to revisit *Buckley's* distinction between contributions and expenditures and the corollary distinction in the applicable standards of review." 134 S. Ct. at 1445. "[W]hether we apply strict scrutiny or *Buckley's* 'closely drawn' test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective." *Id.* The Court concluded that the *Buckley* decision dedicated only three sentences of analysis to the aggregate limits and, especially because today a different statutory regime, a distinct legal backdrop and statutory safeguards now exist, the *McCutcheon* Court found "a substantial mismatch between the Government's stated objective and the means selected to achieve it." 134 S. Ct. at 1446. On the way to its finding, however, and in response to arguments about "suspicious patterns" of PAC affiliations, the court reiterated basic *Buckley* principles on the treatment of coordinated expenditures:

> We have said in the context of independent expenditures that " '[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate.' "

Id. at 1454 quoting *Citizens United,* 558 U.S. at 357 quoting *Buckley, 424 U.S.* at 47.

E. *Barland II* concerns the regulation of truly independent speakers and has no impact on the investigation other than to reinforce its main premises.

As noted above, the starting point for this investigation is the premise that the candidate committees and [redacted] were anything but independent. [redacted] Consequently, [redacted] had an obligation to report the In-Kind contributions that it received from [redacted] This is because [redacted] was an extension of [redacted] functioning as part of the personal campaign committee and being under its control and because coordinated expenditures gave rise to a reporting obligation.

In *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014) (*Barland II*), the Seventh Circuit considered a constitutional challenge to ch. 11 and GAB regulations relating to the imposition of a broad range of registration and reporting requirements on Wisconsin Right to Life. It engaged in a range of political speech and public outreach on issues connected to its mission, including (among other things) mailings, fliers,

information posted on its website, and various forms of advertising. As to Right to Life's relationship with candidates and candidate committees, the court wrote:

> Neither [Wisconsin Right to Life] nor its state PAC contributes to candidates or other political committees, nor are they connected with candidates, their campaign committees, or political parties. *That is to say, they operate independently of candidates and their campaign committees.*

Id. (emphasis added). The court went on to invalidate a wide range of registration and reporting regulations to the extent that they might be applied to independent speakers like Right to Life. The Special Prosecutor takes no issue with this result and importantly it has no application here.

In fact, *Barland II* says much that supports the Special Prosecutor's position. *Barland II* acknowledges the different levels of scrutiny applicable to different types of campaign finance regulation. Phrased in terms of intermediate scrutiny for contributions and strict scrutiny for expenditures, the court noted:

> [T]he [*Buckley*] Court drew a distinction between restrictions on expenditures for election-related speech and restrictions on contributions to candidates. *Buckley* held that limits on contributions are reviewed under an intermediate standard of scrutiny and may be permissible based on the public interest in preventing quid pro quo corruption, but limits on expenditures get strict scrutiny and usually flunk.

Id. at 811. The court did note that some would say that the scrutiny standards might be eroding after *McCutcheon*, but the court observed that these categories nevertheless remained the law. *Id.* at 811-12.

Quoting *Citizens United*, the court also affirmed *Buckley's* coordination principle:

> the [*Citizens United*] Court concluded that political spending by independent groups does not carry the risk of this kind of corruption because *"[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."*

Id. at 823-24 quoting *Citizens United*, 558 U.S. 310, 360 (2010) (emphasis added).

Barland II also discusses the express advocacy rule under *Buckley* as a "limiting" or "narrowing" construction applicable to *independent expenditures*. *Buckley's* limiting principle for FECA's disclosure requirements for independent political expenditures are triggered only when funds are used for communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 812. *Barland II* does not alter *Buckley's* teaching on contributions. Nowhere in the opinion is there any suggestion that the "limiting principle of the express advocacy rule" should be applied to a "contribution situation" where an entity [redacted]

is under the control of the candidate committee working "hand in glove" with such a committee by reasons of dual agency.

Finally, *Barland II* recognized *Citizens United* affirmation of broadly based disclosure requirements, discussed below at page 135. *Citizens United* flatly states disclosure requirements *can* be extended to all forms of election related public speech, *including* issue advocacy. *Citizens United,* 558 U.S. at 366–67.

Barland II has no impact on an investigation of a campaign committee acting "hand in glove" with another entity. This is apparent from the court's repeated use of the word "independent" and the application of the "narrowing" construction of express advocacy to groups *beyond* candidates and their committees.

> *As applied to political speakers other than candidates, their committees, and political parties*, the statutory definition of "political purposes" in section 11.01(16) and the regulatory definition of "political committee" in GAB § 1.28(1)(a) are limited to express advocacy and its functional equivalent as those terms were explained in *Buckley* and *Wisconsin Right to Life II*.

Id. at 834 (emphasis added). In light of *Barland II's* extensive reliance on *Buckley*, if not simple principles of agency, it is reasonable to conclude that – if a candidate committee is required to report based on its activity – it must also do so when it acts through an agent who (or which) is an

extension of the candidate committee and who acts in concert with the candidate committee.

F. The express advocacy rule is not what the Movants make it out to be, and indeed, even truly independent issue advocacy is properly subject to campaign finance regulations relating to matters of disclosure.

1. The Express Advocacy Rule is not one of constitutional dimension.

It is simply mistaken to suggest that an express advocacy rule is required by the First Amendment, rather than as a statutory interpretation intended to save FECA from impermissibly infringing on the rights of independent speakers desiring to expend funds relating to an election.[196]

Chief Justice Roberts, the principal author of *Wisconsin Right to Life*, observed that the issue in *Buckley* was how a particular statutory provision could be construed to avoid vagueness concerns, not what the constitutional standard for clarity was in the abstract, divorced from specific statutory language. "Buckley's intermediate step of statutory construction on the

[196] "To insure that the reach of the [FECA] disclosure requirement was 'not impermissibly broad, we construe[d] 'expenditure' for purposes of that section in the same way we construed the terms of § 608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *McConnell*, 540 U.S. at 191, quoting *Buckley*, 424 U.S. at 80, 96 S.Ct. 612 (footnote and internal quotation marks omitted).

way to its constitutional holding does not dictate a constitutional test." 551 U.S. at 475 n. 7 citing *McConnell*, 540 U.S., at 190.

2. Disclosure regulation and issue advocacy.

This is, in essence, an investigation into whether candidate committees failed to disclose the full extent of support they received [redacted] As noted above, disclosure regulations receive the lowest level of First Amendment scrutiny. The Special Prosecutor has already noted that disbursements made by an entity under the direct control of the candidate committee are obviously reportable under ch. 11. Likewise, disbursements to third parties for services which are intended to influence the election, made at the request of the candidate committee, are In-Kind contributions under Wisconsin law.[197] *See* Wis. Stat. § 11.01(6) and GAB § 1.20(1)(e). This "services" type of In-Kind contribution is most clearly illustrated by monies [redacted] directly or indirectly paid to others to produce advertisements. Such services, too, are reportable by the campaign committee, absent extraordinary circumstances. Of course, the Movants assert that they have the right to work "hand in glove" with a campaign committee to produce an advertisement that is then protected by

[197] Payments to third parties for services for the purpose of influencing the election, made with the authorization and consent of the candidate, are contributions, specifically In-Kind contributions.

the First Amendment, so long as the advertisement constitutes issue advocacy, not express advocacy. Inasmuch as the Movants contend or imply that issue advocacy is protected from all forms of campaign finance regulation, they are plainly wrong.

a. Disclosure Principles Generally

In the context of this investigation, disclosure is every bit as compelling as in the traditional contribution sense, precisely because under Wisconsin law – and consistent with the *Buckley* decision – both controlled and coordinated expenditures are treated as contributions.

This investigation is important because the state has a compelling interest in "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent." *Buckley*, 424 U.S. at 66, 96 S.Ct. 658 (internal quotation marks omitted). This is a primary purpose of Wisconsin campaign finance regulation. Wis. Stat. § 11.001 provides:

> The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. . . . One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. *When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements*

> *made on behalf of every candidate for public office, and in placing reasonable limitations on such activities.*

(emphasis added).

This "informational interest" is sufficiently important to support disclosure requirements. *See, e.g.*, *Buckley* at 66–67. In *Buckley*, the Court recognized that campaign finance disclosure was a critical tool for maintaining transparency in the political marketplace. As interpreted by the Seventh Circuit in *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012):

> "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." Disclosure requirements advance the public's interest in information by "allow[ing] voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." By revealing "the sources of a candidate's financial support," disclosure laws "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."

Id. at 477-78 quoting *Buckley*, 424 U.S. at 14-15, 67.

There is substantial relationship between public disclosure requirements and a "sufficiently important government interest" that has been established ever since *Buckley*. In the words of *Madigan*, there is no need to "invent the wheel" here. *Madigan*, 697 F.3d at 480. *Buckley's* concern for

prevention of *quid pro quo* corruption is at the heart of its views concerning the propriety of disclosure requirements.

b. Disclosure in the Context of Issue Advocacy

The State is not prohibited from imposing disclosure requirements on a campaign committee working "hand in glove" with a third party entity to produce an advertisement, even where the advertisement involves issue advocacy and not express advocacy. Issue advocacy – even if truly independent – may well be subject to government disclosure requirements. Put another way, a state may properly place disclosure and reporting requirements upon groups engaging in issue advocacy. Writing for eight members of the Court, Justice Kennedy addressed the matter as follows:

> Citizens United claims that ... the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. *We reject this contention.*
>
> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, *we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.*

Citizens United, 558 U.S. at 368-69 (citations omitted)(emphasis added). Under existing jurisprudence, the government may – consistent with the First Amendment – impose disclosure obligations on issue advocacy groups.

The Special Prosecutor does not contend that full-blown registration and reporting regulations may be properly imposed on independent non-express advocacy organizations; clearly *Barland II* holds they cannot stand in the form which that court considered. However, in the context of this investigation, the point to be made is that issue advocacy is not the untouchable First Amendment "safe harbor" that the Movants would have this court to believe.

G. The Movants other arguments that ch. 11 only regulates coordinated express advocacy are unpersuasive.

The Movants claim that only coordinated express advocacy expenditures could have been a "contribution" under the statute and that was self-evidently what the *Buckley* Court had in mind. ([redacted] at 68). The immediate response to this is that nowhere in *Buckley* did the Court apply a narrowing construction to the term "contribution." Contributions

are always campaign-related and do not require a limiting construction. As argued above,[198] no narrowing construction was needed.

Nevertheless, the Movants attempt to bolster this argument by contending that Congress had the "same" understanding. ([redacted] at 68). Movants cite to the Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) and the amendment defining independent expenditure as "any expenditure by a person which expressly advocates the election or defeat of a clearly identified candidate, which is made without cooperation or consultation with any candidate ... and which is not made in concert with, or at the request or suggestion of, any candidate. . . ." *Id.* They claim this is evidence that Congress read *Buckley* the way they do, to apply the express advocacy statutory construction "across the board." This statute applies to independent expenditure in a specific sense as defined by federal law. The phrase "independent expenditure" has both a general meaning, denoting any type of independent election spending, and a meaning as a specific term of art under FECA. *See* 2 U.S.C. § 431(17) (now numbered as 52 U.S.C. § 30101(17)). By quoting this statute, the Movants mean to imply that nowhere else in the FECA

[198] *See* above in Section III C.

amendments was there any mention of "cooperation or consultation" language in any part of the FECA amendments. This, of course, is wrong. What the Movants fail to mention is that, in a different section of the *same FECA amendments*, the term "contribution" is amended and defined *without* respect to express advocacy language. The term "contribution," as amended, provided "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." *Id.* at § 112. This statute (90 Stat. 475) was quoted by Movants a few pages earlier in the brief; they are certainly aware of it. ([redacted] at 68). The federal "independent expenditure" definition, which is understood to pertain to independent express advocacy entities like Political Action Committees, *coexists* in federal law with a general definition of "contribution" that treats all expenditures made in cooperation, consultation or concert with a candidate as contributions. The passage of the "independent expenditure" definition as argued by the Movants proves nothing.

The same is true with regard to their argument on the revisions of Wis. Stat. § 11.06(7). ([redacted] at 69). They contend that that section was

amended under *Buckley* to be limited to entities that spend money "to advocate for the election or defeat of any clearly identified candidate." As acknowledged, this statute is reasonably read, like the federal definition of "independent expenditure," as applying to independent express advocacy organizations. That, however, does not mean that ch. 11 only regulates express advocacy independent expenditures. Indeed, at the same time these amendments were enacted, Wis. Stat. § 11.06(4)(d) was also amended to make reportable all contributions and disbursements "made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent." The fact that the legislature modified § 11.06(7) at the same time it mandated reporting under the terms of § 11.06(4)(d) does not amount to proof that the legislature intended to limit ch. 11 to independent express advocacy expenditures only.

Movants also claim that Wis. Stat. § 11.06(2) exempts them from reporting and disclosure requirements. ([redacted] at 33). That statute provides:

> Notwithstanding sub. (1), if a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement *does not constitute a contribution* to any candidate or other individual, committee or group, the disbursement or obligation is

> required to be reported only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum. *The exemption provided by this subsection shall in no case be construed to apply to a political party, legislative campaign, personal campaign or support committee.*

(emphasis added). Several responses to the Movants' position are suggested by the express terms of the statute. First, the investigation centers on expenditures which, under *Buckley*, Wis. Stat. §§11.06(4)(d), 11.06(1), 11.01(15) and 11.10(4), are in fact "contributions." Secondly, the investigation seeks to learn if, by reason of the dual agency [redacted] expenditures made for the benefit of, [redacted], the [redacted] campaign committee, were reportable by the campaign.

IV. THE HIGHLY REGARDED FEDERAL DISTRICT COURT DECISION IN *CHRISTIAN COALITION* HOLDS THAT EXPRESSIVE COORDINATED EXPENDITURES, AS *CHRISTIAN COALITION* EXPLAINS THAT TERM AND AS ADOPTED IN EL. BD. OP. 2000-02, ARE REPORTABLE BY A CANDIDATE COMMITTEE AS CONTRIBUTIONS, ALL CONSISTENT WITH THE FIRST AMENDMENT.

The GAB formal opinion in El. Bd. Op. 2000-02 interprets and implements Wisconsin ch.11 and GAB regulations to require certain expenditures to be reported even if the expenditures are for non-express advertisements. El. Bd. Op. 2000-02 is based on *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), a highly regarded U.S. District

Court decision as recognized by scholars who view it as vital and sound today. Indeed, *Christian Coalition* was codified in the Code of Federal Regulations in 2001. *See* 11 C.F.R. § 100.23 (b) (2001).[199] This regulation was subsequently repealed by the Bipartisan Campaign Reform Act of 2002[200] because Congress viewed the *Christian Coalition* standard as *too rigorous.*[201]

In *Christian Coalition,* the Federal Election Commission brought an enforcement action alleging that the Coalition violated federal campaign finance laws during congressional elections between 1990 and 1994, and during the 1992 presidential election. Counts I and II of the FEC enforcement action concerned coordinated expenditures. The District Court

---

[199] The Federal Register commentary provides:

> The Commission is promulgating new rules at 11 CFR 100.23 that define the term coordinated general public political communication. They generally follow the standard articulated by the United States District Court for the District of Columbia in the *Christian Coalition* decision, supra. This decision sets out at length the standards to be used to determine whether expenditures for communications by unauthorized committees, advocacy groups and individuals are coordinated with candidates or qualify as independent expenditures.

65 Fed. Reg. 76138 (December 6, 2000); App 153.

[200] Pub. L. No. 107-155, §214(c), 116 Stat. 81 (2002). *See also* 71 Fed. Reg. 33190-91 (June 8, 2006); App. 163-164.

[201] Specifically, the BCRA required that any new "regulations shall not require agreement or formal collaboration to establish coordination." *Id.*

wrote that the expenditures related to "Voter Guides" and did not contain express advocacy.

> [The] FEC also alleges that the Coalition violated the FECA in relation to other communications—principally its voter guides. The FEC acknowledges that these guides, which compare candidates' positions on select issues, did not contain express advocacy. However, the FEC asserts that the voter guides were not protected independent expenditures because the Coalition shared information with various campaigns, including the 1992 reelection campaign of President Bush, to such an extent that the Coalition voter guides should be treated for FECA purposes as literature distributed on behalf of the campaign and paid for by the Coalition. On this view, the Coalition's expenditures on its voter guides were illegal in-kind corporate contributions.

52 F. Supp. 2d at 66. The facts relating to the interaction between the Coalition and the candidate committee are discussed at length in the decision. *Id.* at 66 – 83. Notably, the court held the Coalition's expenditures on voter guides (and get-out-the-vote telephone solicitations) did *not* require reporting as expressive coordinated expenditures.

Christian Coalition begins its analysis with a premise fundamental to the Special Prosecutor's position before this Court, *viz.*, that "*Buckley* and its progeny have reaffirmed the profound constitutional difference between campaign contributions and independent expenditures." *Id.* at 83. The government has been given a relatively wide berth on limiting contributions, so long as these rules are directly related to the Government's compelling interest in preventing the appearance of

corruption flowing from large campaign contributions. This contrasts, the court noted, with limitations on independent expenditures, which are often struck down or severely limited because they fail to provide a close enough nexus to a compelling interest. *Id.* at 84. After noting the *Buckley* principle that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act," the District Court wrote:

> Thus, *Buckley* introduced the notion of "coordinated expenditures" and held that for constitutional purposes such expenditures had the status of contributions. See *Colorado Republican*, 518 U.S. at 617, 116 S.Ct. 2309 (plurality) ("the constitutionally significant fact ... is the lack of coordination between the candidate and the source of the expenditure.").

Id. at 85.

Having established that coordinated expenditures are treated under the Act as contributions, the court next introduced the concept of an "expressive coordinated expenditure." *Christian Coalition* offered this example:

> An example of such an expenditure would be for a television advertisement favorably profiling a candidate's stand on certain issues which is paid for and written by the contributor, in which the advertisement does "express the underlying basis for his support," and does discuss candidates and issues, but for which the expenditure is done in coordination with, or with the authorization of, the candidate. It can only be surmised that the *Buckley* majority purposely left this issue for another case. In many respects this is that case.

Id. at 85.

The court considered whether the nature and extent of the contacts were controlling to its decision. It noted, "If the contacts at issue in this case are constitutionally insignificant, the expenditures remain 'independent' . . . . " *Id.* at 86. But then the court asked this question:

> [I]f on these facts the Coalition's expenditures were "coordinated," and were therefore "contributions" for constitutional purposes, are they automatically prohibited by § 441b [prohibiting corporate contributions] or does the First Amendment require a limiting construction of statutory "contributions" with respect to expressive coordinated expenditures?

Id. at 86. As the Movants do here, the Coalition argued § 441b's corporate ban can only apply to "express advocacy" no matter how thoroughgoing the coordination of the speech may be.

The District Court soundly rejected the Coalition's argument as "untenable" and "unpersuasive." *Id.* at 87. "[T]he 'express advocacy' standard *was not constitutionally required for statutory provisions limiting contributions.*" *Id.* at 87 quoting *Orloski v. Federal Election Commission*, 795 F.2d 156, 167 (D.C. Cir. 1986)(emphasis added). Describing what the court referred to as an "anonymity premium," the court provided this example:

> [E]xpensive, gauzy candidate profiles prepared for television broadcast or use at a national political convention, which may then be broadcast, would be paid for from corporate or union treasury funds. Such payment would be every bit as beneficial to the candidate as a cash contribution of equal magnitude and would equally raise the potential for corruption. *Cf. Buckley*, 424 U.S. at 36–37. Even more pernicious would be the

> opportunity to launch coordinated attack advertisements, through which a candidate could spread a negative message about her opponent, at corporate or union expense, without being held accountable for negative campaigning. Coordinated expenditures for such communications would be substantially more valuable than dollar-equivalent contributions because they come with an "anonymity premium" of great value to a candidate running a positive campaign. Allowing such coordinated expenditures would frustrate both the anti-corruption and disclosure goals of the Act.

