UNDER SEAL
STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I / IV
Case No. 2014AP_____ W

STATE of WISCONSIN ex rel. FRANCIS D. SCHMITZ,
Special Prosecutor,

Petitioner,

vs.

THE HONORABLE GREGORY A. PETERSON,
John Doe Judge, UNNAMED MOVANT NO. 1,
UNNAMED MOVANT NO. 2, UNNAMED MOVANT NO. 3,
UNNAMED MOVANT NO. 4, UNNAMED MOVANT NO. 5,
UNNAMED MOVANT NO. 6, UNNAMED MOVANT NO. 7,
and UNNAMED MOVANT NO. 8,

Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR SUPERVISORY WRIT AND WRIT OF MANDAMUS (FILED UNDER SEAL)

Concerning John Doe Proceedings in Five Counties
Hon. Gregory A. Peterson, Presiding
Columbia County No. 13JD000011; Dane County No. 13JD000009;
Dodge County No. 13JD000006; Iowa County No. 13JD000001;
Milwaukee County No. 12JD000023

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Petitioner

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STATE OF WISCONSIN

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I. INTRODUCTION

"Prearranged or coordinated expenditures" result in "disguised contributions" and are subject to regulation, while only truly "independent expenditures" are afforded the highest First Amendment protections.[1] The John Doe judge correctly stated: "As a general statement, *independent organizations* can engage in issue advocacy without fear of government

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[1] *Buckley v. Valeo,* 424 U.S. 1, 25, 46-47, 78 (1976).

regulation. However, again as a general statement, when they coordinate spending with a candidate in order to influence an election, they are subject to regulation."[2] The John Doe judge (hereinafter "judge") did not apply this statement of Wisconsin law to the facts of this case.

The facts before the judge provide reasonable belief that the Friends of Scott Walker (FOSW) and its agents coordinated spending, strategy, and fundraising purposefully and pervasively with a dozen or more 501(c) corporations to influence elections and subvert Wisconsin's campaign finance laws. Under Wisconsin law and consistent with First Amendment principles, it is the conduct of coordination that demonstrates the intent and purpose to influence elections, resulting in regulated contributions.

II. ARGUMENT

A. The Exercise of Supervisory and Original Jurisdiction is Proper on These Facts.

It is firmly established that the Court of Appeals may exercise supervisory and original jurisdiction to issue prerogative writs over the actions of a judge presiding over a John Doe proceeding. *See In re John Doe Proceeding*, 2003 WI 30, ¶¶ 23 and 41, 260 Wis.2d 653, 660 N.W.2d

[2] Schmitz Affidavit 15-17 (emphasis added) (hereinafter "*Aff*"). Unless otherwise indicated. by the "¶" symbol, the Affidavit references are to Bates Stamp page numbers.

260. A supervisory or mandamus writ will not issue unless (1) an appeal is an utterly inadequate remedy; (2) the duty of the circuit court is plain; (3) the circuit court's refusal to act within the line of such duty or its intent to act in violation of such duty is clear; (4) the results of the circuit court's action must not only be prejudicial but must involve extraordinary hardship; and (5) the request for relief must have been made promptly and speedily. *See State ex rel. Kenneth S. v. Circuit Court for Dane County,* 2008 WI App 120, ¶8, 313 Wis.2d 508, 756 N.W.2d 573.

No direct appeal may be taken from the judge's actions. Petitioner's only remedy is this Writ. The Petitioner submits that the judge misapplied Wisconsin law, as explained below. In addition, the judge failed to address facts in the record substantiating a reasonable belief crimes have occurred.

The judge's decision involves a question of law. It is reviewed *de novo. Ide v. LIRC,* 224 Wis. 2d 159, 166, 589 N.W. 2d 363 (1999). The erroneous application of the law and facts has resulted in the judge failing to perform his duties, *i.e.,* to enforce the subpoenas at issue and to maintain the seized property as evidence for the investigation. The judge expressly

invited appellate review to avoid further delays.[3] The Petitioner has promptly sought relief. Accordingly, the Petition is well founded and the requested relief should be granted.

