UNDER SEAL STATE OF WISCONSIN UNDER SEAL

IN SUPREME COURT

No. 2014AP000296 OA

STATE ex rel. TWO UNNAMED PETITIONERS,

Petitioners,

vs.

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

Respondents.

AFFIDAVIT OF THE SPECIAL PROSECUTOR IN SUPPORT OF RESPONSE TO PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION SEEKING DECLARATORY JUDGMENT AND OTHER RELIEF - (FILED UNDER SEAL)

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

FRANCIS D. SCHMITZ, being first duly sworn on oath deposes and says that:

1. I am a respondent in the above-captioned proceeding.

2. I make this Affidavit in support of my response to the petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief.

3. The attachments to this Affidavit are true and correct copies of papers filed in the underlying John Doe proceedings.

4. This Affidavit is Bates Stamped for the convenience of the court. Please note that the attachments are referenced as **page numbers** below. These page numbers are references to the **Bates Stamp numbers** of this Affidavit.

5. By order of Judge Barbara A. Kluka dated August 23, 2013, I act as the Special Prosecutor for the State of Wisconsin in five John Doe proceedings pending in the Counties of Columbia, Dane, Dodge, Iowa and Milwaukee. As respects the five John Doe proceedings, an initial investigation was commenced in Milwaukee County as Case Number 2012JD000023 on September 5, 2012.

6. When it became apparent that the investigation involved persons from other counties across the state, on January 18, 2013 the investigation was tendered to the Attorney General by District Attorney John Chisholm. On May 31, 2013, the Attorney General declined to investigate; he recommended the involvement of the Government Accountability Board. Thereafter, inasmuch as the GAB has no authority to prosecute a criminal matter and because of the statutory requirements of Wis. Stat. §§11.61(2)

and 978.05(1), the Government Accountability Board and the Milwaukee County District Attorney met with the District Attorneys for the Counties of Columbia, Dane, Dodge and Iowa. John Doe proceedings were thereafter commenced in the Counties of Columbia (2013JD000011), Dane (2013JD000009), Dodge (2013JD000006) and Iowa (2013JD000001) on August 21, 2013.

7. Though pending in five different counties, this is one overall investigation.

8. I have filed the Petition for a Supervisory Writ and Writ of Mandamus following an order entered January 10, 2014 by the John Doe Judge, the Honorable Gregory A. Peterson, related to these five aforementioned proceedings. The Order is found at Affidavit p. 0006. Judge Peterson succeeded Judge Kluka as the John Doe Judge after Judge Kluka recused herself from the proceedings.

9. Attached to this Affidavit at pp. 0006 to 0009 is a true and correct copy of the Order dated January 10, 2014 in the John Doe proceedings instituted in the Counties of Columbia, Dane, Dodge, Iowa and Milwaukee.

10. Attached to this Affidavit at pp. 0010 to 0011 is a true and correct copy of the Order dated February 24, 2014 in the John Doe proceedings.

11. Attached to this Affidavit at pp. 0012 to 0033 is a true and correct copy of the Petition for Supervisory Writ and Writ of Mandamus now pending before the court of appeals. Attached to this Affidavit at pp. 0034 to 0066 is a true and correct copy of the Memorandum in Support of the Petition for Supervisory Writ and Writ of Mandamus now pending before the court of appeals. This Petition was filed Friday, February 21, 2014; it has been assigned the following case numbers: 2014AP000417 (Columbia County); 2014AP000418 (Dane County); 204AP000419 (Dodge County); 2014AP000420 (Iowa County); 2014AP000421 (Milwaukee County).

12. Attached to this Affidavit at pp. 0067 to 0105 is a true and correct

copy of the Affidavit of Kevin Kennedy filed in those same court of appeals writ proceedings.

Dated this 25TH day of February 2014.

Francis D. Schmitz
Special Prosecutor
State Bar No. 1000023

Subscribed and sworn to before
me at Madison, Wisconsin on
this 25th day of February 2014

Notary Public, Dane County
State of Wisconsin
My commission is permanent.

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

DECISION AND ORDER GRANTING MOTIONS TO QUASH SUBPOENAS AND RETURN OF PROPERTY

FILED

JAN 22 2014

DANE COUNTY CIRCUIT COURT

MOTIONS TO QUASH

Motions to quash subpoenas have been filed by: (1) Friends of Scott Walker (FOSW); (2) Wisconsin Manufacturers & Commerce, Inc. and its affiliate WMC-IMC.; (3) Wisconsin Club for Growth directors and accountant; and (4) Citizens for a Strong America, Inc. directors and officers. The motions have been fully briefed. The State's brief is a consolidated response, so I assume a consolidated decision will not adversely affect the secrecy order.

I am granting the motions to quash and ordering return of any property seized as a result of the subpoenas. I conclude the subpoenas do not show probable cause that the moving parties committed any violations of the campaign finance laws. I am persuaded the statutes only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose, with one minor exception not relevant here (transfer of personalty, Wis. Stat. 11.01(7)(a)2.), requires express advocacy. There is no evidence of express advocacy.

The motions were filed over two months ago, before I was even assigned this case. They are overdue for a decision. This decision will be brief, enabling me to produce it more quickly. Any reviewing court owes no deference to my rationale, so giving the parties a result is more important that a delay to write a lengthy decision on election and constitutional law. For more detail, readers should consult the parties' briefs. In fact, in order to fully understand the factual and legal context of this decision, that will be necessary for anyone, such as an appellate court, not familiar with this case.

The subpoenas reach into the areas of First Amendment freedom of speech and freedom of association. As a result, I must apply a standard of exacting scrutiny and, in interpreting statutes, give the benefit of any doubt to protecting speech and association.

As a general statement, independent organizations can engage in issue advocacy without fear of government 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.

The State relies heavily on some rather broad language in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board,* 231 Wis. 2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999). This case did give me some pause. However, I agree with the Wisconsin Club for Growth that the case is distinguishable. (Club's response brief at 10-14). But even more important, considerable First Amendment campaign financing law has developed in the fifteen years since that case was decided. (See, e.g., Wisconsin Manufacturers & Commerce initial brief at 5-6). It is unlikely that the broad language relied on by the State could withstand constitutional scrutiny today.

Wisconsin Club for Growth's analysis of the campaign financing statutory scheme is particularly helpful. As the Club explains in its reply brief, the legislature crafted definitions of four key terms: committee, disbursement, contribution and political purposes. All statutory regulations emanate from these four definitions. Before there is coordination there must be political purposes; without political purposes, coordination is not a crime.

To be a committee, an organization must have made or accepted contributions or disbursements for political purposes. Wis. Stat. 11.01(4). As relevant here, acts are for political purposes when they are made to influence the recall or retention of a person holding office. Wis. Stat. 11.01(16). If the statute stopped here, the definition of political purposes might well be unconstitutionally vague. *Buckley v. Valeo,* 424 U.S. 1, 77 (1976). But the definition continues: acts for political purposes include, but are not limited to, making a communication that expressly advocates the recall or retention of a clearly identified candidate. Wis. Stat. 11.01(16)(a). In GAB 1.28, the Government Accountability Board attempted to flesh out other acts that would constitute political purposes, but because of constitutional challenges it has stated it will not enforce that regulation. So the only clearly defined political purpose is one that requires express advocacy.

The State is not claiming that any of the independent organizations expressly advocated. Therefore, the subpoenas fail to show probable cause that a crime was committed.

Friends of Scott Walker is a campaign committee, not an independent organization. Election laws do not ban all coordination between a candidate and independent organizations. As the GAB has recognized, broad language to the contrary is constitutionally suspect. El.Bd. 00-2

(reaffirmed by GAB in 2008). Furthermore, I am persuaded by FOSW that the statutes do not regulate coordinated fundraising. (See FOSW reply at 10-18). Only coordination of expenditures may be regulated and the State does not argue coordination of expenditures occurred. Therefore, the subpoena issued to FOSW fails to show probable cause

The subpoenaed parties raise other issues in their briefs, some quite compellingly. However, given the above decision, it is not necessary to address those issues.

MOTIONS FOR RETURN OF PROPERTY

R.L. Johnson and Deborah Johnson have filed motions for the return of property seized pursuant to search warrants. The Johnsons claim the warrants were defective for several reasons, some of which are among the undecided issues in the above decision on the motions to quash. The Johnsons have not specifically raised the issues that are decided above. However, in the interests of fairness, the same legal conclusions should apply to all parties who have raised challenges in this case. Therefore, for the reasons stated above regarding the limitations on the scope of the campaign finance laws, I conclude that the Johnson warrants lack probable cause. Accordingly, their motions are granted.

ORDER

The subpoenas issued to Friends of Scott Walker, Wisconsin Manufacturers & Commerce, Inc. and its affiliate WMC-IMC, Wisconsin Club for Growth directors and accountant, and Citizens for a Strong America, Inc. directors and officers are quashed and any property seized pursuant to the subpoenas shall be returned.

Any property seized pursuant to search warrants served on R.L. Johnson and Deborah Johnson shall be returned.

Dated: January 10, 2014.

By the John Doe Judge:

Gregory A. Peterson
Reserve Judge

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

FILED
JAN 22 2014
DANE COUNTY CIRCUIT COURT

ERRATA

In the decision and order dated today, I mistakenly referred to Deborah Johnson in the section titled "Motions for Return of Property" and in the order. The reference should be corrected to read Deborah Jordahl. This was brought to my attention by an email from Jordahl's counsel, Dean Strang.

Dated: January 10, 2014.

By the John Doe Judge:

Gregory A. Peterson
Reserve Judge

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

DECISION AND ORDER GRANTING MOTION TO CLARIFY STAY

The Wisconsin Club for Growth has moved to clarify the stay of the January 10 order quashing subpoenas and returning property seized pursuant to search warrants. The Club seeks to prohibit the State from reviewing documents seized from its agents and political associates and from entities that hold records of the Club's donors and expenditures. The Club persuasively argues its request is "vital to maintaining the status quo."

The State opposes the motion. First, the State notes the styling of the motion as a clarification is a misnomer because the motion really seeks to expand the stay. While I agree, I do not see that as a bar to considering the motion.

The State's primary objection seems to be that it needs to examine all the material in its possession that is not subject to the stay in order to find facts to defend against a federal civil rights action and to respond to an action seeking original jurisdiction in the state supreme court. According to the State, it seeks "evidence of the multiple roles played by R.J. Johnson, Deborah Jordahl and others in their interaction with WiCFG, FOSW and other entities" during the recall elections. The State claims this evidence is "at the core of deciding whether WiCFG, FOSW and other entities were complicit in violations of Wisconsin campaign financing laws." The major problem with this argument is that I already ruled in my decision of January 10 that what the State is seeking is not a violation of the campaign financing laws.

Furthermore, it seems to me that the defense in the civil rights action, for example, is based on what the State is looking for, not what it is finding. The same is true for the state supreme court proceeding. If my January 10 decision is wrong and the evidence the State is looking for would violate the campaign financing laws, then it doesn't matter what the State has found or might find. Put another way, whether there was probable cause for the search warrants and whether the prosecutors acted reasonably will depend on facts that existed at the time, not on facts gathered afterward.

Finally, the State argues that the Club's request is unworkable because of the difficulty of determining what constitutes a Club document. Whether the State is correct or not, there is another solution to the problem. At the time of the January 10 decision quashing the subpoenas and ordering return of property, I focused only on the immediate issues raised by the various

motions. However, if my decision is upheld, the ultimate and inevitable consequence will be to terminate the John Doe investigation. It seems rather incongruous for the State to continue to examine documents based on an interpretation of the law that I have ruled is invalid. Therefore, I am granting the motion. For relief, I am amending the January 27 stay order to provide that while the stay is in effect, the State shall not examine any material secured from any source by legal process such as subpoena or search warrant.

Dated February 25, 2014.

By the John Doe Judge:

_____

Honorable Gregory A. Peterson
Reserve Judge

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.

PETITION FOR SUPERVISORY WRIT AND WRIT OF MANDAMUS

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

Francis D. Schmitz
Special Prosecutor
Petitioner

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

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 MOVANTs NO. 1, TO 8

Respondents.

PETITION FOR SUPERVISORY WRIT AND WRIT OF MANDAMUS

Introduction

Special Prosecutor Francis D. Schmitz petitions this Court to exercise supervisory and original jurisdiction over Respondent Hon. Gregory A. Peterson, acting as a John Doe judge. This petition relies upon Wis. Stats. §§783.01 *et seq.* and 809.51.

The John Doe investigation focuses on potentially illegal coordination during the Senate and Gubernatorial recall elections in 2011

and 2012. In the context of Senate recalls, the inquiry seeks to examine the relationship between the candidates, certain 501(c) corporations (*e.g.*, Wisconsin Club for Growth (WiCFG) and Citizens for a Strong America (CFSA)), the Friends of Scott Walker (FOSW) and R.J. Johnson. In the context of the Gubernatorial recall, the inquiry seeks information on the relationship between FOSW, certain 501(c) corporations, and certain individuals (*e.g.* R.J. Johnson and Deborah Jordahl) who simultaneously worked for both WiCFG and FOSW. The investigation focuses on whether these various entities coordinated spending, strategy, and fundraising to subvert Wisconsin's campaign finance laws including those regulating disclosure and contribution limits.

