

STATE OF WISCONSIN

BEFORE THE JOHN DOE JUDGE

IN THE MATTER OF A JOHN DOE PROCEEDING	COLUMBIA COUNTY CASE NO.	13JD000011
	DANE COUNTY CASE NO.	13JD000009
	DODGE COUNTY CASE NO.	13JD000006
	IOWA COUNTY CASE NO.	13JD000001
	MILWAUKEE COUNTY CASE NO.	12JD000023

**NOTICE OF MOTION AND MOTION TO QUASH JOHN DOE SUBPOENAS
SERVED ON WISCONSIN MANUFACTURERS & COMMERCE, INC. AND ITS
AFFILIATE, WMC-IMC**

To: Presiding Judge
P.O. Box 2143
Milwaukee, WI 53201

Francis D. Schmitz
Special Prosecutor
P.O. Box 2143
Milwaukee, WI 53201

NOTICE OF MOTION

PLEASE TAKE NOTICE that, at a time, date and place to be determined by the presiding judge (the "John Doe judge"), Wisconsin Manufacturers & Commerce, Inc. and its affiliates, officers, directors, employees and agents (collectively, "WMC" or the "moving parties") will bring before the John Doe judge its Motion to Quash the John Doe Subpoenas dated October 1, 2013 with a return date of Tuesday, October 29, 2013, at 8:00 a.m.

TAKE FURTHER NOTICE that the moving parties specifically request to be heard by counsel in person on their motion—either on the return date or on another mutually acceptable date and time to be determined by the John Doe judge. Take further notice that the motion below asserts the constitutional protection of the First, Fourth, and Fourteenth Amendments and, accordingly, that pending the resolution of the motion by the John Doe judge or an appropriate

appellate court, the moving parties will not—absent further order—comply with the subpoenas as prepared by the prosecutor and served.

MOTION TO QUASH

WMC moves the John Doe judge to quash the “John Doe Subpoenas Duces Tecum” dated October 1, 2013 and served on WMC and on one of its affiliates on or about that date and to enter an appropriate protective order. In support of the motion, WMC states that the subpoenas impermissibly violate its constitutional rights to free speech and freedom of association, that they are fatally overbroad, that they are void for lack of specificity, and that due process prohibits subjecting anyone to a “Secrecy Order” whose terms are undisclosed.

In addition, to support the motion, WMC submits the accompanying Memorandum of Law and the Affidavit of Kurt Bauer and further states that:

Subpoenaed Parties

1. WMC is a non-profit, non-stock membership organization, established in 1911, that operates under Chapter 181 of the Wisconsin Statutes and section 501(c)(6) of the Internal Revenue Code to advance the interests of its members in a healthy business climate for the state.

2. As part of its mission, WMC has long been involved in the political life of this state. It takes positions on issues of local and state concern to the business community, on referendum issues and, separately, on the outcome of elections.

A. One of WMC’s affiliates, WMC Issues Mobilization Council, Inc. (“WMC-IMC”), long has engaged in issue advocacy on a sustained basis. It also received a subpoena. WMC-IMC is recognized under section 501(c)(4) of the Internal Revenue Code to advance a social welfare agenda. Most often through issue advocacy communications, including broadcast advertising purchased with corporate support,

WMC-IMC engages in coalition/grassroots lobbying efforts on issues such as tort reform, property taxes and state budget priorities. WMC-IMC has been repeatedly recognized for its success in helping to shape public policy debates on important issues facing Wisconsin. The list of WMC-IMC's supporters is confidential. It always has been, notwithstanding repeated efforts to breach that confidentiality. ~~ATC UAC~~
P

B. WMC itself communicates frequently and directly with its members about pending public policy issues as well as on the outcome of elections.

C. WMC's members and others contribute financially to enable WMC and WMC-IMC to advance their respective missions. Those contributions are solicited and received confidentially.

D. In addition, WMC has shared interests on some matters with the Milwaukee Metropolitan Association of Commerce ("MMAC") and the U.S. Chamber of Commerce, which are specifically named in the subpoenas. Accordingly, WMC also communicates with them on issues and elections. ???