Id. at 88. (emphasis added).

[redacted]

[redacted][202].

In direct response to the Coalition's claim (identical to the Movants' claim here) that the First Amendment placed "express advocacy" limits on coordinated expenditures, the court concluded, "[t]he First Amendment requires that the statute be construed to permit only narrowly tailored restrictions on speech that advance the Government's anti-corruption interest, but the Coalition's position allows for *no restrictions at all* on such expenditures." *Id.* at 88 (emphasis added). The District Court, however, rejected the FEC's competing position "that any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures

[202] *See* Statement of Facts text accompanying note 90.

made for the purpose of influencing the election 'coordinated,' i.e., contributions." *Id.* at 89. The court found this reading of the law "overbroad, at least with respect to expressive coordinated expenditures." *Id.* at 90.

The *Christian Coalition* court was mindful that "[e]xpressive coordinated expenditures bear certain hallmarks of a cash contribution but also contain the highly-valued political speech of the spender." *Id.* at 91. Consequently, the court took from "*Buckley* and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate." *Id.* at 91.

The *Buckley* concept of "coordinated expenditures" was crafted in response to fears that the Act's constitutionally permissible contribution limitations could be easily circumvented through coordinated expenditures. *Id.* at 91. The *Christian Coalition* court concluded that a "narrowly tailored definition of expressive coordinated expenditures must focus on those expenditures that are of the type that would be made to circumvent the

contribution limitations." *Id.* at 91. It found that the government's interest in prohibiting unchecked contributions was compelling.

> A contribution provides the candidate with something of value that she wants or needs. Fungible contributions, cash, provide the candidate with the most flexibility. The government's compelling interest arises from the recognition that as the magnitude of a contribution grows, so grows the likelihood that the candidate will feel beholden to the source of those contributors. And, once elected, the candidate may feel obliged to take official action that is not in the public interest to meet the demands of the contributor.

Id. at 91.

The court then approved the FEC's rule that treated "*as contributions expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent* [as it was] *narrowly tailored.*" *Id.* at 91 (emphasis added). The reason is sensible: "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." *Id.* at 92. The court then described four factors showing how an expressive expenditure becomes coordinated:

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated," where the candidate or her 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 (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots).

Id. at 92.[203]

Christian Coalition also established the "partner" or "joint venturer" standard. Describing what amounts to "substantial discussion or negotiation," the court wrote that it "is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners." *Id.* at 92. This standard construes expressive coordinated expenditures to be those in which the candidate has taken a sufficient interest to demonstrate that the expenditures are perceived as valuable for meeting the campaign's needs or wants. *Id.* at 92.

Notwithstanding the fact that *Christian Coalition* was decided within weeks of *Wisconsin Coalition for Voter Participation*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999)(*WCVP)*, the decision is well-regarded even today and then even by those who wish to see campaign finance laws relaxed. It also must be observed that, although Judge Eich's decision in *WCVP* may have lacked the detail of analysis (and certainly Judge Eich lacked the time allowing for such detailed analysis), he reached the same correct conclusions as the *Christian Coalition* court. Evidently, the

[203] This test was adopted in 2000 as the FEC standard for coordination. *See* note 195.

attorneys for the parties in *WCVP* did not share the *Christian Coalition* decision with Judge Eich, or they were unaware of it. Certainly he would have relied on it had he known of it. While the Movant's derogate Judge Eich's so-called "figure-eight" opinion as illogical and out of step due to recent precedent, other more objective (and indeed surprising) sources would be more kind to the *WCVP* court, even though both *Christian Coalition* and *WCVP* are more than fifteen years old.

Notably in 2013, Professor Bradley A. Smith, described as the "'intellectual powerhouse' of the movement to roll back campaign finance restrictions,"[204] wrote very favorably on the *Christian Coalition* decision. *See*, Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 Willamette L. Rev. 603 (2013). Noting that only one federal district court decision has examined coordination in depth, Smith concludes that this decision, *Christian Coalition,* is consistent with *Buckley* and its progeny. *Id.* at 624. More than that, Professor Smith writes that *Christian Coalition* "requires relatively intense consultation between a candidate and a spender to be considered coordination." *Id.* He approves of a coordination formulation triggered "only if the speaker acted at the

[204] This is a self-description. It comes from Professor Smith's website for the Center for Competitive Politics. *See* http://www.campaignfreedom.org/about/staff/bradley-a-smith/

campaign's suggestion or consented to the expenditure, if there were candidate or campaign control over the expenditure, or if there were substantial discussion or negotiation between the campaign and the spender over the communication." *Id.*[205] He believes it goes far – perhaps farther than *Buckley* requires – to guard against the mere appearance of corruption.

> The *Christian Coalition* ruling seemed to require consultation that went beyond creating the mere appearance of corruption – the opportunity for corrupt quid pro quo bargaining – to requiring conduct that would actually be corrupt, or at least create a very heightened appearance of corruption. *It is not certain whether the Buckley Court, had it considered the issue, would have required such a high standard. But the approach taken in Christian Coalition fits quite comfortably into the Buckley paradigm.*

Id. at 625 (emphasis added).

Of course, the formulation of which Professor Smith speaks approvingly is the very same formulation adopted by the GAB in El. Bd. Op. 2000-02. It is the same formulation which was the original FEC standard on coordination.

In fact, "the *Christian Coalition* decision provided the template that shaped the FEC's coordination initial definition." Richard Briffault, *Coordination Reconsidered,* 113 Colum. L. Rev. Sidebar 88, 93 (2013). It was the template, that is, until Congress repealed it because it was *too*

---

[205] Professor Smith goes on to quote the four factors described above. *See* text accompanying note 90.

rigorous.[206] And the subsequent history of the FEC's efforts to place adequate controls is checkered. Twice the coordination regulations have been struck down as arbitrary and capricious, in a context in which they were attacked as too lax.[207]

[206] *See* text accompanying notes 195-197.
[207] *See infra* Section VIII.C.

V. PRECISELY BECAUSE *BUCKLEY* SAID SO, THE "POLITICAL PURPOSES / INFLUENCING THE ELECTION" LANGUAGE OF § 11.01(16) IS NOT UNCONSTITUTIONALLY VAGUE WHEN APPLIED TO CONTRIBUTIONS, INCLUDING EXPENDITURES MADE BY A THIRD PARTY CONTROLLED BY, IN COOPERATION WITH, OR WITH THE CONSENT OF, A CANDIDATE, HIS AGENTS, OR AN AUTHORIZED COMMITTEE OF THE CANDIDATE. (ISSUE 13)

The Special Prosecutor submits that § 11.01(16), the definition of "political purposes," is not unconstitutionally vague when analyzed in terms of the conduct under investigation here. [redacted] This gave rise to what – at this stage of the investigation – the Special Prosecutor believes was a virtual "hand in glove" relationship [redacted] In this context, [redacted] had a reporting obligation as to those expenditures which were made by [redacted]

The short answer to the issue of vagueness is that *Buckley* has already answered this question, and no subsequent decision has modified the *Buckley* principles in this regard. In a section labelled "Vagueness Problems," the Court discussed vagueness relating to contribution limits and contribution disclosure requirements. This Court should also recall that the FECA definitions of "contribution" are substantially identical to the "influencing the election" language found in § 11.01(16).[208] For both contribution limits and contribution disclosure requirements, the Court found no vagueness problems.

> In Part I we discussed what constituted a "contribution" for purposes of the contribution limitations set forth in 18 U.S.C. s 608(b) (1970 ed., Supp. IV). We construed that term to include not only *contributions made directly or indirectly to a candidate*, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, *but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.* The definition of "contribution" in s 431(e) for disclosure purposes parallels the definition in Title 18 almost word for word, and we construe the former provision as we have the latter. *So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.*

---

[208] The *Buckley* Court noted that 2 U.S.C. § 434(e) currently numbered as 52 U.S.C. § 30101(8)(A) and is "almost word for word" identical. The former section provided:

> (e) "contribution"
> (1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of
> (A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party;

424 U.S. at 78. No vagueness problems were found because "contributions" have a sufficiently close relationship to the Act inasmuch as they are connected to a candidate or candidate committee.

The well-reasoned District Court decision in *Christian Coalition,* following principles articulated in *Buckley,* also found that, in the context of contributions, the language "influencing the election" was not unconstitutionally vague; the narrowing construction was applied in the context of expenditures, not contributions.

> *Buckley* read an express advocacy standard into the statutory provisions regarding independent expenditures "relative to" a clearly identified candidate, and independent expenditures "for the purpose of influencing any election for Federal office," The express advocacy standard was coined to cure the vagueness inherent in those two phrases—"relative to" and "for the purpose of . . . influencing"—but for ease of reference the Court adopted a shorthand by which the express advocacy standard applied to certain "expenditures."
>
> . . .
>
> [T]he *Buckley* Court reaffirmed that the term "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." Because, as the *Buckley* Court had explained earlier in its Opinion, such coordinated expenditures involve a limited amount of speech by the contributor, the Court found that the First Amendment did not require a narrowing understanding of "expenditure" as used in the above-quoted sentence. The Court used the term "expenditure" in the phrase "expenditures placed in cooperation with or with the consent of a candidate" advisedly, leaving intact, the normal, broad meaning Congress had given it. However, with respect to the statutory term "expenditure," which the *Buckley* Court interpreted to mean "independent expenditure," the doctrine of unconstitutional vagueness required that Congress's broad definition be narrowed to expenditures on communications containing express advocacy.

52 F. Supp. 2d 87 n.50.

Contributions, unlike independent expenditures, are not subject to the express advocacy narrowing statutory construction. Contributions always are intended to "influence the election." So says *Buckley* and *Christian Coalition.* A "political purposes" definition phrased in terms of "influencing the election," like Wis. Stat. § 11.01(16), is not unconstitutionally vague in the context of contributions, whether direct or In-Kind.

The Movants ([redacted] at 22) offer a string of citations in support of their assertion that the phrase "for purposes of influencing" language is unconstitutionally vague unless restricted to express advocacy. They begin this string with a citation to *Buckley*, 424 U.S. at 76-80. The Special Prosecutor has cited extensively to this exact section of *Buckley* for at least two propositions: (1) contributions including "expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," *id.* at 78, are "by definition" campaign related and not subject to the narrowing construction; and (2) the narrowing statutory construction was applied by *Buckley* to independent expenditures. *Id.* at 80 ("As narrowed, s 434(e), like s 608(e)(1), does not

reach all partisan discussion for it only requires disclosure of those *expenditures* that expressly advocate a particular election result.")(*Id.*) (emphasis added).

The balance of the string cite offers cases involving truly independent expenditures, and the Special Prosecutor does not dispute that the express advocacy statutory construction applies to truly independent entities. *See WMC*, 227 Wis.2d 650 (holding SEB rule could not be retroactively applied to a truly independent expenditure organization); *Virginia Society for Human Life, Inc. v. Caldwell*, 500 S.E.2d 814 (Va. 1998) (involving nonprofit organization that conducted issue advocacy by preparing and distributing "voter guides"); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, (5th Cir. 2006)(involving nonprofit §501(c)(4) corporation and holding that "influencing" language must be read narrowly as to independent entities); *Virginia Society for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998)(same Caldwell case as earlier mentioned in this string; the federal court certified the question to the Virginia Supreme Court). One case, *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 428, (Minn. 2005), contains a discussion of the different treatment between contributions and expenditures, and concludes that

expenditures of entities under the control of a candidate are always subject to regulation because they are campaign related "by definition," exactly as the Special Prosecutor argues here. *Id.* at 428.

Although Movants contend that this court's 1999 decision in *WMC* "controls" these proceedings ([redacted] at 25), their reliance is misplaced. First, *WMC* held only that a GAB interpretation of state law could not be applied retroactively. 227 Wis.2d at 681. Secondly, as noted in the previous paragraph, the *WMC* discussion took place in the context of spending by a truly independent speaker.

VI. CH. 11 AND THE STATUTORY SECTIONS AT ISSUE ARE NEITHER OVERLY BROAD, VAGUE NOR DO THEY OTHERWISE VIOLATE DUE PROCESS. (ISSUES 9, 11 & 12)

A "concept" is not the measure of vagueness or overbreadth. "Coordination" is neither illegal nor prohibited. Candidate committees are free to associate and interact with other entities as much as they please. Such interaction, however, may give rise to reportable disbursements under certain circumstances. Those circumstances are defined by statutes and by regulations. Those statutes and regulations are measured against the First Amendment and Due Process considerations. Movants claim that "coordination" is unenforceable because it is not defined in ch. 11.

([redacted] at 61) The starting point for any reasoned and logical analysis, however, is not the concept that the statutes embody, but rather the statutory language itself.

In the context of this investigation, the obligation of the campaign committee to report certain expenditures as contributions arise from statutes and regulations. These are statutes and regulations requiring the candidate committee to report transactions made with the authorization and consent of the campaign committee as well as those that were made as a result of direction, control, concerted action or some form of pre-arrangement.

A. The ch. 11 provisions at issue here are not unduly broad in relation to their legitimate sweep.

Issues 11 and 12, as the court has framed them, deal with matters of the outright invalidity of the principle of coordination under the First Amendment and with Due Process violations, which the Special Prosecutor understands to relate to concerns of overbreadth. In this regard the decision in *United States v. Williams*, 553 U.S. 285 (2008) is instructive, and at the outset, it is appropriate to note that the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id.* at 303 quoting *Members of*

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

The decision in *United States v. Williams* discussed the validity of statutory schemes involving protected speech. Child pornography statutes were at issue. The Court described the method for analyzing whether statutes were impermissibly overbroad. Noting that the overbreadth doctrine was "strong medicine," not casually employed, the Court wrote:

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at [child pornography]—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is " ' "strong medicine" ' " that is not to be "casually employed."

Williams, 553 U.S. at 292-93 (internal citations omitted). *Williams* held that the child pornography statute in question was not substantially broad relative to its plainly legitimate sweep. Compare *United States v. Stevens*, 559 U.S. 460 (2010)(holding that a statute prohibiting distribution of materials depicting animal cruelty was overbroad where a substantial

number of its applications were unconstitutional judged in relation to the statute's plainly legitimate sweep).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293. In *Williams*, the court considered a number of factors. These included whether the statute under examination had a "scienter" requirement. *Williams*, at 294 ("The first word of § 2252A(a)(3) —'knowingly' — applies to both of the . . . subdivisions . . . at issue here.") The Court also examined the operative language of the statute in question, applying the doctrine of *noscitur a sociis*, meaning that a word is given more precise content by the neighboring words with which it is associated. *Id.* at 294. The Court examined whether the statute prohibited a transaction, versus speech. *Id.* at 295 ("To run afoul of the statute, the speech need only accompany or seek to induce the *transfer* of child pornography from one person to another.")(emphasis added). Finally, the court noted that the statutes at issue in *Williams* specifically had an "intent" requirement.

The Movants complain about "confusion" with respect to the Wisconsin Statutes and ch. 11. Wis. Stat. § 11.06(4)(d) is one subject of their complaint. It provides:

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

(Emphasis added.) Wis. Stat. § 11.10(4), using the same operative language as is found in Wis. Stat. § 11.01(15), provides:

> Any committee which is organized or acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts *in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate is deemed a subcommittee of the candidate's personal campaign committee.*

(Emphasis added.) Other Wisconsin statutes and regulations, as they may apply to the analysis here, use some form of the language found either in Wis. Stat. § 11.06(4)(d) or § 11.10(4).

And, of course, in the context of a criminal investigation, the reporting requirement of these statutes (Wis. Stat. § 11.06(1) is complemented by the provisions of Wis. Stat. § 11.27(1) making it unlawful for a candidate committee to *intentionally* file a false campaign finance report.

Measured under the *Williams* standards, these statutes pass muster.

First, § 11.27 carries – not merely a "knowingly" requirement – but rather an "intent" standard. This will require a prosecutor to show both that the candidate committee (or its agents) knew of the obligation to report the transaction and deliberately disregarded it, thereby filing a false and misleading campaign finance report.

Second, unlike *Williams*, where the statute in question had apparently broad terms like "promote" and "presents," *none* of the terms in the § 11.06(4)(d) list carry a similarly overbroad connotation. Words like "direct," "control," "request," "in concert," and "authorize" are not overbroad. And the "prearrangement" language is imported directly into the statute from *Buckley.* To the extent that "prearrangement" remains undefined in the statutory section, it is subject to construction under the principle of *noscitur a sociis,* just as the *Williams* court examined and construed that statute. Moreover, in Wisconsin, the meaning of "prearrangement" is informed by El. Bd. Op. 2000-02 and the *Christian Coalition* standard.

Third, the statute is directed at transactions, not speech. Certain transactions give rise to reportable contributions. To paraphrase *Williams*, where conduct runs afoul of §§ 11.27 and 11.06(4)(d), the speech (the Issue

Ad) "accompanies" the reportable transaction; it is not the direct object of the criminal statute.

The next level of analysis under Williams, involves "whether the statute ... criminalizes a substantial amount of protected expressive activity." *Williams* at 297. This court should quickly dispose of any such argument or suggestion by the Movants.

It is difficult to understand how these statutes (and § 11.27) "criminalizes a substantial amount of protected expressive activity." What is "criminalized" here is the intentional failure to report a campaign contribution. Unlike *Williams,* where the communication itself was the subject of criminal prosecution, no one here will be subject to prosecution for speaking out. Any potential future prosecution as a result of this investigation here will be based on the knowledge that a reporting obligation existed followed by an intentional disregard of that duty. Noted above, it is the interaction leading up to the publication of issue advocacy that is the subject of investigation and prosecution, followed by disregard of a duty to report; no communication is criminalized at all here.

Moreover, language like that found in Wis. Stat. § 11.06(4)(d) is based directly on *Buckley.* A prosecution under Wis. Stat. § 11.27, focusing on

activity leading to a disguised contribution and an intentional subsequent failure to disclose the contribution, does not *invade* an area of protected speech at all. The candidate and the candidate committee remain free to engage in as much speech in the form of issue advocacy as he, she or it pleases. However, *Buckley* holds that the government may then require the candidate to report expenditures relating to such interaction as contributions in the form of campaign reports. And indeed, such a disclosure requirement, even in an issue ad context, may be viewed as permitted under *Citizens United.*[209]

B. The operative language of the statutes and regulations at issue here have already been upheld as sufficiently precise for purposes of the First Amendment.

The Movants complain about "confusion" with respect to these Wisconsin Statutes and ch. 11.

These statutory terms at issue here, words like "direct," "control," "request," "in concert," and "authorize," are neither overbroad nor are they vague. This issue has already been decided by the United States Supreme Court.

[209] *See* the discussion in Sec. III F. 2. b. above.

In *McConnell*, the Court considered a challenge to BCRA § 214's provisions concerning coordinated expenditures. The statutory language there tracks the ch. 11 statutes and regulations, especially Wis. Stat. § 11.06(4)(d). It provided, "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 540 U.S. at 219 citing 2 U.S.C. § 441a(a)(7)(B)(i). The Court wrote, "Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign' may be treated as indirect contributions subject to FECA's source and amount limitations." *Id.* citing *Buckley,* 424 U.S. at 46. The Court continued:

> Plaintiffs do not dispute that Congress may apply the same coordination rules to parties as to candidates. They argue instead that new FECA § 315(a)(7)(B)(ii) and its implementing regulations are overbroad and unconstitutionally vague because they permit a finding of coordination even in the absence of an agreement. . . [T]hey stress the importance of a clear definition of "coordination" and argue any definition that does not hinge on the presence of an agreement cannot provide the "precise guidance" that the First Amendment demands.

