FILED UNDER SEAL
STATE OF WISCONSIN
IN THE SUPREME COURT

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

Nos. 2013AP2504-2508-W

IN THE MATTER OF JOHN DOE PROCEEDING

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

v.

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

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

[Captions continue on following page.]

REDACTED BRIEF OF UNNAMED MOVANT NO. 1

[redacted]

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CORRECTED
Revised redactions per 3-27-15 Order

No. 2014AP296-OA

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

v.

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

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

Nos. 2014AP417-421-W

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

v.

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

and

EIGHT UNNAMED MOVANTS,
Interested Parties.

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

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ISSUES PRESENTED

In its December 16, 2014, order, this Court set forth the relevant issues as follows:

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.

Below, the Court of Appeals dismissed this issue summarily, and did not order respondents to address it. The court did not address this issue on the merits in its January 30, 2014, order.

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.

Below, the Court of Appeals did not address this issue in its January 30, 2014, order.

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.

Below, phrasing differences aside, the Court of Appeals answered "yes."

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 Does 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.

Below, the Court of Appeals answered "yes."

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).

Below, the Court of Appeals did not address this issue directly, but did hold that any possible "procedural flaw" would affect, at most, the availability of state funds for the Special Prosecutor's compensation, not render the actions of the Special Prosecutor void *ab initio*.

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.

Below, neither the Court of Appeals nor the John Doe Judge addressed this issue.

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?"

Below, the Court of Appeals did not address this issue. The John Doe Judge held in his January 10, 2014, order that the statutory definitions of "contributions," "disbursements," and "political purposes" are limited to contributions or expenditures for express advocacy, and thus do not encompass coordination between a candidate or a campaign committee and an independent organization that engages in issue advocacy.

7a. Whether Wis. Stat. § 11.10(4) and § 11.06(4)(d) apply to any activity other than contributions or disbursements that are made for political purposes under Wis. Stat. § 11.01(16) by: (i) the candidate's campaign committee; or (ii) an independent political committee.

Below, the Court of Appeals did not address this issue. The John Doe Judge held in his January 10, 2014, order that Wis. Stat. § 11.10(4) applies only to contributions or disbursement made for political purposes. The John Doe Judge did not specifically address Wis. Stat. § 11.06(4)(d).

7b. Whether Wis. Stat. § 11.10(4) operates to transform an independent organization engaged in issue advocacy into a "subcommittee" of a candidate's campaign committee if the independent advocacy organization has coordinated its issue advocacy with the candidate or the candidate's campaign committee.

Below, the Court of Appeals did not address this issue. The John Doe Judge indirectly addressed this issue in his January 10, 2014, order, rejecting the notion that coordination transforms an issue advocacy organization into a "subcommittee" in holding that Wis. Stat. § 11.10(4) applies only to contributions or disbursement made for political purposes.

7c. Whether the campaign finance reporting requirements in Wis. Stat. ch. 11 apply to contributions or disbursements that are not made for political purposes, as defined by Wis. Stat. § 11.01(16).

Below, the Court of Appeals did not address this issue. The John Doe Judge indirectly addressed this issue in his January 10, 2014, order by recognizing that, under Chapter 11, contributions and disbursements must be made for political purposes.

7d. Whether Wisconsin Coalition for Voter Participation, Inc. v. State Elections Bd., 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App.), pet. for rev. denied, 231 Wis. 2d 377, 607 N.W.2d 293 (1999), has application to the proceedings pending before this court.

Below, the Court of Appeals did not address this issue. The John Doe Judge answered "no," in his January 10, 2014, order. The John Doe Judge further found that the language in *WCVP* relied upon

by the Special Prosecutor likely could not withstand constitutional scrutiny in light of the considerable First Amendment campaign finance case law that has developed in the 15 years since *WCVP* was decided.

8. Whether fundraising that is coordinated among a candidate or a candidate's campaign committee and independent advocacy organizations violates Wis. Stat. ch. 11.

Below, the Court of Appeals did not address this issue. The John Doe Judge answered "no," in his January 10, 2014, order.

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.

Below, the Court of Appeals did not address this issue. The John Doe Judge did not address this issue directly, but explained in his January 10, 2014, order that, as a general matter, independent organizations can engage in issue advocacy without fear of government regulation; that the State's election laws do not ban all coordination between a candidate and independent organizations; and that to construe such laws more broadly would be "constitutionally suspect."

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?

Below, the Court of Appeals did not address this issue. The John Doe Judge answered "no," in his January 10 and November 6, 2014, orders.

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

Below, the Court of Appeals did not address this issue. The John Doe Judge did not reach this issue in his January 10, 2014, order because he held that coordination on issue advocacy is not regulated by Chapter 11.

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.

Below, the Court of Appeals did not address this issue. The John Doe Judge did not address this issue directly, but did explain in his January 10, 2014, order that, as a general matter, independent organizations can engage in issue advocacy without fear of government regulation; that the State's election laws do not ban all coordination

between a candidate and independent organizations; and that to construe such laws more broadly would be "constitutionally suspect."

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?

Below, the Court of Appeals did not address this issue. The John Doe Judge did not address this issue directly, but did explain in his January 10, 2014, order that the definition of "political purposes" must be confined to one that requires express advocacy or "might well be" unconstitutionally vague.

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.

Below, the Court of Appeals did not address this issue. The John Doe Judge answered "no" in his January 10, 2014, order.

STATEMENT ON ORAL ARGUMENT AND PUBLICTION

Because these issues have vast statewide public importance, this Court should follow its usual practice of allowing oral argument and publishing its decision, as this Court indicated it would in its December 16 and 19, 2014, orders.

STATEMENT OF THE CASE

A. Introduction

This case began when Unnamed Movant No. 1, [redacted]

[redacted] RD. 147; Joint App. 189.[1]

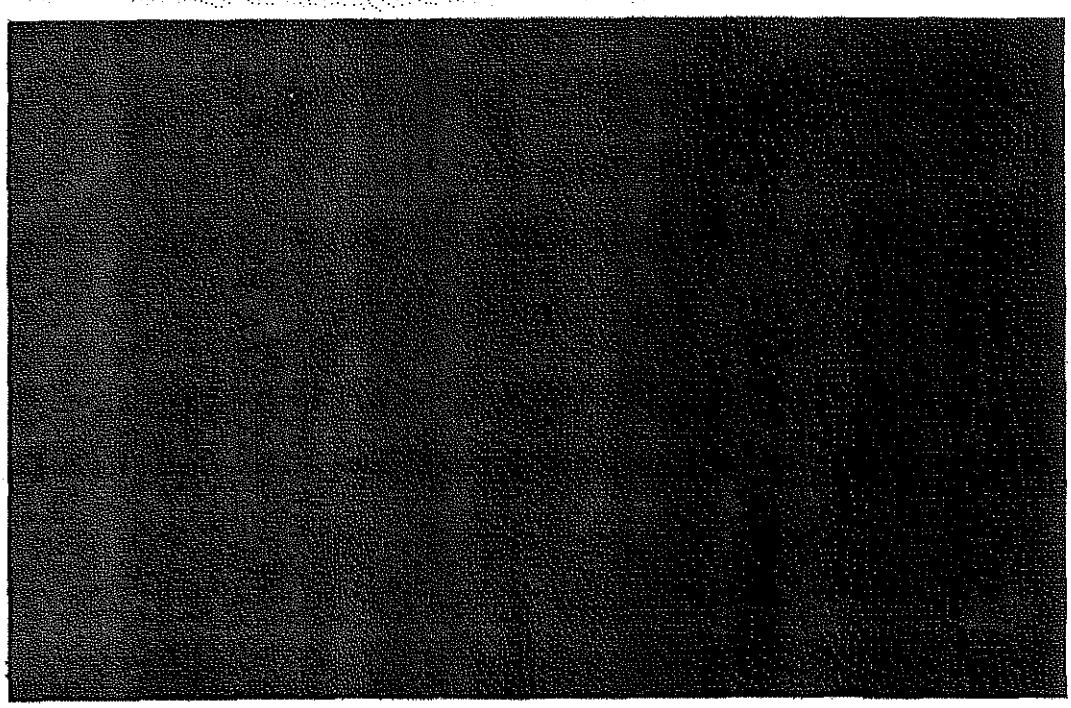
In granting Unnamed Movant No. 1's motion to quash the subpoena, the John Doe Judge held that Wisconsin statutes do not—and, consistent with the First Amendment, cannot—criminalize the conduct the Special Prosecutor wishes to investigate. After the Special Prosecutor sought review in the Court of Appeals, this Court granted Unnamed Movant No. 1's petition to bypass in Case Nos. 2014AP417-421-W. This Court should now affirm the John Doe Judge's decision.

B. "John Doe II"

[redacted]

[1] As used in this brief, "RD." refers to the Dane County appeal record assembled per this Court's order; "RM." refers to the Milwaukee County appeal record assembled per this Court's order; "Joint App." refers to the unnamed movants' joint appendix; "SP Pet." refers to the Special Prosecutor's Petition for Supervisory Writ and Writ of Mandamus, filed in the Court of Appeals on February 21, 2014, in Case Nos. 2014AP417-421-W; "SP Memo." refers to the Special Prosecutor's Memorandum in Support of Petition for Supervisory Writ and Writ of Mandamus, filed in the Court of Appeals on February 21, 2014, in Case Nos. 2014AP417-421-W; and "SP Resp." refers to the Special Prosecutor's Response to Petitions to Bypass Court of Appeals, filed in this Court on April 28, 2014, in Case Nos. 2014AP417-421-W.

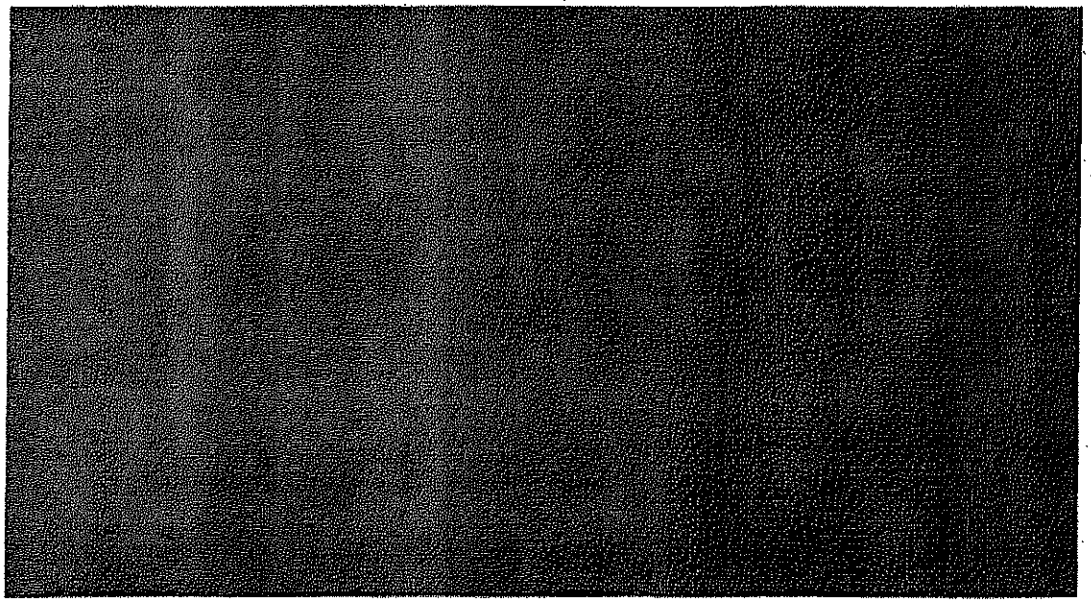
[redacted] RD, 125.