B. The John Doe Investigations Have Been Halted by Reason of the Judge's Fundamental Misapplication of the Law.

A John Doe proceeding under Wis. Stat. §968.26 is a special investigative proceeding commenced, as allowed by law, on the basis of a petition alleging a *reason to believe* that a crime has occurred within the jurisdiction of the court. *State ex. rel. Reimann v. Circuit Court for Dane County*, 214 Wis.2d 605, 611, 571 N.W.2d 385, 386 (1997). The John Doe proceeding is not a procedure for the determination of probable cause so much as it is an inquest for the discovery of crime. *State v. Washington*, 83 Wis.2d 808, 822, 266 N.W.2d 597(Wis. 1978).

These investigations involve an inquiry into possible violations of campaign finance law.[4] Obviously, no charges have been brought. The judge's ruling abruptly halted a portion of the investigations, effectively concluding that there was no reason to believe any crime had been committed. Consequently, this writ proceeding is not about some

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[3] "Any reviewing court owes no deference to my rationale, so giving the parties a result is more important tha[n] a delay to write a lengthy decision on election and constitutional law." *See Aff.*15.

[4] The John Doe Petitions are found at Aff. Pp. 797, 800, 805, 809 and 814.

misapplication of "probable cause" standards to the facts of this case. It is about the judge's rejection of a fundamental premise of one portion of the investigation. That premise is this: the conduct of coordination is legitimately regulated by Wisconsin law and this is true even when a candidate/candidate committee acts in concert with a person engaging in issue advocacy. More than that, however, the judge also failed to appreciate another portion of the investigation evidencing instances of coordination by FOSW or its agents with persons engaged in express advocacy.

For these reasons, no discussion of the standards relating to the issuance and/or scope of subpoenas is required. There is no dispute now before the court that the subpoenas sought information within the scope of the original petitions or that the requested documents were relevant to the purposes of the investigation. Likewise, no analysis of the Order returning property is appropriate at this juncture. Although he quashed subpoenas and ordered the return of property (but did so without any hearing under Wis. Stat. §968.20), the judge acted in this manner because of his rejection of an original premise of the issue advocacy portion of the investigation and because he failed to appreciate the express advocacy evidence in the record.

The balance of this Memorandum focuses on the legal reasons why this inquiry rests on a firm statutory and constitutional foundation.

C. Consistent with First Amendment Principles, Wisconsin Statutes and Regulations Properly Regulate the *Conduct* of Coordination Between 501(c) Corporations and Political Committees, While Still Protecting Truly Independent Speech.

1. Wisconsin Law Proscribes the Conduct Under Investigation, Even When it Includes Issue Advocacy

This is an investigation about *conduct*—direct dealing with an officeholder or his agents while offering something of value—which provides unique opportunities for corruption to occur and avoid statutorily mandated campaign finance restrictions and disclosure.[5] This investigation is not about persons engaging in their "own speech" that is truly independent from political committees and thus protected by the First Amendment. The coordinating *conduct* by a candidate, political committee, or their agents with purported independent issue advocacy 501(c) corporations results in the corporations disseminating the candidate's or political committee's speech. Rather than examining –

[5] Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 Willamette L.Rev. 603 (Summer 2013)(citing *Buckley*, 424 U.S. at 30).

under Wisconsin statutes and regulations[6] – the *conduct* of coordination and the lack of 501(c) corporations' independence from candidates and/or political committees, the judge mistakenly focused only on the type of resulting speech, *i.e.*, issue advocacy.

The clearly stated purpose of Wisconsin's campaign finance laws is set out in legislative findings at Wis. Stat. §11.001 (emphasis added):

> The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. *It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. . . . When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence...*

The United States Supreme Court has also found that the citizens' "right to know" is inherent in the nature of the political process. Transparency enables the electorate to make informed decisions and gives proper weight to different speakers and messages, even for speech that does

[6] Administrative rules are given the effect of law and subject to the same principles of construction as statutes. *See Law Enforcement Stds. Bd. v. Village of Lyndon Station*, 101 Wis.2d 472, 489, 305 N.W.2d 89 (Wis. 1981). "Perhaps the first rule of construction as to administrative rules and regulations is that rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." *Id.* The Government Accountability Board has both specific and general statutory authority to promulgate rules for the purposes of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration. *See* Wis. Stats. §§5.05(1)(f) and 227.11(2)(a).

not contain express advocacy. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). In addition, the Wisconsin Attorney General has formally opined that to the extent Wisconsin administrative rules impose registration, reporting, or disclaimer requirements on independent expenditures that are not express advocacy, *Citizens United* does not make the rules unconstitutional. *OAG-05-10,* ¶36 (August 2, 2010).