In a *Decision and Order* dated January 10, 2014 (hereafter *Order*), Judge Peterson quashed certain subpoenas dated September 30, 2013 and ordered the return of property seized from R.J. Johnson and Deborah Jordahl by search warrants executed on October 3, 2013. This process was issued by Judge Barbara Kluka, the original John Doe judge. The *Order* is premised on the erroneous view that: (1) Wisconsin campaign finance law cannot and does not – consistent with the First Amendment – regulate the *conduct* of coordination between political committees and 501(c)

corporations engaged in issue advocacy; and (2) the record in the John Doe investigation did not include evidence of "coordinated expenditures" or "express advocacy." The John Doe Judge also rejected the precedent of *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis.2d 670, 605 N.W.2d 654 (Ct. App. 1999), *petition for review dismissed*, 231 Wis.2d 377, 607 N.W.2d 293 (1999).

The Petitioner requests this Court vacate the *Order*, mandate enforcement of the John Doe subpoenas and affirm the retention of property seized by search warrant.

Parties

Pursuant to Wis. Stat. §809.51 and to permit the Court and its judicial officers to meet their obligations under SCR 60.04(4), Wis. Stat. §757.19, and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the parties are identified as follows:

1. The Petitioner is the State of Wisconsin, by Special Prosecutor Francis D. Schmitz.
2. The Respondent is Hon. Gregory A. Peterson, the John Doe judge.
3. Unnamed Movant No. 1 is Friends of Scott Walker (FOSW), the personal campaign committee of Scott Walker.

4. Unnamed Movant No. 2 is Wisconsin Club for Growth (WiCFG) and its officers and directors, a Title 26 U.S.C. 501(c)(4) "social welfare" corporation.
5. Unnamed Movant No. 3 is Citizens for a Strong America (CFSA) and its officers and directors, a Title 26 U.S.C. 501(c)(4) "social welfare" corporation.
6. Unnamed Movant No. 4 is Wisconsin Manufacturers and Commerce (WMC), a Title 26 U.S.C. 501(c)(6) "business trade" corporation .
7. Unnamed Movant No. 5 is Wisconsin Manufacturers and Commerce-Issues Mobilization Council, Inc. (WMC-IMC), a Title 26 U.S.C. 501(c)(4) "social welfare" corporation.
8. Unnamed Movant No. 6 is Richard Arthur (R.J.) Johnson, a principal agent of WiCFG and FOSW.
9. Unnamed Movant No. 7 is Deborah Hawley Jordahl, a principal agent of WiCFG and FOSW.
10. Unnamed Movant No. 8 is Jed Sanborn, an accountant for WiCFG and CFSA.

Statement of Issues

I. Consistent with First Amendment principles, do Wisconsin statutes and regulations properly regulate the conduct of coordination between 501(c) corporations and political committees, while still protecting truly independent speech?

   A. Do Wisconsin laws properly differentiate between coordinated speech that may be regulated and truly independent speech that is protected?

   B. Does *Wisconsin Coalition for Voter Participation, Inc. v. SEB* remain valid controlling precedent?

II. Does the record provide a reasonable belief Wisconsin law was violated by FOSW's coordination with independent disbursement committees that engaged in express advocacy speech?

Reasons For Exercising Jurisdiction

1. Under established precedent, a Supervisory Writ is the process used to review the decisions of a John Doe judge. *In re John Doe Proceeding*, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260. The State cannot appeal the John Doe judge's *Order*. This Writ is the sole means by which the State may correct errors below.

2. The John Doe judge erred in applying strict scrutiny in his constitutional analysis of Wisconsin campaign finance law.
3. The exercise of jurisdiction by this Court is required to address the judge's erroneous conclusions that:
    a. The State did not present evidence documenting coordination of expenditures, and
    b. The State did not claim that any of the independent organizations expressly advocated.
4. The Government Accountability Board (GAB) is charged by statute to enforce Wisconsin's campaign finance laws. The GAB frequently provides advice concerning Wisconsin's law on coordination to interested parties. That advice is consistent with the Special Prosecutor's interpretation in the John Doe Proceeding. As set forth in the Affidavit of Kevin J. Kennedy, GAB Director and General Counsel, this Court can clarify Wisconsin campaign finance laws by exercising jurisdiction.

Facts

Procedural History

The John Doe investigation was initially commenced in Milwaukee County by Judge Barbara A. Kluka on September 5, 2012.

As explained in the record of *In re John Doe Proceeding*, 2013 AP 2504-08, Wis. Ct. App. Opinion and Order, January 30, 2014, additional John Doe investigations were commenced in four other counties on August 21, 2013. These are organized under one John Doe Judge and the Petitioner/Special Prosecutor.

On September 30, 2013, based upon affidavits submitted to her, Judge Kluka authorized twenty-nine subpoenas. These subpoenas were intended to compel, *inter alia*, production of documents evidencing the *conduct* of coordination among the subpoenaed parties and with FOSW.

On September 30, 2013, Judge Kluka also authorized the execution of search warrants at the homes and offices of R.J. Johnson and Deborah Jordahl. Those warrants were executed on October 3, 2013 and property was seized.

On October 16, 2013 and thereafter, the Unnamed Movants, other than R.J. Johnson and Deborah Jordahl, filed Motions to quash the subpoenas.

On October 29, 2013, Judge Kluka recused herself as the John Doe Judge. Judge Gregory A. Peterson was soon assigned to the proceedings in all five counties.

On December 4th and 20th, 2013, respectively, R.J. Johnson and Deborah Jordahl filed Motions seeking return of property seized by search warrants.

After briefing, Judge Peterson quashed the subpoenas and also ordered return of the seized property. He wrote:

> I conclude that the subpoenas do not show probable cause that the moving parties committed any violations of the campaign finance laws. I am persuaded the statutes only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose . . . requires express advocacy. There is no evidence of express advocacy.
>
> . . .
>
> Only coordination of expenditures may be regulated and the State does not argue coordination of expenditures occurred. Therefore, the subpoena issued to FOSW fails to show probable cause.[1] [2]

[1] Affidavit of Francis D. Schmitz pp. 16-17.
[2] Unless otherwise noted, all references to the Affidavit or "Aff." refer to the Affidavit of Francis D. Schmitz.

On January 27, 2014, Judge Peterson stayed the *Order* pending supervisory review.[3]

Facts Demonstrating a Reasonable Belief a Crime Occurred

The substantive facts central to this Petition are contained in the affidavits submitted in support of subpoenas and search warrants issued by Judge Kluka. These are contained in the Affidavit of Francis D. Schmitz submitted with this Petition.[4]

During the 2011 and 2012 recall elections, R.J. Johnson (Johnson) and Deborah Jordahl (Jordahl) were key operatives advising and directing both FOSW and WiCFG[5] Johnson was a paid advisor to FOSW and was paid by WiCFG.[6] Jordahl was paid for placement of FOSW advertisements, a paid employee of WiCFG and a signatory for the WiCFG bank account.[7] Johnson and Jordahl controlled the purse for WiCFG. The bank account is in Johnson's name, and indeed, Jordahl wrote the checks.[8] Thus far, the investigation has not developed evidence suggesting that the WiCFG officers and directors were anything but figureheads.

---

[3] Aff. 37-39.
[4] See footnote 2.
[5] Aff. 321.
[6] Aff. 147 (¶12), 170-172, 342 (¶69).
[7] Aff. 148, 319-320.
[8] Aff. 623.

Johnson/Jordahl advised on matters regarding: campaign strategies and messages; fundraising; production, dissemination, and spending for print, telephone, radio, and television advertising; and the execution of and spending for opposition research, polling, and get out the vote efforts ("GOTV").[9] As Governor Walker himself said, Johnson was his "chief advisor" and "kept in place a team that is wildly successful in Wisconsin."[10] As part of the coordination strategy, Johnson and Jordahl also created CFSA, their 501(c), to run advertisements and distribute funds funneled from WiCFG to other 501(c) corporations.[11] R.J. Johnson's wife, Valerie, was the signatory for the CFSA bank account.[12]

The coordination strategy stressed the importance of running all issue advocacy efforts through WiCFG, the 501(c) under the control of FOSW agents Johnson and Jordahl to "*ensure correct messaging.*"[13] Johnson and Jordahl acted as the hub of activities between FOSW and WiCFG in the 2011 recall elections. In Johnson's own words in e-mail, Johnson and

---

[9] Aff. 147-151 (¶¶12, 17, 22-24), 170-172, 199, 321 (¶¶19-20), 342-344 (¶¶69-74), 366-376, 389, 502-506.
[10] Aff. 389.
[11] Aff. 148-150 (¶¶16-19), 181-198, 345 (¶77), 356, 542-544.
[12] Aff. 320.
[13] Aff. 385 (emphasis added).

Jordahl "coordinated spending through 12 different groups" with funding supplied by "grants from the Club."[14]

Johnson's dual role with FOSW and WiCFG is evident from two emails dated April 30, 2012. That day, Johnson worked on both WiCFG donor information and directed the approval of FOSW advertising.[15]

Emails also document the coordination strategy discussions between multiple groups, including WiCFG and FOSW in 2011 and 2012.[16]

Coordinated Fundraising

Kate Doner and Doner Fundraising were agents of FOSW and WiCFG and created fundraising plans for both, scheduled meetings with large donors and prepared talking points for Governor Walker to solicit funds for both WiCFG and FOSW.[17]

Johnson was also instrumental in coordinating fundraising plans through WiCFG to benefit candidates in the 2011 and 2012 recall elections.[18] Evidence shows Governor Walker solicited contributions for WiCFG and was instructed to emphasize to would-be donors that corporate

---

[14] Aff. 407-408.
[15] Aff. 509-513.
[16] Aff. 331-332, 380-384, 410-411.
[17] Aff. 158-159 (¶¶50-52), 320 (¶16), 328-329 (¶¶ 32-35), 331-332 (¶41), 345-346 (¶78), 390-398, 412, 433, 476-481.
[18] Aff. 354-355, 399.

contributions were allowed, no contribution limits applied and the contributor's identity would not be disclosed.[19] Fundraising scripts provided to Governor Walker by his agents referred to WiCFG as "your (c)4." Governor Walker himself inquired about sending thank you notes to "all of our (c)4 donors" in reference to WiCFG.[20] The memo lines of many checks *written to WiCFG* included references to Governor Walker and the 2011 and 2012 recall elections: *e.g.*, "501c4-Walker," "For Governor Walker's Recall Election," "Governor Scott Walker," "Because Scott Walker asked," "Per Governor Walker," "political contribution [L.B.] for Gov. Scott Walker," "Scott Walker project," "Senate Recall Support," "To fight the Walker recall," "Recall Elections," "Recall Campaigns."[21]

Governor Walker and FOSW campaign manager Keith Gilkes,[22] discussed "placement" of contributions. To avoid having to defend certain contributions to FOSW, they apparently vetted certain contributors to determine who should contribute to FOSW and be disclosed, or who should contribute anonymously to WiCFG.[23] Contribution records for those mentioned in the discussion reveal

[19] Aff. 302, 385-388, 390-398. 466-468, 476-478, 550-551, 582-583.
[20] Aff. 392-398, 402-405.
[21] Aff. 452 and WiCFG bank records January 2011-July 2012.
[22] Previously, Gilkes was Governor Walker's Chief of Staff.
[23] Aff. 413-426.

that some of these contributors gave to FOSW and others gave to WiCFG.[24]

On March 29, 2011 in the context of the Senate recalls, Johnson sent an email to the Governor's then chief of staff Keith Gilkes about efforts to assist Senators subject to recall. Johnson wrote, "[a]s far as Fitzgerald,[25] I would tell him the Governor will be raising 5 million plus under Wisconsin control."[26] In a follow-up email, Johnson stated, "[a]lso, to remind you and Fitz, all the positive radio and TV was from Scott through the club. Also the negative against the three. He needs to know that."[27]

Other Coordinated Conduct

Johnson directed the spending of FOSW, as well as WiCFG and other 501(c) corporations, on advertisements supporting or opposing candidates in the 2011 and 2012 recall elections.[28] According to Johnson, during the 2011 recall elections, WiCFG funded the bulk of

---

[24] Aff. 333-334 (¶43).
[25] Aff. 354-355. References to "Fitzgerald" and "Fitz" identify State Senate Majority Leader, Scott Fitzgerald. He was also the chairman and treasurer of the Committee to Elect a Republican Senate (CERS).
[26] Id.
[27] Id.
[28] Aff. 156-158 (¶¶45-47), 259-283, 373, 377-379, 409, 494-497, 507-509, 511-522, 545-549, 658-660, 671, 691-692, 700-703.

the investment ($12 million, many times over what the candidates themselves spent) by running television and radio advertisements.[29] Johnson stated that as part of the successful coordination strategy, an extensive absentee ballot program was conducted by "pro-life, pro-family and pro-2nd amendment" organizations.[30] None of these expenditures were reported by FOSW or other committees.

In the 2012 recall elections, Johnson coordinated spending and developed ads run by - not only FOSW - but also 501(c) corporations who ran network and cable advertisements in support of Governor Walker.[31] These other corporations were funded by WiCFG and CFSA; and then ran ads often approved by Johnson.[32] CFSA received virtually all of its funding from WiCFG.[33] CFSA – and organizations funded by CFSA – placed ads in the 2011 and 2012 recall elections or ran an absentee ballot application program.[34]

---

[29] Aff. 406-409.
[30] Aff. 160 (¶57), 407-408.
[31] Aff. 156-158 (¶45-47), 259-276, 496-501, 542-544
[32] Aff. 254-258, 482-493, 542-544.
[33] Aff. 183-198, 200-218, 345 (¶77), 542. At least $4 million.
[34] Aff. 148-149 (¶¶17-18).