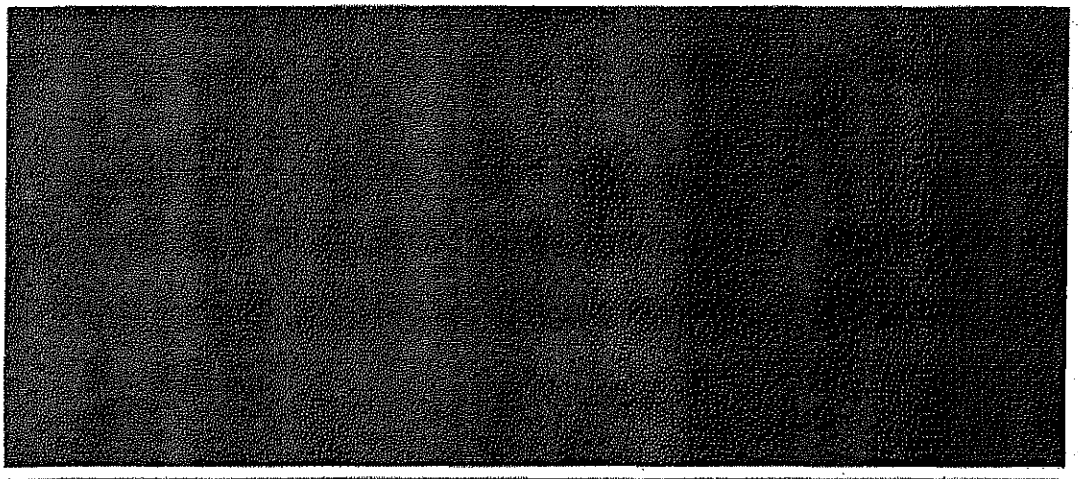


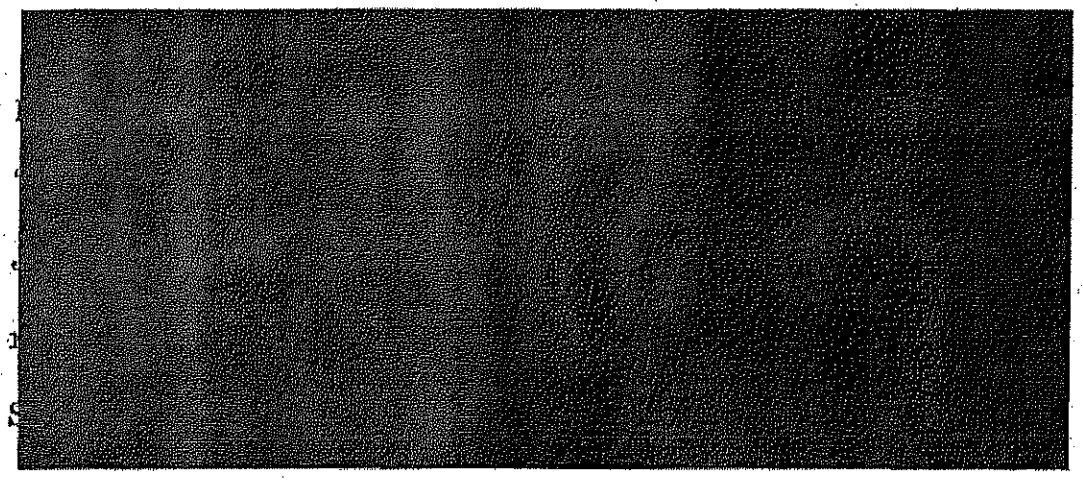
C. John Doe Judge's Decision

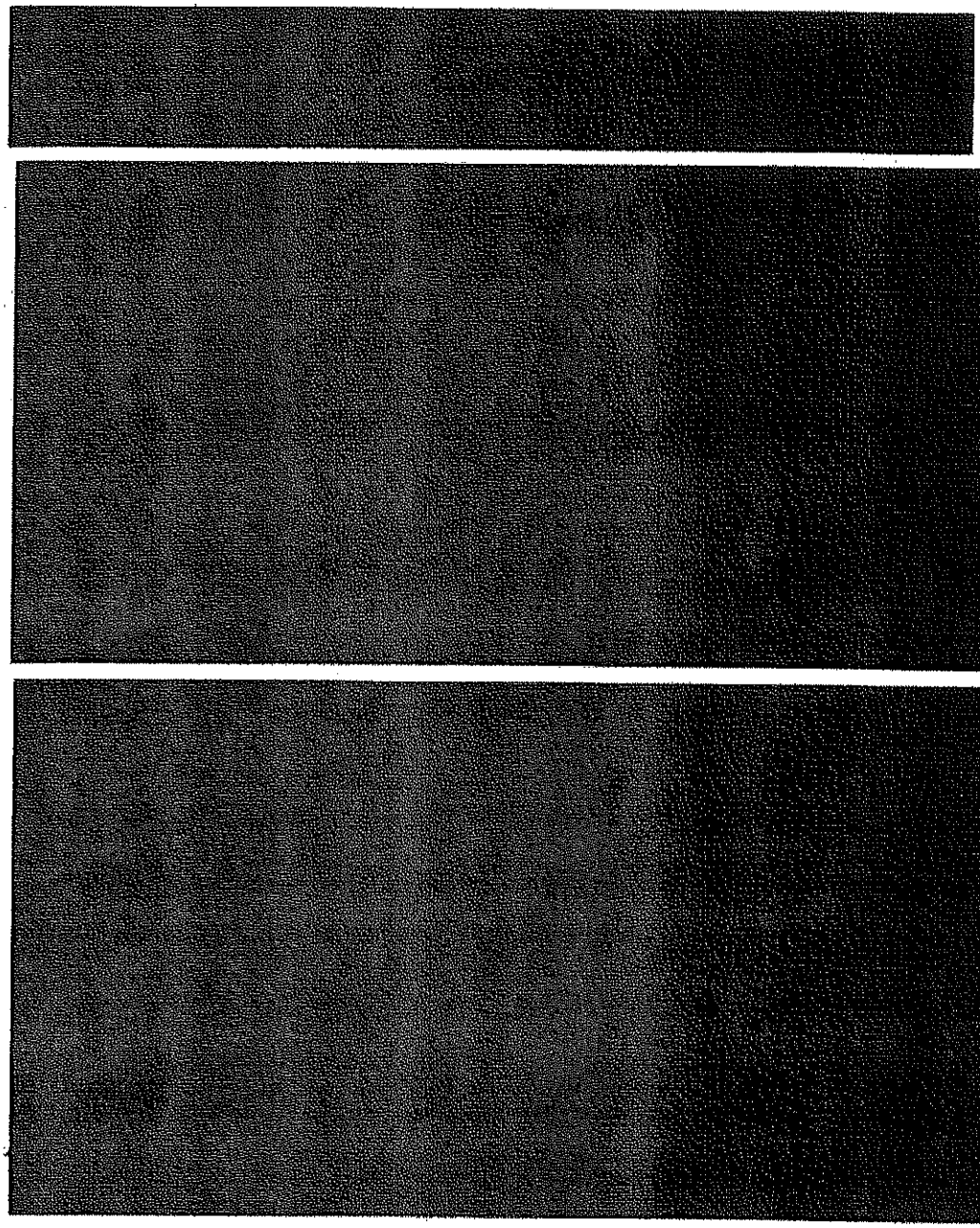
On January 10, 2014, after full briefing, John Doe Judge Gregory Peterson[2] issued a decision and order granting the motions to quash because [redacted]

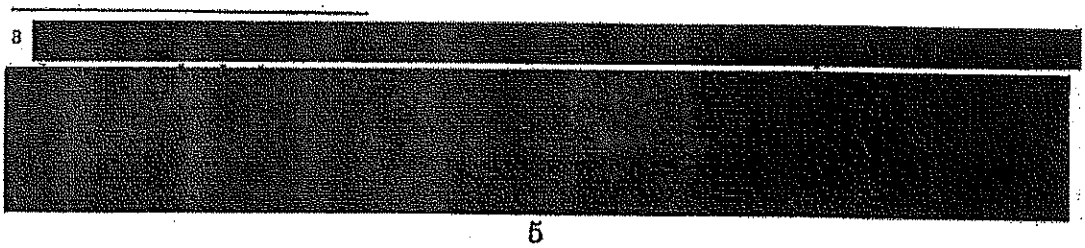
[2] Judge Peterson was appointed after Judge Kluka recused herself.











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D. Court of Appeals and Supreme Court Proceedings

On February 21, 2014, the Special Prosecutor filed a Petition for Supervisory Writ and Writ of Mandamus in the Court of Appeals, Case Nos. 2014AP415-421-W, challenging the John Doe Judge's decision. R.D. 210. On March 31, 2014, Unnamed Movant No. 1, as an Interested Party in the litigation, submitted a brief and supporting appendix in response to the Petition, adopting issues raised by, and analysis and briefing of, the other Interested Parties, including their briefs filed with and relied upon by Judge Peterson.

Two days after the responses were filed, the United States Supreme Court issued its landmark decision in *McCutcheon v. Federal Elections Commission*, -- U.S. --, 134 S. Ct. 1434 (2014), firmly establishing the government's heavy burden of proof in cases involving political speech, such as this one. Accordingly, Unnamed Movant No. 1 submitted a supplemental authority letter to the Court of Appeals to bring *McCutcheon* to its attention.

On April 10, 2014, Unnamed Movant No. 1 filed in this Court a Petition to Bypass the Court of Appeals.

A month later, the Seventh Circuit issued its decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014) ("*Barland II*"), concluding that several provisions of Wisconsin

campaign finance law did not survive First Amendment scrutiny. In its thorough analysis of Chapter 11, the court found that "[t]he effect of [certain limiting language in the definition of 'political purposes' under Wis. Stat. § 11.01(16)] was to place issue advocacy—political ads and other communications that do not expressly advocate the election or defeat of a clearly identified candidate—beyond the reach of the regulatory scheme." *Barland II*, 751 F.3d at 815.

The court in *Barland II* also noted that Chapter 11 and its related regulations are anything but clear:

> Part of the problem is that the state's basic campaign-finance law—Chapter 11 of the Wisconsin Statutes—has not been updated to keep pace with the evolution in Supreme Court doctrine marking the boundaries on the government's authority to regulate election-related speech. In addition, key administrative rules do not cohere well with the statutes, introducing a patchwork of new and different terms, definitions, and burdens on independent political speakers, the intent and cumulative effect of which is to enlarge the reach of the statutory scheme. Finally, the state elections agency has given conflicting signals about its intent to enforce some aspects of the regulatory mélange.

Id. at 808. Certain rules also "could be traps for unwary independent groups and candidates alike if not interpreted in accordance with [First Amendment precedent]." *Id.* at 843 n.26.

On December 16, 2014, this Court granted: (1) Unnamed Movant No. 1's and related parties' petitions to bypass, (2) a related petition for

review, and (3) a related petition for leave to commence an original action, consolidating the three proceedings for purposes of briefing and oral argument.