This investigation focuses on the degree of coordination between 501(c) corporations and candidate or other political committees, as well as between purported independent political committees and candidates. Under Wisconsin law, the act of coordination between ostensibly "independent entities" (such as 501(c) corporations) and political committees has one of the following effects:

> (1) For candidate committees, the "independent entity" is deemed a subcommittee of the candidate's personal campaign committee (Wis. Stat. §11.10(4)) and all legal contributions[7] and disbursements must be disclosed on the candidate's campaign finance reports pursuant to Wis. Stat. §11.06, or
>
> (2) For all political committees, coordinated expenditures must be disclosed as in-kind contributions on the political

[7] Contributions exceeding statutory limits and direct or indirect corporate contributions are not legal. Wis. Stats. §§11.26, 11.38.

committee's campaign finance reports pursuant to Wis. Stat. §11.06.

Every committee must register and must file full campaign finance reports that include contributions received, contributions or disbursements made, and obligations incurred. Wis. Stat. §§11.05(1) and (6). Committees cannot make contributions or disbursements prior to registering. Wis. Stat. §11.06(1). Even a committee that is not primarily organized for political purposes is required to report any disbursement that constitutes a *contribution* to any candidate or other individual, committee or group. *See* Wis. Stat. §11.06(2).

A *person,*[8] including a 501(c) corporation, is a "committee" under Wisconsin statutes, if engaged in making or accepting contributions or making disbursements, whether or not engaged in activities which are exclusively political. Wis. Stat. §11.01(4).[9] "Making or accepting contributions" includes the following two acts, among others: 1) making or accepting a gift of something of value made for political purposes (Wis. Stat. §11.01(6)(a)); or 2) making a "coordinated expenditure." Wis. Adm.

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

[9] *See also Center for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012)(Political committees need only encompass organizations that are *under the control of a candidate* and expenditures of "political committees" so construed can be assumed to fall under government regulation and are, by definition, campaign related.)

Code GAB §1.42(2). Wisconsin law provides that expenditures made in cooperation or consultation, or in concert with, or at the request or suggestion of any candidate, authorized committee, or their agent are deemed "contributions" to such candidate and must be treated and reported as such. Wis. Adm. Code GAB 1.42(2).[10] This Wisconsin regulation is nearly identical to federal law.[11] *See also Center for Individual Freedom (CIF) v. Madigan,* 697 F.3d 464, 496-96 (7th Cir. 2012)(Upheld Illinois' coordination law and noted that *Buckley* upheld similar federal provision).

An act is for a "political purpose[s] when it is done for the purpose of influencing the election . . . of any individual to state or local office [or] for the purpose of influencing the recall from or retention in office of an individual holding a state or local office." Wis. Stat. §11.01(16).

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[10] The language in Wis. Adm. Code GAB §1.42 uses the broader term "expenditure" instead of "disbursement" when prescribing the activities that become subject to Wis. Stat. §11.06(7). This rule adopted the Federal coordination language and thus established a broader category of activity that constitutes a contribution to a candidate committee, including coordinated expenditures. The Legislative history of Wis. Stat. §11.06(7) shows a direct intent to adopt the Federal coordination language. *See* Affidavit of Kevin J. Kennedy ¶10.a.iii and Exhibit 4 (November 30, 1979 Letter to Gail Shee instructing that the Federal coordination provision language should be added to the revisions of Wis. Stat. §11.06(7).)

[11] "Expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. §441a(a)(7)(B)(i). The term "expenditure" includes any *purchase, payment, distribution,* loan, advance, deposit, or *gift of money or anything of value*, made by any person *for the purpose of influencing any election* for Federal office and a written contract, promise or agreement to make an expenditure. 2 U.S.C. §431(9)(A)(i)-(ii).

Importantly, "political purpose" "is not restricted by the cases, the statutes, or the code, to acts of express advocacy." *Wisconsin Coalition for Voter Participation v. SEB*, 231 Wis.2d 670, 680, 605 N.W. 2d 654 (Ct. App. 1999)(hereinafter *WCVP)*.

Furthermore, Wisconsin law provides that no "expenditure" may be made or obligation incurred over $25 in support of or opposition to a specific candidate unless such expenditure or obligation is reported as a "contribution" to the candidate or the candidate's opponent, or is made or incurred by a "committee" filing the voluntary oath specified in Wis. Stat. §11.06(7). Wis. Adm. Code GAB §1.42(1). Coordination between a candidate committee and another entity is presumed – and "any expenditure" of that entity is treated as an in-kind contribution to the candidate committee – when the expenditure is made as a result of a decision by a person who is an officer, a compensated campaign worker, or otherwise an agent of the candidate's campaign committee. Wis. Adm. Code GAB §1.42(6)(a)1.a-c.