Id. at 220. The argument that the coordination definition needed to be "clearer" to provide the "precise guidance" they argued for, just as the Movants do here, was rejected. The Court wrote:

> We are not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that truly are independent.

Id. at 221; *see also Center for Independence v. Madigan*, 697 F.3d at 495-96 (upholding language framed as "made *in concert or cooperation with* or at the *request, suggestion, or knowledge* of a candidate, a political committee, or any of their agents.") (emphasis in original).

The conclusion to be drawn is clear: the language of §§ 11.06(4)(d), 11.10(4) and all the other statutes and regulations involved here that contain similar words or phrases are neither vague nor overbroad.

C. There is no constitutionally mandated "content standard" for coordinated expenditures beyond the standards currently found in Wisconsin law.

Under a heading "Untethered to a 'Content' standard, Converting Coordinated Communications Into Contributions is Unconstitutionally Overbroad," Movants advance an argument about "content standards." ([redacted] at 35) While the Movants do little to discuss what they mean by a "content standard," they claim one is constitutionally mandated and that without one, any attempt at regulation of coordinated expenditures is constitutionally infirm. ([redacted] 32-38) Except in a most general sense, the Movants have not cited any case in support of their position. The Special

Prosecutor is unaware of any court decision holding that such a "content standard" is constitutionally required, especially in the context where control is exercised by the political campaign committee over the third party organization. In support of their argument, Movants set forth hypothetical scenarios.

The Movants first assume an Act 10 advertisement published by [redacted] after "conferring" with [redacted] or his agents about content and timing. ([redacted] at 36). They further assume the [redacted] is never mentioned in these ads, but legislators are. They ask, if everyone believes [redacted], is this enough to make every communication a contribution? The first answer is that communications are never contributions in any sense, but expenditures are, and certain conduct leading up to those expenditures may make them reportable as contributions. One wonders how an ad not mentioning the candidate at all would ever be construed as a campaign contribution to the candidate. Regardless, the answer, under Wis. Stat. § 11.06(4)(d) for example, is that it is reportable if it can be shown that the expenditure was made by the third party "for the benefit of [the] candidate . . . with the authorization, direction or control of or otherwise by prearrangement with

the candidate or the candidate's agent." This language is neither vague nor overbroad, as discussed above.

If notice standards – beyond the plain terms of Wis. Stat. §§ 11.06(4)(d), 11.10(4) and 11.01(15) – are required, such standards are readily available. They take the form of a formal GAB opinion with the force and effect of law. To be subject to regulation, El. Bd. Op. 2000-02 requires that candidate/third party interaction must be the product of substantial control or negotiation over contents, timing, location, mode, intended audience and volume such that the candidate committee and spender emerge as partners or joint venturers. These standards provide more than ample notice.

The Movants suggest that *McCutcheon* somehow requires a "content standard" because government regulation cannot properly target the general gratitude that a candidate may feel towards those who support him or her. ([redacted] at 37) There is no "fit," they contend, between the "government's interest in preventing *quid pro quo* corruption and the regulation of <u>any</u> communications made in 'coordination' with a candidate." [redacted] at 36. Such claims ignore the fact that *McCutcheon* did *nothing* to change the *Buckley* treatment of contributions and the principle that coordinated

expenditures are considered as contributions. 134 S. Ct. at 1445. ("[W]e see no need in this case to revisit Buckley's distinction between contributions and expenditures . . . .") Moreover, Movants ignore the fact that *McCutcheon* reviewed – and did not change – the *Buckley* conclusions about *quid pro quo* corruption or its appearance, as such conclusions related to base contribution limits.[210] In fact, *McCutcheon* makes favorable reference to the virtue of independent expenditures as having "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . [which] undermines the value of the expenditure to the candidate.' " *Id.* at 1454 quoting *Citizens United*, 558 U.S. at 357 quoting *Buckley*, 424 U.S. at 47. This principle is of course a corollary of the *Buckley* rule that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act," a sentence from the

---

[210] The *McCutcheon* Court expressly referenced the *quid pro quo* analysis originally articulated in Buckley without altering it:

> The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. As for the "closely drawn" component, Buckley concluded that the $1,000 base limit "focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." The Court therefore upheld the $1,000 base limit under the "closely drawn" test.

134 S.Ct. at 1444-45 (citations omitted)

very same paragraph as quoted by the *McCutcheon* (and the *Citizen United)* Court.

VII. WIS. STAT. § 11.26(13m), WHICH ALLOWS UNLIMITED CONTRIBUTIONS DURING THE CIRCULATION OF RECALL PETITIONS UNTIL THE RECALL ELECTION IS ORDERED, HAS NO EFFECT ON THIS INVESTIGATION OTHER THAN TO UNDERSCORE THE NEED FOR PROPER DISCLOSURE AND TRANSPARENCY. (ISSUE 6)

A. Notwithstanding Wis. Stat. § 11.26(13m), where a campaign committee authorizes – and indeed directs and controls – a corporate entity that is making expenditures for the benefit of the campaign committee, contributions in any amount must be reported, including prohibited contributions received from that corporation.

In the context of a Recall Election – within certain parameters – contributions to a candidate committee are unlimited. The Special Prosecutor understands Issue 6 to ask whether there is any legal significance to coordinating conduct between a candidate committee and a third party where contribution limits are effectively "suspended."

The answer is that, notwithstanding "suspended" contribution limits, coordinating conduct under the statutes and regulations nevertheless results in a reporting requirement, the intentional neglect of which violates Wis. Stat. § 11.27.

Likewise, In-Kind contributions in the form of expressive coordinated expenditures by [redacted] a corporation, are treated under the statutes and regulations as a contribution to a candidate committee. These corporate contributions violate Wis. Stat. § 11.38(1). Such direct corporate contributions remain prohibited. *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003); *see also* OAG 05-2010 (Note the opinion set forth in part below acknowledges the different treatment between contributions and expenditures, reinforcing the Special Prosecutor's position here.).[211]

[211] At ¶ 17, page 5, the Wisconsin Attorney General wrote:

> *Citizens United* has [not] invalidated Wis. Stat. § 11.38(1)(a)l., in its entirety...[T]he federal law at issue in *Citizens United*, like the state law at issue here, included a ban on corporate political contributions, in addition to the ban on corporate political expenditures. See 2 U.S.C. § 441b(a). The Supreme Court, however, did not strike down, or even question, the ban to the extent it applied to direct contributions. Rather, the Court emphasized that the *Citizens United* case was about *expenditures*, not about *contributions*, and made it clear that it was not disturbing the principle, recognized in *Buckley*, that political expenditures receive greater protection under the First Amendment than do political contributions. See *Citizens United*, 130 S. Ct. at 908-10. Ultimately, the Court invalidated the prohibition on corporate independent expenditures without affecting other aspects of 2 U.S.C. § 441b. *Citizens United* thus provides no direct or immediate basis for questioning the validity of any part of Wis. Stat. § 11.38(1)(a)l., other than the corporate expenditure prohibition.

B. Because the statutes say so and the Wisconsin Constitution does not say otherwise, no person is released from any requirement or liability otherwise imposed under ch. 11 or ch. 12 by virtue of the passing of the date of an election.

Movants ([redacted] at 16 et seq.) contend Wis. Stat. § 11.06(7) must be construed to limit coordination rules for a recall election to a specific period of recall election "candidacy," which they stake as the point in time the election is ordered.

Calling it "meritless," ([redacted] at 23), the Movants scoff at the notion that a candidate and a candidate committee's obligations under ch. 11 are not dependent upon any scheduled election. Yet that is exactly what the statutes provide:

> A person does not cease to be a candidate for purposes of compliance with [ch. 11] or ch. 12 after the date of an election and *no person is released from any requirement or liability otherwise imposed under this chapter or ch. 12 by virtue of the passing of the date of an election.*

Wis. Stat. § 11.01(1)(emphasis added). Consequently, the obligations of the candidate's committee under ch. 11 are not dependent on any election. By comparison, under [redacted] view, presumably an incumbent would stop being a candidate after an election until the next. In this interim, the Movants would have the court believe that the candidate committee is free from any reporting obligations. This is clearly not a logical interpretation

of ch. 11, especially in light of Wis. Stat. § 11.20(8), discussed immediately below.

This investigation seeks to identify expenditures which are contributions, contributions which under ch. 11 must be disclosed. Wis. Stat. § 11.06(1). Such campaign finance reports show the true source of the candidate committee's support. Reporting obligations are entirely independent of any elections. Campaign finance reports are due, at a minimum, in January and July of *any* given year, regardless of whether an election is held. *See* Wis. Stat. § 11.20(8). Once elected, an officeholder is always a candidate, and his or her candidate committee is always a candidate committee, without regard to the passing of an election. The candidate and the candidate committee remain subject to the obligations of chs. 11 and 12 all the time until the committee terminates. This is true even when a candidate loses an election, including officeholder/candidates. Consequently, a contribution received in October of the second year of a four year election cycle is as equally reportable as a contribution received two weeks before an election. An order for a Recall Election changes none of this. Put another way, if a candidate committee's conduct gives rise to a reportable contribution, it does not matter when that conduct occurs.

Focusing on the language of § 11.06(4)(d), when another entity makes expenditures for services for the purpose of benefitting the candidate committee and when that expenditure is made with the direction, control, authorization or "prearrangement" with the candidate committee, an In-Kind contribution is reportable. Focusing on the committee/subcommittee language of §§ 11.01(15) and 11.10(4), as long as another entity makes expenditures in concert with or pursuant to the authorization, request of a candidate committee, the resulting In-Kind contribution is reportable.

"By definition" – to invoke a *Buckley* phrase – an entity *under the control* of the candidate committee always makes *every* expenditure for the purpose of influencing an election and benefitting a candidate; that is what campaign committees do. And of course, [redacted] the investigation has good cause to believe exactly that level of control existed. Such controlled expenditures are indirect expenditures of the candidate committee itself, reportable as if the candidate committee made the expenditure directly, regardless of when in the election cycle the contribution occurred. If the candidate committee spends money, it is reportable. Concerning other entities *not* under the direct control of the candidate committee, a candidate committee may engage in whatever

interaction it pleases with another entity at any time so long as that interaction does not include a *request* to make an expenditure on behalf of the candidate committee. This *also* can be readily understood as an indirect expenditure of the candidate committee itself, reportable as if the candidate committee made the expenditure directly. And expanding the scope farther and invoking El. Bd. Op. 2000-02 / *Christian Coalition*, a reportable transaction occurs when the expenditure resulted from such substantial interaction between the candidate committee and the "spender" such that the candidate committee and the "spender" are considered to be partners or joint venturers.[212]

Wis. Stat. §§ 11.06(4)(d), 11.01(15) and 11.10(4) are not based on the calendar; they are based on the direct control, authorization or joint venture-like involvement of the candidate committee, whose activities can always be understood as – according to *Buckley* – "campaign related," 424 U.S. at 79, and subject to disclosure regulation.

The Movants contend that § 11.06(7) does not apply to non-candidate committees working together in support of other candidates. ([redacted] at 17, #3) It can be assumed they mean entities all working independently of the

[212] 2000-02 and *Christian Coalition* are phrased in terms of a four-pronged test. *See* discussion in text at and after note 181.

candidate committee. [redacted]. Good cause exists to believe this relationship was such that [redacted] lost any form of independence and lost as well the constitutional protections that attend such independence.

The Movants base their candidate-status argument on their reading of Wis. Stat. § 11.06(7). The argument appears to be that "coordination restrictions" under Wis. Stat. § 11.06(7) do not apply unless certain conditions under § 11.06(7) are met. Specifically, the argument is that for "coordination restrictions" to apply, there must be a supported or opposed candidate. ([redacted] at 17).

Wis. Stat. § 11.06(7) provides certain entities ("committees") other than campaign committees, must file an oath of independence. It is phrased in terms of entities who "make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election . . . ." This is the language upon which the Movants base their "candidate" argument. In context, the phrase on which they rely describes the use of monies spent; it does not place

parameters on the time frame of coordinated conduct. The Movants apparently do not read this quoted language as a reference to express advocacy. In fact, however, the clear source of the § 11.06(7) language, adopted in 1980 legislation in response to *Buckley* – is the *Buckley* decision itself and the express advocacy rule. 424 U.S. at 45 ("So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."). Simply stated, the *Buckley* language, "used to advocate the election or defeat of any clearly identified candidate," cannot be fairly read as placing a time frame on the application of principles of either control, direction or coordination. Wis. Stat. § 11.06(7) is intended to specifically apply to independent organizations which engage in express advocacy, like PACs. It requires organizations that spend money to advocate the election or defeat of any clearly identified candidate or candidates in any election to file an oath confirming their independence.

While the GAB referenced Wis. Stat. § 11.06(7) and GAB § 1.42 in El. Bd. Op. 2000-02, the Special Prosecutor understands these references as a rationale means of defining the type of conduct that would be "non-

independent." In fact, however, the operative conduct terms of Wis. Stat. § 11.06(7) ("cooperation," "consultation," "in concert," "request" or "suggestion") are all terms found elsewhere in the key statutes quoted throughout in this brief, *viz.* Wis. Stat. §§ 11.10(4), 11.01(15) and 11.06(4)(d). *See also* GAB § 1.20(1)(e)(using "authorization" as the operative term).

Article XIII, §12 of the Wisconsin Constitution offers no better basis for the Movant's arguments. It contains no provision lending support to the claim that candidacy is limited to the time after a Recall election is ordered, or any other time frame for that matter. Neither § 11.06(7) nor § 12(4) has any language within it that leads to the conclusion that there is a time period during which an officeholder is a candidate and after which ch. 11 and ch. 12 rules do not apply to him or her.

In the final analysis, however, even if "candidacy" was limited under Wis. Stat. § 11.06(7), this would not change the reporting and disclosure obligations of the candidate and the candidate committee under Wis. Stat. § 11.06(1). If a candidate committee receives a contribution, it must report that contribution whenever it is received.

VIII. WHEN A CANDIDATE ENCOURAGES DONATIONS TO A TRULY INDEPENDENT THIRD PARTY ENTITY, THIS *NEVER* RESULTS IN A REPORTABLE CAMPAIGN TRANSACTION. (ISSUE 8)

Wisconsin citizens have a right to know both the source and the extent of a candidate's true sources of financial support which he or she has requested and then received. *See* Wis. Stat. 11.001(1). Unless we are prepared to abandon the notion that cash – especially large amounts of cash – received by (or spent on behalf of) a campaign committee will lead to *quid pro quo* corruption or the appearance thereof, the State has a right to demand such expenditures be reported as contributions. And this is true no matter how their funds were raised, *i.e.*, by candidates or by other persons for the candidate. Having said this, the Special Prosecutor addresses the court's issue as framed.

A. When the third party entity is not independent, a reportable campaign transaction can occur under certain circumstances.

The Special Prosecutor respectfully submits there can never be "coordinated" fundraising between a candidate committee and a truly independent third party. In the context of expenditures by third parties, a less than independent relationship between a candidate committee and a third party entity does give rise *in some circumstances* to a reportable contribution. The response to this issue depends on the nature of the interaction between the third party and the candidate committee. The Special Prosecutor takes no issue with a candidate fundraising for a truly independent third party. However, a candidate committee that *controls* the third party entity incurs a reportable contribution when it directs the third party to collect funds, and this is certainly true when the candidate committee knows that the funds will be used for its benefit. A candidate committee that *requests* a third party entity to collect funds incurs a reportable contribution, and this too is certainly true when the candidate committee knows that the funds will be used for its benefit.

The Movants would have the court imagine a vague set of "coordination" circumstances where a candidate appears as a speaker at an

organization's fundraiser and funds from that event are thereafter used – as a result of an independent decision by the organization – for advertisements putting the candidate in a favorable light. Likewise, Movants suggest that some minor interaction between an organization and a candidate will give rise to allegations of coordination.

This is not at all close to what we are talking about here. We are concerned about a candidate or candidate agent who is reasonably believed to be *directing* or *asking* the third party entity to raise funds under circumstances where the candidate or candidate's agent knows the money will be spent to the candidate's benefit. This is very much unlike a situation where a like-minded candidate encourages – by speaking at a fundraiser or by other more direct encouragement – donations to an independent group. In such a case, the final independent judgment as to how, when and where the money is spent is up to the independent group. [redacted] it is the candidate committee's control that make the fundraising a reportable campaign transaction. [redacted]

And even in the absence of control or a specific request, the principles of El. Bd. Op. 2000-02 / *Christian Coalition* apply. A reportable transaction occurs when the expenditure resulted from such substantial interaction[213] between the candidate committee and the "spender" such that the candidate committee and the "spender" are considered to be partners or joint venturers.

B. Legislative history supports the Special Prosecutor's view of the law as much as it supports the Movants' view.

Although the Special Prosecutor believes the legislative history of ch. 11 supports his reading of the statutes as much as it supports any other position, it must be noted that the Movants delve into extrinsic source analysis without identifying any statutory language that is ambiguous. This runs contrary to accepted rules of statutory construction.

> It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

---

[213] El. Bd. Op. 2000-02 and *Christian Coalition* are both phrased in terms of a four-pronged test. *See* discussion at text at and after note 181 (El. Bd. Op. 2000-02) as well as the text accompanying note 199.

> Thus, we have repeatedly held that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry."

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶¶ 44-45, 271 Wis.2d 633, 681 N.W.2d 110.

Consequently, the Special Prosecutor asserts that a statute like Wis. Stat. § 11.06(4)(d) is plain in its directive that contributions, disbursements and incurred obligations "for the benefit of a candidate [are] reportable by the candidate or the candidate's personal campaign committee if [they are] made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent."

Contributions collected by a third party entity under the control of the candidate committee are no different than contributions collected by the candidate committee itself.

Likewise, contributions collected by a third party entity authorized (*i.e.*, requested) by the candidate committee to do so are indirect contributions that, for analytical purposes under principles of agency, are the legal equivalent of contributions collected by the candidate committee itself.

The prearrangement language in § 11.06(4)(d) is also reasonably read as incorporating that exact part of *Buckley* that discusses coordinated expenditures as campaign contributions. 424 U.S. at 46-47. "Section

608(b)'s contribution ceilings rather than s 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.") To the extent that the "prearrangement" language needs further definition, Wis. Stat. § 11.01(15), defining "personal campaign committee," uses standards appropriate to this context: cooperation, consultation and action in concert. *See also* Wis. Stat. § 11.10(4)(describing a "subcommittee" of a personal campaign committee). Finally, the contours of "prearrangement" are discussed in El. Bd. Op. 2000-02, which has the force and effect of law. *See* Wis. Stat. § 5.05(6a). The Special Prosecutor notes that the "coordination" definitions found in El. Bd. Op. 2000-02 generally track the words already found in the personal campaign committee statute, Wis. Stat. § 11.01(15) and Wis. Stat. § 11.06(4)(d), using words like "request," "cooperation," "consultation," and "control."

The Movants argue that, in an analysis of legislative history, solicitation of money or other things of value for an independent entity was rejected by the legislature in the form of Assembly Bill 1005. ([redacted] at 36). That Bill provided:

> No individual who holds a state or local office may solicit any money or other thing of value or act in concert with any other person to solicit any money or other thing of value for or on behalf of any committee that is required to file an oath under s. 11.06(7), any organization that makes a noncandidate election expenditure; or any organization that is subject to a reporting requirement under section 527 of the Internal Revenue Code.

The bill rejected by the legislature proposed to prohibit the solicitation of money or action in concert with another to solicit any money for an *independent* entity. As the Special Prosecutor has already noted, soliciting money for a truly independent organization is not the object of this inquiry.