After this Court's action, on January 13, 2015, the GAB adopted a resolution regarding campaign finance issues.[4] In the preamble, the GAB provided: "Whereas, Wisconsin's campaign finance laws . . . have not undergone a thorough legislative review or revision since 1978" and "[w]hereas, the language of the statutes is convoluted and difficult for the average person to read and understand."[5] The GAB resolution called on the Legislature to address "[w]hat coordination between a candidate and other committees should be permissible and what should be prohibited," and urged the Legislature to revise the "definition of political purpose so as to be consistent with court rulings."[6]

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[4] Memorandum from Kevin J. Kennedy, Dir. & Gen. Counsel, GAB, re Campaign Finance Revision Resolution, Jan. 13, 2015; Joint App. 379.
[5] *Id.* at 130; Joint App. 379.
[6] *Id.* at 130; Joint App. 379.

STANDARD OF REVIEW

This Court generally reviews *de novo* a judge's interpretation of Wisconsin statutes and regulations, as well as the constitutional foundation for those interpretations. *See Coulee Catholic Sch. v. Labor & Indus. Review Comm'n*, 2009 WI 88, ¶ 31, 320 Wis. 2d 275, 768 N.W.2d 868; *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, ¶ 11, 591 N.W.2d 583 (1999).

Here, however, many of the issues arose in the context of the Special Prosecutor's petition in Case Nos. 2014AP417-421-W for supervisory writ and writ of mandamus (implicating supervisory writ standards) directing the John Doe Judge to enforce subpoenas that involve political speech (implicating First Amendment standards). As a result, the Special Prosecutor faces a doubly demanding standard of review.

A. Supervisory Writ Standards

"A 'writ of supervision is not a substitute for an appeal.'" *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110 (emphasis added) (quoting *State ex rel. Dressler v. Circuit Court for Racine Cnty.*, 163 Wis. 2d 622, 630, 472 N.W.2d 582 (Ct. App. 1991)). "A supervisory writ is considered an extraordinary

and drastic remedy that is to be issued only upon some grievous exigency.'" *Id.* (quoting *Dressler*, 163 Wis. 2d at 630).

In John Doe proceedings where the party seeking relief acts promptly, "[w]hether a supervisory writ is warranted . . . turns upon whether [the] judge clearly violated a plain duty under the amended John Doe statute." *In re John Doe Petition*, 2010 WI App 142, ¶ 4, 329 Wis. 2d 724, 793 N.W.2d 209 (emphasis added); *see also Kalal*, 2004 WI 58, ¶ 17. Only a challenge to a John Doe judge's constitutional authority to act requires *de novo* review. *See In re John Doe Proceeding*, 2004 WI 65, ¶¶ 6, 24, 272 Wis. 2d 208, 680 N.W.2d 792 (examining a John Doe judge's authority to subpoena legislative documents), *opinion modified on denial of reconsideration sub nom., In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, 277 Wis. 2d 75, 689 N.W.2d 908.

Furthermore, "[a]n act which requires the exercise of discretion does not present a clear legal duty and cannot be compelled through mandamus." *Id.* at ¶ 5 (emphasis added). The John Doe statute provides that "[t]he extent to which the judge may proceed in an examination under sub. (1) or (2) [including subpoenaing witnesses] is within the judge's discretion." Wis. Stat. § 968.26 (emphasis added); *see also In re Doe*, 2009 WI 46, ¶ 29, 317 Wis. 2d 364, 766 N.W.2d 542

("We read the statute as extending judicial discretion in a John Doe hearing not only to the scope of a witness's examination, but also as to whether a witness need testify at all.").

Thus, even if the John Doe Judge's exercise of discretion does not completely bar mandamus, the Special Prosecutor must establish, at a minimum, that the "extraordinary and drastic remedy" of a supervisory writ is warranted because the John Doe Judge "clearly violated a plain duty." *See Kalal*, 2004 WI 58, ¶ 17; *John Doe Petition*, 2010 WI App 142, ¶ 4.

B. First Amendment Standards

This case also involves political speech. "[T]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *McCutcheon*, 134 S. Ct. at 1441 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). As a result, "'[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'" *Id.* at 1452 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)).

Here, because the subpoenas and the Special Prosecutor's construction of Wisconsin statutes and regulations burden core areas of First Amendment protection—including compelling disclosure and

burdening political speech and association, candidate and independent spending for political speech, and fundraising for political speech—strict scrutiny applies. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007). Under strict scrutiny, the government has the burden to prove that its construction of the statutes (and ultimately, that ordering compliance with the subpoenas) "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.*

Below, the Special Prosecutor suggested that "intermediate" scrutiny applied. In *McCutcheon*, the Supreme Court acknowledged, but did not reassess, the line drawn in *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), between contributions and expenditures, and whether the applicable level of scrutiny to be applied to regulation of each may be different. *McCutcheon*, 134 S. Ct. at 1445-46. The Court explained, however, that "regardless whether [courts] apply strict scrutiny or *Buckley's* 'closely drawn' test, [courts] must assess the fit between the stated governmental objective and the means selected to achieve that objective." *Id.* at 1445.

Furthermore, *McCutcheon* reestablished that the only legitimate governmental objective for restricting campaign finances is preventing "*quid pro quo*" corruption or the appearance of "*quid pro quo*"

corruption. *Id.* at 1450-51, 1462. "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *Id.* at 1450. "Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." *Id.* at 1451 (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010)). If there is any doubt as to the governmental objective, "'the First Amendment requires [courts] to err on the side of protecting political speech rather than suppressing it.'" *Id.* (quoting *Wis. Right to Life*, 551 U.S. at 457 (opinion of Roberts, C.J.)).

In sum, strict scrutiny applies here. But even if it did not apply, the Special Prosecutor would still bear the heavy burden of showing a close fit between the government's stated objective—which, under *McCutcheon*, can only be to prevent *quid pro quo* corruption or its appearance—and the means selected to achieve it—namely, a criminal investigation including subpoenas demanding millions of documents implicating core First Amendment protections, all purportedly under the authority of a novel, unreasonable, incredibly broad and sweeping construction of Wisconsin campaign finance statutes and regulations. *See id.* at 1446.

ARGUMENT

Issues 1-5: The John Doe procedures were legally improper.[7]

A. Proposed Holding

This Court should hold that: (a) Wisconsin law does not permit a reserve judge to be appointed to oversee a multi-county John Doe proceeding; (b) the Special Prosecutor was improperly appointed under Wis. Stat. § 978.045, and his actions therefore are void; and (c) the campaign finance issues before this Court are not moot because Judge Peterson's decision is valid in Milwaukee County, and the issues before this Court are likely to recur in each election cycle.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movant No. 7 on these five issues.

Unnamed Movant No. 1 also notes that Unnamed Movant No. 7 has not challenged the authority of the John Doe judges to act in Milwaukee County. Thus, Judge Peterson's January 10, 2014, order

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[7] Unnamed Movant No. 1 was not a party to the litigation involving Issues 1-5, and did not receive a search warrant as relevant to Issue 14. All of the remaining Issues were addressed in Unnamed Movant No. 1's briefs in support of its motion to quash before the John Doe Judge. RD. 72, 73, 153. Of course, this Court may affirm "on a theory or on reasoning not presented to the lower court." *Liberty Trucking Co. v. Dep't of Indus., Labor & Human Relations*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

quashing the subpoena directed to Unnamed Movant No. 1 is valid, even if this Court agrees with Unnamed Movant No. 7 on Issues 1-5.

Furthermore, even if procedural errors require the parties to be returned to the positions they occupied before August 2013, the remaining issues before this Court should still be decided. "[E]ven if an issue is moot, this court may address the issue if: (1) the issue is of great public importance; (2) the situation occurs so frequently that a definitive decision is necessary to guide circuit courts; (3) the issue is likely to arise again and a decision of the court would alleviate uncertainty; or (4) the issue will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties." *In re John Doe Proceeding*, 2003 WI 30, ¶ 19, 260 Wis. 2d 653, 660 N.W.2d 260.

Here, the constitutionality and reach of Wisconsin's campaign finance laws, as well as the First Amendment rights of individuals, candidates, elected officials, donors, and third party groups to participate freely in Wisconsin's political processes, are at stake. These issues will undoubtedly and necessarily recur each election cycle, and the answers have clear, statewide import. Everyone involved in any aspect of a campaign or election (candidates, campaign committees,

501(c) organizations, and the voting public) deserves clarity from this Court on the governing rules. Accordingly, this Court should reach the remaining questions regardless of whether the outcome of Issues 1-5 might otherwise moot those questions.

Issue 6: Wis. Stat. § 11.26(13m), when read in conjunction with Wis. Stat. §§ 9.10 and 11.06(7), eliminates any justification for the Special Prosecutor's expansive view of coordination restrictions.

A. Proposed Holding

This Court should hold that, based on the interplay of Wis. Stat. §§ 9.10, 11.06(7), and 11.26(13m), any Chapter 11 coordination restrictions for a recall election must be tied to a specific, constitutionally and statutorily-dictated recall election "candidacy." In the case of the 2012 gubernatorial recall, Governor Walker's "candidacy" did not begin until April 9, 2012. And prior to that time, Governor Walker and his campaign committee were entitled to raise unlimited campaign funds in connection with opposing the circulation of the recall petitions.

B. Wisconsin's statutory restriction on coordination in Wis. Stat. § 11.06(7) only applies to a specific kind of disbursement.

Wisconsin's statutory restriction on coordination is found in Wis. Stat. § 11.06(7) and, by its plain language, applies solely to a specific

kind of disbursement. To violate the statute, the following elements must be met:

(1) the disbursement must involve coordination with a "clearly identified candidate" or agent of such candidate in an "election";

(2) as part of the disbursement, the candidacy was "supported" or "oppos[ed]"; and

(3) the coordination must have involved disbursements in support of that particular candidate (as opposed to some other candidate or candidates involved in other elections).

Id.[8]

By the plain words of the statute, at no point do the restrictions of Wis. Stat. § 11.06(7) apply to a campaign committee when its consultants or representatives engage in coordination activities with non-candidate committees regarding support of or opposition to other candidates.[9]

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[8] *See also* GAB 1284, Independent Disbursements of Corporations and Non-Political Organizations Guideline (May 2012); Joint App. 377 ("Wisconsin Statutes define an independent disbursement as a payment used to advocate the election or defeat of a clearly identified candidate for state or local office. To be independent, a disbursement must be made without cooperating or consulting with any candidate or candidate's agent or authorized committee who is supported by the independent disbursement.") (cited in *Barland II*, 751 F.3d at 840 n.25).

[9] As argued below, Wis. Stat. § 11.10(4) does not contain an additional coordination restriction, as proposed by the Special Prosecutor. To the extent, however, that any such additional restriction could apply, § 11.10(4) also uses the term "candidate."

C. An incumbent officeholder does not become a recall "candidate" subject to the coordination restrictions of Wis. Stat. § 11.06(7) until constitutional and statutory requirements are met.

Candidacy in a recall election is a special matter of constitutional and statutory law, triggered not by the "contemplation" or "desire" to run for office as set forth in Wis. Stat. § 11.01(1), but by the successful presentment, review, and "filing" of a sufficient number of proper recall petition signatures under Wis. Stat. § 9.10. Without "candidacy" in an "election," there cannot be improper coordination "supporting" such candidacy under Wis. Stat. § 11.06(7).

1. Wisconsin Recall Procedures

The right to recall in Wisconsin began in 1911, when the Legislature enacted a statute allowing for recall of municipal officials. Wis. Session Laws, Chapter 635, at 843-44 (July 12, 1911); *see also Stahovic v. Rajchel*, 122 Wis.2d 370, 376, 363 N.W.2d 243 (Ct. App. 1984). Recall did not apply to Wisconsin state office holders until the state constitution was amended in 1926. *See* Laws of Wisconsin, Chapter 270 at 348-49 (June 11, 1925) (creating Wis. Const. Art. XIII, § 12). Another seven years passed before the state legislature enacted

statutes providing the "machinery governing recall elections" similar to those in place for municipal recalls.[10]

The modern version of the recall statute is contained in Wis. Stat. § 9.10, which has three main parts: (1) general guidelines relating to the circulation of a petition, (2) specific requirements for the face of the recall petition, and (3) standards for review and scheduling of a recall election by a government agency.