3. In 1999, WMC successfully petitioned the Wisconsin Supreme Court and vindicated, against a sustained prosecution by the Wisconsin Elections Board and the Wisconsin Department of Justice, its constitutional right to engage in issue advocacy and to protect the privacy and associational rights of its members and contributors, unrestricted by impermissible statutory or administrative regulation. *See Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999).

A. That litigation involved, in part, WMC's refusal on constitutional grounds to disclose its contributors and supporters.

B. In its decision, the Wisconsin Supreme Court emphasized the constitutional protection offered political speech and association, lying “at the heart of the First Amendment.” *Id.* at 663, citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*).

C. Any government action that threatens either freedom is subject to the closest scrutiny. *Buckley*, 424 U.S. at 25.

4. In addition, WMC and WMC-IMC have seen their concern for the protected speech and the privacy of their members and supporters vindicated in the face of repeated efforts to impose enhanced regulation and disclosure on lobbying and political activity:

- Twenty years ago, a federal district court invalidated Wisconsin’s attempt to prohibit lobbyists from associating with and volunteering their time to candidates for public office. *Barker v. Wis. Ethics Bd.*, 841 F. Supp. 255 (W.D. Wis. 1993).
- In 2002, WMC, WMC-IMC and several other organizations successfully challenged a mandatory disclosure regulation in state law. *Wis. Realtors Ass’n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002).
- Five years ago, as part of a broad coalition, WMC again stood before the state’s highest court to help prevent premature discovery that would have disclosed the identity of corporate supporters in a defamation action brought by a disgruntled public official and candidate. *Lassa v. Rongstad*, 2006 WI 105, 294 Wis. 2d 187, 718 N.W.2d 673.
- In 2009, WMC successfully argued that the Wisconsin Supreme Court should amend the Code of Judicial Conduct to reflect the right of independent groups to engage in political expression in connection with judicial elections without fear of automatic judicial recusal. *In the Matter of Amending the Code of Judicial Conduct*, Pet. 09-10, Wisconsin Supreme Court SCR 60.04 (2009).
- In 2010, WMC and other groups successfully opposed implementation by the Government Accountability Board (the successor of the State Elections Board) of a revised administrative rule that would have unconstitutionally regulated WMC’s political speech. *Wisconsin Club for Growth, Inc. v. Myse*, No. 10-427, 2010 WL 4024932 (W.D. Wis. Oct. 13, 2010).

5. Since then, WMC has continued its political involvement—openly, freely, vigorously, and legally.

Uncontroverted Facts

6. In 2011 and 2012, WMC was actively involved with and on behalf of its members in the unprecedented public policy debate that characterized a turbulent 20 months in Wisconsin history – preceding and following the enactment of Act 10, which limited collective bargaining.

A. Throughout that period, WMC engaged in direct and grassroots lobbying and in issue advocacy by calling attention, in a variety of ways, to issues affecting the public policy decisions being made in Wisconsin. That public policy debate preceded the recall elections and continued through the petition efforts and recall elections of state senators and the governor. The policy debate continues today.

B. Separately, WMC also supported and endorsed candidates but only in communications with its members, communications not subject to registration and reporting under state campaign finance law.

7. On October 1, 2013, WMC (and WMC-IMC) each received a “John Doe Subpoena Duces Tecum” issued under Wis. Stat. § 968.26(1). *See also* Wis. Stat. § 968.135. For a period of two full years, 2011 and 2012, the subpoenas seek the production from WMC of all “Recall Related Information and Records,” a term defined in a six-page attachment to the subpoenas. In addition, the subpoenas seek “all records and information” in connection with specified campaigns and elections and, specifically, “all e-mails..., memoranda and correspondence” with MMAC and the U.S. Chamber of Commerce.