Finally, Wisconsin law specifically requires financial disclosure when a candidate works in concert with a second committee.

> Any committee which is organized or acts with the cooperation of or upon consultation with a candidate or agent

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

Wis. Stat. §11.10(4). By operation of law, any person coordinating with or acting at the request or suggestion of the Governor Scott Walker or his committee, FOSW, is deemed to be a subcommittee of FOSW. That person is subject to all campaign finance contribution prohibitions, limitations, and disclosure requirements applicable to FOSW. See, e.g., Wis. Stats. §§11.05; 11.06(1); 11.12; 11.16; 11.20; 11.24(2); 11.25(1); 11.26; 11.27; 11.38(1)(a)1.

Wisconsin law clearly distinguishes between coordinated activities and truly independent activities. It prohibits unlimited and undisclosed spending for *coordinated* activities even if the resultant speech is issue advocacy. In the context of First Amendment principles, the former State Elections Board explained the application of Wisconsin statutes and regulations to coordinated activities. *See* El.Bd.Op. 00-2, pp. 8-13 (affirmed by the G.A.B. on 3/26/08). Wisconsin law treats any coordinated expenditure made at the request or suggestion of the candidate or his agent as a contribution. *See id.* at pp. 11-12 citing *FEC v. The Christian*

Coalition, 52 F.Supp.2d 45, 98 (D.D.C. 1999). If the spender's communication is made at the request or suggestion of the campaign – or the spender and the campaign act in a joint venture – the coordinating *conduct* results in a contribution regardless of whether the communication contains issue advocacy. *See* El.Bd.Op. 00-2 at p. 12. Violations of these laws carry both civil and criminal penalties and such regulation of coordinated *conduct* is consistent with the First Amendment. *See* Wis. Stats. §§11.60 and 11.61.

2. There is Good Reason to Believe FOSW and the 501(c) Respondents May Have Violated Wisconsin Law.

In accepting the John Doe Petitions, the initial judge found there was *reasonable belief* that a crime has occurred. Information available to the judge provided a reasonable belief that FOSW and its agents, utilized and directed 501(c) corporations, as well as certain political committees, to circumvent Wisconsin's campaign finance contribution limitations and disclosure laws. As one example, Governor Walker and Keith Gilkes, the FOSW campaign manager, discussed vetting contributions prior to acceptance, thus giving rise to the reasonable inference that some contributors were directed to Wisconsin Club for Growth (WiCFG) to

avoid public disclosure by FOSW.[12] At this early stage of the John Doe investigation, the State seeks to obtain additional information relevant to this and other coordination activities.

There is ample additional evidence providing a reasonable belief that the *conduct* of coordination between FOSW and 501(c) corporations was done for the purpose of influencing the recall from or retention in office of the Governor and State Senators, or the elections, during the 2011 and 2012 recall elections. This is a *political purpose*. As a result of this "conduct," the speech of the 501(c) corporations was not their own, but rather that of Governor Walker and FOSW. R.J. Johnson was an agent of FOSW and WiCFG, among other 501(c) corporations.[13] His own words remove any doubt that the 501(c) corporations intended to influence elections.

> Ads were run on poll tested issues, including fiscal responsibility, tax hikes, wasteful spending and spending priorities that *moved independent swing voters to the GOP candidate*.[14]

There was also sufficient evidence to provide a reasonable belief that the *conduct* of coordination resulted in "contributions" within the meaning of Wisconsin law. This conduct is within the scope of campaign finance

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[12] Aff.333-34 Furthermore, the accompanying Petition contains an extended discussion of the facts referenced in this and other sections of the Argument.
[13] Aff.407-08.
[14] *Id.*

regulation, thus requiring disclosure of such contributions. In quashing the subpoenas and ordering the return of property, the judge focused on coordinated fundraising; however the coordinated *conduct* was far more extensive. The *conduct* included detailed discussions and agreements regarding: campaign strategies and messages; fundraising; production, dissemination, and spending for print, telephone, radio, and television advertising. *See Petition*, pp. 8-18. Other *conduct* included the execution of, and spending for, opposition research, polling, and Get Out The Vote efforts ("GOTV"). *Id.* FOSW agents, like R.J. Johnson, Kate Doner, and Deborah Jordahl, were simultaneously agents of WiCFG, Citizens for a Strong America (CFSA), and other 501(c) corporations. *See Petition* pp. 8-10.