Section 9.10(1) provides that any elected official in Wisconsin may be subject to a recall.[11] To commence a recall, the petitioners must file a declaration of intent with the appropriate election official—in the case of the Governor, the GAB.[12] If petitioners file a declaration, the GAB publicly must announce the necessary number of signatures. Wis. Stat. § 9.10(1)(d). In most cases, the necessary number of signatures will be 25 percent of the votes cast during the prior gubernatorial election. Wis. Stat. § 9.10(1)(b). Section 9.10(2) sets forth a laundry list of requirements for the actual recall petition and the signatures to

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[10] Letter from Chief of Legislative Reference Library to George Brown, Office of the Secretary of State, Chapter 44, Laws of 1933 drafting records (December 23, 1932) (regarding creation of Wis. Stat. § 6.245).

[11] The preamble of Art. XIII, § 12 requires the office holder to have served one year before being subject to recall.

[12] *See* GAB, "Recall of Congressional, County and State Officials," June 2009, http://gab.wi.gov/sites/default/files/publication/65/recall_manual_for_congressiona_county_and_state__82919.pdf (site visited Dec. 30, 2014).

be gathered, including that the signatures must be gathered within a 60-day period. *See* Wis. Stat. § 9.10(2)(d).

Under § 9.10(3)(b), if a recall petition is submitted ("offered for filing"), the election official to whom the petition is submitted (normally, the GAB) has 31 days to complete a "careful examination" of whether the petition on its face is sufficient to call for an election. Within that 31-day period, the incumbent has 10 days in which to file objections. Wis. Stat. § 9.10(3)(b). During the 31-day period, any party may seek an extension of the time limit by establishing "good cause" to the local circuit court. *Id.*

If the election official accepts the petition for filing, the incumbent has 7 days to file a writ of mandamus or prohibition in the circuit court, challenging the agency determination. Wis. Stat. § 9.10(3)(bm). At that point, the only matter that the court may consider is whether the petition is sufficient. *Id.* If the petition is sufficient, the recall election proceeds.

Under Article XIII, § 12(4) of the Wisconsin Constitution, "[u]nless the incumbent [subject to recall] declines within 10 days after the filing of the petition, the incumbent shall without filing be deemed to have filed for the recall election." *See also* Wis. Stat. § 9.10(3)(c) ("The official against whom the recall petition is filed shall be a

candidate at the recall election without nomination unless the official resigns within 10 days after the original filing of the petition.") (emphasis added). The procedures for other "candidates" are the same as the normal election nomination procedures. *Id.* But for the incumbent officeholder, "candidacy" is a matter of constitutional and statutory right.

2. The Walker Recall

Governor Walker was sworn in on January 3, 2011. The recall effort against Governor Walker became formal on November 15, 2011, when the Committee to Recall Walker filed the necessary registration with the GAB. The Committee then had 60 days to gather the required number of signatures, which the GAB calculated to be 540,208. [13]

The Committee to Recall Walker submitted almost 1 million signatures.[14] After an initial legal fight,[15] the parties and the GAB came to an agreement on the sufficiency of the recall petitions and the scheduling of the recall election. The parties agreed with the GAB recommendation that the gubernatorial recall election be held on the

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[13] *See* GAB, Committee to Recall Walker, http://gab.wi.gov/node/2100 (site visited Dec. 30, 2014).
[14] *Id.*
[15] *See In Re: Petitions to Recall Governor Scott Walker*, No. 12-CV-295 (Wis. Cir. Ct. Dane Cnty. 2012). The GAB ultimately determined that the number of valid signatures was 900,939. *See* GAB, *supra*, http://gab.wi.gov/node/2100.

same date as the other pending recall elections, including that of the Lieutenant Governor and four state senators.[16] The parties also agreed that the recall petition would be "filed" as of March 30, 2012, thereby providing for a recall primary (if needed) on May 8, 2012, and the general election to follow on June 5, 2012.[17]

Therefore, according to Wisconsin constitutional and statutory provisions, the triggering events for recall candidacy were not initiated until November 15, 2011 (when the Committee to Recall Walker filed the necessary registration with the GAB), and were not completed until April 9, 2012 (10 days after the recall petition was "filed"). Accordingly, Governor Walker was not a "supported" or "oppos[ed]" recall "candidate," subject to Chapter 11 restrictions on coordination of communications regarding his own candidacy, until after April 9, 2012.[18]

Previously, the Special Prosecutor attempted to dismiss the significance of this analysis in nothing more than a footnote, arguing

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[16] *See* "Judge approves May 8, June 5 recall dates," WQOW.com, Mar. 13, 2013, http://www.wqow.com/story/17152190/all-sides-agree-to-may-8-june-5-for-recalls?clienttype=printable (site visited Dec. 30, 2014).

[17] *Id.*

[18] The only exception to this rule (discussed below) is the approximately 60-day period beginning November 15, 2011, during which Governor Walker and his campaign committee were entitled to raise unlimited campaign funds in connection with opposing the circulation of the recall petitions. *See* Wis. Stat. § 11.26(13m).

that under Wis. Stat. § 11.01(1), an elected official is always a "candidate." RD. 125 at 20, n.64. That position is meritless, as a matter of both statutory and constitutional law.

Section 11.01(1) provides that a person becomes a candidate when "tacitly or expressly" consenting to be considered as such. The statute further reads that the candidacy does not end "by virtue of the passing date of the date of an election." *Id.* This is necessary, of course, so that post-election requirements, such as filing post-campaign finance reports, remain applicable. But the statute does not say once a candidate, always a candidate; nor that all activities, regardless of time and context, are imputed to candidate committees—particularly for purposes of a supported or opposed candidacy in a specific "election" under § 11.06(7). At some point, the winner of an election is an officer holder, not a candidate. That is the point of an election.

From a constitutional perspective, the Special Prosecutor's reading is equally suspect because "[t]he Supreme Court repeatedly has explained that elected officials do not park their constitutional rights at the door when they assume public office." *John Doe Proceeding*, 2004 WI 65, ¶ 41 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 788, 122 S. Ct. 2528 (2002)) (overturning restriction on speech of candidates for office, including incumbents, because law violates First

Amendment). And, as discussed below, the Special Prosecutor's view makes even less sense when one considers Wis. Stat. § 11.26(13m).

D. Wis. Stat. § 11.26(13m) permits a window of unlimited campaign contributions prior to the time an incumbent officeholder is subject to a recall election.

Wis. Stat. § 11.26(13m) ("subsection 13m") provides, in pertinent part, that the contribution limitations of § 11.26 do not apply:

> [f]or the purpose of payment of legal fees and other expenses incurred in connection with the circulation, offer to file or filing, or with the response to the circulation, offer to file or filing, of a petition to recall an officer prior to the time a recall primary or election is ordered, or after that time if incurred in contesting or defending the order.

Thus, subsection 13m allows the potential subject of recall to raise unlimited funds during a period of at least 60 days, *see* Wis. Stat. § 9.10(2)(d), just prior to a recall petition being formally filed.

Subsection 13m initially was created by the Legislature in 1984 to deal with election recounts. 1983 Wis. Act 183. An analysis by the Wisconsin Legislative Reference Bureau indicates the statute was created as a part of a more general rewriting of recount procedures.[19] The Legislature was concerned that, under existing law, campaign money used for legal fees and other expenses relating to a recount did

[19] Analysis by the Legislative Reference Bureau of Assembly Bill 694, at 3 (Wis. 1983); Joint App. 432 ("Currently, contributions utilized for the purpose of payment of legal fees and other expenses incident to a recount need not be deposited in a campaign depository and need not be reported under the campaign finance law.").

not need to be deposited into an official campaign account and did not need to be publicly reported.[20] The new statute was intended to require the public reporting of recount funds, but set an unlimited exception for contributions used for legal fees and other costs relating to a recount.[21]

Three years later, the Legislature expanded the exception to recall activity. 1987 Wis. Act 27. No dollar-contribution limitations under § 11.26 would be applied during the time period that a recall petition was being circulated and/or opposed. *Id.* At the conclusion of the circulation period, when a recall election was either ordered or not, the regular election limits would apply again. The legislative history of the enactment is sparse. A memorandum from one state senator at the time notes that, under existing law, expenses for a recall would be subject to the normal election restrictions, which vary according to office held or being sought.[22] The change eliminated this restriction until an election was ordered.

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[20] *Id.*; Joint App. 432.

[21] *Id.*; Joint App. 432. The unlimited contribution exception addressed the Legislature's more general concerns regarding recounts: they could be complicated and expensive. *See id.*; Joint App. 432 (noting that the new provisions also provided mechanisms for the hiring of additional election officials and the reimbursement of expenses incurred by the board of canvassers).

[22] Sen. Helbach, Motion to Wis. J. Comm. On Fin., Elections Bd.: Exemption of Certain Contributions from Contribution Limitations, Senate Bill 100 (Wis. 1987); Joint App. 433.

Subsequent GAB administrative interpretations confirmed the dual nature of the subsection 13m exemption: the amount of money that could be contributed by individuals and political committees was unlimited, but the contributions could be used only for expenses relating to supporting or opposing the circulation of the recall petitions during the circulation period, prior to a determination of whether the recall would proceed.[23] Most significantly, the GAB advised that advocacy, including television ads, was a proper expense for the exempt recall funds.[24]

The significance of subsection 13m is seen in its contrast with the Special Prosecutor's justification for an expansive reading of coordination restrictions. The Special Prosecutor seeks to limit the role of speech (money) in both issue and express advocacy and cites to the policy statement under Wis. Stat. § 11.01(1) that "excessive spending" "jeopardizes the integrity of elections" and subjects the process "to a potential corrupting influence." *See* SP Memo. at 7. But this policy against "excessive spending" becomes practically irrelevant when the

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[23] *See* Letter from Kevin J. Kennedy, Dir. & Gen. Counsel, GAB, to Attorney Jeremy P. Levinson (May 27, 2011) (on file with GAB); Joint App. 371; *see also* Memorandum from Kevin J. Kennedy, Dir. & Gen. Counsel, GAB, to All Interested Persons and Committees Involved with Recall Efforts (May 26, 2011) (on file with GAB); Joint App. 368.

[24] *Id.*; Joint App. 368, 371.

Legislature: (a) explicitly provides for unlimited contributions for officeholders about to be subject to a possible recall election (§ 11.26(13m)), and (b) permits unlimited coordination activity in support of other candidates (§ 11.06(7)).[25]

E. The alleged "conduct of coordination" does not, and cannot, violate Chapter 11.

The Special Prosecutor's evidence will be discussed in more detail under Issue 10 below. [redacted]

As previously discussed, this conduct simply cannot form a basis for a criminal prosecution because it does not and cannot violate Wis. Stat. § 11.06(7). The coordination restrictions in that statute only apply to specific, candidate-directed disbursements in support of that particular "candidate" in a specific election. And, as Judge Peterson found, the Special Prosecutor did not claim that any of the independent organizations expressly advocated.