[redacted] The legislative rejection of this bill does little to shed light on issues relevant to this investigation.

The Movants also argue ([redacted] at 37) that the 1980 Amendments provide solid proof that "coordinated" fundraising was tacitly approved when Wis. Stat. § 11.06(7) was revised. As noted by the Movants, the language of § 11.06(7), prior to the 1980 amendments, provided that:

> Every voluntary committee and every individual who desires to accept contributions and make disbursements during any calendar year, in support of or in opposition to any candidate in any election shall file with the registration statement under s. 11.05 a statement under oath affirming that *all contributions are accepted and disbursements made without the encouragement, direction or control of any candidate* who is supported or opposed. Any person who falsely makes such an oath, or any committee or agent of a committee who carries on any activities with intent to violate such oath is guilty of a violation of this chapter.

(Emphasis added.) The new 1980 version of § 11.06(7) is phrased in terms of disbursements only and substituted language "cooperation or consultation" as well as "act in concert with, or, at the request or suggestion" in place of the "encouragement, direction or control" language.

The Movants claim this means it is "open season" on coordinated fundraising, [redacted]. This is a hasty conclusion. First, Wis. Stat. § 11.06(7)(1979-1980) is directed at entities that are truly *independent*; that is its fundamental premise. If a candidate wants to solicit money for a like-minded organization which is truly independent, then that candidate is free to do so. That is not what we are dealing with here.

Second, if § 11.06(7) was adopted, as the Movants contend, to incorporate federal election standards at 2 U.S.C. § 431(17)(1980), ([redacted] at 38 n.28 and accompanying text), then (as the Special prosecutor has already observed), Wis. Stat. § 11.06(7) does not apply to third party groups except to the extent that those entities engage in express advocacy. 2 U.S.C. § 431(17) (1980), as quoted by the Movants provides:

> [A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Indeed, that is the reasonable reading of the language, "advocate the election or defeat of any clearly identified candidate" in § 11.06(7). Movants contend this proceeding has everything to do with non-express advocacy; if that is true, by virtue of their own legislative history argument, § 11.06(7) does not apply here.

Other statutory amendments made in 1980 are more directly applicable to the issue at hand. These are the amendments pertaining to reportable contributions under Wis. Stat. § 11.06. At the very same time that the legislature removed "coordinated contribution" language from § 11.06(7), they incorporated such language into § 11.06(4)(d). The old, pre-1980 version of the statutes provided:

> (d) A contribution, disbursement or obligation made or incurred for the benefit of a candidate is reportable by the candidate or the personal campaign committee if it is made or incurred with the encouragement, direction or control of the candidate or the campaign treasurer.

Wis. Stat. § 11.06(2)(d)(1977-1978). The version adopted in 1980 renumbered the section to Wis. Stat. § 11.06(4)(d) and revised it to provide:

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

That language remains in effect to this day. The fundraising coordination language was not struck from the statutes; it was moved to § 11.06(4)(d).

And, not inconsistent with the Movants' position before this court, the language was made more strict. It dropped a reference to "encouragement" of contributions and substituted stricter language. However, it did not remove all restrictions on fundraising.

To summarize, where truly independent organizations are involved, a candidate may well solicit money for such an organization. There comes a point, however, where such interaction renders the organization less than independent, even if fundraising is involved. That point is defined by "the other" statutory amendment enacted in 1980, the one directed at "Reportable Transactions" found in Wis. Stat. § 11.06(4)(d). A third party entity ceases to be independent under Wis. Stat. § 11.06(4)(d) whenever the third party entity is controlled by the candidate committee, is authorized to act by the candidate committee or otherwise interacts by "prearrangement" with the candidate committee.

C. The conduct under investigation might prove to violate the existing liberal federal election rules if they applied, but regardless, Wisconsin is entitled to enforce the *Christian Coalition* standards, the standards first embraced by the Federal Election Commission before Congress repealed them as too lax.

The Movants go on to discuss federal election law and imply (if not outright state) that federal candidates do exactly what is going on here. The

Special Prosecutor is not so sure. By the end of the investigation, it may well be that the conduct that occurred here violated even the liberal federal rules (if they applied here). Nonetheless, several points in response to the Movants' claims are in order.

First, FEC rules currently do not enforce strict standards relating to coordination between candidates and non-express advocacy groups, notwithstanding congressional desires to the contrary.

Second, the FEC rules were formerly much stricter; in fact, in 2000, the FEC adopted the *Christian Coalition* standard,[214] which of course is *followed* in Wisconsin in El. Bd. Op. 2000-02.

Third, viewing the standard as too high, Congress *repealed* the FEC rule adopting *Christian Coalition* and mandated that the FEC adopt rules that "shall not require agreement or formal collaboration to establish coordination." Public Law 107-155 March 27, 2002, 116 STAT. 81, § 214 (c). Of course, this "agreement or formal collaboration" is *exactly* what *Christian Coalition* requires.

Fourth, the new FEC rules have not fared very well thereafter, not because they were too strict but because they were too lax. The 2003

[214] *See* note 195.

version regulated any public communication inside a 120 day pre-election window but otherwise regulated only express advocacy. The measure was challenged by two congressmen who filed suit under the Administrative Procedures Act. The D.C. Circuit Court of Appeals ruled that the FEC's 2003 coordination regulation failed to meet Administrative Procedures Act standards. The regulation's "fatal defect" was that it regulated *only* express advocacy outside of the 120-day pre-election window and that the FEC had provided no "persuasive justification" for such "weak restraints" on potentially corruptive coordinated activity. *Shays v. FEC*, 414 F.3d 76, 100 (D.C. Cir. 2005). In response, the FEC revised the coordination regulation in 2006.[215] The 2006 regulation was materially identical to the first revision, except that it shortened, from 120 days to 90 days, the pre-election windows for all public communications subject to the coordination rule with respect to a primary election for a congressional race.[216] The 2006 regulation was challenged again in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), and the D.C. Circuit Court of Appeals found again that the regulation was unduly narrow and lacked the justification required by the Administrative Procedures Act. The court of appeals wrote the new

[215] 71 Fed. Reg. 33190, 33190 (June 8, 2006).
[216] *Id.* at 33193; 11 C.F.R. § 109.21(c)(4) (2006).

regulation "still permits exactly what we worried [about previously], i.e., more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words." *Id.* at 925. The current set of rules remain in place, to date unchallenged for a third time, but nevertheless these current rules are not as demanding under the First Amendment as the original *Christian Coalition* standards previously enacted by the FEC in 2000.

Fifth, under basic principles of federalism, Wisconsin is entitled to have stronger standards than the federal authorities.

D. An Informal Letter from 2005 does not change the analysis of the issues before the court.

The Movants cite to a May 2005 informal GAB staff response to a question posed by an election lawyer. ([redacted] at 63) As compared to El. Bd. Op. 2000-02, this letter does not have the force and effect of law. *See* Wis. Stat. § 5.05(6a). The informal opinion was prompted by a letter concerning a candidate who asked about "steering" a person to donate to a 501(c)(4) issue advocacy organization. Specifically, the informal letter framed the question as: "whether a candidate's action in directing a prospective contributor to an issue advocacy organization which engages only in non-express advocacy could result in the contributor's contribution

to the issue advocacy organization being treated as an in-kind contribution to the candidate." The informal opinion supports the Special Prosecutor position for a number of reasons.

First, the GAB staff counsel answered the question – in an extended fashion – treating the donation in terms of its treatment as an In-Kind contribution. This is significant because the Movants suggest it is important that legislation expressly addressing "coordination," like certain federal statutes, was not adopted in Wisconsin. The federal statute expressly states that an expenditure "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."[217] The argument is that Wisconsin could have adopted such a statute but did not. ([redacted] at 37) As a momentary aside, this federal language closely tracks the language found in Wis. Stat. §§ 11.06(4)(d) and 11.01(15). However, the point to be made now is that, similar to the federal statute, In-Kind contributions under Wis. Stat. § 11.01(6) and GAB § 1.20(1)(e) require that any "thing" of

[217] 52 U.S.C. § 30116(a)(7)(B)(i) (formerly 2 U.S.C. § 441a(a)(7)(B)(i)).

value expended by a third party for the benefit of the campaign committee be reported as a campaign contribution.

Second, even though the GAB staff attorney was addressing a question regarding a non-Voluntary Oath § 11.06(7) organization that engaged in issue advocacy (versus an entity that "advocate[d] the election or defeat of any clearly identified candidate or candidates in any election"), he nevertheless referenced Wis. Stat. § 11.06(7) and the standards that section contains, phrased as action "in concert," "cooperation," and "consultation." These are not unlike the standards set forth in Wis. Stat. §§ 11.06(4)(d), 11.01(15), and the related subcommittee statute, Wis. Stat. § 11.10(4). It was not unreasonable for staff counsel to reference § 11.06(7) in this context. Standards relating to independent express advocacy entities are reasonably related to the standards that would be applied to independent issue advocacy organizations.

Third, in theory this letter represents the type of situation addressed earlier in this Section with which the Special Prosecutor has no objection. In other words, a candidate would *not* be considered to be "coordinating" with another organization in a situation where a candidate encouraged a

contribution to a like-minded issue advocacy group that truly was independent.

Fourth, the interaction giving rise to a finding of "control," "direction," "authorization," or "action in concert" is in fact a matter of degree, as the letter suggests. It was appropriate for the staff counsel to rely on El. Bd. Op. 2000-02, the opinion, which *did* have the force and effect of law, in providing advice to the attorney.

Fifth, the Special Prosecutor notes that if any of the Movants here were confused or unclear about any aspect of ch. 11 and "coordination," they could have made inquiry of the GAB just as the election lawyer did in this instance. Indeed, they could have requested a formal opinion which would have had the force and effect of law and upon which they would have been absolutely entitled to rely. Wis. Stat. § 5.05(6a). They did not do that.

E. The Special Prosecutor doubts "everybody does it" the way it appears to have been done here.

Finally, the Movants argue "everybody does it." ([redacted] at 51). The Special Prosecutor doubts it. Nevertheless, if the Movants have good cause to believe that [redacted][218]

[redacted]

[218] *See* text accompanying note 46.

[redacted][219] [redacted], [220] [redacted],

[redacted], [221] they should come forward with it. All the better if that evidence includes the fact that [redacted]

[redacted]. [222] [redacted] That too should be thoroughly investigated.

IX. THE MOVANTS ARE ASKING THIS COURT TO IGNORE ALL FIRST AMENDMENT JURISPRUDENCE UPHOLDING REASONABLE CAMPAIGN FINANCE REGULATION IN THE FACE OF CONCERN FOR QUID PRO QUO CORRUPTION OR THE APPEARANCE THEREOF.

In effect, the Movants are asking the Court to overrule decades of jurisprudence, beginning with *Buckley* and ending with *McCutcheon*, 134

---

[219] *See* text accompanying note 38.
[220] *See* text accompanying note 41.
[221] *See* text accompanying note 152.
[222] *See* text accompanying notes 86 to 88.

S. Ct. at 1444-45, holding that large, secret campaign contributions present a serious potential for corruption or its appearance and that regulations in the form of contribution limits and disclosure requirements are closely drawn to address this legitimate concern.

The explosion of issue advocacy in the past ten years is evidence of its effectiveness. Such issue advocacy is predicated, however, on the concept of an *independent* speaker.

On the other hand, it is commonly acknowledged that words of express advocacy are *not* generally used in *campaign* ads. *See WRTL*, 551 U.S. at 471 ("the most effective campaign ads, like the most effective commercials for products . . ., avoid the [Buckley] magic words [expressly advocating the election or defeat of a candidate]") quoting *McConnell*, 540 U.S. at 127 (internal quotation marks omitted); *see also* Craig B. Holman & Luke Mcloughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 13 (2001).

If indeed the most effective advertising does not use magic words, and if campaigns now put the bulk of their money into campaign ads that do not contain these magic words, why ever would candidate committees continue

to use *limited* campaign dollars which must be *disclosed* publicly when they can create an alter ego corporate entity that can produce the exact same ads with *unlimited* funds (including *unlimited* corporate funds) *without ever having to disclose* the source of such funds to produce the same ads?

The Movants claim that candidate committees should be allowed to do this. The Special Prosecutor responds by saying this creates a circumstance ripe for *quid pro quo* corruption at levels heretofore never envisioned (or countenanced) by the United States Supreme Court.

Accepting the Movants invitation to hold that unlimited coordination may occur between a candidate committee and a third party entity (so long as the product of the collaboration does not use magic words), invites candidate committees to have a third party entity produce the exact campaign ads they would have otherwise themselves produced. It invites them to do so using undisclosed, unlimited funds from both individuals and corporations. A candidate committee would be foolish not to accept that sort of invitation. It is, indeed, the very antithesis of the *Buckley* principles and the principles of campaign finance law.

However, the Movants claim that "[T]he risk that coordinated issue advocacy will lead to corrupt bargains – rather than mutual promotion of

agreed public policy goals – is infinitesimally small." ([redacted] at 89). This is an amazing statement, in support of which they provide the following example:

> [A]ssume a candidate who is pro-gun control, or even one who has taken no position on the issue: Is it conceivable that the National Rifle Association will seek to coordinate its antigun control advocacy with that candidate? Is it conceivable that that coordinated advocacy will somehow help the candidate in the same way a contribution of cash would? Is it conceivable that the candidate will be induced corruptly to change his views because of the benefits secured through coordination?

([redacted] at note 42) The answer is unconditionally yes, particularly in the case of a candidate who is neutral on the issue of gun control before he is courted by the NRA.

First of all, the example assumes what must be understood to be a truly independent third party entity, the National Rifle Association (NRA). We are not dealing with independent entities in this investigation, based on evidence so far developed. Second, even using the NRA example, the Movants claim there is an "infinitesimally small" chance that an offer of an undisclosed one million dollars spent on issue ads that the candidate committee itself produced and then deployed in whatever markets it chose, whenever it chose, would not tend to corrupt the candidate or provide the appearance of corruption. Is such a candidate more likely to vote against gun control, even though he was neutral before the election, after the

receipt of an undisclosed one million dollars, notwithstanding what his constituency might want? Might he or she be able to create an appearance during the campaign of being in favor of gun control while secretly accepting NRA money, only thereafter to have a change of heart when it came time to vote on gun control legislation? Is such a corrupt bargain "inconceivable," as the Movants suggest? The Special Prosecutor submits that the answers to all of these questions are obvious. Of course, a secretly provided million dollars, spent at the whim of the candidate committee without the use of magic words, will be – at the very least potentially – a corrupting influence. And there can be no reasonable dispute that it would lead, if ever disclosed, to the appearance of corruption.

But beyond the NRA, under the Movant's' view, the candidate is free to set up – either directly or indirectly – a third party corporation that he, she or some agent can control unconditionally. That corporation would then be unrestricted in its production of candidate directed election-related ads that were funded by secret money in unlimited amounts, including undisclosed funds from corporations.

Without overruling *Buckley* and *McCutcheon*, each of which affirmed base contribution limits and affirmed the concept of the regulation of

coordinated expenditures[223] as contributions, the type of conduct provided in the examples above is properly subject to regulation in the form of required reporting.

X. THE CHIEF JUSTICE OF THE WISCONSIN SUPREME COURT APPOINTED THE JOHN DOE JUDGES AND HAD FULL LAWFUL AUTHORITY TO DO SO. (ISSUE 1)

Chief Justice Shirley Abrahamson, in an order signed on her behalf by A. John Voelker, the Director of the State Courts, appointed Judge Barbara A. Kluka, and then Judge Gregory A. Peterson, to serve first in Milwaukee and then subsequently in the Counties of Columbia, Dane, Dodge and Iowa.[224]

The Chief Justice of the Wisconsin Supreme Court has full authority to make such appointments. Wis. Stat. § 753.075(2) provides:

> The chief justice of the supreme court may appoint any of the following as a reserve judge:
>
> (a) Any person who has served a total of 6 or more years as a supreme court justice, a court of appeals judge or a circuit judge.
>
> (b) Any person who was eligible to serve as a reserve judge before May 1, 1992.

The orders for specific judicial assignment indicate that the Director of State Courts signed the order on behalf of the Chief Justice.

---

[223] *See McCutcheon*, 134 S. Ct. at 1454.
[224] *See* D:5; D:11A; M:8 and M:205.

In the appellate proceedings below the Three Unnamed Petitioners below (Movants 2, 6 and 7 here) were all provided with copies of the Kluka appointment orders as part of their Redacted Appendix at Bates 115-19. They acknowledge such receipt. ([redacted] at note 9, at 32) The orders plainly reflect that Mr. Voelker signed as the agent of the Chief Justice, and that Mr. Voelker did not appoint the reserve judge on his own authority. *See* Figure 22.[225]

Application Order and Order of Assignment

☒ It Is Ordered the judge named below is assigned this case.
☐ This assignment is denied.

Shirley Abrahamson
Chief Justice

By: Electronically signed by
A. John Voelker, Director of State Courts
Chief Judge/Deputy Chief Judge/DCA/Director/Chief Justice

August 21, 2013
Date

Name of Judge Assigned:

Barbara A. Kluka

Figure 22

[225] D:5: App. 54-61.

There was not just one order appointing Judge Kluka and Judge Peterson to preside in five counties. There were five proceedings commenced in five separate counties. There were five different orders. And again, the Movants acknowledge as much. ([redacted], note 7 at page 26)

XI. THE CHIEF JUDGE OF THE FIRST JUDICIAL DISTRICT APPOINTED THE JOHN DOE JUDGES TO SERVE ONLY IN MILWAUKEE COUNTY. (ISSUE 2)

The Special Prosecutor is unaware of any orders entered by the Honorable Jeffrey Kremers, Chief Judge of the First Judicial Circuit, appointing any reserve judge to serve in connection with proceedings relevant here other than orders appointing Judge Barbara Kluka and Judge Gregory Peterson to serve in Milwaukee County only.[226]

[226] Per the Order of February 25, 2015, the reassignment orders of the Chief Judges in Judicial District 6 and 7 appointing Judge Gregory Peterson as the John Doe judge in Iowa, Dodge and Columbia Counties are now part of the record. *See* App. 54-61. The appointment of Judge Peterson is part of the Dane County record. *See* D:98.

XII. THE JOHN DOE JUDGE PRESIDED OVER FIVE JOHN DOE PROCEEDINGS IN FIVE SEPARATE COUNTIES, NOT ONE CONSOLIDATED PROCEEDING, AND THE PROCEEDINGS – SINCE HIS APPOINTMENT – HAVE BEEN DIRECTED BY THE SPECIAL PROSECUTOR, NOT THE DISTRICT ATTORNEY OF ONE OF THE COUNTIES. (ISSUE 3)

The Special Prosecutor knows of no authority that prohibits a John Doe Judge, who is appointed and acting in five counties,[227] from conducting a John Doe proceeding in each of those five counties.

Five different District Attorneys each petitioned for commencement of John Doe proceedings in their respective counties. Judge Barbara Kluka was appointed in each of those counties and thereafter appointed the Special Prosecutor to serve in each of those five counties.

After Judge Kluka recused herself for reasons unknown to the Special Prosecutor, Judge Gregory Peterson was appointed to serve as the John Doe Judge.

Neither Judge Kluka nor Judge Peterson has ever entered any order consolidating the John Doe proceedings in one of the five counties. Once more, the Movants acknowledge as much. ([redacted] note 7, page 26) The proceedings have moved forward in parallel in all five counties and a

[227] *See* D:5; D:11A; M:8; and M:205.

separate record has been maintained in each county. On November 13, 2013, Judge Peterson selected Dane County as the county designated to receive original papers, with copies being filed in the other four counties.[228] As to this aspect of the Movants' argument, the Court of Appeals noted below,

> The petitioners first argue that John Doe investigations that were initiated in multiple counties have been illegally consolidated into a single proceeding. *This argument erroneously conflates the terms "investigation" and "proceeding."* What has occurred here 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 being filed against different individuals or entities respectively residing or headquartered in each of those counties.