Johnson's own words remove any doubt that the alleged coordination between 501(c) corporations and political committees in the 2011 and 2012 recall elections influenced the outcome:

> Targeted districts had as much as 8 weeks of heavy network and cable television and radio. 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*.[35]

Johnson also described the impact of issue advocacy used in two State Senate races in 2011 by defining Shelly Moore and Fred Clark early to "turn off independent women and older voters."[36] Johnson used the ads to keep "the pressure on through the election" and credited his efforts in winning the Moore race by 16 points and the Clark race by 4 points.[37]

Potential Corrupting Influence

Transparency in campaign finance regulation is critical because contributions received without the light of disclosure can have a corrupting influence – or the appearance thereof – on those that benefit from these contributions (or disbursements).

---

[35] Aff. 407-408 (emphasis added).
[36] Aff. 407-408. Shelly Moore and Fred Clark were Democratic candidates in the 2011 recall elections.
[37] Aff. 407-408.

Bank records indicate WMC-IMC contributed $988,000 to WiCFG in 2011.[38] Governor Walker participated in conference calls with individuals including James Buchen, then Senior Vice President of WMC on at least April 6, 2011 and December 22, 2011, regarding coordination of strategies for the 2011 and 2012 recall elections.[39] James Buchen also sent an email to Governor Walker on December 22, 2011 requesting a meeting to discuss the "future of UI [Unemployment Insurance] and WC [Workman's Compensation] councils."[40] With checks signed by FOSW worker Deborah Jordahl, WiCFG contributed $2,500,000 to WMC-IMC in 2012.[41] During the 2012 gubernatorial recall election, WMC-IMC sponsored ads directed by Johnson, supporting Governor Walker and criticizing his opponent, Tom Barrett.[42] Thereafter, the Legislature and Governor Walker went beyond the recommendations of the Unemployment Insurance Advisory Council and the Workers' Compensation Advisory Council and pursued pro-business initiatives.[43]

---

[38] Aff. 155.
[39] Aff. 251-252, 430-431.
[40] Aff. 253.
[41] Aff. 432, 482.
[42] Aff. 155-156, 244-250, 254-255, 342 (¶68), 486-488.
[43] See *Wisconsin State Journal*, "Proposed Law Would Allow State to Check, Freeze Private Bank Account to Recover Overpayments to Jobless", Steven Verburg, May 29,

Bank records show Gogebic Taconite (mining company) contributed at least $930,000 to WiCFG and $300,000 to WMC-IMC in 2011 and 2012.[44] During those same years, Gogebic lobbied the Wisconsin Legislature to pass legislation to allow Gogebic to open a mine in northern Wisconsin and to restrict access to managed forest land located on the mine site.[45] The Legislature passed and the Governor signed both 2013 Wisconsin Act 1(relating to regulation of ferrous mining and related activities) and 2013 Wisconsin Act 81(relating to public access to managed forest land that is located in a proposed ferrous mining site).

Express Advocacy

The Republican State Leadership Committee Inc. (RSLC) is an independent disbursement committee registered with the GAB. They filed an oath stating they would not coordinate their disbursements with candidates for which they would spend money to support or oppose.[46] Far from being independent, evidence shows Johnson coordinated with RSLC on the content of

---

2013 and "Republicans Pushing Possible Changes to Workers' Comp System", Matthew DeFour, September 13, 2013.

[44] Aff. 152 (¶27). Since filing the September 28, 2013affidavit, additional records show $230,000 in contributions to WiCFG.

[45] See Gogebic Taconite LLC lobbying interests for the 2011-2012 and 2013-2014 legislative sessions and Aff. 221-222.

[46] Aff. 286-292.

"broadcast and cable" advertising in the 2011 recall elections.[47] Johnson coordinated radio advertising to "complement" the ads RSLC was running in the same 2011 recall election races.[48] Johnson stated that the RSLC spent $500,000 in supporting the 2011 recall elections.[49]

The Republican Governors Association established the RGA Wisconsin PAC/Right Direction Wisconsin PAC (RDW).[50] This PAC was registered with the Government Accountability Board and filed an oath stating they would not coordinate their disbursements with candidates for which they would spend money to support or oppose.[51] Nevertheless, FOSW and its agents were regularly conducting meetings/conference calls with RGA[52] to discuss campaign strategy, including polling.[53] Governor Walker conducted phone calls and attended fundraising events coordinated by RGA.[54] RDW paid for 8 advertisements supporting Governor

---

[47] Aff. 293, 399-401.
[48] Aff. 219-220, 400-401.
[49] Aff. 406.
[50] This PAC modified its name multiple times: RGA Wisconsin 2010 PAC, RGA Wisconsin PAC, Right Direction Wisconsin PAC.
[51] Aff. 225-226.
[52] Aff. 234, 236.
[53] Aff. 242.
[54] Aff. 235, 237-241, 552-554, 589.

Walker or critical of Governor Walker's opponents in the 2012 recall elections.[55] During the 2012 recall elections, RDW made approximately $8,000,000 in "independent" disbursements supporting Governor Walker or opposing his opponents.[56]

Prayer for Relief

WHEREFORE, based upon the entire record, the Petitioner requests that this Court issue a supervisory writ and writ of mandamus which:

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.

[55] Aff. 227-230.
[56] See campaign finance reports for Right Direction Wisconsin PAC: Special Pre-Primary and Special Pre-Election 2012 (Gov., Lt. Gov., Sen. 13, 21, 23, 29).

Dated this 21ST day of February 2014.

Respectfully submitted,

Attorney Francis D. Schmitz
Petitioner and Special Prosecutor
Wisconsin Bar No. 100023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

STATEMENT

Pursuant to Wis. Stat. (Rule) § 809.51(4), I state that this Petition is prepared with proportional serif font. The word count of the Petition itself, excluding the caption, signature blocks, and this Statement, is 2,740 words.

Dated this 21st day of February 2014.

Attorney Francis D. Schmitz
Petitioner and Special Prosecutor
Wisconsin Bar No. 100023

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

Francis D. Schmitz
Special Prosecutor
Petitioner

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

LAW REVIEW ARTICLES

OTHER AUTHORITIES

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, and UNNAMED MOVANTS NO. 1 to NO. 8,

Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR SUPERVISORY WRIT AND WRIT OF MANDAMUS

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

[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

[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).

---

[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

---

[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

---

[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]

---

[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]

---

[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

---

[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,

Francis D. Schmitz

Attorney Francis D. Schmitz
Petitioner and Special Prosecutor
Wisconsin Bar No. 100023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

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,

Attorney Francis D. Schmitz
Petitioner and Special Prosecutor
Wisconsin Bar No. 100023

Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I / DISTRICT 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.

AFFIDAVIT OF KEVIN J. KENNEDY
DIRECTOR AND GENERAL COUNSEL
WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD

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

Francis D. Schmitz
Special Prosecutor
Petitioner

P.O. Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-465

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, and UNNAMED MOVANTS NO. 1 to NO. 8,

Respondents.

AFFIDAVIT OF KEVIN J. KENNEDY

DIRECTOR AND GENERAL COUNSEL

WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

Kevin J. Kennedy, being first duly sworn on oath, deposes and says that:

1. I am the Director and General Counsel of the Wisconsin Government Accountability Board (G.A.B.). I was appointed to this position on November 5, 2007. The G.A.B. took over the responsibilities of the former State Elections and State Ethics Boards on January 10, 2008.

2. Prior to my position with the G.A.B., I served for 24 years as the Executive Director of the Wisconsin State Elections Board (SEB), the predecessor to the G.A.B. with respect to election and election campaign administration.

3. Prior to my position as Director of the SEB, I served as staff counsel for the SEB for 4 years.

4. The G.A.B. is statutorily charged with the responsibility for the administration of Wis. Stats. chs. 5 to 12, other laws relating to elections and election campaigns, as well as lobbying and ethics laws. *See* Wis. Stat. §5.05(1).

5. The G.A.B. officially began work on January 10, 2008. It was created a year earlier by 2007 Wisconsin Act 1, replacing the State Elections Board and the State Ethics Board. The G.A.B. is made up of six former judges, nominated by a panel of four Wisconsin Appeals Court judges, appointed by the Governor and confirmed by the Senate. The six board members serve staggered six-year terms; one member's term expires each year. Both the Board and its staff must be non-partisan. Wis. Stats. §§5.05(2m)(d)-(e), 15.60(4)-(8). In a 2010 commentary titled "The Persistence of Partisan Election Administration," Ohio State University law

professor Daniel P. Tokaji states: "The best American model is Wisconsin's Government Accountability Board, which consists of retired judges selected in a way that is designed to promote impartiality." *See* Exhibit 1, *Election Law @ Mortiz*, September 28, 2010. Professor Tokaji followed up in 2013 with a draft paper titled "America's Top Model: The Wisconsin Government Accountability Board." *See Exhibit 2, abstract* January 16, 2013, paper to be published in *U.C. Irvine Law Review*, "Symposium: Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance" (2013, Forthcoming).

6. Pursuant to its statutory responsibilities, the mission of the G.A.B. is to ensure accountability in government by enforcing ethics and lobbying laws, and to enhance representative democracy by ensuring the integrity of the electoral process. To carry out this mission, the Board and its staff direct their energies toward providing for an informed electorate. The G.A.B. is a source of information about the election process, and the activities and finances of candidates for public office.

7. The G.A.B. is committed to ensuring that Wisconsin elections are administered through open, fair and impartial procedures that guarantee that

the vote of each individual counts, and that the will of the electorate prevails. The G.A.B. uses information technology and the Internet to make information readily available to the public about the financing of political campaigns, elections, lobbying, and financial interests of public officials. The Board and its staff are dedicated to enforcing the election, ethics, lobbying and campaign finance laws vigorously to reduce the opportunity for corruption and maintain public confidence in representative government.

8. The issuance of a supervisory or mandamus writ is controlled by equitable principles and an appellate court can consider the rights of the public and third parties. *State ex rel. Dressler v. Circuit Court for Racine County, Branch 1*, 163 Wis.2d 622, 630, 472 N.W.2d 532 (Wis. Ct. App. 1991)(citing *Cartwright v. Sharpe*, 40 Wis.2d 494, 503, 162 N.W.2d 5 (Wis. 1968)).

9. In the instant matter, the G.A.B. respectfully requests that this Court consider the rights of the G.A.B., as a third party, and the rights of the public in general. The Court should consider the impact of this matter on:

A) The G.A.B.'s ability to provide accurate and consistent advisory opinions to individuals, candidates, political committees, and other

persons (*See* Wis. Stat. §5.05(6a)) and to enforce Wisconsin's campaign finance laws (*See* Wis. Stat. §5.05(2m)); and

B) The ability for the public to satisfy their right to information regarding the true source of a candidate's support or extent of that support, such that our democratic system of government can be maintained (*See* Wis. Stat. §11.001; *See also, Citizens United v. FEC,* 558 U.S. 310, 130 S.Ct. 876, 899, 916 (2010).)

10. The G.A.B. is responsible for providing advisory opinions regarding the propriety of a person's actions under Wis. Stats. chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19. *See* Wis. Stat. §5.05(6a). The G.A.B. is also responsible for enforcement of Wisconsin's campaign finance laws found in Wis. Stats. ch. 11 and in Wis. Adm. Code GAB ch. 1. Failure of this Court to address the instant matter would impact the G.A.B. greatly and consequently all parties involved in election campaigns, including in the following ways:

A. The G.A.B., and previously the SEB, has routinely provided advisory opinions consistent with the State's application of Wisconsin law regarding coordination of expenditures and its treatment as contributions. In fact, throughout the recall elections in

2011 and 2012, the G.A.B. provided such advisory opinions regarding coordination. The G.A.B. has also provided advisory opinions to persons involved in the 2014 election campaigns. Those that already received advisory opinions presumably conformed their conduct to the advice and would now be at a significant competitive disadvantage to others who may not consider themselves subject to the same rules. In addition, while the G.A.B. continues to render advice consistent with its past application of the law, the instant matter has called that advice into question, creating great difficulties administering the campaign finance law. Clarity is particularly necessary, during this election year.

i. Pursuant to 2007 Wisconsin Act 1, the G.A.B. was required to review and affirm (or reject) all prior SEB formal opinions. 2007 Wisconsin Act 1, Section 209 (2)(f). Attached as Exhibit 3 is formal opinion El.Bd.Op. 00-2, originally adopted by the former SEB in 2000. Pursuant to 2007 Wisconsin Act 1, this formal opinion was reviewed and specifically affirmed by the G.A.B. in a public meeting on March 26, 2008. Pages 8-13 of the opinion include a detailed

analysis of Wisconsin law regarding a candidate's coordination with issue advocacy groups, and the opinion concludes that such coordination constitutes conduct that is subject to campaign finance regulation because the coordination results in a political contribution.

ii. Pursuant to 2007 Wisconsin Act 1, the G.A.B. was required to review and affirm (or reject) all prior administrative rules originally promulgated by the SEB. Pursuant to its requirements under this Act, the G.A.B. reviewed and specifically affirmed Wis. Adm. Code GAB §1.42 (coordination) in a public meeting on March 26, 2008. In addition, the G.A.B. reviewed and specifically affirmed Wis. Adm. Code GAB §1.20 (in-kind contributions) in a public meeting on May 5, 2008.

iii. In 1978, the SEB promulgated the original Wis. Adm. Code GAB §1.42, subsequent to the U.S. Supreme Court's *Buckley v. Valeo* decision. The Legislature chose not to modify Wis. Adm. Code GAB §1.42, when it made statutory revisions in 1979. In 1985, I drafted a revised Wis. Adm. Code GAB

§1.42 to comport the rule more precisely with Wis. Stat. §11.06(7) and its use of the federal definition of conduct that is known as coordination. Attached as Exhibit 4 is a copy of the microfiche legislative drafting file for the 1979 revisions to Wis. Stat. §11.06(7).