[25] Moreover, as set forth under Issue 11, the Special Prosecutor's justification also must be sufficiently compelling to justify infringement of otherwise protected activity under the First Amendment of the United States Constitution and Article I, § 3 of the Wisconsin Constitution.

In sum, Wis. Stat. § 11.26(13m), when read in conjunction with Wis. Stat. §§ 9.10 and 11.06(7), eliminates any justification for the Special Prosecutor's expansive view of coordination restrictions because: (a) Governor Walker did not become a recall "candidate" until April 9, 2012—[redacted]; (b) previous to that time, [redacted] had a statutory right to engage in unlimited fundraising for approximately 60 days; and (c) at all times, [redacted] could engage in coordinated expenditures in support of other candidates.

Issue 7: The statutory definitions of "contributions," "disbursements," and "political purposes" are limited to contributions or expenditures for express advocacy.

A. Proposed Holding

This Court should hold that the statutory definitions of "contributions," "disbursements," and "political purposes" in Wis. Stat. §§ 11.01(6), (7), and (16) are necessarily limited to contributions and expenditures for express advocacy. Issue advocacy is not regulated by Chapter 11.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2 and 6 on this issue.

Unnamed Movant No. 1 emphasizes that, even if the Wisconsin Legislature could have crafted restrictions on issue advocacy, the Legislature has specifically chosen not to. In other words, by their plain terms, the restrictions of Chapter 11 do not apply to issue advocacy.

The restrictions apply to groups of two or more persons that accept "contributions" and/or make "disbursements." *See* Wis. Stat. § 11.01(4). The definitions of "contribution" (§ 11.01(6)) and "disbursement" (§ 11.01(7)) both require such actions be done for "political purposes."

The definition of "political purposes" is set forth in § 11.01(16). In 1979, the Legislature crafted the definition of "political purposes" to conform to the definition of express advocacy in *Buckley v. Valeo*, 424 U.S. 1 (1976)—"communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate." Wis. Stat. § 11.01(16)(a)1.; *see* 1979 Wis. Ch. 328 (1980); *see also Barland II*, 751 F.3d at 812-15; *Elections Bd. of Wis. v. WMC*, 227 Wis. 2d 650, ¶ 33, n.26, 597 N.W.2d 721 (1999).

Although § 11.01(16) states that "political purposes" is "not limited to" the delineated items in § 11.01(16)(a), the statute does not, and cannot, go beyond *Buckley's* express advocacy definition without

creating "potential regulatory mischief" that otherwise needs to be avoided under constitutional standards. *Barland II*, 751 F.3d at 833-34. In the end, by its own plain terms, Chapter 11 restrictions do not apply to issue advocacy.

Issue 7a: Wis. Stat. §§ 11.10(4) and 11.06(4)(d) do not apply to any activity other than contributions or disbursements that are made for "political purposes."

A. Proposed Holding

This Court should hold that, as a matter of statutory definition, Wis. Stat. §§ 11.10(4) and 11.06(4)(d) only apply to contributions and disbursements made for "political purposes" under Wis. Stat. § 11.01(16), regardless of whether one is considering a candidate campaign committee or an independent political committee.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2 and 6 on this issue.

Unnamed Movant No. 1 emphasizes that, as set forth above, the statutory definitions, either explicitly under § 11.06(4)(d) or indirectly through use of the term "committee" in §§ 11.10(4) and 11.01(4), lead back to the terms "contributions" and "disbursement," both of which require that only actions done for "political purposes" are subject to regulation. *See* Wis. Stat. § 11.01(6), (7). The definition of "political

purposes," *see* Wis. Stat. § 11.01(16), requires express advocacy and excludes issue advocacy. *Barland II*, 751 F.3d at 815.

The analysis is the same regardless of the group at issue because the limitations are still tied to the definitions of restricted activity under Chapter 11. An independent "political committee" is one that, at least in part, accepts "contributions" or makes "disbursements." *See* Wis. Stat. § 11.01(4). When an independent political committee undertakes such actions (that is, engages in express advocacy) it may be subject to restriction. If the group engages in no such express advocacy, however, it cannot be subject to restrictions.

A candidate campaign committee, meanwhile, is one that always takes in and spends its money for purposes of express advocacy. *See* Wis. Stat. § 11.01(15) ("personal campaign committees" are formed "for the purpose of influencing the election or reelection of a candidate"). The restrictions of Chapter 11 (or lack thereof) on the interactions between a regulated candidate campaign committee and unregulated individuals and groups, such as issue advocacy organizations, are discussed in other sections of this brief.

Issue 7b: Wis. Stat. § 11.10(4) does not operate to transform an independent organization engaged in issue advocacy into a "subcommittee" of a candidate's campaign committee.

A. Proposed Holding

This Court should hold that Wis. Stat. § 11.10(4) does not operate to transform an independent issue advocacy group into a campaign subcommittee because: (a) the plain language of § 11.10(4) applies to "committees," and issue advocacy groups are not "committees"; and (b) independent issue advocacy groups are not regulated under Chapter 11.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2 and 6 on this issue.

In particular, Unnamed Movant No. 1 notes that § 11.10(4) uses specific, defined terms in setting forth its restrictions: It applies when multiple "committees" are interacting.[26] But "committees," by definition, are only those groups that engage in express advocacy, not issue advocacy. *Barland II*, 751 F.3d at 834. Moreover, issue advocacy groups are specifically excluded from regulation under Chapter 11 and, therefore, cannot be subject to restriction under § 11.10(4). Thus,

[26] As explained under Issues 8, 9, 11, and 12, significant additional problems arise with the Special Prosecutor's proposed application of § 11.10(4) in this case.

actions of an issue advocacy group cannot transform the group into a "subcommittee" of a candidate's campaign committee under § 11.10(4).

Issue 7c: The campaign finance reporting requirements in Wis. Stat. ch. 11 do not apply to contributions or disbursements that are not made for "political purposes."

A. Proposed Holding

This Court should hold that the campaign finance reporting requirements in Chapter 11 only apply to contributions and disbursements that are made for "political purposes," defined by Wis. Stat. § 11.01(16), because the Wisconsin Legislature has chosen to regulate only that specific activity. The requirements do not apply to activity not done for "political purposes."

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2 and 6 on this issue.

Once again, Unnamed Movant No. 1 directs the Court's attention to the definitional structure of Chapter 11. The definitions of "contribution" and "disbursement" both require any such actions be done for "political purposes," which is limited to express advocacy. *See* 1979 Wis. Ch. 328 (1980); *see also Barland II*, 751 F.3d at 812-15; *WMC*, 227 Wis. 2d 650, ¶ 33, n.26. By its plain terms, the Chapter 11

requirements on the reporting of "contributions" and "disbursements" only apply to actions done for "political purposes."

Issue 7d: *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board* is either inapplicable or should be overruled.

A. Proposed Holding

This Court should overrule *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 ("*WCVP*"). Its holding erroneously construes issue advocacy as subject to Chapter 11 restriction, and the case has been eclipsed by subsequent First Amendment rulings.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2 and 6 on this issue.

Unnamed Movant No. 1 also notes that the John Doe Judge considered *WCVP* but found, as argued by Unnamed Movants Nos. 2 and 6, that: (1) *WCVP* is distinguishable; and (2) *WCVP* could not withstand constitutional scrutiny based on the "considerable" First Amendment campaign financing law that has developed since the case was decided. RD. 163 at 2; Joint App. 15.

Nevertheless, the Special Prosecutor will undoubtedly repeat *WCVP*'s statement that "the term 'political purposes' is not restricted by the cases, the statutes or the code to acts of express advocacy." *WCVP*, 231 Wis. 2d ¶ 15. But, as explained in detail under Issue 7, in Chapter 11, the definition of "political purposes" is limited to express advocacy. *See also Barland II*, 751 F.3d at 815. Accordingly, if *WCVP* applies, this Court should overrule it. *See Cook v. Cook*, 208 Wis. 2d 166, ¶ 53, 560 N.W.2d 246, 256 (1997) ("[T]he supreme court . . . has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

Issue 8: Fundraising that is coordinated among a candidate or a candidate's campaign committee and an independent advocacy group does not, and cannot, violate Wis. Stat. ch. 11.

A. Proposed Holding

This Court should affirm the John Doe Judge and hold that coordinated fundraising, whether in support of candidate committees, independent political committees, or other candidate committees, is not restricted by Chapter 11. RD. 163 at 3; Joint App. 16. Judge Peterson's decision is confirmed by: (a) the unequivocal legislative history, (b) the plain language of the Chapter 11 statutory and regulatory scheme, and (c) the common sense understanding and

practice of everyone from the President of the United States to individual union members.

B. Since 1980, the Wisconsin Legislature has explicitly and repeatedly rejected prohibitions on coordinated fundraising.

1. Wisconsin's 2006 Rejection of § 11.382

In 2006, the Wisconsin Legislature considered proposed legislation creating a new prohibition on elected officials' fundraising for third-party groups, whether the groups were engaged in either "issue advocacy" or "express advocacy" expenditures. The proposed new statute (Wis. Stat. § 11.382) would have read as follows:

> **11.382 Certain solicitations by elective officials prohibited.** 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.

2005 Assembly Bill 1005, at 2; Joint App. 435.

In its analysis of this proposed legislation, the Legislative Reference Bureau explicitly noted that, at that time, no such fundraising restriction existed in Wisconsin. *Id.* at 1; Joint App. 434 ("Currently, there is no similar restriction"). In other words, the legislative history demonstrates that, as of 2006, there was no

restriction on elected officials' fundraising for independent groups, such as the § 501(c)(4) groups at issue in this matter.

The Wisconsin Legislature rejected the proposed legislation,[27] and has not enacted any fundraising restrictions on elected officials since that time. Thus, elected officials, candidates, and similarly situated persons subject to other restrictions under Chapter 11 continue to be free to raise money for independent organizations.

2. Wisconsin's 1980 Amendment of § 11.06(7)

The legislative history of Wis. Stat. § 11.06(7) also demonstrates the Legislature did not seek to ban coordinated fundraising for either "issue advocacy" or "express advocacy" groups. On its face, § 11.06(7) repeatedly limits its application to committees that make "disbursements" designed to advocate the election or defeat of a clearly identified candidate, requiring them to affirm the disbursements are made independently from the candidate who benefits from them. The title of § 11.06(7) ("Oath for Independent Disbursements") confirms that the subsection reaches disbursements, but not contributions.

Section 11.06(7)'s lack of reference to fundraising or contributions is not an oversight. The current version of the statute, addressing only

[27] *See* 2005 Assembly Bill 1005, Important Actions, http://docs.legis.wisconsin.gov/2005/proposals/ab1005 (site visited Jan. 28, 2014).

disbursements, was adopted in 1980 during the Wisconsin Senate's consideration of Assembly Bill 603. The legislative history contains a letter proposing that § 11.06(7) be modified to adopt the definition of "independent expenditure" in the FECA.[28] According to the letter, "[o]ne of the advantages of using the federal language is that legal opinions on cases brought before the FEC can be useful to us." RD. 156; Joint App. 422.

The Wisconsin Senate agreed and struck prior language of § 11.06(7), which had required a voluntary oath committee to affirm that all "contributions" were accepted without "encouragement, direction or control."[29] The Legislature approved the Senate's

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[28] *See* 2 U.S.C. § 431(17) (1980) ("[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.").

[29] Until revised in 1980, Wis. Stat. § 11.06(7) provided as follows:

> 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 c who carries on any activities with intent to violate such oath is guilty of a violation of this chapter.