8. WMC has, in its actual possession, certain “Recall Related Information and Records,” as described in the attachment or arguably subject to the subpoenas, and certain

communications with MMAC and the U.S. Chamber of Commerce. However, the amount of time required to respond to the subpoenas would be staggering: the cost estimated to exceed \$100,000.00.

9. Anticipating a challenge, the subpoenas directed that challenges be filed “with the John Doe Judge” with a return address of the postal box in Milwaukee used in this pleading.

10. The subpoenas also cited a “Secrecy Order that applies to this proceeding,” although no such order accompanied the subpoenas and WMC and WMC-IMC have seen none.

11. The subpoenas’ attachment lists at least 14 elections, by district number and candidate name, as falling within the definition of “Recall Related Information and Records.” In addition, it lists the names of 30 organizations, associations or other entities and four individuals, seeking from WMC and WMC-IMC all communications—broadly defined—with those entities and individuals during the entire two-year time period.

12. The scope of the subpoenas requires—explicitly, implicitly, or in effect—without limitation any material of any kind that relates in any way to the identified campaigns and elections or to the identified individuals or entities.

A. Other than by naming specific organizations and individuals, there is no attempt to limit or filter the material subpoenaed.

B. The subpoenas make no distinction between issue advocacy, which is not regulated under state campaign finance law, and express advocacy to support or defeat a clearly-identified candidate, which is regulated.

Constitutional Allegations

13. The subpoenas, if enforced, would violate WMC's rights under the First, Fourth, and Fourteenth Amendments and the Due Process clause and their parallel provisions under the state constitution including, but not limited to, Article I (sections 3, 4, 8 and 11).

14. The subpoenas are void for overbreadth, unduly burdensome, and unreasonable. They seek a massive amount of material for two calendar years without differentiating between regulated and unregulated conduct or articulating the potential relationship to any criminal conduct, real or perceived, by any individual or entity.

15. The subpoenas reach constitutionally-protected activity, which is criminalized neither by state nor federal law, including WMC's right to communicate with its own members, with other like-minded organizations, and with the public and the right of its members to freely associate. Those rights to speech and association not only protect WMC's right to express its point of view on issues and public policy development but its right to communicate freely with others, whether individuals or entities, that share its point of view.

16. The turmoil and controversy in 2011 and 2012 was, foremost, a public policy debate involving state legislation. It preceded the recall elections identified in the subpoenas and, even now, continues. Yet the subpoenas ignore the constitutional distinctions between speech on public policy, on the one hand, and speech about campaigns and elections, on the other hand.

17. Speech on issues of public concern and policy cannot be regulated under state campaign finance law. Speech involving candidates can be regulated but only in the narrowest circumstances—to prevent corruption or the appearance of corruption in conjunction with the

election or defeat of a clearly-identified candidate for public office. The subpoenas' failure to distinguish between regulated and unregulated conduct is fatal.

18. Neither WMC nor any other organization or individual can be subjected to a secrecy order that it has not seen. Notwithstanding the reach of a John Doe proceeding, that reach does not exceed the Due Process Clause or the state constitution in Article I. While WMC has taken steps to preserve the secrecy of the proceeding and directed the preservation of all materials that might be subject to the subpoenas, it cannot be held liable for any breach of the order or any failure to comply with the subpoenas related to it.

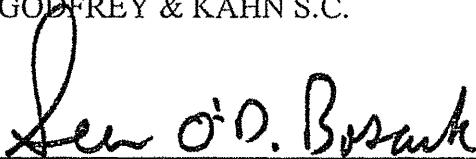
REQUEST FOR RELIEF

Wherefore, WMC requests that the John Doe judge quash the October 1 subpoenas as issued to WMC and WMC-IMC, eliminating any obligation to respond, and that the judge enter an appropriate protective order for the remainder of this proceeding.

Dated: October 25, 2013.

GODFREY & KAHN S.C.

By:



Brady C. Williamson
State Bar No. 1013896
Sean O'D. Bosack
State Bar No. 1029661

Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53703
Phone: 608-257-3911
Fax: 608-257-0609

10291382.1