App. 16. (emphasis added).

This "five county" approach results from the application of several statutes. Created by 2007 Wisconsin Act 1, Wis. Stat. §§ 11.61(2) and 978.05(1) effectively remove the authority of the Dane County District Attorney to prosecute campaign finance and election crimes occurring in the Capitol. These statutes are part of a suite of laws[229] designed to give

---

[228] D:107; M:207.

[229] Chapters 11 and 12 of the Wisconsin Statutes contain similar language. *See* Wis. Stat. § 11.61(2)("Except as otherwise provided in ss. 5.05 (2m) (c) 15. and 16. and (i), 5.08, and 5.081, all prosecutions under this section shall be conducted by the district attorney for the county where the defendant resides . . . ."); *see also* Wis. Stat.§12.60(4) ("Prosecutions under this chapter shall be conducted in accordance with s. 11.61 (2)").

politicians and their agents the right to be prosecuted – if they so choose[230] – in the county of their residence. Wis. Stat. § 978.05(1) provides that the District Attorney shall:

> prosecute all criminal actions before any court within his or her prosecutorial unit and have sole responsibility for prosecution of all criminal actions arising from violations of chs. 5 to 12 . . . that are alleged to be committed by a resident of his or her prosecutorial unit . . . unless another prosecutor is substituted under s. 5.05 (2m) (i) or this chapter or by referral of the government accountability board under s. 5.05 (2m) (c) 15. or 16.

Of course, the statute could not – and does not – go so far as to provide only politicians and their agents the right to be prosecuted in the county of their residence. It applies with equal force to all persons prosecuted under Wisconsin Statutes chs. 5 to 12. While all of the conduct being investigated arguably occurred in Dane County, the responsibility for prosecuting any potential charges rests with prosecutors in five different counties, where various subjects of this investigation reside.

Since my appointment, there has been no District Attorney directing this investigation, except perhaps in the sense that I serve in that capacity in their stead. I alone have been ultimately responsible for the investigation and all decisions related thereto.

---

[230] Venue for a criminal proceeding under campaign finance laws is in the county of the defendant's residence [Wis. Stat. § 971.19(12)], *unless the defendant elects to be tried in the county where the offense was committed.* Wis. Stat. § 971.223(1).

XIII. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE JOHN DOE JUDGE HAS AUTHORITY TO APPOINT A SPECIAL PROSECUTOR UNDER THE DECISIONS OF *STATE V. CUMMINGS* AND *STATE V. CARLSON.* (ISSUE 4)

In direct response to the matters contained in Issue 4, a John Doe judge is authorized to appoint a special prosecutor to act where the district attorney has given that special prosecutor express authority to act in his or her stead. A Wisconsin judge has inherent authority, as found by the court of appeals, without respect to the existence of the enumerated circumstances under Wis. Stat. § 978.045(1r). Prosecutors perform many functions and duties prior to the issuance of charges and nothing in the law of Wisconsin bars an attorney from acting with the express authority of a district attorney prior to the filing of charges. In fact, Wis. Stat. § 978.045(1r) contemplates the appointment of a special prosecutor at the request of a district attorney in a John Doe proceeding. The court has framed the matter of "refusal" of the district attorney as "refus[ing] to continue the investigation or prosecution of any potential charge." The District Attorneys have turned control of the investigation and prosecution to a special prosecutor for the reasons and purposes as found by Judge Kluka in her appointment order; those reasons and purposes form as valid a basis for the appointment as would an outright refusal to proceed with a

prosecution. Finally, a certification to the Department of Administration is, as recognized in *State v. Bollig,* 222 Wis.2d 558, 587 N.W.2d 908 (Ct. App. 1998), part of a system intended to control special prosecution costs. While it may give the Department of Administration a basis to refuse payment to the Special Prosecutor, it does not affect the substance of his authority to act as an attorney controlling this investigation in each of the five counties.[231]

The court's review of this court of appeals decision on these issues presents a question of law, which is reviewed de novo. *State v. Hemp,* 2014 WI 129, ¶ 12, 856 N.W.2d 811, 815.

A. Concessions by the Movants resolve Issues 4 and 5 as a practical matter.

The Special Prosecutor begins by noting that the concessions of the Movants resolve all questions contemplated by Issues 4 and 5.

The reason is this: the Movants have conceded that all of the orders of the Milwaukee County proceeding are lawful. In their Conclusion, Movants state that they seek a declaration that "every act of the special

[231] The special prosecutor has yet to submit vouchers for payment. At some point they will be submitted with the understanding that there is no expectation of prompt payment, as well as the fact, as Movants point out for some reason, the hourly rate I was asked to work for is higher than that specified in the statutes. As has been publicly disclosed, the Special Prosecutor was paid for work as an investigator for the GAB. The last such payment was over one year ago.

prosecutor and of the John Doe judges accordingly is *void ab initio*, from August 23, 2013 forward, and of no legal effect *except* as to the John Doe judges' orders in Milwaukee County." ([redacted] at 69; *see also* [redacted] at 14))(emphasis added). This is not merely a mistaken turn of a phrase. It is supported by statements elsewhere in the Movants' brief. For example, from the [redacted] Brief at page 29, we read, "[redacted] does not challenge Judge Kluka's initial appointment there [Milwaukee]." The problem arose "later" after Judge Kluka was properly appointed in Milwaukee County, [redacted] contends, when the Director of State Courts extended that appointment to four more counties in one functionally-consolidated proceeding or investigation. *Id.* And at page 33, she remarks, "[redacted] does *not contest* the appointment of Judge Peterson in Milwaukee County . . . ." And at page 59, we read, "The actions of both [judge and special prosecutor] are void outside Milwaukee County and from August 2013 forward."

These concessions lead to one conclusion, the same as contained in [redacted] own Conclusion at page 69, *viz.*, the *Milwaukee County orders* of the John Doe Judge were lawful both before and after August 23, 2013.

This is significant. There was no difference in the orders that were entered in Milwaukee, Columbia, Dane, Dodge or Iowa as relates to the Movants here. As the Movants point out, the papers contained captions from all five counties. Consequently, there was not one body of evidence retrieved, for example, through service of a Columbia County search warrant that was not also retrieved by virtue of a search warrant issued in the Milwaukee County proceeding. This is because *all* subpoenas and warrants were issued "out of" *each* of the separate proceedings in each of the five counties.

This leaves the Special Prosecutor to ask, if the orders of the Milwaukee County Judge were legally sufficient, what is the practical consequence of a technical insufficiency (assuming there is one) in the other counties?

No one would seriously question that a judge may issue a subpoena to anyone anywhere within the State. Likewise, no one would seriously question the authority of a judge to grant a search warrant to be served anywhere in the state. Wis. Stat. § 968.12(4).

Wis. Stat. § 11.61(2) requires that "prosecutions" shall be conducted by the "district attorney for the county where the defendant resides." It does not however, prohibit a district attorney from conducting an investigation

that may relate to, but also go beyond, the borders of his jurisdiction. Investigations are not prosecutions. Upon completion of the investigation, the district attorney would be free to bring charges as appropriate relating to residents of his or her county and also share the investigative evidence relating to residents of other counties with the district attorney for the proper prosecutorial unit, *e.g.*, Dane County. *State v. Cummings,* 199 Wis.2d 721, 744-45, 546 N.W.2d 406, 415 (1996) ("[W]e see no reason why a district attorney could not independently [*i.e.,* without participation of the John Doe Judge] file a complaint based solely upon evidence obtained through a John Doe proceeding, even if it was the district attorney who initiated the John Doe.); *see also State v. O'Connor*, 77 Wis.2d 261, 274, 252 N.W.2d 671, 676 (1977) ("If evidence adduced in the [Dane County] John Doe investigation together with information obtained by the authorities from other sources amounts to probable cause, we see no reason why a criminal action may not be initiated by means of a complaint filed with and a warrant issued by any judge or court commissioner having jurisdiction to act in [Milwaukee County]."). Wisconsin law allows a prosecutor to both (1) file a complaint based on evidence gathered in a John Doe investigation independent of the judge, and (2), share information

between counties, again independent of the judge. Applying these principles here, nothing would stop the Milwaukee County District Attorney (or a Special Prosecutor acting there) from completing the investigation, charging his case as appropriate, and sharing evidence with other counties as warranted as well.

If the orders of the Milwaukee County John Doe Judges were lawful, no practical issue of consequence remains.

B. The Special Prosecutor functions lawfully as the expressly appointed agent of the District Attorney and this principle of agency is reflected in Wis. Stat. § 978.045(3)(a).

Wisconsin law allows a John Doe judge to appoint a special prosecutor to perform the functions of a district attorney when the district attorney in each county requests the appointment.

Legitimate prosecutorial authority can derive from an informal act of appointment by the district attorney; anything after that is simply a discussion of who pays for the special prosecutor's work. *State v. Bollig*, 222 Wis.2d 558, 571, 587 N.W.2d 908, 913 (Ct. App. 1998) ("[T]he central purpose of appointments under § 978.045(1r) is to assure that the State will not have to pay for the services of a special prosecutor under circumstances not anticipated in the statute."). A district attorney can appoint a special

prosecutor for any reason at all "and [he] serves at the pleasure" of that district attorney, simply by virtue of the appointment. Wis. Stat. § 978.045(3)(a). That statute provides:

> If an attorney is available and willing to serve as a special prosecutor without state compensation, the district attorney may appoint the attorney as a public service special prosecutor to serve at the pleasure of the district attorney. The public service special prosecutor may perform the duties and has the powers of the district attorney while acting under such an appointment, but is not subject to the appointment procedure under subs. (1g) and (1r) or to the compensation under sub. (2).

A special prosecutor possesses all the powers of the district attorney. *Id.* The action of a "court of record" is not required. No order *of any kind* is needed. Indeed, no forms or reports are mandated. Compare Wis. Stat. § 978.045(1g) (mandating the use of forms provided by the Department of Administration).

The Special Prosecutor has always worked with the express authorization of all five of the elected District Attorneys. That fact alone is sufficient to validate the actions taken on their behalf. That is to say, the source of authority is not merely the appointment by the John Doe Judge. Independent authority is also grounded in the simple fact of the prior authorization of the five District Attorneys. Indeed, to date I have served willingly.

The lawfulness of my conduct as a Special Prosecutor should not turn on whether I will ever be paid, how much I will be paid, or who in the Department of Administration was notified. To be sure, the Department was notified,[232] but all of these considerations relate to formal requirements concerning costs under the statute, not the substance of lawful authority. This view is exactly consistent with the decision in *Bollig* discussed below. *See Bollig*, 222 Wis. 2d at 571 n.7. If the John Doe judge or the district attorneys somehow failed in following the process to make proper arrangements for payment under a statute designed to control costs, it may well be that the Department of Administration has a legitimate reason to refuse to pay me. It does not follow, however, that because a cost regulating statute may not have been followed, my ability to discharge my duties as an attorney was comprised. Indeed, as noted below, non-lawyers are allowed to "practice" before a John Doe judge without prejudice to the proceeding. A duly licensed attorney acting as a special prosecutor with the express authority of the district attorneys, who has a possible future fee dispute with the Department of Administration, should fare no worse.

[232] App. 76.

While the Movants contend there is no legal or factual basis for the lawful actions of the Special Prosecutor, Wis. Stat. § 978.045(3)(a) recognizes that permission to act is itself sufficient. Permission to act was obtained here; that permission is sufficient to imbue the Special Prosecutor with lawful authority.

C. The court of appeals correctly decided that the John Doe Judge has authority to appoint a Special Prosecutor under the decisions of *State v. Cummings* and *State v. Carlson*.

In Issue 4, the court asks, essentially, whether the appointment of the Special Prosecutor is lawful when none of the nine enumerated grounds in Wis. Stat. § 978.045(1r) apply. The Special Prosecutor has not contended that the appointment was made under one of the nine statutory subsections, nor did Judge Kluka utilize Wis. Stat. § 978.045 as the basis for her appointment. The court of appeals was not persuaded by arguments that Wis. Stat. § 978.045(1r) need be satisfied as a condition precedent to the lawful appointment of a special prosecutor. App. 18-19. The court of appeals held that "[b]ecause we are satisfied that the prior judge did have inherent authority to appoint a special prosecutor under *Cummings* and *Carlson*, we are not persuaded that she violated any plain legal duty in making the appointment here—regardless whether the statutory criteria

were also met." App. 14-22 (citing *State v. Cummings*, 199 Wis. 2d 721, 735-36, 546 N.W.2d 406, 411 (1996); and *State v. Carlson*, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451 (WI App 2001)).

1. The John Doe Judge had Authority to Appoint a Special Prosecutor under *State v. Carlson*.

The John Doe Judge based her decision to appoint a special prosecutor under the authority of *State v. Carlson*, 2002 WI App 44, 250 Wis.2d 562, 641 N.W.2d 451. *Carlson* continues a tradition upholding the broad authority of a judge to appoint a special prosecutor.

Carlson involved a "Refusal Hearing" under the Implied Consent law. The circuit court appointed a City Attorney as a Special Prosecutor to handle the hearing which by law a district attorney customarily prosecutes. The district attorney was not unavailable nor was he or she otherwise prohibited from handling this hearing;[233] none of the circumstances enumerated in Wis. Stat. § 978.045(1r) applied. Carlson's refusal to take a chemical test was held unlawful. On appeal, Carlson challenged the court's authority to appoint the City Attorney as a special prosecutor, arguing that an appointment could not be made under § 978.045(1r) in a non-criminal

[233] In fact, it was the practice and policy of the trial court to routinely appoint a City Attorney to handle certain Refusal Hearings. *Carlson*, 2002 WI App 44, ¶ 9. Presumably, this practice resulted from the fact that City Attorneys routinely appear before the court on first-time Operating While Intoxicated offenses.

case. *Carlson*, 2002 WI App 44 ¶ 5. The Court of Appeals rejected the argument, writing:

> [A] complete reading [of § 978.045] gives the court almost *unfettered authority to appoint a special prosecutor* to perform "the duties of the district attorney."

Id. (emphasis added). The *Carlson* court further wrote:

> In the case at bar, the appointment was made by the court on its own motion. A plain reading of the statute tells us that when a court makes this appointment on its own motion, *all that is required* of the court is that it enter an order in the record "stating the cause therefor." Wis. Stat. § 978.045(1r). Then, the appointed special prosecutor may "perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney." *Id.* In short, if a court makes a special prosecutor appointment on its own motion, it is constrained only in that it must enter an order in the record stating the cause for the appointment.

Carlson, 2002 WI App 44 ¶ 9 (emphasis in original)(footnotes omitted).

The John Doe Judge specifically relied upon the *Carlson* rule in appointing the Special Prosecutor here. Indeed, as *Carlson* requires, an Order was entered into the John Doe record. Reasons were stated for the entry of the Order. The District Attorneys invited her consideration of the issue in a letter. The appointment order was entered by the John Doe Judge after due consideration of the circumstances presented by this investigation.

Carlson emphasized a court has "unfettered discretion" under Wis. Stat. § 978.045(1g) and, as the court of appeals correctly pointed out, that

section contemplates both an appointment on the court's own motion or upon the request of a district attorney. App. 14-22.

Carlson and the court of appeals decision below continue a tradition of decisions upholding the authority of a circuit judge to appoint an attorney to act as a special prosecutor. "The judiciary's power to appoint . . . special prosecutors is an inherent power." *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis.2d 1, 17, 531 N.W.2d 32, 37-38 (1995) (referring to the appointment of both prosecutors and guardians ad litem). This is a time-honored principle dating to at least 1935, as expressed in *Guinther v. City of Milwaukee*, 217 Wis. 334, 258 N.W. 865 (1935). In *Guinther*, the City Attorney moved to dismiss a Disorderly Conduct ordinance violation against the defendant. The court denied the motion to dismiss and appointed a private attorney to prosecute the matter. On appeal after being found guilty, the defendant claimed error because the City was not represented by the City Attorney. The City Attorney, appearing before the supreme court, argued that the Common Council was the only authority able to appoint an attorney to act on behalf of the City. The supreme court disagreed that the trial court was powerless to act. It wrote, "[t]he court properly called to its aid one of its officers." 217 Wis. at 340.

In *State v. Lloyd*, the Kenosha County District Attorney abandoned a Hit and Run prosecution after the court denied a motion to dismiss "in the public interest." *State v. Lloyd*, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981). The court appointed an attorney to serve as a prosecutor in place of the defaulting district attorney. On appeal, the defendant contended that, because the district attorney did not request appointment of a special prosecutor under Wis. Stat. § 59.44(2) (the statutory predecessor of Wis. Stat. § 978.045), the court was powerless to act. Although – as here – none of the circumstances enumerated in Wis. Stat. § 59.44(2) warranted a special prosecutor appointment, the court's authority to appoint a special prosecutor was nevertheless upheld. *Lloyd*, 104 Wis.2d at 56-57.

Against the background of this precedent, the Movants have advanced no persuasive reasons leading to a conclusion that the John Doe Judge's appointment order was unlawful or otherwise improper.

No court has ever held[234] that the terms of § 978.045 represent a limit of a judge's authority to appoint a special prosecutor. In fact and to the

[234] At note 10, page 42, [redacted] suggests a split of authority on this issue. [redacted] cites *In re Jessica J.L.*, 223 Wis.2d 622, 589 N.W.2d 660 (Ct. App. 1998) (Roggensack, J.) limits the court's inherent authority (described in *Lloyd*) to appoint only when one of the enumerated circumstances under Wis. Stat. § 978.045 apply. Jessica J.L. was a minor child victim of a sexual assault. *Jessica J.L.* was decided in the context of a *Shiffra* motion where the minor victim objected to the State's waiver of a materiality hearing and

contrary, that statute has been found to be a "cost management" device having little or no bearing on the legal requirements for the lawful appointment of a special prosecutor. *State v. Bollig*, 222 Wis.2d 558, 587 N.W.2d 908 (Ct. App. 1998) (Roggensack, J.). The *Bollig* decision is discussed in detail below.

2. The Special Prosecutor appointment was lawful under *State v. Cummings*.

Independent of any other source, the authority to appoint a Special Prosecutor is also to be found in the inherent powers of the John Doe Judge.

The Special Prosecutor was appointed to facilitate the progress of the John Doe proceeding. The John Doe Judge specifically found a special prosecutor was necessary "for the efficient and effective conduct of the investigation."[235] She made this finding knowing the Department of Justice refused to assist and superintend this five-county investigation and knowing no other entity had statewide criminal jurisdiction. As the John Doe Judge

---

asserted a right to "participate in the criminal proceedings in regard to all *Shiffra* determinations . . . ." *In re Jessica J.L.*, 223 Wis.2d at 628. Without discussion and using very broad language, the court rejected this argument, stating the "only attorneys who may prosecute a sexual assault on behalf of the State in circuit court are a district attorney or a special prosecutor appointed pursuant to § 978.045." *Id.* at 630. *Jessica J.L.* does not stand as precedent limiting the inherent authority of the court.

[235] *See* App. 94.

also wrote, "I find that a John Doe run by five different local prosecutors, each with partial responsibility for what is and should be one overall investigation . . . is markedly inefficient and ineffective."[236]

In *State v. Cummings,* 199 Wis.2d 721, 546 N.W.2d 406 (1996), the supreme court considered whether a John Doe Judge possessed the authority to issue and then seal a search warrant. The supreme court upheld that authority. Not merely relying on the fact that Wis. Stat. § 968.12 confers the authority to issue a search warrant on a "judge," the court wrote that the John Doe statute should be "interpreted in a manner which support[s its] underlying purpose." *Cummings*, 199 Wis.2d at 734-35. The court also ruled "[d]enying John Doe judges the ability to issue search warrants would seriously reduce the investigatory power of the John Doe proceeding." *Id.* at 735.