B. The G.A.B. has also received complaints from both major political parties, as well as others, and completed investigations of those complaints, which involved alleged violations of Wisconsin law regarding illegal coordination. In fact, throughout the recall elections in 2011 and 2012, the G.A.B. investigated complaints alleging illegal coordination. The G.A.B.'s ability to satisfy its statutory responsibilities to enforce Wisconsin campaign finance law has been compromised by the instant matter and clarity is necessary during this election year.

11. In a decision with eight United Supreme Court Justices concurring, the Court stated that the citizens' right to know is inherent in the nature of the political process and transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 899 and

916 (2010.) In *Citizens United*, the Supreme Court clarified that disclosure requirements are not limited to speech that is the functional equivalent of express advocacy, reasoning 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 914-915 (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) and *McConnell v. FEC,* 540 U.S. 93, (2003)).

12. The Wisconsin Legislature left no doubts about the purpose of Wisconsin's campaign finance laws, when it codified its declaration of policy almost 40 years ago in Wis. Stat. §11.001 as follows:

> (1) 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. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such

activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

(2) This chapter is also intended to ensure fair and impartial elections by precluding officeholders from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them.

(3) This chapter is declared to be enacted pursuant to the power of the state to protect the integrity of the elective process and to assure the maintenance of free government.

13. The impact of the instant matter on the public is profound. In contradiction of the stated legislative purpose of Wisconsin's campaign finance laws, affirming the John Doe judge's interpretation of Wisconsin law regarding coordination would result in candidate's direct control over millions of dollars of undisclosed corporate and individual contributions without limitation on the amounts accepted. A candidate could operate secret committees and direct them to run overwhelming and negative advertising, while the candidate remains above the fray and the public would not know the true source of the contributions or expenditures. The public would have no way of knowing who actually was supporting the candidate and to what extent. This would undermine Wisconsin's system

of campaign finance regulation. The impact of this circumvention of contribution limits raises the same significant concerns about actual corruption or the appearance of corruption upon which the United States Supreme Court upheld contribution limitations in *Buckley v. Valeo,* 424 U.S. 1, 25 (1976). Without campaign finance disclosure and disclaimers identifying the actual sponsors of campaign advertisement, the public would have no way of tracking whether a donation resulted in favorable treatment by the elected candidate.

14. Wis. Stat. §11.001 expresses a legislative policy which continues to hold true: "Our democratic system of government can be maintained only if the electorate is informed" and "excessive spending on campaigns for public office jeopardizes the integrity of elections." The G.A.B.'s mission comports with this legislative policy and enforcing both of these

fundamental principles is necessary to ensure Wisconsin has an informed electorate and to preserve our democratic system of government.

Dated this 21st day of February 2014.

Kevin J. Kennedy
Government Accountability Board
Director and General Counsel
State Bar No. 1017591

Subscribed and sworn to before
me at Madison, Wisconsin on
this 21st day of February 2014.

Notary Public, Dane County
State of Wisconsin
My commission is permanent.

Election Law @ Moritz
Information and insight into the laws governing federal, state, and local elections

Posted: September 28, 2010

The Persistence of Partisan Election Administration

Daniel P. Tokaji
Robert M. Duncan/Jones Day Designated Professor of Law; Senior Fellow, Election Law @ Moritz
Moritz College of Law

It has been almost ten years since the disputed election that gave rise to *Bush v. Gore*, the Help America Vote Act of 2002 (HAVA), and a number of related election reforms in the states. In some respects, this has been a time of great progress. We have eliminated punch card voting machines and moved to statewide registration lists. We offer provisional ballots to voters who registered but don't find their names on the list when they show up to vote. And the process has been made more convenient, with over 30% of Americans voting before election day through absentee and in-person early voting in 2008.

Notwithstanding these significant changes, a fundamental problem at the heart of the 2000 election debacle has yet to be solved. Ten years ago, many observers suspected bias on the part of election officials responsible for the recount, including Florida Secretary of State Katherine Harris as well as local election officials. Similar concerns surrounded the 2004 presidential election, particularly actions taken by Ohio's Secretary of State Ken Blackwell – most infamously, the requirement that registration applications be on 80-pound paper weight. More recently, Republicans have raised concerns of partisan bias on the part of Democratic election officials, including Minnesota's Secretary of State in the contested U.S. Senate election in 2008.

Whether or not these officials have acted based on partisan bias is impossible to know for sure. What can be said with confidence is that conflicts of interest are a pervasive problem in U.S. election administration. In over 30 states, the chief election official – usually the secretary of state – is elected as the candidate of one of the major parties. And in most of the remaining states, the chief election official is selected by a party-affiliated official, usually the state's governor. Both systems create an inherent conflict of interest between election officials' duty to discharge their duties to all citizens and their own personal and political interests. The situation is not much better at the local level. Party-affiliated election officials run election in almost half of the local election jurisdictions in the U.S.

This state of affairs is directly contrary to an emerging international consensus that election administrators should be insulated from partisan politics. According to the influential European Commission for Democracy Through Law: "Only transparency, *impartiality and independence from politically motivated manipulation* will ensure proper administration of the election process, from the pre-election period to the end of the processing of results." For the most part, the persons and institutions running American elections lack such impartiality and independence.

Recognizing this conflict of interest is the easy part; solving the problem is much more difficult. Bipartisan boards can also be dysfunctional too, as my colleague Ned Foley has noted with reference to New York's recent

EXHIBIT 1
Kennedy Affidavit
Schmitz Affidavit 0080
February 21, 2014

experience. The best American model is Wisconsin's Government Accountability Board, which consists of retired judges selected in a way that is designed to promote impartiality. Other countries, including Canada, Australia, and India, have election administration bodies insulated from partisan politics that might also serve as a model for reform in the U.S.

Unfortunately, it is not realistic to expect many states to replace party-affiliated chief election officials with more independent institutions. The party that controls that office – or that is poised to do so – can be expected to oppose such reform. In some states, both major parties will oppose institutional reform, since it takes away an elected office for which their candidates may run.

Moreover, even if we could insulate election officials from partisan politics, the institutions responsible for making election laws are no model of impartiality. While there are a handful of federal laws that govern election, including HAVA, most of the rules regarding voter registration, voting technology, provisional ballots, absentee voting, voter identification, and recounts are the product of state law. When one party controls the state legislative process and enacts laws making it more difficult for some people to vote or have their votes counted, there is reason to worry. The most notable examples in recent years are the Indiana and Georgia laws requiring voters to present government-issued photo ID, despite the paucity of evidence showing voter impersonation to be a serious problem.

Partisanship is thus a spectre haunting the making of election laws, as well as their implementation. With the increased polarization of American politics, these concerns have never been more serious. This year, 23 states will have partisan elections for the state's chief election official. Control over the state legislature and Governor's office will also be a stake in a number of states. There has been a fair amount of attention to the impact that this year's elections will have on the forthcoming round of redistricting. Less noticed is the fact that this election will dictate which party controls the machinery of elections in many swing states.

Of particular concern is that states will move to impose more aggressive proof-of-citizenship requirements that may impede participation by eligible voters. In 2005, Ohio enacted a law requiring naturalized citizens to produce a certificate of naturalization if challenged at the polls. (Disclosure: I was part of the legal team that successfully sued to stop this law.) And long before making news with its recent immigration law, Arizona enacted a stringent proof-of-citizenship law that is the subject of ongoing litigation. More recently, Georgia adopted a controversial voter verification program, to which the U.S. Department of Justice originally objected on the ground that it would have an adverse impact on minority voters – though it ultimately abandoned its objection, perhaps to avoid a constitutional challenge to Section 5 of the Voting Rights Act.

Exaggerating voter fraud, especially when it comes to immigrants, has become a cottage industry in some quarters, and a convenient excuse to make it more difficult for some citizens to register and vote. Overly restrictive rules for voter registration and verification can be expected to have a negative impact on some groups, including Latino and Asian American citizens who already have low turnout rates.

What is the solution? While there are no easy answers, the pervasive partisanship in the making and implementation of election laws necessitates close judicial oversight of elections. Though some have complained that about the increase in election-related litigation since 2000, the reality is that the federal courts are the government institution most insulated from partisan politics. Accordingly, they have a vital role to play in policing election administration. Because access to federal courts is essential, they should be generous in allowing a private right of action in cases alleging a violation of federal election laws, as I argue in a forthcoming article. Courts should also closely scrutinize laws and practices alleged to have a disparate impact on certain groups of voters, including racial and ethnic minorities.

In the long run, the United States needs to move toward electoral institutions that are insulated from partisan politics, as is the norm in most other democracies. In the short run, however, such reforms are not likely. It is therefore essential that courts play an active role in checking partisan election administration, especially when it comes to laws and practices likely to have a disparate impact on poor and minority voters.

Dan Tokaji is an authority on election law and voting rights. He specializes in election reform, including such topics as voting technology, voter ID, provisional voting, and other subjects addressed by the Help America Vote Act of

2002. He also studies issues of fair representation, including redistricting and the Voting Rights Act of 1965. View Complete Profile

---

America's Top Model: The Wisconsin Government Accountability Board

Daniel P. Tokaji
Ohio State University (OSU) - Michael E. Moritz College of Law

January 16, 2013

To be published in U.C. Irvine Law Review, Symposium: Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance (2013, Forthcoming)
Ohio State Public Law Working Paper No. 184

Abstract:
The United States is an outlier among democratic countries when it comes to the institutions charged with running our elections. Most other democratic countries have an independent election authority that enjoys some insulation from partisan politics in running elections. In the United States, by contrast, partisan election administration is the near-universal norm at the state level. In most states, the chief election authority — usually the Secretary of State — is elected to office as a nominee of his or her party, while in almost all the remaining states the chief election official is appointed by partisan officials.

There is one conspicuous exception to the partisan character of election administration at the state level: Wisconsin's Government Accountability Board ("GAB"). Established by the Wisconsin state legislature in 2007, the GAB has responsibility for election administration, as well as enforcement of campaign finance, ethics, and lobbying laws. Its members are former judges chosen in manner that is designed to ensure that they will not favor either major party. This makes the GAB unique among state election management bodies in the U.S.

Is there any hope for nonpartisan election administration in an era of intense political polarization? This article considers this question by examining and assessing the performance of Wisconsin's GAB. It concludes that the GAB has been successful in administering elections evenhandedly during its first five years of existence and, accordingly, that it serves as a worthy model for other states considering alternatives to partisan election administration at the state level. Part II discusses the origins and history of the GAB, putting it in the context of other electoral institutions in the U.S., as well as electoral institutions in other democratic countries. Part III discusses the most important election administration issues that have come before the Wisconsin GAB since its creation, including fierce partisan debates over voter registration and voter identification, errant reporting of election results in a very close state supreme court race, and contentious recall elections of the Governor and prominent state legislators. Part IV concludes by evaluating the GAB's performance during these trying times and considering whether the Wisconsin model can and should be exported to other states.

Number of Pages in PDF File: 51

Keywords: election law, voting rights, election administration, HAVA, vote suppression, voter fraud, voter ID

working papers series

Date posted: January 17, 2013 ; **Last revised:** January 18, 2013

Suggested Citation

Tokaji, Daniel P., America's Top Model: The Wisconsin Government Accountability Board (January 16, 2013). To be published in U.C. Irvine Law Review, Symposium: Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance (2013, Forthcoming); Ohio State Public Law Working Paper No. 184. Available at SSRN: http://ssrn.com/abstract=2201587 or http://dx.doi.org/10.2139/ssrn.2201587

Contact Information

Daniel P. Tokaji (Contact Author)
Ohio State University (OSU) - Michael E. Moritz College of Law (email)
55 West 12th Avenue
Columbus, OH 43210
United States

El. Bd. 00-2 (Reaffirmed 3/26/08)

Summary:

Non-registrants, including corporations, may communicate to the general public their views about issues and/or about a clearly identified candidate, without subjecting themselves to a registration requirement, if the communication does not expressly advocate the election or defeat of a clearly identified candidate; expenditures which are "coordinated" with a candidate or candidate's agent will be treated as a contribution to that candidate; intra-association communications that are restricted to "a candidate endorsement, a position on a referendum or an explanation of the association's views and interests" distributed to the association's members, shareholders and subscribers to the exclusion of all others, are exempt from ch. 11, Stats., regulation; and a non-partisan, candidate-non-specific voter registration or voter participation drive is not subject to the registration and reporting requirements of ch.11, Stats.