(Emphasis added.)

amendment and it was signed into law.[30] By making this change, the Legislature also eliminated any reference to "contributions" in § 11.06(7) that could have been interpreted before 1980 as applying to coordinated fundraising by a candidate on behalf of the voluntary oath committee.

Furthermore, no Wisconsin judicial decision holds that a candidate's fundraising activities for a voluntary oath committee could violate § 11.06(7). An Elections Board opinion from 1978 reaches this conclusion, but the decision was based on the prior version of § 11.06(7). El. Bd. Op. 78-8; Joint App. 323. The opinion was "revised" on March 26, 2008, and now states that "a voluntary committee may not accept any contribution with the 'encouragement, direction or control' of a candidate or his or her agents." *Id.* at 2; Joint App. 324. But even this "revised" version still relies on the "encouragement, direction or control" language of § 11.06(7) that was eliminated in 1980.

The oversight in Opinion 78-8 was implicitly acknowledged by the GAB in its similar 2008 affirmance of Opinion 00-2. El. Bd. Op. 00-2; Joint App. 327. Opinion 00-2, in part, attempted to explain the

[30] Chapter 328, Laws of 1979 (Wis.).

impact on Wisconsin law of *Clifton v. Federal Election Commission*, which invalidated FEC rules prohibiting corporations from coordinating the text of voter guides with candidates. 114 F.3d 1309, 1314 (1st Cir. 1997) ("It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives"). Based on this language, the GAB advised that "[s]ome level of contact between a candidate and a committee making expenditures is permissible." El. Bd. Op. 00-2, at 10; Joint App. 336.

3. Federal election law, relied upon by the Wisconsin Legislature, permits coordinated fundraising.

As previously discussed, the Wisconsin Legislature intentionally modeled § 11.06(7) after federal law. Federal law, however, authorizes federal candidates to raise funds for "super PACs" that make independent expenditures to support the election of those very same candidates. *See* 52 U.S.C. § 30116(a)(7)(B)(i) (stating that only "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committee, or their agents, shall be considered to be a contribution to such candidate") (emphasis added).

Nothing in the federal statute applies to fundraising. And nothing in the FEC's extensive rules on coordinated independent

expenditures applies to the coordination of fundraising activities. *See* 11 C.F.R. § 109.21.

Moreover, in 2011, the FEC issued an advisory opinion to the two "super PACs" that support Democratic members of the Senate and the House. The opinion held that members of Congress could participate in fundraising for these committees:

> Federal officeholders and candidates, and officers of national party committees, may attend, speak at, or be featured guests at fundraisers for the Committees, at which unlimited individual, corporate, and labor organization contributions will be solicited, so long as the officeholders, candidates, and officers of national party committees restrict any solicitations they make to funds subject to the limitations, prohibitions, and reporting requirements of the Act.

FEC A.O. 2011-12, at 4; Joint App. 385. [81] The Advisory Opinion did not discuss the coordination standard in 11 C.F.R. § 109.21, even though the relevant "super PACs" make only independent expenditures supporting members of Congress.

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[81] A 2002 statute prohibits federal candidates from raising funds that do not comply with the limitations on amounts and sources of funds in the Act. *See* 52 U.S.C. § 30125 (formerly, 2 U.S.C. § 441i). "Section 441i was enacted by Congress long after the Act's contribution limits and source prohibitions. It was upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93, 181-184 (2003), and remains valid since it was not disturbed by either *Citizens United* or *SpeechNow*." FEC A.O. 2011-12, at 4; Joint App. 385 (footnote omitted). Wisconsin, however, does not have an equivalent provision.

After the FEC issued the Advisory Opinion, various news stories described fundraising by candidates for President during the 2012 election campaign on behalf of "super PACs," the most prominent being Republican candidates for President in 2012 working closely with "super PACs," or contributors to "super PACs," supporting their candidacy.[32]

In stark contrast to the Special Prosecutor's positions and handling of this John Doe proceeding, there has been no attempt by federal authorities to limit coordinated fundraising. In fact, Mythili Raman, Acting Assistant Attorney General, Criminal Division, United States Department of Justice, testified before Congress[33] that recent decisions of the United States Supreme Court and the lower federal courts have applied the First Amendment to political speech in a way that has made criminal prosecutions all but impossible:

> The increasing use of Super PACs and the types of 501(c) organizations described above impacts transparency and changes the kinds of

[32] *See* Alexander Burns, "Mitt Romney addressing super PAC fundraisers," July 28, 2011, http://www.politico.com/news/stories/0711/60143.html (site visited Dec. 30, 2014); Peter H. Stone, "Democrats and Republicans alike are exploiting new fundraising loophole," July 27, 2011, http://www.publicintegrity.org/2011/07/27/5409/democrats-and-republicans-alike-are-exploiting-new-fundraising-loophole (site visited Dec. 30, 2014).

[33] Statement of Mythili Raman Before the Subcommittee on Crime and Terrorism Committee on the Judiciary United States Senate, "Current Issues in Campaign Finance Law Enforcement," Apr. 9, 2013, http://www.justice.gov/iso/opa/ola/witness/04-09-13-crm-raman-testimony-re-current-issues-in-campaign-finance-law-enforceme.201361129.pdf.

> criminal cases the Department can bring under our campaign finance laws. We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s.

In sum, the Wisconsin Legislature's conscious elimination of "contributions" from the reach of the voluntary oath statute demonstrates that the Special Prosecutor's current attempt to criminally investigate coordinated fundraising is not just misplaced, it is completely contrary to the established law.

C. Statutory and regulatory language, including GAB § 1.42 and Wis. Stat. § 11.10(4), does not prohibit coordinated fundraising.

As previously discussed, § 11.06(7) reaches disbursements but not fundraising. Contrary to the Special Prosecutor's position, neither GAB § 1.42 nor Wis. Stat. § 11.10(4) restricts coordinated fundraising either.

1. GAB § 1.42 does not prohibit coordinated fundraising.

Wis. Stat. § 11.06(7)'s restriction on disbursements is further set forth in Wis. Admin. Code GAB § 1.42 ("GAB § 1.42"). The Special

Prosecutor may try to contend that GAB § 1.42(6) [34] regulates (or creates a criminal ban on) coordinated fundraising through that section's "presumption" of coordination. But such a position is untenable on several grounds.

First, as indicated above, GAB § 1.42 simply does not apply to coordinated fundraising. Rather, it is a rule intended to interpret, implement, or inform the boundaries of the coordinated expenditure limits in Wis. Stat. § 11.06(7). Nothing in the rule regulates coordinated fundraising activities or limits in any way a candidate's right to raise funds on behalf of independent groups. And nothing in GAB § 1.42 prohibits coordinated activity in support of other candidates.

Second, the GAB lacks the authority to create—through an administrative rule—a criminal violation for coordinated fundraising not otherwise provided by statute (a principle that is particularly obvious here, where the Wisconsin Legislature explicitly chose not to regulate, much less ban, coordinated fundraising). *See* Wis. Stat. § 5.05(1)(f) (granting GAB the authority to promulgate rules

[34] GAB § 1.42(6) provides that an "expenditure made on behalf of a candidate will be presumed to be made in cooperation or consultation with any candidate ... or at the request or suggestion of a candidate ...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 the candidate's personal campaign committee."

interpreting or implementing Chapter 11 election laws, but nowhere giving GAB authority to independently criminalize conduct not otherwise prohibited by state law); *Oneida Co. v. Converse*, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993).

Third, to criminalize coordinated fundraising through an administratively-created presumption of coordination in a rule that does not even mention fundraising would be to wade wholly and deeply into the constitutional problems of lack of fair notice and First Amendment vagueness and overbreadth (as addressed in Issues 9, 11, and 12). As Judge Sykes noted in *Barland II*, the presumption of coordination in GAB § 1.42(6) may well create a "trap[] for unwary independent groups and candidates alike" if it is not interpreted in accordance with the limiting principles established in *Buckley* and *Wisconsin Right to Life II*. *See Barland II*, 751 F.3d at 843 n.26. To interpret GAB § 1.42(6) to allow a presumption of coordination relating to issue advocacy, campaign strategies, and fundraising would stretch far beyond those limiting principles.

In the end, no reasonable person could possibly have been on notice that GAB § 1.42(6) prohibits coordinated fundraising for independent advocacy groups or coordinating activities in support of other candidates.

2. Wis. Stat. § 11.10(4) does not prohibit coordinated fundraising.

Perhaps recognizing the flaw in his arguments under Wis. Stat. § 11.06(7) and GAB § 1.42, the Special Prosecutor alternatively has relied on Wis. Stat. § 11.10(4), which provides:

> No candidate may establish more than one personal campaign committee. Such committee may have subcommittees provided that all subcommittees have the same treasurer, who shall be the candidate's campaign treasurer. The treasurer shall deposit all funds received in the campaign depository account. Any committee which is organized or acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate is deemed a subcommittee of the candidate's personal campaign committee.

Based on this language, the Special Prosecutor has contended that, if an elected official or candidate fundraises, discusses issues, discusses strategy, or in other ways works with a § 501(c) organization, he is "working in concert" with that organization, transforming the organization into a subcommittee of the official's campaign committee.[35] Thereafter, the organization is subject to all campaign

[35] [redacted]

finance contribution prohibitions, limitations, and disclosure requirements.[36]

The Special Prosecutor's proposed construction of the statute defies basic tenets of statutory interpretation, and certainly is not narrowly tailored to avoid grave First Amendment problems. Nothing in the text of Wis. Stat. § 11.10(4), its legislative history, GAB interpretation, or public policy supports the Special Prosecutor's interpretation.

First, the statutory language at issue involves two "committees" working in concert. But "committee" is defined under Wis. Stat. § 11.01(4) as a combination of two or more persons accepting "contributions" and making "disbursements." "Contributions" and "disbursements" involve utilizing something of value for "political purposes." Wis. Stat. § 11.01(6), (7), (16); *see also Barland II*, 751 F.3d at 815 ("So the whole regulatory system turns on what counts as a 'contribution,' 'obligation,' or 'disbursement.' Chapter 11 defines all three terms very broadly to include anything of value given or spent 'for political purposes.'").

[36] The Special Prosecutor's "subcommittee" argument is also discussed under Issue 7b.

Critically, the statutory definition of "political purpose" does not include issue advocacy. *Barland II*, 751 F.3d at 815 ("The effect of this limiting language [in the definition of 'political purpose'] was to place issue advocacy—political ads and other communications that do not expressly advocate the election or defeat of a clearly identified candidate—beyond the reach of the regulatory scheme.") Therefore, under the statutory language at issue, when a candidate or his committee engages in fundraising for an issue advocacy group, there are not two Chapter 11 regulated "committees" working in concert; rather, there is only one regulated "committee" working with a non-regulated group.

Second, the legislative history completely undercuts the Special Prosecutor's argument. The FECA repealed the Federal Corrupt Practices Act of 1925, which had established contribution limits. It was repealed because the Act did not prohibit candidates from establishing multiple committees to accept contributions and thereby skirt federal contribution limits. Section 11.10(4) is Wisconsin's solution to that same problem.[37]

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[37] *Cf.* Chapter 93, Laws of 1975 (Wis.) and Report of the Senate Committee on Rules and Administration on S. 382, S. Rep. No. 92-229, at 114 (1971); *see also* Chapter 328, Laws of 1979 (Wis.). Section 11.10(4) was originally enacted in 1975 with language similar to § 11.06(7) prior to 1980. When § 11.06(7) was amended in 1980, the same language cited earlier from the federal definition of "independent

The Wisconsin Legislature's intent in closing that potential loophole is strikingly distinct from the Special Prosecutor's apparent suggestion that the Legislature intended to force independent, federally recognized social welfare organizations—whose very purpose is to engage in constitutionally protected First Amendment communications—under the umbrella of the candidate's campaign committee and thereby force them to operate under the burdens placed on elected officials. *See generally Citizens United*, 558 U.S. 310; *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

Moreover, the Special Prosecutor's suggested construction of § 11.10(4) runs contrary to the Wisconsin Legislature's 1980 amendment to § 11.06(7). Recall that, in 1980, the Legislature removed what might have been deemed to be a restriction on coordinated fundraising. Under the Special Prosecutor's interpretation, that change to § 11.06(7) would have been meaningless, as the supposed ban on coordinated fundraising would have continued under § 11.10(4).