FOSW agents, like Johnson and Doner, planned and executed efforts through WiCFG to "ensure correct messaging."[15] FOSW agents had direct control over WiCFG and according to e-mails, Governor Walker himself wanted "all the issue advocacy efforts run thru one group" to avoid "past

[15] *Aff.*385.

problems with multiple groups doing work on 'behalf' of Gov. Walker."[16]

FOSW agents specifically stated:

> In Wisconsin, a 501(c)(4) is the *legal* vehicle that runs the media/outreach/GOTV campaign. The Governor is encouraging all to invest in Wisconsin Club for Growth. [17]

An August 18, 2011 email summarizes the coordination that occurred during the 2011 recall elections.[18]

> Our efforts were run by Wisconsin Club for Growth and *operatives R.J. Johnson and Deb Jordahl, who coordinated spending through 12 different groups.* Most spending by other groups was directly funded by grants from the Club.[19]

The coordination included direct control over advertising scripts and placement. *See Petition*, pp. 12-13.

D. Wisconsin Laws Properly Differentiate Between Coordinated Speech That is Regulated and Truly Independent Speech That is Protected.

Neither the right to associate nor the right to participate in political activities is absolute. *Buckley v. Valeo,* 424 U.S. 1, 25 (1976). "Prearranged or coordinated expenditures" are equivalent to "disguised contributions," subject to the same limitations as contributions. *Id.* at 25, 46-7, 78. Any restrictions on coordinated expenditures are subject to only

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[16] *Id.*
[17] *Id.* (emphasis in original).
[18] *Aff.*407.
[19] *Aff.407-08* (emphasis added).

the intermediate level of scrutiny—the restriction must be closely drawn to match a sufficiently important government interest. *Buckley*, 424 U.S. at 25; *See also FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, 533 U.S. 431, 456 (2001).

> Ever since our decision in Buckley, it has been settled that expenditures by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign' may be treated as indirect contributions subject to FECA's source and amount limitations.

McConnell v. FEC, 540 U.S. 93, 202, 219-223 (2003); *CIF v. Madigan,* 697 F.3d at 496.

The U.S. Supreme Court reaffirmed this rationale when it declared "coordinated spending [is] the functional equivalent of contributions." *Colorado II*, 533 U.S. at 447. Coordinated expenditures for communications, even those that avoid express advocacy, are treated as contributions. *McConnell*, 540 U.S. at 202.[20] In the context of a political party's coordinated expenditures with candidates of that party, the United States Supreme Court specifically held "[c]oordinated expenditures, *unlike expenditures truly independent*, may be restricted to minimize

[20] Upholding application of 2 U.S.C. §441a(a)(7)(B)(i)-(ii) to coordinated expenditures for communications that avoid express advocacy, which are contributions.

circumvention of contribution limits." *Colorado II,* 533 U.S. at 465 (emphasis added).

Restrictions on contributions are preventative to ensure against the reality or appearance of corruption created by circumvention of valid contribution limits. *See Colorado II,* 533 U.S. at 456; *Citizens United,* 558 U.S. at 356. Contribution limitations and disclosure regulations, whether by direct contribution or resulting from coordinated expenditures, are closely drawn restrictions designed to limit the actuality and appearance of corruption resulting from large individual contributions. This is a sufficiently important government interest to support regulation. *Buckley,* 424 U.S. at 25-26.

The First Amendment permits the government to regulate coordinated expenditures. *WRTL v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011) (Sykes, J.) (citing *Colorado II*, 533 U.S. at 465).[21] "The need for an effective and comprehensive disclosure system is especially valuable after *Citizens United,* since individuals and outside business entities may engage in unlimited political advertising *so long as they do not coordinate tactics*

[21] The Seventh Circuit also emphasized that the "separation between candidates and independent expenditure groups" negates the possibility that independent expenditures will lead to, or create the appearance of, quid pro quo corruption. *WRTL,* 664 F.3d at 155.

with a political campaign or political party." *CIF*, 697 F.3d at 487 (emphasis added). *See also* Wis. Stat.§11.001.