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on March 26, 2008.

Opinion:

You have requested that the State Elections Board issue a formal opinion establishing guidelines for voluntary associations and other non-registrants who wish to spend money for the purpose of publishing and distributing the following types of communications: communications that raise voter awareness about candidates and campaign issues; communications that promote voter registration or voter participation; and communications that are limited to members, shareholders and subscribers.

Your requests are as follows:

Metropolitan Milwaukee Association of Commerce

> In the past, if a get-out-the-vote effort did not advocate a specific candidate, they were exempt from state election laws §11.04, Stats.
>
> A November 26, 1999 decision (No. 99-2574, Court of Appeals, District IV) says the Elections Board can investigate get-out-the-vote efforts carried out under §11.04, Stats., even if they do not advocate on behalf of any candidate. Based on this recent court decision, if a candidate or campaign is aware or encourages such a non-advocacy effort, the cost of the effort is a reportable contribution that must be fully disclosed.
>
> To our knowledge, the Elections Board has never articulated this standard. As Wisconsin's Supreme Court said in its ruling last year in the WMC case:
>
> "Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he [or she] may act accordingly." Given

the short time frame prior to the upcoming spring elections, it is imperative for the Elections Board to provide fair warning and guidance to the many organizations conducting get-out-the-vote efforts.

WISCONSIN RIGHT TO LIFE

I have enclosed copies of some publications, a phone script and a radio ad that we have used in past elections. We would like clarification of how the Board would view these activities in light of the Appeals Court decision and Clearinghouse Rule 99-150.

Specifically, we would like to know: 1) which of these activities would the Board consider to fall under Clearinghouse Rule 99-150 and, thus, be subject to state election law? 2) if any of these activities were carried out in consultation with a candidate or a candidate's committee, which ones would the Board consider to be a contribution to a candidate's campaign and thus, subject to state election law? 3) if the Board considers any of these materials to be subject to state election law, would they be exempt if they were received only by members of Wisconsin Right to Life?

The Elections Board prefaces its commentary on the specifics of a response to your requests with the caveat that three of the areas -- "issue" advocacy, "coordinated" expenditures, and intra-association communications -- in which you have requested the Board's opinion are so fact intensive that the Board's opinion is virtually limited to the facts upon which the opinion is predicated. Slight changes in the wording of an issue advocacy communication or minimal increases in the amount or extent of contacts by a campaign agent regarding an expenditure of an independent committee, or expanding an intra-association communication beyond the strict limits of "endorsements of candidates, positions on a referendum or explanation of its views and interests," can completely change the regulatory outcome.

I. WRL Request

WRL is requesting the Board's opinion with respect to the association's activities in its non-registrant capacity, not with respect to its sponsored PAC's activity. Consequently, what WRL is asking the Board is which of the described communications or described circumstances will impose a registration and reporting requirement on the association -- a requirement that the association is not able to meet because of its corporate non-MCFL status. (MCFL status refers to the holding of the U.S. Supreme Court in Massachusetts Citizens for Life v. Federal Election Commission, 479 U.S. 238 (1986) that certain non-profit, ideological corporations may not be prohibited from making expenditures for express advocacy purposes. Whether or not WRL would or could qualify for that status is not in issue in this opinion and, therefore, WRL will be treated as a non-registrant for purposes of this discussion.)

WRL has raised three issues for the Board's consideration and discussion: 1) whether a given communication would cross the line from unregulated issue advocacy to regulated express advocacy; 2) with respect to a communication that would otherwise be unregulated, what kind of "contacts" between officers or agents of WRL and officers or agents of the campaign that "benefits" from the communication would constitute "coordination" between the two entities causing the communication (and the expenditures for it) to be subject to campaign finance

regulation; 3) if the text of a communication would cause it to be subject to regulation under the express advocacy test, would that communication nevertheless be free from regulation, under §11.29(1), Stats., if the association limited distribution of the communication to members, shareholders and subscribers of the association, to the exclusion of all others.

DISCUSSION

A. Express Advocacy vs. Issue Advocacy

The term "express advocacy," in the context of campaign finance regulation, was established in the U.S. Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976), in the Court's review of the Federal Election Campaign Act's expenditure limitations, (§608(e)(1) of the federal act):

> We agree that in order to preserve the provision against invalidation on vagueness grounds, s.608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office. (at p.702)

One concludes from the court's discussion that money that is spent, (by an otherwise non-registrant), for a communication which expressly advocates the election or defeat of a clearly identified candidate is subject to campaign finance regulation. Conversely, money that is spent (by an otherwise non-registrant) for a communication that does not expressly advocate the election or defeat of a clearly identified candidate is not subject to campaign finance regulation (absent other circumstances: see the discussion on "coordination"). In applying Buckley, the courts have said that the express advocacy standard establishes a three-prong test for determining whether a communication, and the expenditure for it, is subject to regulation (i.e., contains express advocacy):

1. The communication must clearly identify a candidate. Whether by name, description, picture or other depiction, the identity of the candidate(s) discussed in the communication must be unmistakable.

2. The communication must advocate the candidate's election or defeat.

3. The advocacy must be express, not implied.

Requirements (2) and (3) almost have to be read together such that a message which criticizes a specific candidate but calls for his/her election or defeat only impliedly, not expressly, is not subject to regulation. And a communication expressly advocating some action other than electing or defeating a candidate is also not subject to regulation. To clarify, or provide examples of, these joint requirements, the Buckley Court added (to the above quoted language on p.702), **Footnote 52** to spell out words or terms that expressly advocate election or defeat. Those terms, (commonly referred to as the "magic words"), are:

1. "Vote for;"
2. "Elect;"

3. "Support;"
4. "Cast your ballot for;"
5. "Smith for Assembly;"
6. "Vote against;"
7. "Defeat;"
8. "Reject."

The Buckley decision and, particularly, its express advocacy test have been the subject of numerous federal court decisions. Broadly generalized, those decisions go in two different directions. One direction reflected in decisions in the First, Second and Fourth Circuits of the United States Courts of Appeals (and in various district court decisions) takes a strict-construction approach to the Buckley express advocacy test, requiring use of the "magic words," or an equivalent of those words, to subject a communication to regulation. More significantly, this direction limits the determination of express advocacy to the text of the message and virtually excludes examination of the context in which the message is uttered. This approach considers the Buckley Court to have intended the express advocacy test to be a "bright line" demarcation between what may be regulated and what may not. The other direction is reflected in the U.S. Court of Appeals Ninth Circuit's decision in FEC v. Furgatch, 807 F. 2d 857 (9th Cir. 1987), which rejected a strict "magic words" approach and added a context-based determination of express advocacy in the form of "limited reference to external events."

> We begin with the proposition that "express advocacy" is not strictly limited to communications using certain key phrases. The short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words "elect;" "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate. (at p.863)
>
> We conclude that context is relevant to a determination of express advocacy. A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers. We should not ignore external factors that contribute to a complete understanding of speech, especially when they are factors that the audience must consider in evaluating the words before it. However, context cannot supply a meaning that is incompatible with, or simply related to, the clear import of the words. (at pp.863-864)
>
> With these principles in mind, we propose a standard for "express advocacy" that will preserve the efficacy of the Act without treading upon the freedom of political expression. We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an

> exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.
>
> We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act. At the same time, however, the court is not forced under this standard to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of "express advocacy." (at p.864)

A careful analysis of what the Furgatch court is really saying raises the question whether the court is saying something different from Buckley or saying the same thing differently. The answer to that question seems to depend on the analyst's perspective. What the court did say was that Buckley did not establish a "bright line." Also, the three-prong Buckley test becomes a four-prong test:

> 1. Speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning.
>
> 2. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act.
>
> 3. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.
> (emphasis supplied throughout)
>
> 4. (Although the court didn't spell the 4th one out: the speech must identify clearly the subject candidate. That is a given under Buckley.)

Thus, express advocacy is speech that is unmistakable and unambiguous, suggestive of only one plausible meaning, containing a clear plea for action and it must be clear what action is advocated: vote for or against a [clearly identified] candidate. That sounds a lot like the functional equivalent of the "magic words." But, at least, the Ninth Circuit opened the door to consideration of context in express advocacy determinations. Other federal courts, however, have not chosen to walk through that door.

Wisconsin codified the express advocacy test in §§11.01(6), (7) and (16), Stats., which provide that both "contributions" and "disbursements" must be made for "political purposes" and that "political purposes" includes (but, by the statute's own language, is not to be limited to) "The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum." To further clarify which disbursements are subject to campaign finance regulation, the Elections Board adopted Wis. Adm. Code ElBd Rule 1.28(2)(c), which provides:

> (2) Individuals other than candidates and committees other than political committees are subject to the applicable disclosure-related and record-keeping-related requirements of ch.11 Stats., only when they:
>
> (c) Make expenditures for the purpose of expressly advocating the election or defeat of a clearly identified candidate.

Note that the rule did not include, or make reference to, the "magic words" test.

The Board's application of the express advocacy test became the subject of litigation in 1996, when several non-registrants spent money to comment (positively or negatively) on the views, positions or voting records of specific candidates. In WMC v. State Elections Board, 227 Wis.2d 650 (1999), the State Elections Board made a determination that the defendant, WMC, a non-registrant, had paid for communications that contained express advocacy, notwithstanding that the text of those communications did not contain any of the eight terms of Footnote 52 (or even any equivalent of the terms in Footnote 52). When WMC failed to comply with registration and reporting under ch.11, Stats., as ordered by the Elections Board, the Board sought to enforce its order in circuit court.

After the Dane County Circuit Court dismissed the Elections Board's complaint on, essentially, due process grounds, the Wisconsin Supreme Court upheld the trial court's dismissal on the ground that the Board was attempting to do retroactive rulemaking by making a determination of express advocacy based on context. The Wisconsin Supreme Court said that the Board may not make a determination of express advocacy, (and thereby impose campaign finance regulation), based on the context in which speech is uttered or a communication is made – unless before making that determination the legislature enacts a statute or the Elections Board adopts a rule spelling out that context-based test.

The Court added its opinion that the legislature or the Board may be able to craft a context-oriented express advocacy rule that may be able to pass constitutional muster, but that that rule may only be applied prospectively:

> We stress that this holding places no restraints on the ability of the legislature and the Board to define further a constitutional standard of express advocacy to be prospectively applied. We encourage them to do so, as we are well aware of the types of compelling state interests which may justify some very limited restrictions on First and Fourteenth Amendment rights. (at p.32)

But the Court also qualified any attempt to define "express advocacy" with the proviso that any communication that meets that definition must contain "explicit words of advocacy of election or defeat of a candidate":

> Consistent with this opinion, we note that any definition of express advocacy must comport with the requirements of Buckley and MCFL and may encompass more than the specific list of "magic words" in Buckley footnote 52, but must, however, be "limited to communications that include explicit words of advocacy of election or defeat of a candidate." (at p.33) (Emphasis supplied)

The Elections Board did attempt, in Clearinghouse Rule 99-150, to promulgate a rule clarifying determinations of express advocacy, but the rule was not context-based. That rule adopted the eight terms of Footnote 52 as examples of express advocacy and added that the term "express advocacy" also included the functional equivalent of any of those eight terms. The standing committees of the Wisconsin Legislature objected to the Board's rule and the rule was referred to the Legislature's Joint Committee for Review of Administrative Rules (JCRAR). JCRAR also objected to the rule and introduced a bill amending §11.06(2) and creating §§11.01(13) and (20) and 11.01(16)(a), Stats., requiring reporting of certain "issue advocacy" disbursements made during the last 60 days before an election.

Unless (and until) the legislature enacts the legislation recommended by JCRAR, however, the standard applicable in Wisconsin is the one that was applicable before the WMC case: expenditures are subject to regulation on the basis of the message they purchase only if the message expressly advocates the election or defeat of a clearly identified candidate. The Board believes that that standard means that, even without a rule, a message that does not include some form of the "magic words," or their equivalents, is not subject to campaign finance regulation.

Looking at the materials included with WRL's opinion request, Items (1), (3), (4), (6), (7), and (8) do not include any of the "magic words" or any equivalent of them. Even under the Furgatch test, these items contain no "plea to action" whatsoever, let alone a "clear plea". That means that not only do they not urge the reader or listener or viewer to vote one way or another, they do not urge the reader or listener or viewer to do anything. Consequently, to paraphrase the Court in WMC, they do not "include explicit words of advocacy of election or defeat of a candidate," and are not subject to campaign finance regulation (based on their text alone).

Items (2) and (5) of the WRL opinion request include the following language that suggests a call to action, but may stop short of express advocacy:

> Item (2)
> The November 3 election offers a clear choice between candidates running in your area.
> ....
> You can truly make a difference for the women harmed by abortion and for the unborn children whose beating hearts must not be silenced.
> BE INFORMED.
> MAKE A COMPASSIONATE CHOICE.

This language asks that the reader/voter make a compassionate choice on November 3: and suggests that the compassionate choice is to vote pro-life. The plea to action is clear; the course of action is not.

> Item (5)
> Now he wants to be re-elected to the State Assembly. Can unborn children, parents and taxpayers afford two more years of Virgil Roberts?

This language is similar to the "Don't let him do it" in Furgatch, except it is in rhetorical form rather than in the imperative. The only way to avoid two more years of Virgil Roberts is to vote him out on November 3, but that conclusion is implied not expressed.