Third, if Wis. Stat. § 11.10(4) were as comprehensive as the Special Prosecutor wishes it to be, the Elections Board likely would have mentioned the statute when it issued its guidance on § 11.06(7)

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expenditure" was added to § 11.10(4) and the same language deleted from § 11.06(7) ("encouragement, direction or control") was deleted from § 11.10(4).

coordination in Opinion 00-2 (or for that matter, when the Legislature contemplated passage of § 11.382). But it did not. Indeed, the GAB's explanation of coordination at GAB § 1.42, which (to repeat) is limited only to expenditures, would make little sense if Wis. Stat. § 11.10(4) overwhelmingly trumped those provisions and made illegal all coordination of any kind between a candidate and an independent group.[88]

Fourth, the Special Prosecutor's error in construction is easily demonstrated by the absurd consequences that would flow from such an interpretation. Under the Special Prosecutor's view, any time any elected official fundraises for a third-party group—be it the Girl Scouts, the Sierra Club, a church, or any combination of two or more persons—that third-party group would become a regulated campaign sub-committee, subject to all the reporting and restriction requirements of Chapter 11. The candidate's treasurer even would become the treasurer of the Girl Scouts, or whomever, by operation of law. *See* Wis. Stat. § 11.10(4).

Finally, if the Special Prosecutor's reading is to be accepted, multiple constitutional infirmities would arise, including those

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[88] This analysis equally applies if the Special Prosecutor argues that Wis. Stat. § 11.06(4) is somehow a separate, independent coordination restriction.

discussed below in Issues 9, 11, 12, and 13 relating to free speech, vagueness, overbreadth, and fair notice.

In sum, the Special Prosecutor's reading of Wis. Stat. § 11.10(4) must be rejected. It is wholly inconsistent with Wis. Stat. § 11.06(7) and GAB § 1.42. It is contrary to the Wisconsin Legislature's intent in amending § 11.06(7) and in refusing to pass the proposed Wis. Stat. § 11.382. And it is certainly not "narrowly tailored." Instead, it creates substantial First Amendment burdens on candidates' and independent organizations' right to free speech and association.

D. The common sense understanding of permissible coordinated fundraising is shown through the almost identical coordination activity of the opposing recall candidate and his supporters.

Coordinated activity involving third-party groups has become a routine aspect of political life. The Special Prosecutor's proposed construction of Chapter 11 defies the everyday understanding of the relevant provision and, as a result, creates a dangerous trap for candidates.

On the national level, President Barack Obama established and controls a third-party advocacy group, Organizing for Action, which has

raised millions of dollars as a § 501(c)(4) organization.[39] Those who contributed $500,000 or more were permitted to attend quarterly meetings with the President at the White House.[40]

On the state level, although the John Doe proceeding involves only the conduct of those on one side of the 2011-12 recalls, similar activity was extensive for the other party and candidate.[41] As one observer noted, the Democratic candidate "wouldn't stand a chance" in the gubernatorial recall without the millions in independent expenditures spent by one third-party group.[42]

Yet the leader of one of the third-party groups, We Are Wisconsin, was a self-proclaimed "long-time" associate of the Democratic candidate, and readily and publicly appeared with the Democratic candidate, all while directing millions in independent ads.[43]

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[39] *See* Matea Gold, "Organizing for Action raises $4.8 million in first quarter," Los Angeles Times, Apr. 12, 2013, http://articles.latimes.com/2013/apr/12/news/la-pn-organizing-for-action-fundraising-20130412 (site visited Dec. 30, 2014).
[40] *See* Mike Allen, "6 days to sequester," Politico.com, Feb. 23, 2013, http://www.politico.com/playbook/0213/playbook10090.html (site visited Dec. 30, 2014).
[41] *See* Ben Jacobs, "Wisconsin Recall: Bucking the Super-PAC Trend," The Daily Beast, June 3, 2012, http://www.thedailybeast.com/articles/2012/06/03/wisconsin-recall-bucking-the-super-pac-trend.html (site accessed Dec. 30, 2014).
[42] *Id.* (noting that Tom Barrett was the beneficiary of $5.5 million in ads which came primarily from union organizations that were not required to disclose their lists of donors).
[43] *See* Ruth Conniff, "Wisconsin Recall: Day One," The Progressive, May 9, 2012, http://www.progressive.org/wisconsin_recall_day_one.html (site accessed Dec. 30, 2014) (noting the appearance of Phil Neuenfeldt at Tom Barrett political event and quoting Neuenfeldt as follows: "I've known Tom Barrett a long time, and I've never seen him so fired up"); Gavin Aronsen, "The Dark Money Behind the Wisconsin

We Are Wisconsin later spent more than $3 million opposing Governor Walker in the recall.[44] The group also funneled more than $2 million dollars to another liberal expenditure group running so-called "independent" anti-Walker ads.[45]

The Democratic candidate's interaction with "independent" groups also included meeting with the leader of a third-party committee on the day after the committee publicly submitted a "notice of independent expenditure" to the GAB.[46] The head of the Democratic Governors Association (DGA) later not only appeared with the Democratic candidate, he helped in debate preparation.[47] The DGA

Recall," Mother Jones, June 5, 2012, http://www.motherjones.com/mojo/2012/06/wisconsin-walker-recall-money-stats (site accessed Dec. 30, 2014) (noting that Neuenfeldt ran the We Are Wisconsin Political Fund, an independent expenditure group); *see also* Andy Kroll, "Wisconsin Recall Elections: The Dark Money Pours In," Mother Jones, Aug. 5, 2011, http://www.motherjones.com/politics/2011/08/wisconsin-recall-americans-prosperity-dark-money (site visited Dec. 30, 2014) (noting that We Are Wisconsin spent almost $9 million in the 2011 Wisconsin Senate recalls).

[44] *See* Wisconsin Democracy Campaign, "Recall Race for Governor Cost $81 Million," July 25, 2012, http://www.wisdc.org/pr072512.php#tbl1 (site visited Jan. 21, 2015).

[45] *See* Jacobs, *supra*.

[46] According to the GAB website, the Democratic Governors Association ("DGA") Action WI independent group filed a notice of independent expenditure on May 29, 2012. On May 30, 2012, Tom Barrett appeared in a "Wisconsin Recall Update" with DGA Executive Director Colm O'Comartun, where O'Comartun announced that DGA head Martin O'Malley would travel to Wisconsin to campaign with Barrett. *See also* Michael Dresser, "O'Malley to stump in Wisconsin for Walker foe," Baltimore Sun, May 30, 2012, http://articles.baltimoresun.com/2012-05-30/news/bal-omalley-to-stump-in-wisconsin-for-walker-foe-20120530_1_barrett-campaign-milwaukee-mayor-tom-barrett-martin-o-malley (site visited Dec. 30, 2014).

[47] *See* Huffington Post, "Tom Barrett Will Stress Scott Walker's 'Failure to Lead' In Final Debate," June 1, 2012, http://www.huffingtonpost.com/2012/05/31/tom-barrett-scott-walker_n_1561152.html (site visited Dec. 30, 2014).

spent more than $3 million on the recall, including giving $1 million to Greater Wisconsin, an "independent" group that sponsored anti-Walker ads.[48]

The coordination was not limited to the candidate and these "independent" groups. The Democratic Party readily conceded that it was working "in collaboration" with a supposedly independent "grassroots" group and the Wisconsin Democratic Party Chairman then went on national television to solicit financial support for the recall efforts. [49]

In sum, the Special Prosecutor contends that coordinated fundraising is prohibited. But his view is contrary to the express statutory and regulatory language of Chapter 11, unequivocal legislative history, and the common sense understanding of everyone else. Accordingly, this Court should affirm Judge Peterson's finding that coordinated fundraising is not regulated in Wisconsin.

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[48] *See* Caitlin Huey-Burns, "DGA Pours $1 Million More into Wis. Recall Effort," Real Clear Politics, May 24, 2012, http://www.realclearpolitics.com/articles/2012/05/24/dga_pours_1_million_more_into_wis_recall_effort_114264.html (site visited Dec. 30, 2014).

[49] *See* Today.com, "The Ed Show for Monday, October 10th, 2011," Oct. 11, 2011, http://www.today.com/id/44859829/ns/msnbc-the_ed_show/t/ed-show-monday-october-th/#.Uq9nPajnbIU (site visited Dec. 30, 2014); *see also* Democratic Party of Wis., "You're the first to know: Recall Walker Now," Oct. 10, 2011, http://wisdems.org/news/blog/view/2011-10-youre-the-first-to-know-recall-walker-now (site visited Jan. 13, 2015) (referencing "collaboration with United Wisconsin" and seeking donations in conjunction with television announcement).

Issue 9: Due process prohibits a criminal prosecution founded on a theory that coordinated issue advocacy constitutes a regulated "contribution" under Wis. Stat. ch. 11.

A. Proposed Holding

This Court should hold that Chapter 11 fails to give fair notice that coordinated issue advocacy could constitute a regulated "contribution." Therefore, a criminal prosecution based on a theory of such "contributions" violates due process under both the Wisconsin and United States Constitutions.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2, 4, and 6 on this issue.

Unnamed Movant No. 1 emphasizes that this Court has summarized the concept of Due Process as follows:

> Due process requires that the law set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication. Before a court can invalidate a statute on the grounds of vagueness, it must conclude that "some ambiguity or uncertainty in the gross outlines of the duty imposed or conduct prohibited" appears in the statutes, "such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *State v. Courtney, supra,* 74 Wis.2d [705] at 711, 247 N.W.2d 714 [(1976)].

> A criminal statute must be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited. "Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L.Ed.2d 222 (1972).
>
> A criminal statute must also provide standards for those who enforce the laws and those who adjudicate guilt. A statute should be sufficiently definite to allow law enforcement officers, judges, and juries to apply the terms of the law objectively to a defendant's conduct in order to determine guilt without having to create or apply their own standards. *State v. Courtney,* 74 Wis.2d 705, 711, 247 N.W.2d 714 (1976). The danger posed by a vague law is that officials charged with enforcing the law may apply it arbitrarily or the law may be so unclear that a trial court cannot properly instruct the jury as to the applicable law. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

State v. Popanz, 112 Wis. 2d 166, 172-73, 332 N.W.2d 750 (1983) (footnotes omitted.)

The Special Prosecutor's theory that coordinated issue advocacy constitutes a regulated "contribution" fails this test in every respect. Chapter 11, whether in §§ 11.06(4)(d), 11.06(7), or 11.10(4), has <u>never</u> been read to by anyone, prior to the Special Prosecutor, to say that coordinated issue advocacy is a reportable "contribution."