"By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 558 U.S. at 360 (citing *Buckley*, 424 U.S. at 46). Collusion between a candidate and an independent committee is evidence that the independent committee is not truly independent and thus would not qualify for the free-speech safe harbor for independent expenditures. *WRTL v. Barland,* 664 F.3d at 153, 155. A candidate's coordination *conduct* which provides knowledge of advertisement "content plus timing makes a huge difference relative to the benefit of the ad to the candidate." *Cao v. FEC*, 619 F.3d 410, 427, 433-34 (5th Cir. 2010). This is the type of coordinated activity that implicates the same corruption and circumvention concerns of the *Colorado II* court. *Id.*

An organization engaged in "issue advocacy" that coordinates with a candidate is subject to campaign finance regulations; the lack of independence makes the expenditures contributions. *FEC v. Christian Coalition*, 52 F.Supp.2d 45, 91-2, 98-9 (D.D.C. 1999). Where a candidate has requested or suggested that the spender engage in certain speech, where

the candidate or agents can exercise control over expenditures, or where there has been substantial discussion or negotiation between the campaign and the spender over expenditures, such *conduct* gives the expenditures sufficient contribution-like qualities to fall within the regulation of contributions. *Id.* This *conduct* indicates that the speech is valuable to the candidate, regardless of its content. *Id.*

In the proceedings below, the Respondents relied heavily upon *FEC v. WRTL (WRTL II)*, 551 U.S. 449 (2007) and *Citizens United v. FEC,* 558 U.S. 310 (2010) for the proposition that the First Amendment requires a court to err on the side of protecting political speech rather than suppressing it. Such reliance is misplaced because *WRTL II* addressed only truly independent advertisements and no question was raised regarding coordination. *See Cao v. FEC,* 619 F.3d 410, 435 (5th Cir. 2010). In *Citizens United*, the Supreme Court rejected the contention that disclosure requirements are limited to speech that is the functional equivalent of express advocacy. The Court determined that while disclaimer and disclosure requirements may burden the ability to speak, they "impose no ceiling on campaign-related activities" and "do not prevent anyone from

speaking." *Id.* at 366-67, citing *Buckley*, 424 U.S. at 64 and *McConnell,* 540 U.S. at 201.

Contrary to the judge's assertion that the law has changed in the last fifteen years, legal scholars agree that *Buckley* and its progeny permit limiting contact between speakers and the candidate or his agents, otherwise known as coordination.[22] The only issue debated is the level of contact between a candidate and the speaker required to establish coordination. Some scholars suggest a broad coordination standard without substantial discussion or negotiation.[23] Other scholars argue that the coordinating conduct must meet the *Christian Coalition* joint venture standard.[24] Regardless, legal scholars *agree* that – at a minimum – the *Christian Coalition* joint venture standard remains an uncontroverted basis to find coordination sufficient to treat purported independent expenditures as contributions consistent with First Amendment speech and association rights.[25]

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[22] *See e.g.* Smith, *supra* n.8; Richard Briffault, *Coordination Reconsidered,* 113 Colum.L.Rev. Sidebar 88 (2013); Thomas R. McCoy, *Understanding* McConnell v. FEC *and its Implications for the Constitutional Protection of Corporate Speech*, 54 DePaul L.Rev. 1043 (2005).
[23] Briffault, *supra* n.27.
[24] Smith, *supra* n.8.
[25] Smith and Briffault, *supra* n.8,27.

As set forth below, Wisconsin adopted the *Christian Coalition* joint venture standard.

E. Wisconsin Coalition for Voter Participation, Inc. v. SEB Remains Valid Controlling Precedent.

In *WCVP*, the Court applied *Buckley's* determination that "prearranged or coordinated expenditures" are equivalent to "disguised contributions." The Court addressed issues nearly identical to those presented in this case and ruled against the parties seeking to halt an investigation into illegal coordination between a candidate's campaign and an issue advocacy entity.

Contributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy. *See WCVP*, 231 Wis.2d at 679 (emphasis in original). *See also* Wis. Stat. §11.06(1). The fact that a third party runs "issue ads" versus "express advocacy ads" is not a defense to illegal "coordination" between a candidate's authorized committee and third party organizations. *WCVP*, 231 Wis.2d at 679

The First Amendment cannot be interpreted to bar an investigation into potential violations of the state's campaign finance law as a consequence of coordination. *WCVP*, 231 Wis.2d at 679. *WCVP* rejected the argument that Wisconsin law first requires speech in the form of

express advocacy before regulation may attach and it rejected due process notice arguments. The *WCVP* Court referenced a federal court's "common sense" legal analysis applying coordination principles to issue advocacy expenditures, treating them as contributions subject to regulation. *WCVP,* 231 Wis.2d at 686, fn. 11 citing *FEC v. The Christian Coalition,* 52 F.Supp.2d at 92. The court specifically stated:

> ... the issue before us has nothing to do with the Coalition's partisan or non-partisan status, or the content of its mailing. It concerns only the Board's investigation into whether the Coalition, no matter what purpose it was organized for, and no matter whether some, many, or most people might think the message on the cards wasn't advocating one candidate over the other—made an unreported in-kind contribution to the Wilcox campaign.

WCVP, 231 Wis.2d at 683, 605 N.W.2d at 660-661.

F. Evidence Supports a Reasonable Belief FOSW Coordinated With Certain Independent Committees Who Engaged in Express Advocacy Speech and Violated Wisconsin Law.

Wisconsin statutes specifically provide that a committee wishing to make a truly independent disbursement must affirm that it does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate. Independent committees must sign an oath. Wis. Stat. §11.06(7). If an independent committee makes disbursements that are coordinated with a candidate or agent, that

committee is no longer considered "independent." Its disbursements become reportable in-kind contributions to the candidate's campaign committee. Wis. Adm. Code GAB §§1.20, 1.42. *See also WCVP*, 231 Wis.2d 670 at fn. 2 citing Wis. Stats. §11.01(6)(a)1. and 11.12(1)(a). See also OAB-05-10, ¶20 (recognizing that a "disbursement" may also qualify as a "contribution" under Wisconsin statutes).

The judge did not focus on evidence in the record that at least two political committees expressly advocated either for Governor Walker and Senate recall candidates or expressly advocated against their opponents. Coordination regarding such express advocacy was in direct contravention of the oaths of independent disbursements.[26]

Emails document coordination between the Republican State Leadership Committee Inc. ("RSLC"), a registered independent disbursement committee, and FOSW agents during the 2011 recall elections. In one such email from R.J. Johnson to an RSLC representative, Johnson wrote:

> Need to know that you are up and the content of your spot. We are drafting radio to complement. Also need to know if you plan to play any further in WI beyond Holperin.[27]

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[26] *Aff.* 225-26, 286-292.
[27] *Aff.* 219-20, 400-01.

These plans were then shared with Governor Walker, Keith Gilkes and Kate Doner in an email dated July 13, 2011.[28]

Evidence also included eight separate advertisements sponsored by Right Direction Wisconsin PAC (political committee of the Republican Governor's Association [RGA]) critical of Governor Walker's opponents in the 2012 Gubernatorial recall election.[29] Additional emails document that agents of FOSW were regularly conducting meetings and conference calls with the RGA[30] to discuss campaign strategy, including polling.[31]

III. CONCLUSION

Based on the Petition for Supervisory Writ and Writ of Mandamus and the authorities set forth herein, the Petitioner requests the relief sought

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[28] *Aff.* 293.
[29] *Aff. 227-30.*
[30] *Aff.* 234,236.
[31] *Aff.* 242.

in the Petition so that this investigation can proceed without further delays. Specifically, the Petitioner requests an order that:

1. Vacates the Hon. Gregory A. Peterson's January 10, 2014 *Order* quashing the subpoenas and directing the return of property seized by search warrants.
2. Directs the John Doe judge to enforce the subpoenas served upon the Respondents.
3. Grants such other equitable relief as the Court may deem just and appropriate.

Dated this 21st day of February 2014.

Respectfully submitted,

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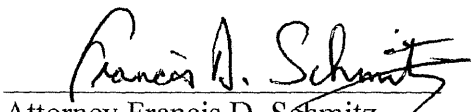
CERTIFICATION

I certify that this Memorandum conforms with the rules contained in Wis. Stat. §809.19(8)(b) and (c), for a Memorandum produced using proportional serif font. The length of the portions of this Memorandum described in Wis. Stat. §809.19(1)(d), (e) and (f) is 4,996 words. *See* Wis. Stat. §809.19(8)(c)1. In combination with the Petition that this Memorandum supports, the total word count is under 8,000. *See* Wis. Stat. §809.51(1).

Dated this 21ST day of February 2014,



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