Conducting a single John Doe investigation by a committee of five local prosecutors each with only partial authority would, in the words of *Cummings*, "seriously reduce the investigatory power of the John Doe proceeding." *Id. The John Doe Judge expressly so found here.*[237] Since the grant of John Doe jurisdiction "by its very nature includes those powers

---

[236] *Id.*
[237] D:11.

necessary to fulfill the jurisdictional mandate," the Judge Doe Judge must be allowed the authority to organize this investigation under one central special prosecutor. *Id.* at 736. While it would have been most appropriate to organize this investigation under the auspices of the Attorney General and the Department of Justice, that option was not available to the Judge. He refused to act.

D. A refusal to act is not a condition precedent to the exercise of inherent authority, but in any event, the appointment in these proceedings was made after the Attorney General refused to exercise his statewide jurisdiction and assume control of this investigation.

The Court has asked, in order to exercise inherent authority, whether there must be a refusal to act by the district attorney. If a refusal to act is needed as a predicate to the exercise of the John Doe Judge's inherent authority, in a very real sense, there was a refusal to act by a prosecutor, *viz.* the Attorney General. Here, the Attorney General was tendered the entire investigation as a function of his statewide authority. He refused to act.

Moreover, and going beyond this refusal, the logic behind the inherent authority decisions like *Lloyd* applies here with equal force. The five District Attorneys' ability to act efficiently is significantly hampered, although they themselves did not flatly refuse to act. It is hampered by

virtue of ethical considerations, *i.e.*, the possible appearance of impropriety due to their status as partisan elected officials. It is further constrained by virtue of simple logistics, *i.e.*, the inability to conduct an orderly and efficient investigation across five disparate counties. If, as the Movants suggest, a special prosecutor must be justified by some prosecutorial "default," the circumstances of this proceeding, as found to exist by the John Doe Judge, are as compelling as a refusal to act.

E. A pending charge is not a condition precedent to the exercise of inherent authority to appoint a special prosecutor.

The Movants argue that a John Doe Judge is incapable of appointing a special prosecutor because no charge has yet been filed. This is a variation on a theme advanced earlier below, *i.e.*, that a John Doe judge does not sit as a court of record and lacks the authority to appoint a special prosecutor. The "court of record" limitation is an artifact of § 978.045 and courts have never construed this "special prosecutor statute" as a limit on a judge's authority. The Special Prosecutor has found no cases holding that a circuit court judge, convened in John Doe session, loses its otherwise inherent authority to appoint a special prosecutor.

In fact, Wis. Stat. § 978.045 contemplates the appointment of a special prosecutor in the context of a John Doe proceeding. It provides at sub. (1r)

that a "judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in . . . John Doe proceedings . . . or in investigations." The point is not that the enumerated conditions of sub. (1r) apply here; they do not. In fact, however, the quoted provision is a stand-alone sentence in sub. (1r) and when read in isolation, provides complete authority for my appointment. Such a reading is consistent with the wide discretion granted a judge as described in *Carlson*. It is also consistent with the inherent authority principles previously articulated by the courts. None of these prior opinions suggest that a judge, in the course of the discharge of his or her statutory duties, may not (*i.e.* does not have the inherent authority to) appoint an attorney to assist as a special prosecutor in the absence of pending charges, especially after the judge is advised that the individual acts with the district attorney's authority, permission and consent. Finally, noting the language quoted immediately above, the legislature itself recognizes the authority of a John Doe judge to appoint a special prosecutor when asked to do so by a district attorney. A John Doe presents, by definition, a pre-charge circumstance. In light of the case law and indeed in light of the language of Wis. Stat. § 978.045(1r) quoted above, there is no basis for the Court here to limit a

judge's inherent authority to the nine enumerated circumstances described in that cost-control statute.

F. Wis. Stat. § 5.05(2m) has no bearing on the issue of whether the Special Prosecutor was properly appointed.

The Movants make much of the fact that, once the Attorney General refused to undertake the investigation, a GAB investigation under Wis. Stat. § 5.05(2m) was not commenced. In the letter wherein he refused to take any action in response to the request to assume responsibility for this investigation, the Attorney General wrote that he was concerned about "the perception that my office can not [sic] act impartially, thus undermining public confidence in the investigation as a whole . . . ."[238] Of course, this is exactly the same concern that was cited to Judge Kluka by all five District Attorneys.[239] The Attorney General also noted the Government Accountability Board had statewide jurisdiction to "investigate campaign finance violations, which may be civil or criminal in nature."[240] He continued, "Should the Government Accountability Board determine, after investigation, that criminal enforcement is appropriate, they may refer the matter to the appropriate district attorney. Only if that district attorney and

[238] D:10, page 5.
[239] D:10, page 2.
[240] D:10, page 6.

a second district attorney declines to prosecute would my office have prosecutorial authority."[241]

The Movants claim that the Attorney General's advice, and the terms of Wis. Stat. § 5.05 were "ignored." They are wrong. A prosecutor's authority to proceed in this investigation, including a prosecutor like the Attorney General, is not based solely on § 5.05(2m). The Attorney General himself has said so.

> In my opinion, unless otherwise stated in a specific statutory provision, criminal provisions and civil forfeiture provisions of the *election laws, lobby laws, and ethics laws can be enforced by a district attorney independently of the Board. A referral following an investigation by the Board is not required.* Wis. Stat. § 5.05(2m)(c)15.-18. has no application to cases independently initiated by a district attorney without a referral by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15.

App. 254 (emphasis added). It is routine for the Attorney General's Office to provide assistance in major cases, once such assistance is requested by the local prosecutor. That is exactly what happened in this proceeding; the Attorney General was asked to exercise his statewide authority on behalf of local prosecutors. He refused. To suggest that the Attorney General could not become involved because of the terms and conditions of Wis. Stat. § 5.05(2m) is simply wrong.

---

[241] *Id.*

More than this, the Government Accountability Board was already fully involved in the investigation at the point the Attorney General wrote his letter;[242] the first meeting of the five District Attorneys *took place at* the offices of the Government Accountability Board. Just as a prosecutor is free to request the assistance of the Office of the Attorney General, the Government Accountability Board is free to cooperate with local district attorneys in the course of its investigations. Wis. Stat. § 5.05(2m) does not require the GAB to follow the precise statutory procedures outlined in that statute and this is particularly true where the investigation holds the potential for criminal charges. In fact, Wis. Stat. § 5.05(2m) makes it clear that the GAB has absolutely no authority to prosecute a criminal case; that task is left to state prosecutors. No doubt public officials and political operatives would prefer that the GAB always utilize the § 5.05 procedures; Wis. Stat. § 5.05(1)(b) requires that the subject of any GAB investigation must be given notice before any process may issue. Wis. Stat. § 5.05(1)(b). And for this reason, in circumstances where – for example – theft of campaign finance funds is suspected, the GAB makes direct referrals to prosecutors. Likewise, in circumstances of election fraud, the GAB also

[242] App. 90-93

makes direct referrals to local prosecutors. In these cases, the GAB could but does not initiate its own investigation and send a "notice postcard" to the subject suspected of theft or election fraud. These examples are no different than the inter-agency cooperation that was involved here. Of course, the GAB is empowered to conduct such criminal investigations (not prosecutions) on their own under Wis. Stat. § 5.05(2m), but it makes little sense to unilaterally move forward with a criminal investigation without involving the prosecutor who will ultimately be responsible for the prosecution, if any is to be had. Such cooperation prevents counterproductive effort.

XIV. ASSUMING, ARGUENDO, THERE WAS A DEFECT IN THE APPOINTMENT OF EITHER THE JOHN DOE JUDGE OR THE SPECIAL PROSECUTOR, THAT DEFECT DID NOT DEPRIVE THE JOHN DOE JUDGE OF COMPETENCY TO PROCEED. (ISSUE 5)

The Court has requested a discussion of the matter of the competency of the John Doe Judge to proceed, assuming a defect in the appointment of either the John Doe judge or the Special Prosecutor.

A. Any assumed defect in the appointment of the Special Prosecutor did not result in a loss of competency.

Under *Bollig*, a defect in the appointment of an attorney does not affect the competency of the court to proceed. The Movants suggest that the "one

day defect" in *Bollig was* a "niggling" mistake. ([redacted] at 52). To the contrary, this niggling matter included the fact that the attorney had filed the papers commencing the Chapter 980 proceeding. In other words, he had the benefit of no judicial appointment whatsoever at the time he commenced the action. This is not simply an annoyance as the Movants suggest; at least on its face, it calls into question the integrity of the proceedings. The court of appeals in *Bollig* examined Wis. Stat. § 978.045 extensively, as discussed below, and found no lack of competance. Before turning to that discussion, however, I note a key feature of *Bollig* that is shared with these proceedings.

> Bollig filed a motion to dismiss the petition, asserting that Mochalski was not authorized to file it because the court had not appointed him special prosecutor on February 3, 1997, the date on which he filed the petition. On May 13, 1997, the circuit court conducted a hearing on the motion during which Mochalski and Matousek explained the circumstances surrounding Mochalski's appointment. *It was undisputed that Matousek asked Mochalski to act as a special prosecutor in regard to Bollig's ch. 980 petition and that Mochalski agreed to do so prior to filing the petition.*

Bollig, 222 Wis. 2d at 562(emphasis added). Would the result be the same if a private "sovereign citizen" acting on his own took it upon himself to file a criminal proceeding against someone he perceived to have committed a crime. Of course, the answer is "no." A key difference in *Bollig*, perhaps *the* key difference, is that the attorney there – as here – acted with the

authority of the district attorney. This is the essential feature that preserved the competence of the court.

Bollig performed a structured and reasoned analysis on special prosecutor appointments under Wis. Stat. § 978.045. In reaching its conclusions, *Bollig* undertook to determine if a defect in the appointment under Wis. Stat. § 978.045(1r) was "central" to the legislature's purpose. As a result, the legislative purpose of the statutory scheme was examined. Further, the court noted a decision must be made about whether the statutory purpose could be fulfilled without strictly following the statutory directive. *Id.* at 569. The court concluded "[i]t is necessary to the statutory scheme that the power of the district attorney is not exercised without either a prior authorization from the district attorney or the circuit court." *Id.* at 570. Noting that "the purpose behind [§ 978.045 and] the different ways in which a special prosecutor may be appointed is targeted at controlling DOA's expenditures," *id.*, and finding no legislative history indicating that strict compliance with the procedures of § 978.045(1r) would or should result in a loss of competence, the court concluded that the central purpose of appointments under § 978.045(1r) is to assure that the State will not

have to pay for the services of a special prosecutor under circumstances not anticipated in the statute. *Id.* at 571.

Regarding the core purpose of § 978.045, the court wrote, noting that he acted with the authority of the district attorney, the court wrote that the defect in the appointment of the attorney one day after he filed the petition was not central to Wis. Stat. § 978.045(1r). *Id.* at 571. The one day time period, to the extent that it had significance in *Bollig*, related to the issue of *prejudice*, discussed momentarily. In other words, a fair reading of *Bollig* leads to the conclusion that competence of the court would not have been affected whether or not the attorney had *ever* been formally appointed under the statute, but for the issue of prejudice.

Nothing about the *Bollig* analysis, thus far, suggests that a finding of a "lack of competence" is appropriate here. But the opinion goes on. A defect in the appointment "can affect the circuit court's competence *only if* Bollig suffered actual prejudice." 222 Wis. 2d at 571 (citing *State v. Kywanda F.*, 200 Wis.2d 26, 37, 546 N.W.2d 440, 446 (1996) (emphasis added)). Observing a Chapter 980 petition must be filed within ninety days of discharge or release from a correctional facility, the court found that the date on which the circuit court signed the special prosecutor appointment

order was within the statutory time frame. Consequently, no prejudice was found. 222 Wis. 2d at 572.

The *Bollig* court took into account the reasons for the appointment there, finding them satisfactory. As for the reasons for the appointment in this case, the Movants criticize the appointment of the Special Prosecutor, suggesting that it was a sham. Other than to suggest that Judge Kluka was part of a sham designed to make it "easy" for prosecutors to conduct an investigation while hiding behind some form of a figurehead, they offer nothing of substance to dispute the findings of Judge Kluka. As part of the Order appointing a special prosecutor, Judge Kluka found:[243]

> • The Attorney General declined to assume responsibility for this investigation, citing a conflict of interest and the appearance of impropriety;
>
> • A Special Prosecutor will eliminate any appearance of impropriety;
>
> • A John Doe proceeding run by five different local prosecutors, each with partial responsibility for what is and should be one overall investigation and prosecution, is markedly inefficient and ineffective; and
>
> • A Special Prosecutor with jurisdiction across the severally affected counties is required for the efficient and effective conduct of the investigation.

A district attorney who wants to avoid accountability does not start this process by *trying to turn the entirety of the investigation to the Attorney General, a member of a different political party.* In fact, a district attorney

[243] D:11.

who wants the "easy way out" and wants to hide does not commence this John Doe investigation at all. These proceedings were commenced by five different prosecutors, both Republicans and Democrats. I have seen nothing to suggest that any action was taken for improper reasons, whether those reasons might be to take the "easy" way out, to hide behind me or for any other the reason.

The Movants argue that it is improper to use a special prosecutor when the district attorneys are themselves not conflicted out and are not disqualified from further work under the direction of the Special Prosecutor. They must remain answerable to those who elect them, the Movants contend. Two points in response are in order. First, the district attorneys remain answerable to their respective electorates and this is true when they make decisions to work through and with special prosecutors. These proceedings have been less than secret due to the matters made public by [redacted] If a majority of the citizens of any one or more of the five counties dislike or otherwise object to the manner in which the John Doe proceedings have been conducted, they remain free to express their opinion at the polls. Second, I am, and I have been, the decision-maker as to all matters relating to the John Doe since my appointment for all five

proceedings in all five counties.[244] That role is entirely consistent with the findings of Judge Kluka, citing as she did the need for a non-partisan prosecutor who will act where the Attorney General refused to act and who will oversee proceedings that are inter-related in such a way as to be one overall investigation. To be sure, one or more of the Movants have labored hard to make it appear in the public media that "one of the district attorneys" is actually coordinating these proceedings. This proves the adage, "Don't believe everything you read in the newspapers." It is simply not the case. No one other than myself directs these John Doe proceedings, notwithstanding what some of the Movants may say publicly, either directly or indirectly through affiliates.

The Special Prosecutor respectfully submits that Judge Kluka found – and the Movants have done nothing to effectively refute – the good reasons that she had for the Special Prosecutor appointment.

The last step of the *Bollig* analysis is prejudice. Since the defect was not central to the purpose of Wis. Stat. § 978.045 in *Bollig*, the court's competence to proceed depends on a showing of "prejudice." 222 Wis. 2d

[244] Movants ([redacted] at 52) seem to suggest that because the Special Prosecutor is not elected, as a district attorney is, he is not accountable. The Special Prosecutor's appointment could certainly be terminated by the John Doe judge and he is certainly accountable to the Office of Lawyer regulation.

at 571-72. In these proceedings, no prejudice has been claimed; the word "prejudice" does not appear in the Movants' briefs on Issues 1 to 5.

B. Any defect in the appointment of the John Doe judge did not result in a loss of competency to proceed.

The analytical steps needed to determine when competence is lost is carefully set forth in the *Bollig* decision. In analyzing the validity of his appointment, the Special Prosecutor has outlined the various factors that are required for this determination: (1) whether the defect in the proceedings was "central" to the purpose of the legislative (*i.e.*, statutory) purpose, which necessarily requires both a discussion of that purpose and whether or not that purpose can be fulfilled without strict compliance with the directive; (2) what is the truly essential purpose of the statutory scheme and whether that was fulfilled under the circumstances; and (3) prejudice.

As it relates to a defect in the appointment of the John Doe judge, the Movants advance no discussion of these analytical steps under *Bollig,* as the court has invited.

The Special Prosecutor cannot conceive a circumstance under which some technical defect in the papers appointing Judge Kluka or Judge Peterson would deprive them of competence under the statutory section authorizing the appointment of reserve judges. Wis. Stat. § 753.075(2).

Moreover, no claim is made that any supposed defect had any prejudicial effect upon them.

The Movants instead transform Issue 5 into a "void *ab initio*" argument.

C. The Return of Property / Suppression Argument

In their brief before this Court ([redacted] at 58, 59, 69) Movants seek relief in the form of Orders that amounts to suppression of any evidence gathered by the John Doe Judge and/or the Special Prosecutor because of his supposed lack of authority. They phrase these arguments in terms of returning the parties to the position they were in before August 2013. These arguments are also not dependent upon resolution of any issues other than those presented by Issues 1 to 5. In other words, Movants seek this drastic remedy, because they claim the Special Prosecutor and/or the John Doe Judge was not properly appointed.

The Special Prosecutor recognizes that the handling and retention of the property gathered in this investigation will be affected by the resolution of Issues 6 to 14. For the purposes of this section, however, argument will be limited to a circumstance assuming Issues 6 to 14 are resolved in favor of the State.

A technical defect in the appointment of the Special Prosecutor or the John Doe judge does not justify suppression of the John Doe evidence as a remedy. No case law supports such a proposition. If any defect does exist, it is *unlike* that found in cases where evidence has been suppressed for violations of a statute. *See, e.g., State v. Popenhagen,* 2008 WI 55, 309 Wis.2d 601, 749 N.W.2d 611 (evidence gained by subpoena without a showing of probable cause suppressed as required by Wis. Stat. § 968.135); *see also State v. Hess,* 2010 WI 82, 327 Wis.2d 524, 785 N.W.2d 568 (Evidence suppressed where it was obtained through execution of arrest warrant issued by judge without statutory basis and without proper showing by affidavit).

John Doe law offers no support for a suppression remedy. At worst, this case involves a private, licensed lawyer acting as a John Doe prosecutor with the knowledge and consent of the district attorney. However, even when John Doe proceedings have been conducted by *non-lawyers*, evidence has not been suppressed, and by analogy, no good reason exists to do so here. *State v. Noble*, 2002 WI 64, 253 Wis.2d 206, 646 N.W.2d 38. *Noble* involved a prosecution arising out of a John Doe investigation. In the John Doe hearing, a Department of Justice

investigator questioned the witness, Debra Noble. The investigator was not licensed to practice law. Subsequently, Ms. Noble was charged with perjury. She moved to suppress the transcript of her John Doe testimony. Noble claimed that Wis. Stat. § 757.30 prohibits an unlicensed person from practicing law and, citing a Due Process violation, she argued suppression of the evidence was warranted. The trial court denied the motion, but the court of appeals reversed. The sole issue on review was whether Noble's testimony should be suppressed because her questioning was unlawfully conducted by the investigator, resulting in a Due Process violation. Finding no Due Process violation, the court wrote, "[w]e are not compelled by any statute, constitutional violation or policy considerations to suppress the testimony in this case." *Noble*, 2002 WI 64 ¶¶ 1, 18.

Finally, and perhaps most obviously, using a Writ proceeding to obtain a suppression of evidence ruling is improper. While arguably a Petition would lie to prohibit a John Doe Judge from acting wholly outside her jurisdiction, this is not the case here based upon the submissions under seal to the court. As the court can see from a review of the Affidavit materials, the John Doe Judge acted on the basis of sworn submissions received from investigators. Indeed, the Special Prosecutor has not submitted *any* sworn

applications for process to the John Doe Judge.[245] The existence of a private attorney special prosecutor, even assuming a defective appointment, does not constitute a violation of rights sufficient to justify suppression of the evidence.