Whether either one of these communications "includes explicit words of advocacy of election or defeat of a candidate may depend on the political orientation of the reader, but they are closer than the other five.

B. Coordination of Expenditures vs. Independent Expenditures

In striking down limits on independent expenditures -- because of the absence of the potential quid pro quo that justified restrictions on contributions -- the Buckley Court recognized an exception to that approach for money spent on communications that are "coordinated" with a candidate or his campaign or agents. In this tension between permissible contribution limits and impermissible independent expenditure limits, the court recognized the necessity of regulating expenditures that were so "coordinated" with a campaign that they ceased to be independent and were enough like contributions to be treated as such:

> The parties defending [the cap on expenditures by individuals] contend that [the cap] is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities ... Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than s.608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, s.608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. (Buckley at pp.46-47, emphasis supplied)

The Court did not, however, provide a definition of, or standard for, "prearranged or coordinated expenditures amounting to disguised contributions." Furthermore, the Buckley court did not distinguish coordinated express advocacy from coordinated issue advocacy or even speak to the question whether one is distinguishable from the other with respect to government's authority to regulate.

The federal courts have begun to look at the issue of "coordinated" issue advocacy. In 1997, the United States Court of Appeals First Circuit, in Clifton v. Federal Election Commission 114 F. 3d 1309, held that the FEC's regulations restricting corporate contacts with candidates (or the

candidate's agents) with respect to certain forms of issue advocacy, (voter guides and voting records), were beyond the FEC's authority under the Federal Election Campaign Act (FECA). "The regulation on voter guides provided that either a corporation or union publishing a guide must have no contact at all with any candidate or political committee regarding the preparation, contents and distribution of the voter guide or, if there is such contact, (1) it must be only through written questions and written responses, (2) each candidate must be given the same prominence and space in the guide, and (3) there must be no "electioneering" message conveyed by any scoring or rating system used, or otherwise." (at p.1311)

> Starting with the FEC rule requiring substantially equal space and prominence, we begin with the proposition that where public issues are involved, government agencies are not normally empowered to impose and police requirements as to what private citizens may say or write. Commercial labeling aside, the Supreme Court has long treated compelled speech as abhorrent to the First Amendment whether the compulsion is directed against individuals or corporations. (at p.1313)
>
> It seems to us no less obnoxious for the FEC to tell the Maine Committee how much space it must devote in its voter guides to the views of particular committees. We assume a legitimate FEC interest in preventing disguised contributions; ... The point is that the interest cannot normally be secured by compelling a private entity to express particular views or by requiring it to provide "balance" or equal space or an opportunity to appear. (at pp.1313-1314)
>
> The other rule principally at issue is the limitation on oral contact with candidates. We think that this is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office. As we have explained, the regulations bar non-written contact regarding the contents, not merely the preparation and distribution of voter guides and voting records; thus inquiries to candidates and incumbents about their positions on issues like abortion are a precise target of the FEC's rules as applied here. (at p.1314)
>
> It is hard to find direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues. The only difference between such an outright ban and the FEC rule is that the FEC permits discussion so long as both sides limit themselves to writing. Both principle and practicality make this an inadequate distinction. (at p.1314)
>
> It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives. Further, the restriction is a real handicap on intercourse: the nuances of positions and votes can often be discerned only through oral discussion; as any courtroom lawyer knows, stilted written interrogatories and answers are no substitute for cross-examination. A ban on oral communication, solely for prophylactic reasons, is not readily defensible. (at p.1314)

The First Circuit was not saying that issue advocacy could be coordinated and it was not even saying that the FEC could not promulgate a rule prohibiting coordination of issue advocacy. What the court was saying was that the FEC could not attempt to prevent coordination with a prophylactic rule against all oral contact between candidates and committees who make expenditures after that contact. In other words, the FEC may promulgate a rule proscribing illicit coordination, but the rule before the court was not that rule. The further implication of this decision is that the outright ban on any "consultation, cooperation or action in concert" such as appears in the Wisconsin Statute, s.11.06(7), Stats., (and which is identical to the language of the federal statute), may be unenforceable. Some level of contact between a candidate and a committee making expenditures is permissible.

> The Supreme Court has said, in discussing related statutory provisions, that expenditures Valeo....; but "coordination" in this context implied some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue. ... (at p.1311)

What constitutes "coordination," however, remained for other courts and other decisions. Recently, in Federal Election Commission v. The Christian Coalition, 52 F. Supp. 2d 45, (August, 1999), the United States District Court for the District of Columbia addressed the question of coordinated expenditures, generally, and coordinated "issue advocacy" in particular. The court found that coordinated issue advocacy was subject to campaign finance regulation, but that "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which coordination is extensive enough to make the potential for corruption through legislative quid pro quo palpable without chilling protected contact between candidates and corporations and unions." (at p.91) The court tried to strike a balance between the position of the Coalition that only coordinated expenditures for the purpose of express advocacy could be subject to regulation and the position of the FEC that any "consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election "coordinated" contributions." (at p.92)

> While the FEC's approach would certainly address the potential for corruption in the above-described scenario, it would do so only by heavily burdening the common, probably necessary, communications between candidates and constituencies during an election campaign. (at p.96)

> I take from Buckley and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate. (at p.97)

> A narrowly tailored definition of expressive coordinated expenditures must focus on those expenditures that are of the type that would be made to circumvent the contribution limitations. (at pp.97-98)

That portion of the FEC's approach which would treat as contributions expressive coordinated expenditures made at the request or suggestion of the candidate or an authorized agent is narrowly tailored. The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions. (at p.98)

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. . (at pp.98-99)

At about the same time, (November, 1999), the Wisconsin Court of Appeals, in Wisconsin Coalition for Voter Participation et al. v. State Elections Board (No.99-2574), was asked to review a similar issue: whether the State Elections Board could investigate the alleged "coordination" of a communication, (and the expenditures for it), between a candidate's campaign and a committee called Wisconsin Coalition for Voter Participation, notwithstanding that the communication did not (concededly) expressly advocate the election or defeat of a clearly identified candidate.

The Court of Appeals agreed with the Dane County Circuit Court, (from whose decision the appeal was being taken), that "express advocacy is not an issue in this case." (at p.6) The Court of Appeals found that while (under Buckley) "independent expenditures that do not constitute express advocacy of a candidate are not subject to regulation, ... contributions to a candidate's campaign must be reported whether or not they constitute express advocacy."(at p.7)

Contrary to plaintiff's assertions, then, the term "political purposes" is not restricted by the cases, the statutes or the code, to acts of express advocacy. It encompasses many acts undertaken to influence a candidate's election -- including making contributions to an election campaign. ...(at p.8)

Under Wis. Adm. Code s.ElBd 1.42(2), a voluntary committee such as the coalition is prohibited from making expenditures in support of, or opposition to, a candidate if those expenditures are made "in cooperation or consultation with any candidate or ... committee of a candidate ... and in concert with, or at the request or suggestion of, any candidate or ... committee ..." and are not reported as a contribution to the candidate. These provisions are consistent with the federal campaign finance laws approved by the Supreme Court in Buckley -- laws which, like our own, treat expenditures that are "coordinated" with, or made "in cooperation with or with the consent of a candidate ... or an authorized committee" as campaign contributions. (at pp.8-9)

> There is little doubt that had the coalition given 354,000 blank paid postcards to the Wilcox campaign committee, allowing it to put whatever message it wished on them, this would have been a reportable contribution. .... If there was consultation or coordination with the Wilcox campaign, it makes no difference that the chosen message was printed by the Coalition rather than by the campaign itself. As we have noted above, we think the Board was correct in observing (in one of its briefs to the circuit court) that "[i]f the mailing and the message were done in consultation with or coordinated with the Justice Wilcox campaign, the [content of the message] is immaterial." (at pp.9-10)

In finding that "if the mailing and the message were done in consultation with or coordinated with the Justice Wilcox campaign, the [content of the message] is immaterial," the court did not determine any standard for "coordination" other than to recite the Wisconsin Statutory standard set forth in the oath for independent disbursements, (s.11.06 (7), Stats.). That standard is that the committee or individual making the disbursements does not act in cooperation or consultation with, or act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate who is supported by the disbursements.

The conclusion that appears to follow from these cases is that speech which does not expressly advocate the election or defeat of a clearly identified candidate may, nevertheless, be subject to campaign finance regulation if the following two elements are present: (1) the speech is made for the purpose of influencing voting at a specific candidate's election; and (2) the speech (and or the expenditure for it?) is coordinated with the candidate or his/her campaign. The Courts seemed to be willing to merge express advocacy with issue advocacy if "coordination" between the spender and the campaign is sufficient that the potential for a quid pro quo is immediate and apparent and, therefore, that the expenditure ought to be treated as a contribution.

The Wisconsin Court of Appeals did not need to establish a standard for "coordination" because the proceeding before it was not one to determine whether "coordination" occurred, but a proceeding to determine whether the Elections Board could investigate whether "coordination" had occurred. But putting the standard established in Christian Coalition together with Wisconsin's statutory language one derives a standard as follows: coordination is sufficient to treat a communication (or the expenditure for it) as a contribution if:

> The communication is made at the request or suggestion of the campaign (i.e., the candidate or agents of the candidate); or, in the absence of a request or suggestion from the campaign, if the cooperation, consultation or coordination between the two is such that the candidate or his/her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Turning to the eight items WRL has included, all eight would appear to be made for the purpose of influencing voting at a specific candidate's election (if one concedes that the purpose of informing voters of a candidate's position on an issue or issues is to influence their voting). Consequently, under the above standard, with respect to such communications, WRL would have to refrain from "discussion or negotiation with the campaign over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots) such that the candidate and the spender (WRL) emerge as partners or joint venturers in the expressive expenditure, albeit not equal partners." And, of course, WRL could not act at the request or suggestion of the candidate or the candidate's agents.

Another approach to the same subject matter is to divide it into two categories: contacts between a campaign and an independent committee in which 1) the campaign is the speaker and 2) the committee is the speaker. Each of those two categories would be divided into two sub-categories: 1) discourse on philosophy, views and interests, and positions on issues and 2) discourse on campaign strategy.

In all of the cases discussed above, including Buckley, protection of a candidate's right to meet and discuss, with any person (including corporate persons), his or her philosophy, views and interests, and positions on issues (including voting record), is absolute. As the First Circuit said in Clifton:

> ... [as to] the limitation on oral contact with candidates. We think that this is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office. (p.1314)

A candidate's (or campaign's) right to discuss campaign strategy, however, is not so absolute. It is the slippery slope and the best advice is to avoid (or, at the very least, minimize) it. The closer that such discussion comes to providing details that will facilitate or optimize the independent committee's expenditures, the more that discussion "dissolves in practical application" into coordination. Providing a committee with campaign literature or an 8 x 10 glossy picture is one thing, but providing a committee with an itinerary of media purchases and appearances, including text, is another.

Similarly, an independent committee's right to meet and discuss its philosophy, views and interests, and positions on issues, is probably equally absolute to that of the candidate. But the right of the committee to discuss <u>its</u> strategy for the campaign probably doesn't exist if the committee wishes to remain independent. A campaign has no need to know that information other than for the purpose of coordination.

C. Communications to Restricted Class (Members, Shareholders and Subscribers)

Under §11.29(1), Stats., a voluntary association, like WRL, may communicate a candidate endorsement, a position on a referendum or an explanation of the association's views and

interests with its members to the exclusion of all others without subjecting that communication to campaign finance regulation. In El. Bd. Op. 88-4, the Elections Board issued a formal opinion that says that the statute will be construed strictly. That means the communication's distribution must be limited to the association's members, shareholders and subscribers to the exclusion of all others. A distribution pattern that appears to go beyond the restricted class may render the protection of §11.29(1), Stats., inapplicable. According to that Opinion, if the communication's message goes beyond a candidate endorsement, a position on a referendum or an explanation of the association's views and interests, the protection of §11.29(1), Stats., may not apply:

> Wisconsin law prohibits corporations and cooperatives and unregistered organizations from engaging in political activity. §11.38(2), Stats. The exclusions of §11.29(1), Stats., provide an exemption from those requirements. (p.1)
>
> Wisconsin law clearly permits any organization to make communications to its membership. Communications of a political nature which consist of endorsements of candidates, positions on a referendum or an explanation of the organization's views or interests are not subject to the registration and reporting requirements of Chapter 11, Stats. This is provided that the communications are funded solely by the organization and the communications are limited to the members of the organization to the exclusion of all others. §11.29(1), Stats. (p.1)
>
> The exclusion from disclosure of communications with respect to endorsements and an explanation of the organization's views or interests is designed to permit otherwise political communications by an organization because it does not reach out to the general public. Although the communications may be designed to influence voting, or even expressly advocate the election or defeat of a clearly identified candidate, the communications are not subject to disclosure because the audience and activity are restricted. (p.2)
>
> If a candidate requests the organization to communicate to its membership, the organization may inform its membership of candidate endorsements and an explanation of its views or interests. The views and interests of the candidate do not qualify for the exclusion from disclosure except to the extent that the organization utilizes them in its explanation of its views and interests. To the extent that communication of the candidate's views and interests go beyond the statutory exclusion they are subject to disclosure and limitation under the applicable provisions of Chapter 11, Stats. (p.2)
>
> Communications of a political nature which go beyond the scope articulated in §11.29(1), Stats., would be subject to the registration and reporting requirements of Chapter 11. If the political communications are done in cooperation or consultation with, in concert with, or at the request or suggestion of a candidate, the communications will be subject to the contribution limits of Chapter 11. (p.1)

To be on the safe side, if an organization confines itself to communicating "a candidate endorsement, a position on a referendum or an explanation of the association's views and interests with its members to the exclusion of all others," pays for the communication with its

own funds, and does not distribute any candidate literature with the communication, the organization's communications will not be subject to ch.11, Stats.