To the contrary, an experienced Wisconsin appellate court judge, Judge Peterson, found that prohibitions against coordinated issue advocacy do not exist under Chapter 11. RD. 163 at 2; Joint App. 15. The Seventh Circuit also found that Chapter 11 does not restrict issue advocacy in any way. *Barland II*, 751 F.3d at 815. And the GAB, the very agency tasked with educating the public on Chapter 11, has now conceded that the language of the statute is "convoluted and difficult for the average person to read and understand."[50]

With no notice that Chapter 11 could be interpreted to state that issue advocacy coordination is a regulated "contribution," a John Doe criminal investigation premised on such conduct violates due process.

Issue 10: The records in the John Doe proceedings do not indicate that Wisconsin law was violated by a campaign committee's coordination with independent advocacy organizations that engaged in express advocacy speech.

A. Proposed Holding

After reviewing the Special Prosecutor's records, the John Doe Judge quashed the subpoenas based on a finding that there was no evidence of express advocacy. This Court should hold that Judge Peterson did not violate a plain legal duty in finding that the conduct at issue does not violate Wisconsin law, and thus the Special Prosecutor

[50] *See* Kennedy Memo, *supra*, at 130; Joint App. 379.

cannot establish that a supervisory writ is warranted. Even under a *de novo* standard, this Court should uphold Judge Peterson's decision because there is no evidence of coordinated express advocacy.

B. The John Doe Judge did not clearly violate a plain legal duty in quashing the subpoenas based on a finding that there is no evidence of express advocacy.

As previously discussed, Judge Peterson quashed the Special Prosecutor's subpoenas because they failed to show probable cause that a crime was committed. Specifically, Judge Peterson made the following findings:

- Chapter 11 does not regulate coordinated fundraising, only coordinated expenditures.
- In the absence of "political purposes," even coordinated expenditures are not illegal under Chapter 11.
- The only clearly defined "political purpose" under Chapter 11 is one that requires express advocacy.
- The Special Prosecutor did not claim that any of the independent organizations expressly advocated.

RD. 163 at 2-3; Joint App. 15-16.

Subsequently, Judge Peterson clarified that, despite his earlier erroneous reference to probable cause, "the subpoenas were quashed

properly" because "the statutes only prohibit coordination involving express advocacy [and] [t]here is no evidence of express advocacy here." RD. 233 at 2; Joint App. 30 (emphasis added).

To repeat, in John Doe proceedings where the party seeking relief acts promptly, "[w]hether a supervisory writ is warranted . . . turns upon whether [the] judge clearly violated a plain duty under the amended John Doe statute." *John Doe Petition*, 2010 WI App 142, ¶ 5 (emphasis added); *see Kalal*, 2004 WI 58, ¶ 17. An act requiring the exercise of discretion—such as a decision to quash subpoenas, *see* Wis. Stat. § 968.26(3); *Doe*, 2009 WI 46, ¶ 29—does not present a clear legal duty, *see John Doe Petition*, 2010 WI App 142, ¶ 5.

Judge Peterson exercised his statutory discretion in deciding to quash the subpoenas based on a finding that there was no evidence of express advocacy. Moreover, as explained under Issues 9 and 12, even if Judge Peterson's legal findings were erroneous, his decision was entirely reasonable because Chapter 11 is anything but "clear." Because Judge Peterson did not clearly violate a plain, legal duty, the Special Prosecutor cannot establish that the "extraordinary and drastic remedy" of a supervisory writ is warranted. *See Kalal*, 2004 WI 58, ¶ 17.

C. A *de novo* review of the records confirms that there is no evidence of express advocacy or criminal conduct.

The Unnamed Movants do not have sufficient access to the records that were before the John Doe Judge to make a thorough and responsive argument at this point. Nevertheless, the Special Prosecutor, who is privy to the records, has had multiple opportunities to identify instances of illegal coordination, but has failed to do so. Indeed, even under *de novo* review, the records cited in the Special Prosecutor's most recent brief (his April 28, 2014, Response to Petitions to Bypass Court of Appeals) do not support a John Doe criminal investigation.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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51 [redacted]

[redacted].[52]

A similar incongruous logic arises when one rephrases the issue as to whether the independent group was actually "independent." Chapter 11 does not define "independence" (or lack thereof) except in connection with specific prohibited activity set forth in § 11.06(7). If Chapter 11 does not restrict issue advocacy, does not restrict coordinated fundraising, does not restrict the exchange of campaign strategy, and does not restrict GOTV efforts, then the combination of these factors cannot form a new, previously undefined violation.

In sum, as Judge Peterson found, none of the Special Prosecutor's records establish wrongdoing. They instead are examples of entirely

[52] As noted above under Issue 8, the suggestion that a regulatory provision can establish a presumption of criminal impropriety is contrary to law.

legal interactions between candidates, candidate committees, and 501(c) organizations. Although the Special Prosecutor may disagree with the state of current campaign finance law that allows such interactions, this disagreement does not, and cannot, support the John Doe investigation here.

Issue 11: Even if Wis. Stat. ch. 11 somehow prohibits issue advocacy "coordination," such prohibition violates the First Amendment of the United States Constitution and/or Article I, Section 3 of the Wisconsin Constitution.

A. Proposed Holding

This Court should hold that the First Amendment of the United States Constitution and Article I, § 3 of the Wisconsin Constitution do not permit Chapter 11 restrictions of coordinated issue advocacy.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2, 4, and 6 on this issue.

Unnamed Movant No. 1 also notes that this Court recently reaffirmed that the First Amendment rights protected under the Wisconsin and United States Constitutions may be treated as coextensive. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 23 n.9, 851 N.W.2d 337 (citing *Lawson v. Hous. Auth. of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955) (holding that Article I, §§ 3 and 4 of the

Wisconsin Constitution "guarantee the same freedom of speech and right of assembly and petition as do the First and Fourteenth [A]mendments of the United States [C]onstitution"), and *Cnty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999) ("Wisconsin courts consistently have held that Article I, § 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment of the United States Constitution.")).

Under the First Amendment (and thus similarly under Article I, § 3 of the Wisconsin Constitution), parties engaged in issue advocacy enjoy the broadest constitutional protections. *See Wis. Right To Life*, 551 U.S. at 476 (stating that the Supreme Court "has never recognized a compelling interest" in regulating issue advocacy). The only remaining question, then, is whether the coordinated nature of such advocacy somehow lessens this otherwise impenetrable constitutional protection. *Cf. McCutcheon*, 134 S. Ct. at 1458 (reviewing alternatives to government's purported "anti-circumvention" interest).

As set forth in detail in the arguments of Unnamed Movants Nos. 2, 4, and 6, the independent advocacy groups in this matter are concerned with issues, not elections. The groups are not trying to circumvent "contribution" limits through issue advocacy because they do not accept or make "contributions" in the first place. They do not

advocate for the election of a clearly identified candidate. Because, as the Supreme Court has held, issue ads "are by no means equivalent to contributions," then coordinated issue ads cannot be contributions either. *Wis. Right To Life*, 551 U.S. at 478.[53]

To hold otherwise would be to gut the protected status these groups enjoy and install unnecessary and unjustified barriers between these citizens and the very elected officials with whom they seek to interact. As the Supreme Court has stated, "[t]he First Amendment 'is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'" *McCutcheon*, 134 S. Ct. at 1448 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

The Special Prosecutor's proposed construction of Chapter 11 violates the First Amendment of the United States Constitution and Article I, § 3 of the Wisconsin Constitution.

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[53] Focusing on possible attempts to circumvent candidate fundraising limits is equally unavailing since, as set forth under Issue 6, recall candidates could raise unlimited funds during the time period just prior to a recall petition being formally filed.

Issue 12: Due process prohibits a criminal prosecution founded on an allegation of "coordinated" issue advocacy.

A. Proposed Holding

This Court should hold that Chapter 11 fails to give fair or proper notice of whether or in what ways coordination with an issue advocacy group is restricted. Therefore, a criminal prosecution based on any such theory of coordination violates due process.

B. Adoption and Additional Argument

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 2 and 6 on this issue. Unnamed Movant No. 1 also refers the Court to its additional argument under Issue 9.

Issue 13: 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.

A. Proposed Holding

This Court should hold that 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.

B. Adoption and Additional Arguments

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movant Nos. 2 and 6 on this issue.

Unnamed Movant No. 1 highlights that Wis. Stat. § 11.01(16) defines "for political purposes" to include acts done "for the purpose of influencing" an election. Acts that are for political purposes "include but are not limited to" express advocacy to elect or defeat a clearly identified candidate. *Id.* Under *Buckley, WMC,* and *Barland II,* the definition of "political purposes" must be restricted to express advocacy to avoid unconstitutional vagueness.

As previously discussed, the Wisconsin Legislature added the express advocacy clarification in § 11.01(16)(a)1. to comply with *Buckley,* ultimately placing issue advocacy beyond the reach of the Chapter 11. *WMC* further establishes that the definition of "political purposes" is limited to express advocacy, and that the "for the purpose of influencing" language in § 11.01(16) is unconstitutionally vague unless narrowly construed to cover only communications that "expressly advocate the election, defeat, recall or retention of a clearly identified candidate." *See WMC,* 227 Wis. 2d at 662-63. And, most recently, the Seventh Circuit held that the "for the purpose of influencing the election" language causes § 11.01(16)'s definition of political purpose to be unconstitutionally vague unless restricted to express advocacy. *Barland II,* 751 F.3d at 804.

Because political speech lies at the core of the First Amendment protections, vagueness "loom large in this area." *Id.* at 811. Accordingly, campaign finance regulations must be precise, clear, narrow and specific, and may extend only to speech that is "unambiguously related to the campaign of a particular . . . candidate." *Buckley*, 424 U.S. at 80. As applicable to the definition of "political purposes" in Chapter 11, unless § 11.01(16) is read to apply only to express advocacy communications—communications which expressly advocate "the election, defeat, recall or retention of a clearly identified candidate"—it must be stricken as unconstitutionally vague.

Issue 14: The affidavits underlying the search warrants issued in the John Doe proceedings lacked probable cause.

A. Proposed Holding

This Court should hold that Judge Peterson did not violate a plain legal duty in finding that affidavits underlying the search warrants at issue did not support probable cause because the conduct at issue did not violate Wisconsin law.

B. Adoption

Unnamed Movant No. 1 hereby expressly adopts the arguments of Unnamed Movants Nos. 6 and 7 on this issue.

CONCLUSION

For all of these reasons, and for all of the reasons adopted by reference, Unnamed Movant No. 1 respectfully requests that Judge Peterson's decision be upheld, and the Special Prosecutor's petition be dismissed.

Respectfully submitted this 30th day of January, 2015.

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CERTIFICATION - WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c)—as amended by this Court's December 16, 2014, order—for a brief produced with a proportional serif font. The length of the portions of this brief subject to the word-count requirement is 14,585 words.

Dated this 30th day of January, 2015.

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CERTIFICATION - WIS. STAT. § 809.19(12)(f)

I certify that I have submitted an electronic copy of this brief, excluding the joint appendix, which complies with the requirements of Wis. Stat. § 809.19(12)(f), as modified by this Court's January 13, 2015, order. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date, and that a copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 30th day of January, 2015.

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CERTIFICATION - FILING UNDER SEAL AND SERVICE

I certify that, pursuant to this Court's December 16, 2014, order, the original and twenty-two (22) copies of this original brief, as well as seventeen (17) copies of this redacted brief, are being filed under seal, pending further order of the Court.

Three (3) copies of the original brief, as well as two (2) copies of the redacted brief, are being served upon counsel of record via first-class mail, or mail at least as expeditious.

Dated this 30th day of January, 2015.

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