Considerations of the good faith rule also apply here. The warrants at issue were executed by law enforcement officers acting in good faith on the authority of the John Doe judge. Suppression of evidence is appropriate only where: (1) the judicial officer issuing the warrant abandoned his or her detached, neutral role; (2) the agent was dishonest or reckless in preparing the affidavit supporting the issuance of the warrant; or (3) the agent's reliance on the warrant establishing probable cause was not objectively reasonable; or (4) where the agent's reliance on the warrant particularizing the place to be searched or object to be seized was not objectively reasonable. *See State v. Eason*, 245 Wis.2d 206, 629 N.W.2d 625 (2001); *United States v. Leon*, 468 U.S. 897 (1984). A suppression order cannot and should not be entered without a hearing on these types of issues, assuming some defect in the special prosecutor appointment.

---

[245] App. 72-78.

The same arguments apply with equal force to any defect that might exist in the appointment of the John Doe Judge. The Movants argue briefly ([redacted] at 59) that the John Doe Judge acted without proper authority and cite *State v. Hess, supra.* *Hess* has no application here. It involved a case discussing whether the good-faith exception to the exclusionary rule permits the use of evidence obtained by a law enforcement officer after execution of an arrest warrant that was void from the outset because the warrant had no basis in fact or law. 327 Wis. 2d at 529. For purposes of analyzing Issues 1 to 5, we do not deal here with a situation where the search warrant had no basis in fact or law.

XV. A SUPERVISORY WRIT IS THE PROPER VEHICLE OF OBTAINING REVIEW OF ERRORS OF LAW COMMITTED BY A JOHN DOE JUDGE.

In response to the various arguments about the standard for review for supervisory writs and discretionary review, the Special Prosecutor begins by noting that these proceedings do not involve only a supervisory writ. The proceedings include an Original Action which the court has accepted on specified terms and conditions. The court has ordered that "the record in Milwaukee County Case No. 2012JD23 and the record in Dane County Case No. 2013D9 shall constitute the record for purposes of these

proceedings in this court." Moreover, the Court ordered that the proceedings should involve a series of issues specified by the court, some apparently raised *sua sponte*. Consequently, the Special Prosecutor submits that standards of discretionary review are inapplicable in the context of an Original Action which involves fourteen issues and a record, all as specified by the Court.

These circumstances notwithstanding, by filing a supervisory writ, the Special Prosecutor followed the procedure specified in *In re John Doe Proceedings*, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260, seeking relief under Wis. Stat. § 809.51. The writ was intended to obtain review, invited by Judge Peterson himself, of a *de facto* dismissal of a John Doe proceeding. Judge Peterson concluded the John Doe proceeding was not based on facts showing a reason to believe a crime had been committed. In fact, Judge Peterson quickly issued a very short decision precisely because he expected appellate review.[246]

In re John Doe Proceeding, 2003 WI 30, contains an extensive analysis of the law relating to John Doe proceedings and the appellate review of

[246] *See* Decision and Order, D:163, page 1 ("The decision will be brief, enabling me to produce it more quickly. Any reviewing court owes no deference to my rationale, so giving the parties a result is more important tha[n] a delay to write a lengthy decision on election and constitutional law.")

issues arising there. The John Doe judge in the underlying proceedings in that case made determinations concerning three witnesses. As to two of these, the John Doe judge entered orders disqualifying counsel. As to the third, it was the witness who claimed the prosecutor should be disqualified. That motion was denied and the witness was granted immunity and did thereafter testify. 2003 WI 30, ¶4-17. All three witnesses filed supervisory writs. In determining that a supervisory writ was an appropriate means for reviewing the actions of a John Doe judge, the court wrote:

> On balance, we conclude that Wisconsin Constitution, Article VII, Section 5(3), read together with the language in Wis. Stat. § 808.03(2) and in Wis. Stat. § (Rule) 809.51(1) including "other person or body," is sufficiently broad in scope to permit the court of appeals to exercise supervisory jurisdiction over the actions of a judge presiding over a John Doe proceeding. *Interpreting the constitution to allow for the court of appeals to exercise jurisdiction over the actions of a John Doe judge represents sound practice and is in keeping with the court of appeals' traditional role as an error-correcting court.*

2003 WI 30, ¶48 (emphasis added). Consequently, a supervisory writ proceeding arising out of a John Doe proceeding is a review intended to correct errors.

As part of its analysis, the court examined the decision in *State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis.2d 605, 571 N.W.2d 385 (1997). *Reimann* is most commonly cited for its discussion of the

"reason to believe" standard under Wis. Stat. § 968.20, the John Doe statute, but in *In re John Doe*, the court discussed a "peripheral" issue tacitly considered in the *Reimann* case. Mr. Reimann filed a petition seeking a John Doe proceeding pursuant to Wis. Stat. § 968.26 (1995–96), but the petition was denied without a hearing. Reimann then sought relief in the form of a supervisory writ in the court of appeals under Wis. Stat. § 809.51 (1995–96). The court of appeals granted the writ and ordered the John Doe judge to examine Reimann and his witnesses. *Id.* at 612–13, 571 N.W.2d 387. This court accepted the petition for review on the issue of whether the denial of the petition was proper and whether a judge was required to examine a complainant under oath, and then modified the writ. In its subsequent decision in *In re John Doe*, this court acknowledged it had implicitly approved the use of a supervisory writ issued by the court of appeals under § 809.51 (1995–96) to review the actions of a John Doe judge. 2003 WI 30, ¶ 39.

Making it very clear that the supervisory writ serves as a means to provide review for the correction of errors made by a John Doe judge, the *In re John* Doe court held that a supervisory writ was means of review otherwise served by a regular, direct appeal.

> It is true that a John Doe judge's decisions made in the context of a John Doe proceeding are not subject to direct appeal pursuant to Wis. Stat. § 808.03, because the decisions of a John Doe proceeding are not the decisions of a 'circuit court' or a 'court of record.' However, we have concluded that such actions are subject to review pursuant to a petition for supervisory writ.

2003 WI 30, ¶ 41.

The propriety of a review of the John Doe Judge's determination here is particularly appropriate inasmuch as this was effectively a "final order that dispose[d] of the entire matter in litigation as to one or more of the parties. . . ." Wis. Stat. § 808.03(1).

In any event, as a final point, the traditional standards for a supervisory writ have been met. A Writ was promptly pursued after Judge Peterson's refusal to conduct a John Doe investigation, which was requested by a prosecutor and which had a sound basis in law. A supervisory or mandamus writ will lie where (1) an appeal is an utterly inadequate remedy; (2) the duty of the circuit court is plain; (3) the circuit court's refusal to act within the line of such duty or its intent to act in violation of such duty is clear; (4) the results of the circuit court's action must not only be prejudicial but must involve extraordinary hardship; and (5) the request for relief must have been made promptly and speedily. *See State ex rel.*

Kenneth S. v. Circuit Court for Dane County, 2008 WI App 120, ¶8, 313 Wis.2d 508, 756 N.W.2d 573.

These factors are fulfilled here. There is no appeal available. The public suffers a hardship in the sense that, a well-founded, legitimate investigation has been thwarted. Judge Peterson had a "plain duty" to conduct a John Doe investigation requested by the District Attorney. *See* Wis. Stat. § 968.26(1) ("If a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge *shall* convene a proceeding described under sub. (3) and *shall* subpoena and examine any witnesses the district attorney identifies."). Compare Wis. Stat. § 968.26(2). The termination of the John Doe proceeding was a refusal to discharge that duty. Moreover, the judge's decision involves a question of law, reviewed *de novo. Ide v. LIRC,* 224 Wis. 2d 159, 166, 589 N.W. 2d 363, 367 (1999). The erroneous application of the law and facts has resulted in the judge failing to perform his duties under Wis. Stat. § 968.26(1). The Special Prosecutor promptly sought relief in the court of appeals. Indeed, Judge Peterson invited that review.[247]

[247] *See* note 242; *see also* order Granting Stay, D:192, page 1 ("The State's theory is not frivolous. In fact, it is an arguable interpretation of the statutes. I simply happen to disagree. An appellate court may indeed agree with the State. In that event, I encourage

XVI. THE AFFIDAVITS UNDERLYING THE WARRANTS ISSUED IN THE JOHN DOE PROCEEDINGS PROVIDED PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF A CRIMINAL VIOLATION OF WIS. STAT. §§ 11.27, 11.26(2)(A), 11.61(1), 939.31, AND 939.05 WOULD BE FOUND IN THE PRIVATE DWELLINGS AND OFFICES OF THE TWO INDIVIDUALS WHOSE DWELLINGS AND OFFICES WERE SEARCHED AND FROM WHICH THEIR PROPERTY WAS SEIZED. (ISSUE 14)

Under Wis. Stat. § 968.12, a John Doe Judge has the authority to issue search warrants based upon probable cause. *See State v. Cummings*, 199 Wis.2d 721, 734-35, 546 N.W.2d 406, 410-11 (1996) In that context, in *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court explained that any review of probable cause determinations must be made based upon the "totality of the circumstances" approach. 462 U.S. at 230, 233, 238. Under this approach, rather than focusing on a numerical or formalistic determination of probable cause:

> The issuing magistrate is simply to make a practical, common sense decision whether, given all of the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. *And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for. . . conclude[ing]" that probable cause existed.*

462 U.S. at 238-39 (emphasis added). "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not

---

the appellate court to address the alternative and significant Constitutional arguments raised in this case.")

technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *United States v. Kimberlin*, 805 F.2d 210, 228 (7th Cir. 1986).

In addition, search warrants issued by a neutral and detached judicial officer are entitled to a presumption of validity. *United States v. Leon,* 468 U.S. 897, 913-14 (1984). As one federal district court explained in *United States v. Ruggiero*, 824 F. Supp. 379 (SDNY 1993):

> A reviewing court must accord substantial deference to the finding of an issuing judicial officer that probable cause exists. . . . The reviewing court's determination should be limited to whether the issuing judicial officer had a substantial basis for the finding of probable cause. . . . Courts have long-recognized the presumption that judges will scrutinize any application and will scrupulously impose the restrictions required by statute. . . . Thus, substantial deference must be given to the prior judicial determination of probable cause, and any doubt should be resolved in favor of upholding the authorization.

824 F. Supp. at 399 (citations omitted). Thus, in reviewing prior probable cause findings made by a judicial officer in issuing a warrant, "great deference" is to be accorded that determination. *See State v. Lindgren*, 2004 WI. App. 159, ¶¶ 19-20, 275 Wis. 2d 851, 862-63, 687 N.W.2d 60.

Accordingly, the warrant-issuing judge's determination of probable cause should stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause. *See State v. Jones*, 2002 WI App 196, ¶ 11, 257 Wis.2d 319, 651 N.W.2d 305 (citing *State v.*

Multaler, 2002 WI 35, ¶ 7, 252 Wis.2d 54, 643 N.W.2d 437). The defendant bears the burden of proving insufficient probable cause when challenging a search warrant. *Id.*

The quantum of evidence needed to establish probable cause for a search warrant in this context is less than that required to support bindover for trial at the preliminary examination. *State v. Kiper*, 193 Wis.2d 69, 83, 532 N.W.2d. 698 (1995) (citing *State v. Higginbotham*, 162 Wis.2d 978, 989, 471 N.W.2d 24 (1991)). Correspondingly, the duty of the judge issuing the warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit including the "veracity" and "basis of knowledge" of persons supplying hearsay information, that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Higginbotham* at 990, 471 N.W.2d 24 (citing *State v. DeSmidt,* 155 Wis.2d 119, 131, [454 N.W.2d 780] (1990) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983))).

Finally, even if the reviewing court determines that probable cause was lacking, the drastic remedy of suppression is appropriate only where: (1) the judicial officer issuing the warrant abandoned his or her detached, neutral role; (2) the agent was dishonest or reckless in preparing the

affidavit supporting the issuance of the warrant; or (3) the agent's reliance on the warrant was not objectively reasonable. *See United States v. Leon*, 468 U.S. 897 (1984) and *State v. Eason*, 245 Wis.2d 206, 629 N.W.2d 625 (2001).

In this instance, the John Doe judge declined to find probable cause for the issuance of the search warrant, based upon the legal theory[248] on which the search warrants were predicated – not upon any failure to establish probable cause to believe that evidence of a criminal violation of Wis. Stat. § 11.27, Wis. Stat. § 11.26(2)(a), Wis. Stat. § 11.61(1), Wis. Stat. § 939.31, and Wis. Stat. § 939.05 would be found in the private dwellings and offices of either Unnamed Movant Nos. 6 and 7 ([redacted]). The John Doe Judge that issued the search warrants was presented with an expansive affidavit together with 143 pages of exhibits. [redacted]

[redacted]

[248] Presiding Judges for *five* counties reviewed the Petition and supporting Affidavits and thereafter requested that the Petition be heard by the reserve judge, Judge Barbara Kluka. Not one of them questioned the legal theory of the investigation. Similarly, the same legal theory was presented to the Attorney General who after considering the matter for over five months, declined involvement and recommended that the matter be investigated by the Government Accountability Board with no mention of any concerns related to the legal theory. Stated another way, at least five jurists and the chief law enforcement officer in the State of Wisconsin reviewed the Petition and Affidavit without one of them questioning the legality of the investigation. For example, one aspect of the search warrants was predicated on a potential violation of Wis. Stat. § 11.27; that is discussed in sec. VI.A.

[redacted] [249] [redacted]

[redacted] [250] [redacted]

---

[249] D:20, 19; App. 524-49; M:49; App. 478-523.

[250] [redacted] see D:20 ¶¶ 11-15, and ¶ 46; [redacted] see M:49. ¶¶ 23-31. 36-42; [redacted] see D:20 ¶¶ 11-15, M:49 ¶¶ 65, 67, 69, 71, 74; [redacted] see D:20 ¶¶ 16-20, M:49 ¶ 75; [redacted] see D:20 ¶¶ 11-15; [redacted] see D:20 ¶¶ 50-52, M:49 ¶¶ 30, 32, 51, 56-57, 48, 76-77; [redacted] see D:20 ¶¶ 34-36 [redacted] ¶ 45; [redacted]

[redacted].[251]

[redacted]

At the time John Doe Judge Kluka issued the search warrants, *Wisconsin Coalition for Voter Participation v. SEB*, 231 Wis.2d 670, 605 N.W. 2d 654 (Ct. App. 1999) provided the John Doe judge with a legal authority to issue those search warrants, legal authority that cannot simply

---

¶¶ 53-55; [redacted] (also M:49 ¶ 36 for RSLC); [redacted] see D:20 ¶¶ 28-40, M:49 ¶ 28, and generally Affidavit of December 10, 2012 (M:49.)

[251] Generally D:20, D:19 (App. 524-49), and specifically ¶¶ 10-27; D:19; M:49 (App. 478-523), and specifically ¶¶ 24-42, 69-75.

be disregarded. As noted in *State v. Walters*, 2003 WI.App 24, 260 Wis.2d 210, 659 N.W.2d 151.

> Officially published opinions of the court of appeals have statewide precedential effect. Wis. Stat.§§752.41(2), 809.23; *see also Cook v. Cook*, 208 Wis.2d 166, 186, 560 N.W.2d 246 (1977) Lower courts are bound by the precedent of our published decisions and the decisions of the Wisconsin Supreme Court, whether the lower courts agree with the law or not."

Id. at 226.

The finding of probable cause predicated on established legal precedent provided Judge Kluka with a basis to issue the search warrants. The Special Prosecutor asserts that when the successor John Doe judge disregarded the probable cause determination of Judge Kluka, a determination that was to be given "great deference" given the fact *it was not contrary* to existing legal authority, the successor John Doe judge erroneously exercised his discretion.[252] The successor John Doe judge recognized there was an equally valid interpretation of the statutes in his Order granting a stay of proceedings. There, the judge stated, "The State's theory is not frivolous. In fact *it is an arguable interpretation* of the

[252] The successor John Doe judge also made other erroneous determinations. [redacted] ." *See* D:163, App. 23. [redacted]

statutes."[253] Consequently, the probable cause determination of Judge Kluka should have been upheld.

Unnamed Movants Nos. 6 and 7 (and also challenge the search warrants as "general warrants."

This mischaracterization is not an oversight; it is a disingenuous attempt to mislead the court into the impression that the more expansive timeframe covered all items sought by the search warrant.

The basis for that expanded timeframe as to search warrant item 1(a) can be found in the affidavit for the search warrants.

[253] D:192, App. 29.
[254] *See* D:58; D:59.

[redacted][255] Accordingly, it was reasonable to believe that evidence of other communications after that timeframe could exist which could establish knowledge of [redacted] and others relating to compliance with Wisconsin campaign finance law. (See Sec. IV A. *supra*.) Given this fact, the timeframe described in the search warrant was adequately related to the records relevant to the particular crime. See *State v. DeSmidt*, 155 Wis.2d 119, 136-37, 454 N.W.2d 780, 787 (1990). The search warrants were limited to specific entities and individuals, a specific timeframe, and specific classes of documents related to the recall elections and potential campaign finance violations. For this reason, the claims by Unnamed Movants Nos. 6 and 7 that that the search warrants lacked "particularity" are without legal and factual support.

Unnamed Movants Nos. 6 and 7 ([redacted]) make the curious argument that the decision of John Doe Judge Peterson may not be reviewed, even if probable cause existed for the search warrant, as the failure to find probable cause if it existed would not be a violation of a

[255] M:49 ¶ 23, Ex. 15; App. 493-94. The email was subsequently forwarded to [redacted] and others.

positive and plain duty.[256] One need only look to the obligations created by statutes to find the answer to this question. Wis. Stat. § 968.12(1) provides, "A judge *shall* issue a search warrant if probable cause is shown."(emphasis added). This statutory obligation is consistent with the duty imposed by the oath of office when appointed as a judge. See Wis. Stat. § 757.02(1). Accordingly, this argument of Unnamed Movants 6 and 7 need not be given any further consideration.

Finally, the Special Prosecutor would note that pursuant to the court's Order of December 16, 2014, the above entitled cases are separate appeals that are consolidated for purposes of briefing only.[257] In that regard, the filing by [redacted] challenging the search warrants is misplaced, as they did not challenge the warrants before the John Doe judge and accordingly cannot do so now on appeal. It is generally accepted that matters not raised earlier before the circuit court will not be considered for the first time on appeal. See *Apex Elecs. Corp. v. Gee*, 217 Wis.2d 378, 384, 577 N.W.2d 23, 26 (1998) and *State v. Huebner*, 2000 WI 59, ¶¶ 10-12, 235 Wis.2d 486,

---

[256] *See* brief of Unnamed Movant No. 6 [redacted] 61-62. No cite to legal authority or case law is even offered to support this proposition. Under the theory of Unnamed Movant No. 6, any judge could decline to find probable cause for any reason, even political, and that decision would not be contrary to the judge's obligation under Wis. Stat. § 968.12(1).

[257] *See* Order of December 16, 2014, at 2, and Order of January 12, 2015, "these three proceedings have been consolidated for purposes of briefing and oral argument. . . ."

492-93, 611 N.W.2d 727, 730. The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court. *State v. Caban*, 210 Wis.2d 597, 604, 563 N.W.2d 505 (1997). A material issue exists as to whether [redacted] as an entity even has standing to object to the search of the personal residences of [redacted] and [redacted] Accordingly, the challenge to the search warrants made by [redacted] may not properly be considered.