Turning to the specific items included in WRL's letter: all eight of the pieces communicate a candidate's views, position or voting record on abortion issues but would probably qualify as either or both a candidate endorsement or an explanation of the views and interests of the association. While it is true that §11.29(1), Stats., exempts communication of the association's views and interests, not a candidate's, because the material originated with the association, the candidate's views or position set forth therein reflect the association's opinion of those views. Generally, associations have broad latitude when communicating material originating with the association. Associations may not, however, use this privilege to act as a conduit for campaign literature or campaign solicitations.

II. MMAC Request

Guidelines Relative to Non-advocacy Voter Registration and Voter Participation Efforts

MMAC is also requesting the Board's opinion with respect to the association's activities in its non-registrant capacity, not with respect to its sponsored PAC's activity. What MMAC is asking the Board, in addition to the issues raised and discussed above, is: to what extent may an unregistered association or other non-registrant conduct voter registration or voter participation drives without being subject to a registration requirement or subject to other compliance requirements of ch.11, Stats.

The initial response to the opinion request from MMAC is to note that the law has not changed: a non-partisan, candidate-non-specific voter registration or voter participation drive is not subject to the registration and reporting requirements of ch.11, Stats. The governing statute is s.11.04, Stats., which has not changed in many years and is quite clear in its command:

> **11.04 Registration and voting drives.** Except as provided in s.11.25(2)(b), ss.11.05 to 11.23 and 11.26 do not apply to nonpartisan campaigns to increase voter registration or participation at any election that are not directed at supporting or opposing any specific candidate, political party, or referendum.

What that language is saying is that a committee of persons who engage in an effort to "raise voter turnout" or voter registration, and who do so on a nonpartisan basis without directing their effort at "supporting or opposing any specific candidate, political party or referendum" are not required to comply with §§11.05 to 11.23, Stats., (which are the registration and reporting provisions of ch.11, Stats.), or §11.26, Stats. (ch.11's limit on contributions). As long as an organization confines itself to the specific language of §11.04, Stats., the organization would appear to have a safe harbor. Concededly, however, some issues have arisen about the interpretation of some of the language in §11.04, Stats.

The litigation to which MMAC's letter refers raised a controversial issue about the meaning of the term "nonpartisan" in the statutory phrase: "nonpartisan campaigns to increase voter registration or participation." Neither §11.01, Stats., nor §5.02, Stats., (the two statutory sections

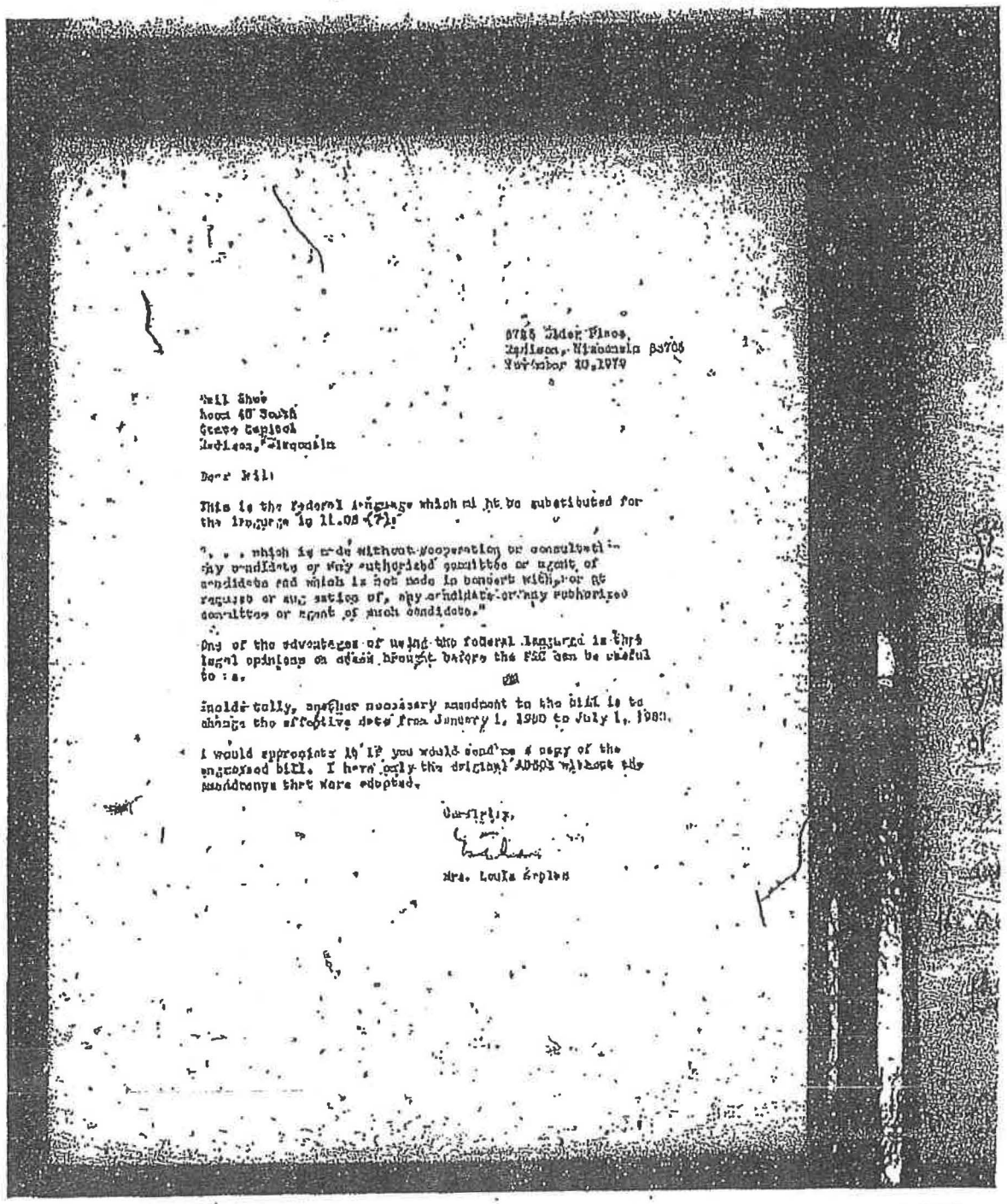
defining terms for election and campaign finance purposes), defines the term "nonpartisan." The American Heritage Dictionary defines "partisan" as follows:

> Partisan - n. 1. A militant supporter of a party, cause, faction, person or idea; adj. 2. Devoted to or biased in support of a single party or cause.

The Board believes that, at the very least, the legislature intended that an organization's message urging citizens to register and to vote could not, within the exemption of §11.04, Stats., exhort or suggest that they vote to support one party or another or exhort the voter to participate in a designated party's partisan primary. This meaning is sometimes referred to as "Partisan" with a capital "P". The legislature could also have intended that a voter registration or participation drive, seeking to qualify for the exclusion of §11.04, Stats., could not be partial towards any "cause, faction, person or idea." This is sometimes referred to as "partisan" with a lower case "p". Either interpretation of the term "partisan" or "nonpartisan" incorporates a certain amount of redundancy into §11.04, Stats., because of the subsequent phrase in the statute: "that are not directed at supporting or opposing any specific candidate, political party, or referendum."

The best way to avoid this issue is to refrain from mentioning any "party, cause, faction, person or idea" in the text of the message communicated to the public. Instead, by confining the message to registration and going to the polls, the meaning of the statute, and the meaning of the message, do not require interpretation.

Finally, with respect to the "coordination" issue alluded to in your letter, suffice it to say that the decision to conduct a voter drive and the particulars of that drive, including the funding of it, are best not discussed with a candidate or any agent of a candidate. That does not mean that an organization may not discuss with a candidate his or her views on issues important to the organization, but the organization is well advised not to include in that discussion the organization's consideration of a voter drive or the particulars of that drive.



6725 Elder Place,
Madison, Wisconsin 53705
November 10, 1979

Neil Shea
Room 40 South
State Capitol
Madison, Wisconsin

Dear Neil:

This is the federal language which might be substituted for the language in 11.05 (7):

". . . which is made without cooperation or consultation with any candidate or any authorized committee or agent of candidate and which is not made in concert with, or at request or suggestion of, any candidate or any authorized committee or agent of such candidate."

One of the advantages of using the federal language is that legal opinions on cases brought before the FEC can be useful to us.

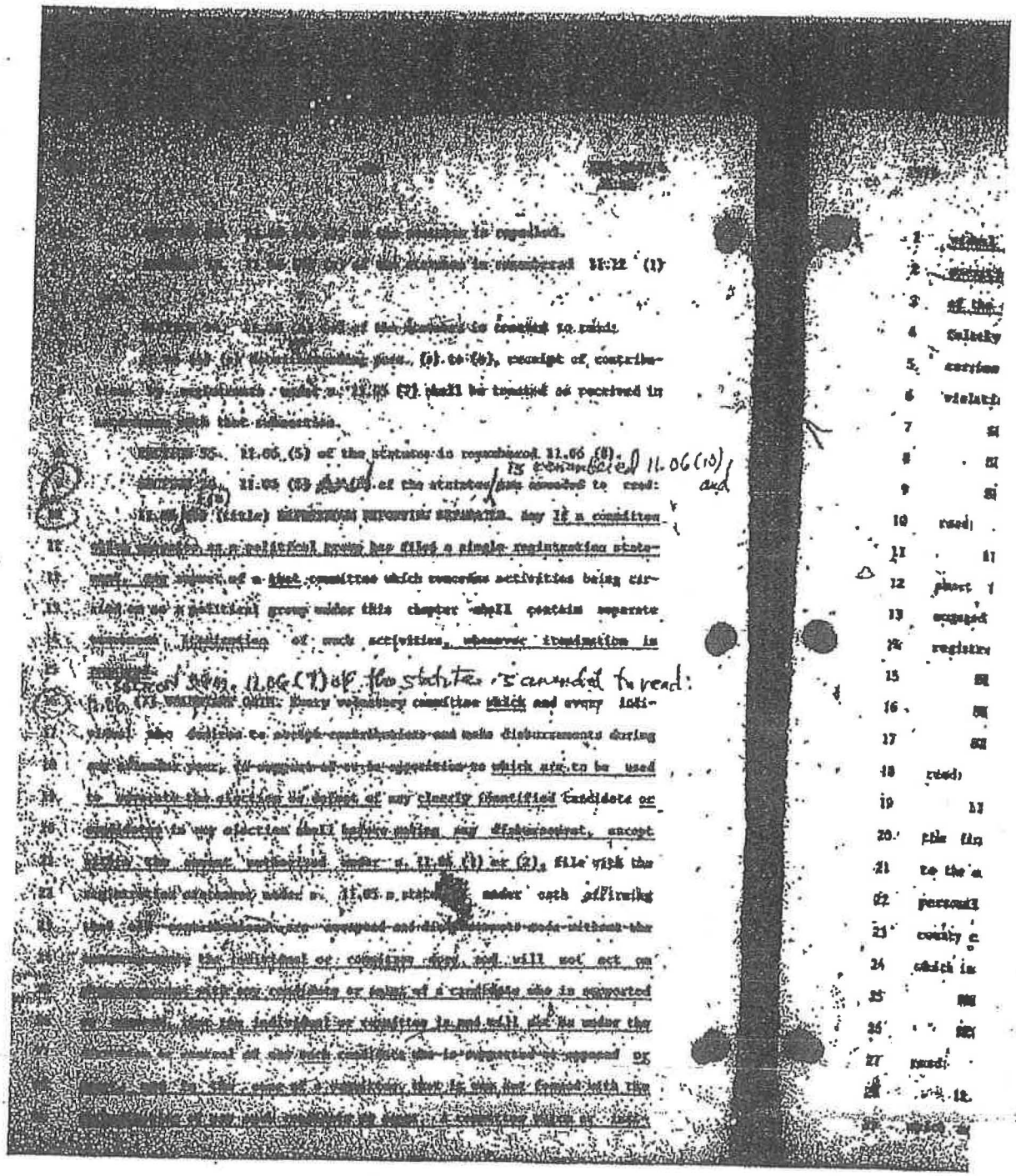
Another fully, another necessary amendment to the bill is to change the effective date from January 1, 1980 to July 1, 1980.

I would appreciate it if you would send me a copy of the engrossed bill. I have only the original AB803 without the amendments that were adopted.