XVII. THE RECORDS IN THE JOHN DOE PROCEEDING ESTABLISH A REASONABLE BELIEF THAT WISCONSIN LAW WAS VIOLATED BY A CAMPAIGN COMMITTEE'S COORDINATION ([redacted] WITH A "PURPORTED" INDEPENDENT ADVOCACY ORGANIZATION THAT ENGAGED IN "EXPRESS ADVOCACY SPEECH." (ISSUE 10)

The Special Prosecutor observes that this issue, as originally framed by the Court, implies that an organization that has engaged in coordinated activity with a campaign committee is "independent," when joint control is exercised by the same principals within both entities. [redacted]

[redacted][258]

[258] *See* M:2, 3, 12, 21, 31, 49, 124; *see also* D:19, 20.

[redacted][259], [260], [redacted]

[259] [redacted]

[260] As discussed in footnote 67 and Sec.VII B. above, [redacted] *See* Wis. Stat. § 11.01(1). Accordingly, [redacted] personal campaign committee was required to conform to the requirements of Chapter 11 at all times relevant to the investigation.

[redacted][261] [redacted]

[redacted]

[redacted]

[redacted]

[redacted][262]

NAME	ORGANIZATION	POSITION / DESCRIPTION
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

[261] *See* M:3 ¶ 11; M:49, ¶ 24, Ex. 16.
[262] *See* M:49, ¶ 28, Ex. 19.1 and 19.2

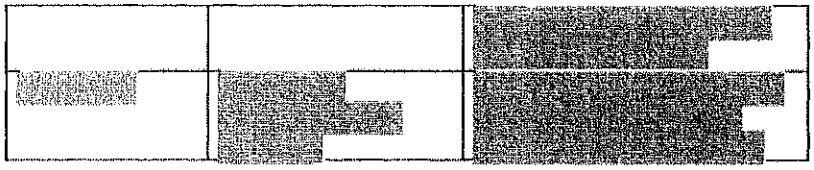


Figure 23.

[redacted][263][redacted][264][redacted][265].

[redacted]

---

[263] M:49 ¶ 29, Ex. 20.
[264] M:3 ¶¶ 12-15.
[265] M:3 ¶ 19.

[redacted][266]

[redacted]

[redacted][267] these "purportedly" independent advocacy organizations filed "Oaths of Independence" indicating that they were *not* acting in concert, cooperation or consultation with any candidate.[268]

[redacted]

[266] M:3 ¶ 16; M:49 ¶ 31; D20 ¶¶ 11-15, 21-27.
[267] [redacted]
See D:19 Ex. 11.1; D:19. Ex. 8.2 and 8.3.
[268] *See* D:19 Ex. 33; D:20 ¶¶ 30-31; D:19 Ex. 8.2 and 8.3.

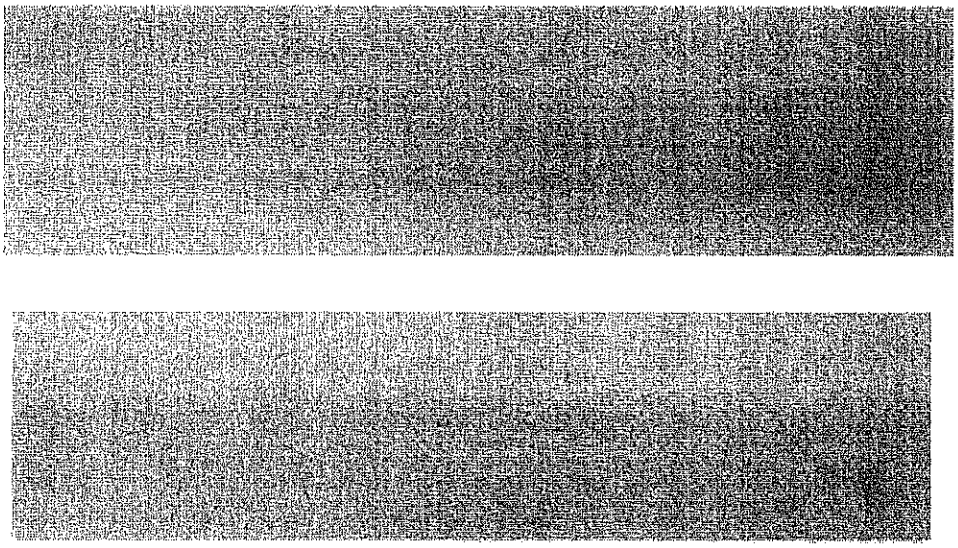
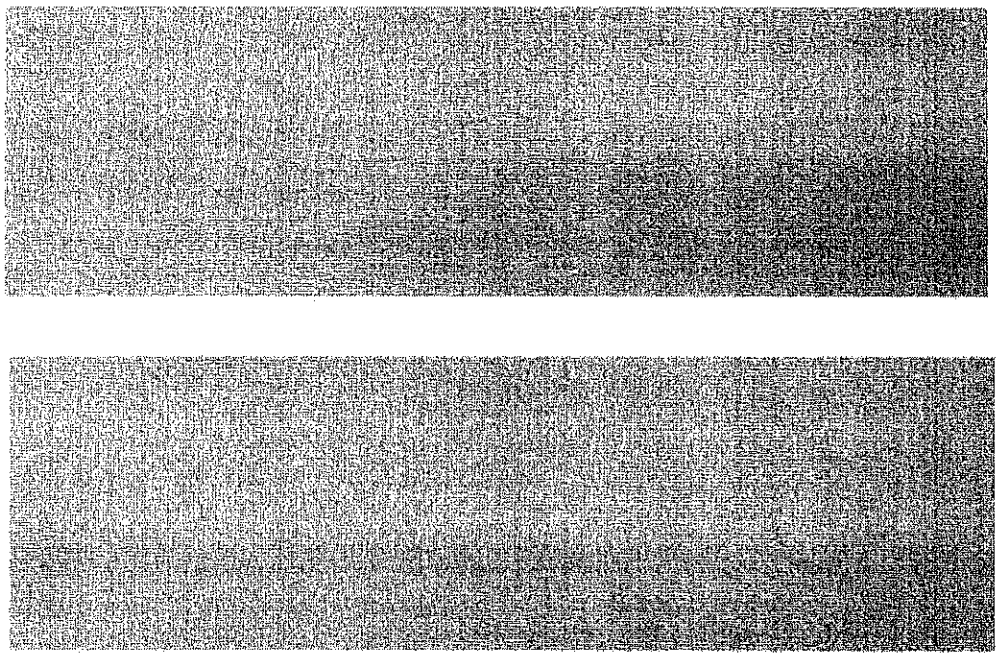


Figure 24.



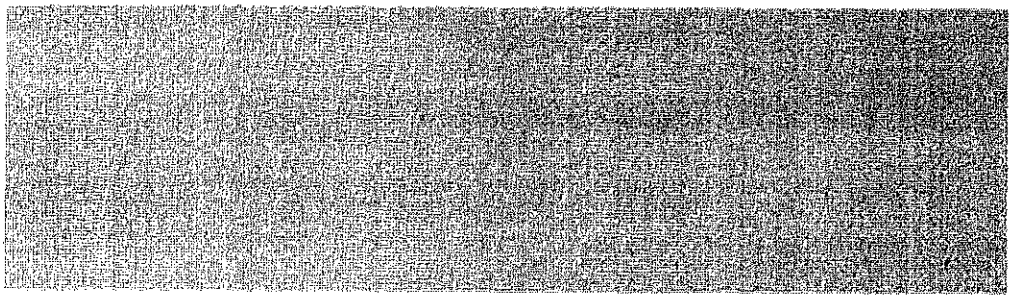
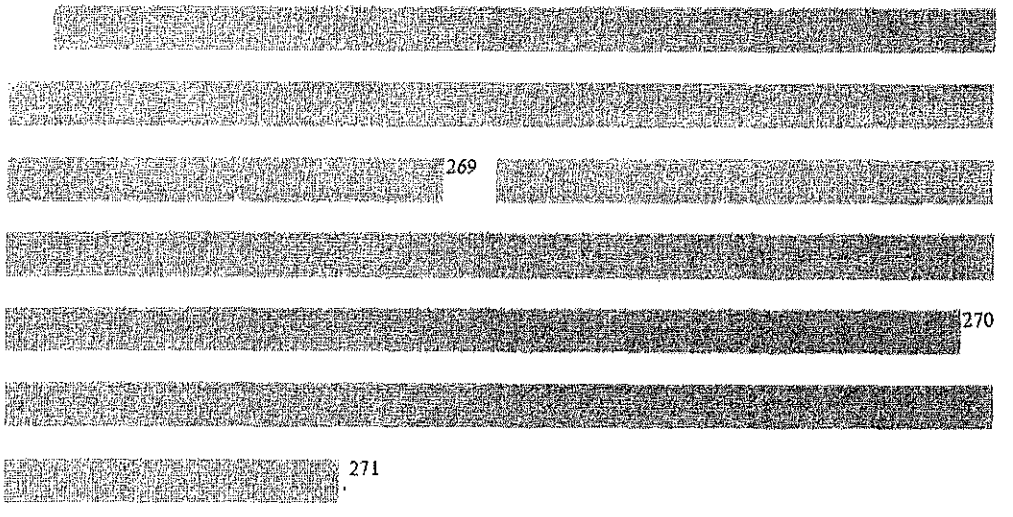


Figure 25.



[269] D:19 Ex. 33.
[270] D:19 Ex. 8.2 and 8.3.
[271] D:19 Ex. 9.

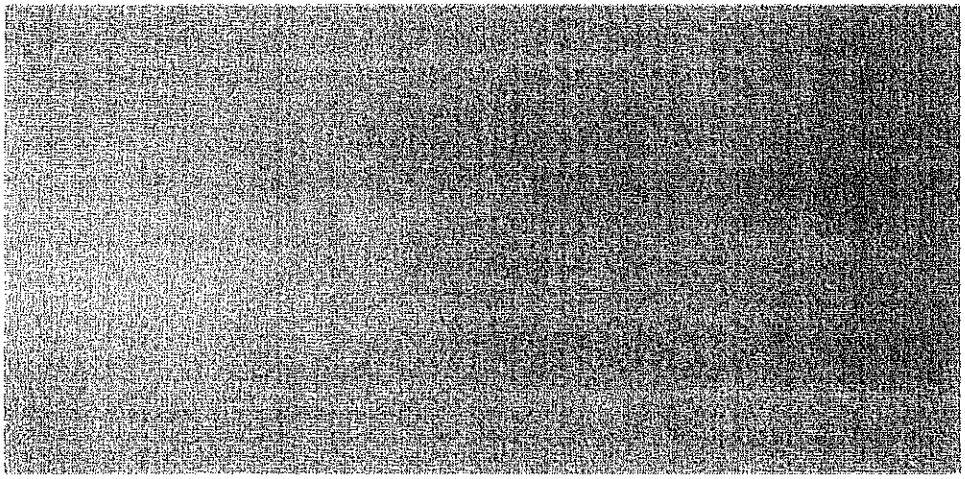


Figure 26

[redacted][272]

[redacted][273] [redacted][274] and [redacted][275] [redacted][276] [redacted]

[redacted][277] [redacted]

[272] D:19: Ex. 10.1.
[273] D:19 Ex. 11.1.
[274] D:19 Ex. 12.
[275] D:16.
[276] D:19 Ex. 15.
[277] D:20 ¶ 34.

[redacted] 278

[redacted] 279

[redacted] 280

278 M:49, Ex. 87.
279 M:49, Ex. 2.
280 M:49 ¶ 36, Ex. 24.1

[redacted][281]

[redacted]

Figure 27.

[redacted]

[281] D:19: Ex.7.1

[redacted] „282

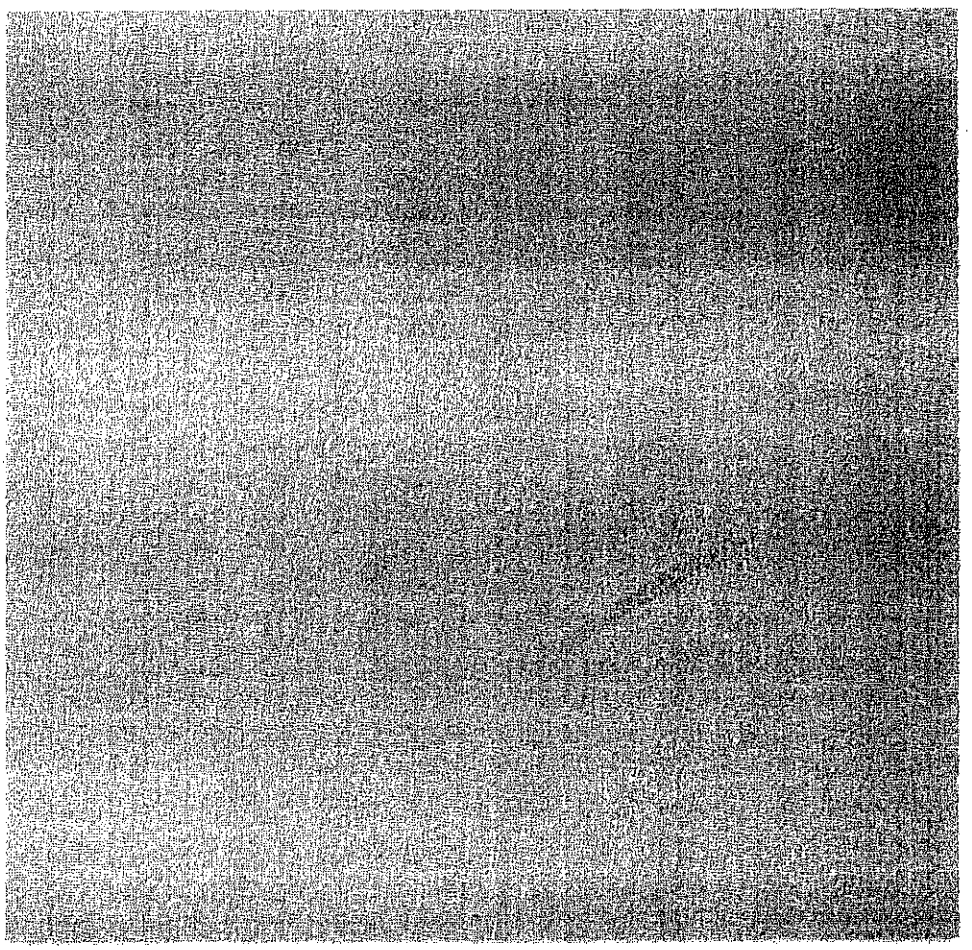


Figure 28.

[redacted]

[282] D:20 ¶ 55; D:19, Ex. 34. [redacted] M:49 ¶¶ 24-27; D:20 ¶¶ 53-55.

[redacted][283]

[283] App. 24

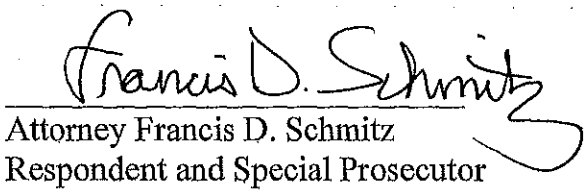
CONCLUSION

For all of the foregoing reasons, the Special Prosecutor respectfully requests that this court:

1. Uphold the decision of the court of appeals affirming the appointment of the John Doe Judge and Special Prosecutor;
2. Declare that Wisconsin campaign finance law, consistent with U. S. Supreme Court precedent, requires personal campaign committees to report coordinated issue advocacy expenditures;
3. Overturn the decision of the John Doe judge quashing the subpoenas and ordering the return of property seized be overturned; and
4. Allow this investigation to continue so that a determination can be made whether:
    a. personal campaign committees failed to report contributions; and
    b. false oaths regarding independent disbursements for express advocacy were made.

Dated at Milwaukee, Wisconsin this 31st day of March, 2015.

Respectfully submitted,



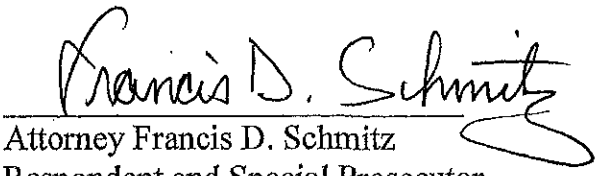
Attorney Francis D. Schmitz
Respondent and Special Prosecutor
Wisconsin Bar No. 1000023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

CERTIFICATION OF FORM AND LENGTH

I certify that this "corrected" brief conforms with the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in Wis. Stat. § 809.19(1)(d), (e) and (f) is 51,316 words pursuant to the Court Order of Feb. 20, 2015. *See* Wis. Stat. § 809.19(8)(c)1.

Dated at Milwaukee, Wisconsin this 31th day of March, 2015.



Attorney Francis D. Schmitz
Respondent and Special Prosecutor
Wisconsin Bar No. 1000023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

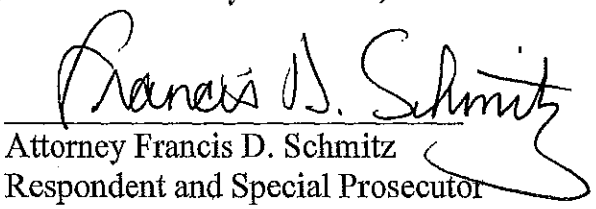
CERTIFICATION UNDER RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this "corrected" brief, with a separate appendix, which complies with the requirements of Wis. Stat. §§809.19(12). The electronic filing of a searchable PDF file here is pursuant to this Court's order of January 13, 2015 pertaining to the filing in this case.

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

A copy of this certificate is included with the brief and has been filed with the Court and served on the other parties in this case.

Dated at Milwaukee, Wisconsin this 31st day of March, 2015.



Attorney Francis D. Schmitz
Respondent and Special Prosecutor
Wisconsin Bar No. 1000023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

CERTIFICATION UNDER RULE 809.19(13)

I hereby certify that I previously submitted an electronic copy the appendix, which complies with the requirements of Wis. Stat. §§809.19(13). The electronic filing of a searchable PDF file here is pursuant to this Court's order of January 13, 2015 pertaining to the filing in this case.

I hereby certify that the text of the electronic copy of the appendix is identical to the text of the paper copy of the brief.

A copy of this certificate is included with the brief and has been filed with the Court and served on the other parties in this case.

Dated at Milwaukee, Wisconsin this 31st day of March, 2015.

Attorney Francis D. Schmitz
Respondent and Special Prosecutor
Wisconsin Bar No. 1000023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

CERTIFICATION OF APPENDIX

I hereby certify that previously filed with the brief as a separate document, was an appendix that complied with Wis. Stats. §809.19(2)(a) and that contains at a minimum consistent with the Order of December 16, 2014 the following:

(1) a table of contents;

(2) the findings or opinion of the John Doe Judge and relevant orders;

(3) the relevant decisions of the Wisconsin Court of Appeals; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the court's reasoning regarding those issues.

I further certify that this Appendix is filed under seal, pursuant to the secrecy orders entered in the John Doe proceeding and the Order of December 16, 2014. An original Appendix has been filed as well as a redacted Appendix.

I have previously submitted an electronic copy of this Appendix. I further certify that the electronic Appendix is identical in content and

format to the printed form of the Appendix filed as of this date.

Dated at Milwaukee, Wisconsin this 31st day of March, 2015.

Attorney Francis D. Schmitz
Respondent and Special Prosecutor
Wisconsin Bar No. 1000023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

CERTIFICATE OF SERVICE

I hereby certify that pursuant to §§ 809.80(3)(b) and (4), Wis. Stats., and the Court's Orders of December 16, 2014 Order and March 31, 2015, the original and twenty-two (22) copies of the Special Prosecutor's "corrected" brief, 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 will be served upon counsel of record via first-class mail or personal service on the same date of the filing, on or before April 6, 2015.

Dated this 31st day of March 2015,

Francis D. Schmitz

Attorney Francis D. Schmitz
Respondent and Special Prosecutor
Wisconsin Bar No. 1000023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659