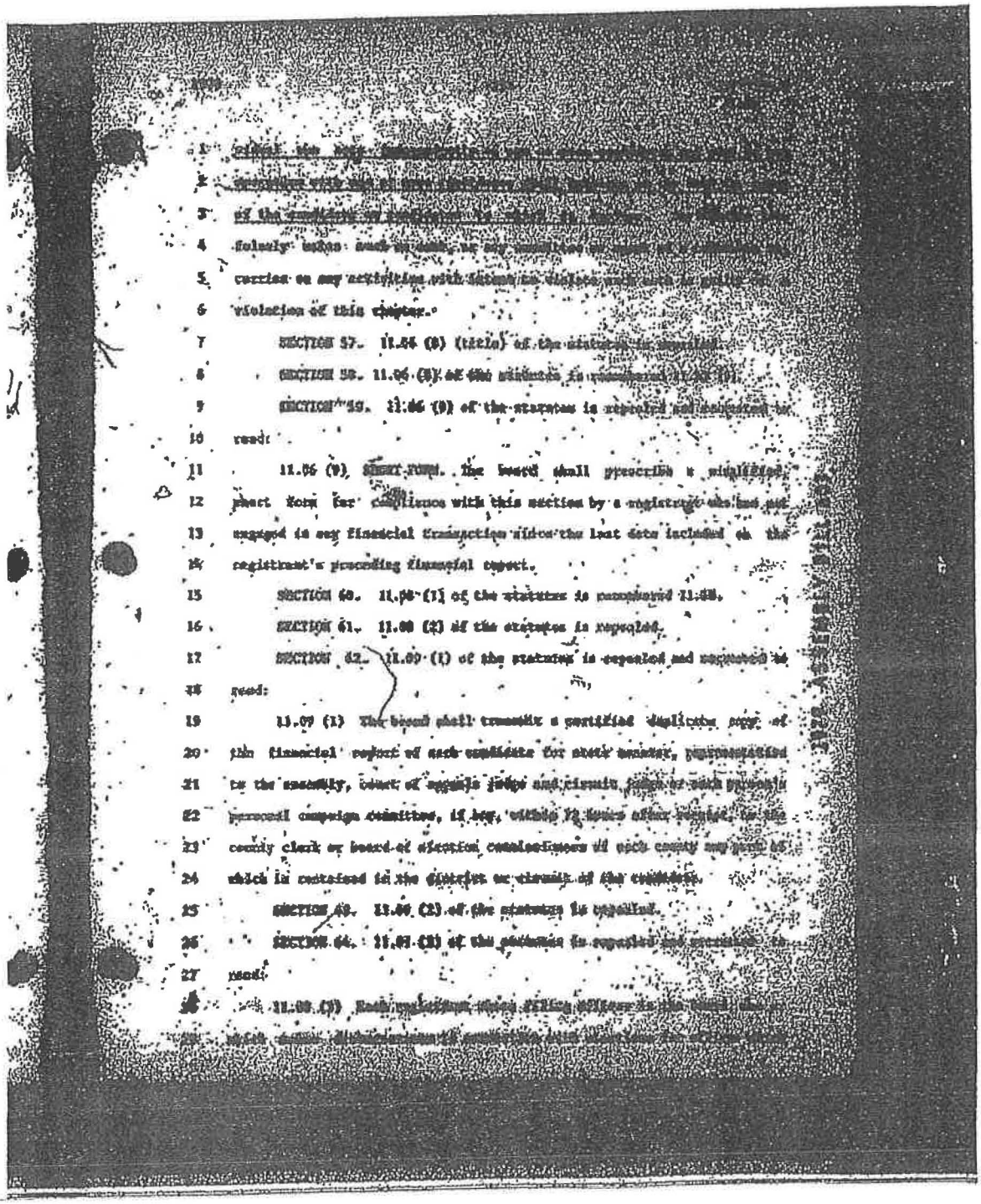
Cordially,

Mrs. Louis Koples

EXHIBIT 4
Kennedy Affidavit
Schmitz Affidavit 0101
February 21, 2014



Schmitz Affidavit 0102



violation of this chapter.

SECTION 57. 11.56 (3) (title) of the statutes is repealed.

SECTION 58. 11.06 (3) of the statutes is renumbered 11.06 (3).

SECTION 59. 11.06 (9) of the statutes is repealed and recreated to read:

11.06 (9) SHORT FORM. The board shall prescribe a simplified short form for compliance with this section by a registrant who has not engaged in any financial transaction since the last date included on the registrant's preceding financial report.

SECTION 60. 11.08 (1) of the statutes is renumbered 11.08.

SECTION 61. 11.08 (2) of the statutes is repealed.

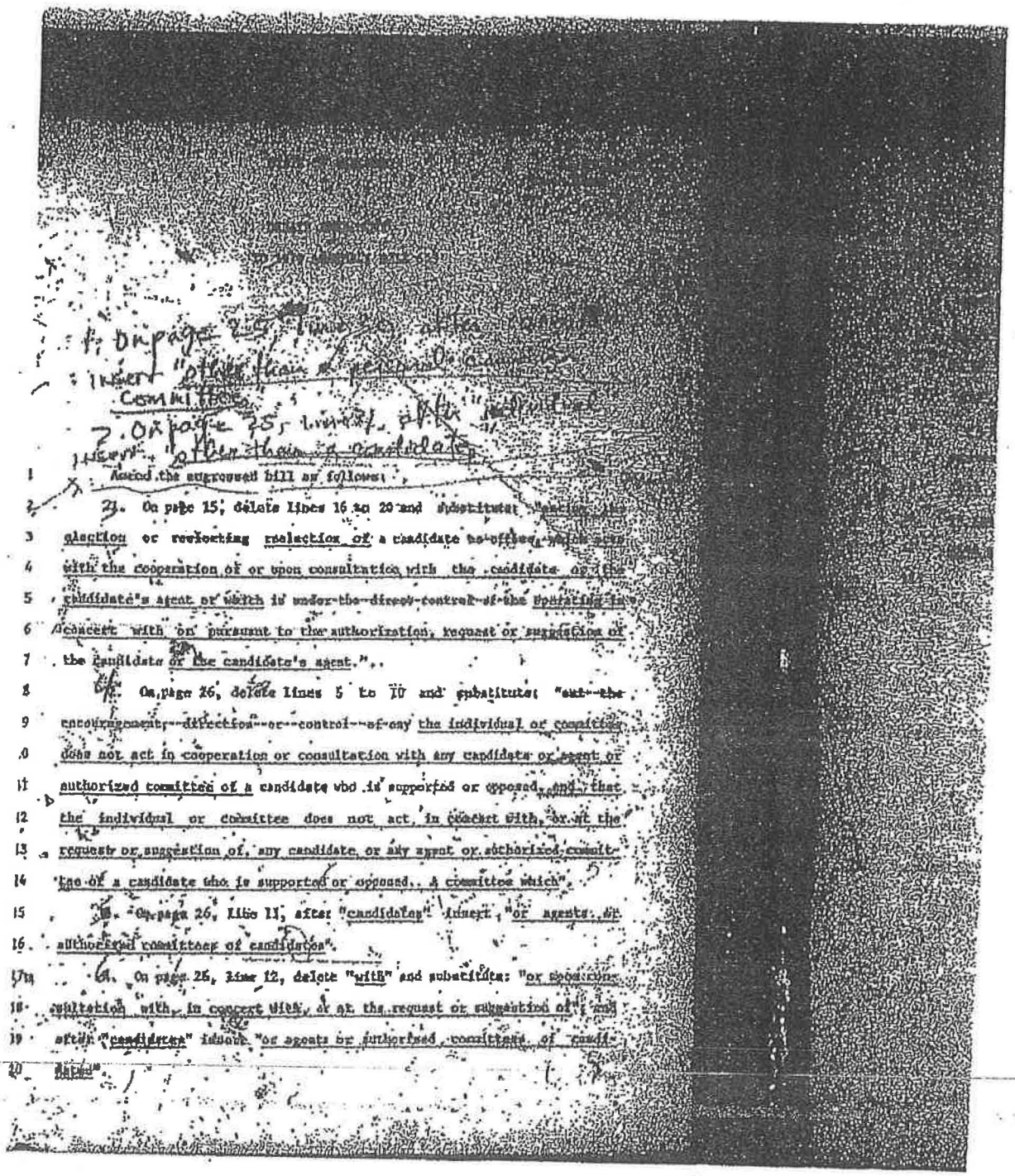
SECTION 62. 11.09 (1) of the statutes is repealed and recreated to read:

11.09 (1) The board shall transmit a certified duplicate copy of the financial report of each candidate for state senator, representative to the assembly, court of appeals judge and circuit judge or such person's personal campaign committee, if any, within 72 hours after receipt, to the county clerk or board of election commissioners of each county any part of which is contained in the district or circuit of the candidate.

SECTION 63. 11.09 (2) of the statutes is repealed.

SECTION 64. 11.21 (3) of the statutes is repealed and recreated to read:

11.21 (3) Each registrant, other than a filing officer as to whom



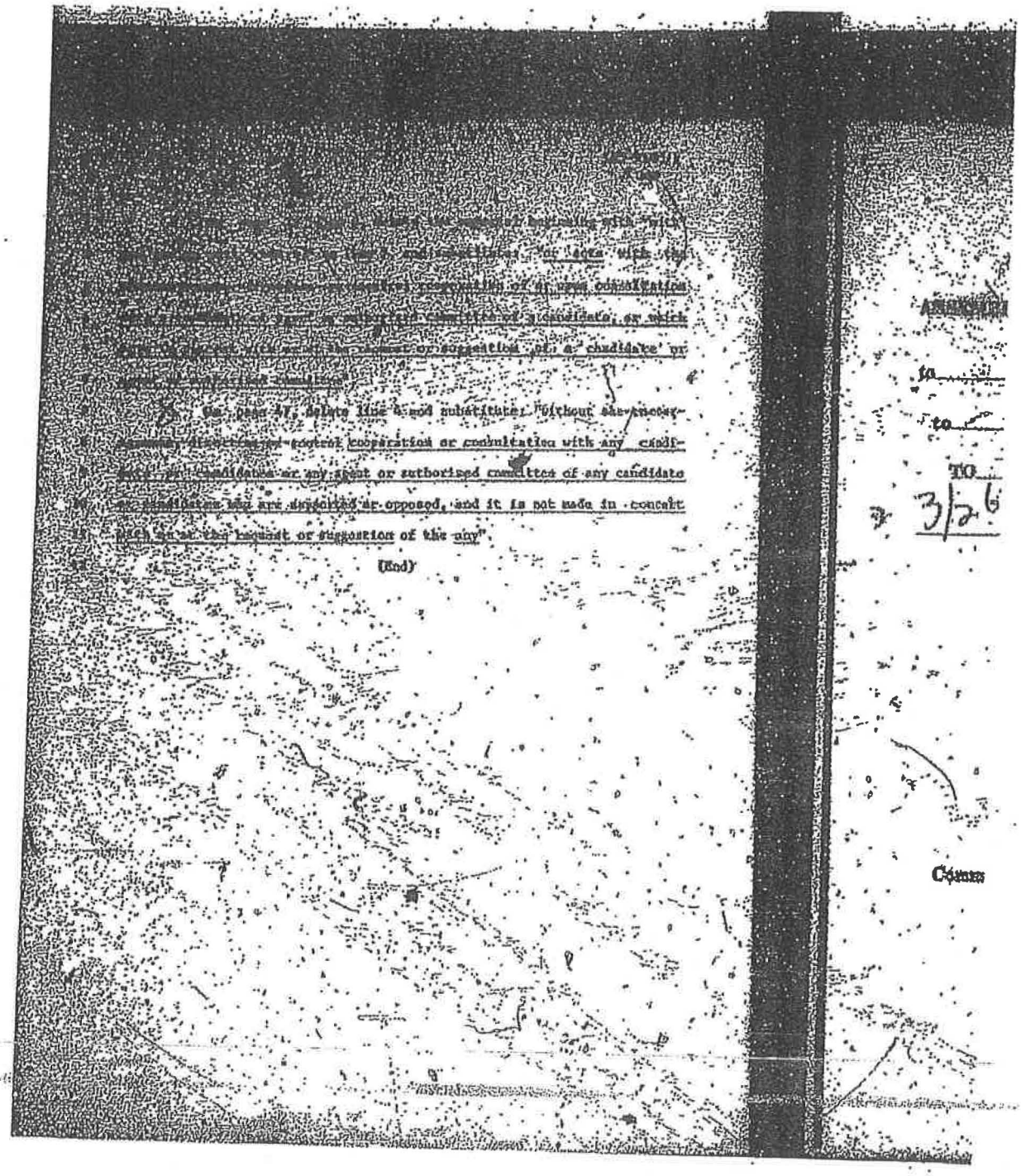
Amend the engrossed bill as follows:

1. On page 15, delete lines 16 to 20 and substitute: "action for the election or reelection or reelection of a candidate to office, which is made with the cooperation of or upon consultation with the candidate or the candidate's agent or which is under the direct control of the candidate or in concert with or pursuant to the authorization, request or suggestion of the candidate or the candidate's agent.".

2. On page 16, delete lines 5 to 10 and substitute: "but the encouragement, direction or control of any the individual or committee does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and that the individual or committee does not act in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed. A committee which".

3. On page 26, line 11, after "candidate" insert ", or agents or authorized committees of candidates".

4. On page 26, line 12, delete "with" and substitute: "or cooperation, consultation with, in concert with, or at the request or suggestion of," and after "candidates" insert "or agents or authorized committees of candidates".



On page 47, delete line 4 and substitute: "without the knowledge, direction, control, cooperation or consultation with any candidate or any agent or authorized committee of any candidate for candidates who are supported or opposed, and it is not made in concert with, or at the request or suggestion of the any".

(End)