HANSEN REYNOLDS DICKINSON CRUEGER LLC

**CONFIDENTIAL**
**JOHN DOE PROCEEDINGS**

October 25, 2013

Francis D. Schmitz, Esq.
Post Office Box 2143
Milwaukee, Wisconsin 53201

Re: ***In the Matter of a John Doe Proceeding***
**Columbia County Case No.: 13-JD-000011**
**Dane County Case No.: 13-JD-000009**
**Dodge County Case No.: 13-JD-000006**
**Iowa County Case No.: 13-JD-000001**
**Milwaukee County Case No.: 12-JD-000023**

Dear Mr. Schmitz:

Enclosed please find a Motion to Quash Subpoena Directed to Citizens for a Strong America, Inc. in the above-referenced matters.

Sincerely,

**HANSEN REYNOLDS DICKINSON CRUEGER LLC**

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**STATE OF WISCONSIN** **BEFORE THE JOHN DOE JUDGE**

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| IN THE MATTER OF A JOHN DOE PROCEEDING | COLUMBIA COUNTY CASE NO. | 13JD00011 |
| | DANE COUNTY CASE NO. | 13JD000009 |
| | DODGE COUNTY CASE NO. | 13JD000006 |
| | IOWA COUNTY CASE NO. | 13JD000001 |
| | MILWAUKEE COUNTY CASE NO. | 13JD000023 |

**MOTION TO QUASH FOUR SUBPOENAS DIRECTED TO CITIZENS FOR A STRONG AMERICA, INC.**

Citizens for a Strong America, Inc., whose directors or officers were served with five subpoenas in the above-captioned proceeding to produce documents on October 29, 2013, respectfully submits on its own behalf and on behalf of its four directors and officers the following Motion to Quash and incorporated suggestions in support.

**Introduction**

This Court must quash the Special Prosecutor's efforts to compel Citizens for a Strong America, Inc. ("CFSA") to disclose its confidential supporters, political communications, and political strategies. This is so for two reasons. First, the government's likely theory of criminal liability is invalid. It would extend campaign finance laws to sanction communications and conduct well beyond the outer bounds fixed by Wisconsin law and the United States Constitution. Second, the subpoenas are unconstitutionally overbroad. Even if the government could articulate the elements of a valid theory to capture CFSA's 2011 and 2012 conduct, its document demands would have to substantially relate to those elements. Yet here, its demands range far beyond any conceivable theory, sweeping into almost all of CFSA's 2011-2013 political activity. Indeed, the government would pry into almost all of CFSA's internal communications

and relationships with key supporters as far back as 2009, two years before the recall elections at issue.

As discussed below, now is the time for this Court to assert control over this investigation by examining (1) the government's underlying theory and (2) the legality of its apparent plan of investigation. Both the theory and the apparent plan for investigating it raise grave constitutional issues. They cannot be saved for another day.

**(a) The Government's Theory of Criminal Liability Is Invalid**

First, the government's theory, if valid, would severely punish conduct that, at best, is at the outermost frontier of what the First Amendment permits the state to regulate—let alone criminalize. Specifically, the government appears to believe that some level of coordination between candidate campaigns and outside issue advocacy groups in 2011 and 2012 could support a felony conviction under Wisconsin law.

As a starting point, coordination is itself core political speech and association protected under the First Amendment and Wisconsin Constitution. Nonetheless, the government's theory assumes that a fine constitutional line cleaves through the very heart of this protected activity, dividing a zone of protected speech from an adjacent zone of criminal conduct. If the manner and degree of political association between candidate campaigns and CFSA takes on a certain cast, so the theory goes, then wholly unregulated political speech morphs into an impermissible "in-kind contribution" to campaign committees. In other words, if a backward look at the 2011 and 2012 recall elections makes a factfinder feel that CFSA's political speech dovetailed in some vaguely impermissible way with the candidates' speech, then groups like CFSA have strayed into

a constitutional electric fence. But even worse than the shock—a Wisconsin felony conviction—is the muffling and chilling of future political association and speech.

Whether the First Amendment and due process even permit such an inquiry presents a substantial constitutional question. The line of demarcation, "coordination," must be clear *before* any prosecution—not haltingly sketched, erased, and redrawn to achieve a predetermined result based on a criminal inquiry's developing facts. Additionally, the line itself—whatever it turns out to be—must satisfy rigorous First Amendment scrutiny. As discussed below, however, this Court can avoid reaching this constitutional issue. The government's theory fails for the simple reason that it does not even state a crime under Wisconsin law: it extends to issue advertisements that are not subject to Wisconsin's campaign finance laws.

**(b) The Government's Investigation Is Constitutionally Overbroad**

Second, even if the government's theory were not legally infirm, its all-encompassing probe of one half of Wisconsin's sharply divided political universe goes far beyond what is necessary. Investigations of compliance with campaign finance laws, which govern political speech and association, are fundamentally different from investigations of illicit conduct such as narcotics or financial crimes. Where the investigation seeks to expose confidential lists of political supporters, or communications about beliefs and political strategy, in an environment where (as shown below) politically motivated harassment and recriminations have occurred, attempts to compel disclosure must survive First Amendment scrutiny. The specific information demanded must be substantially related to the elements of the crime being investigated. As discussed below, the government's demands for several additional years of sensitive communications and

donor lists are not substantially related to any of the elements the government would need to prove—even if its theory were legally valid.

Because of the chill this investigation is already casting over protected political speech and association, this Court cannot wait to test the government's theories or methods. It should act now, and the first step should be to quash the CFSA subpoenas.

## I. The First and Fourth Amendments Limit the Scope of Criminal Subpoenas that Seek to Compel Disclosure of Political Supporters, Strategies, and Communications

### (a) The Fourth Amendment Reasonableness Standard Applies

Both the First and Fourth Amendments protect CFSA and apply to the subpoenas in this case. The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. "The central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). With respect to John Doe search warrants, this means that "any document requested, in order to be relevant to the inquiry, must focus on the factual assertions made to the judge at the commencement of the proceeding." *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, 277 Wis.2d 75, 689 N.W.2d 908 (modifying paragraphs 53-55 of earlier opinion on denial of reconsideration at 2004 WI 65, 272 Wis.2d 208, 680 N.W.2d 792).

With respect to computer data, a keyword search may be helpful in describing the documents required, but even this, standing alone, is not enough. *In re Doe Proceeding*, 2004 WI 65, at ¶ 51 n.18 (while a "keyword search may have been helpful, the requirements set out...below are also necessary to a valid subpoena"). These additional requirements are fourfold. A valid subpoena:

> (1) limits the requested data to the subject matter described in the John Doe petition, *Reimann,* 214 Wis.2d at 622[, 571 N.W.2d 385]; (2) shows that the data requested is relevant to the subject matter of the John Doe proceeding, *Washington,* 83 Wis.2d at 843[, 266 N.W.2d 597]; (3) specifies the data requested with reasonable particularity, *Walling,* 327 U.S. at 209[, 66 S.Ct. 494]; *Hale* [*v. Henkel*], 201 U.S. [43] at 77[, 26 S.Ct. 370, 50 L.Ed. 652]; and (4) covers a reasonable period of time...

*In re Doe Proceeding*, 2004 WI 149, at ¶ 55. Ultimately, "it is the district attorney's burden to provide support to the John Doe judge for a constitutionally sufficient subpoena, as he is the party who commenced the proceeding and sought the subpoena." *In re Doe Proceeding*, 2004 WI 65, at ¶ 52.

**(b) The First Amendment Requires Exacting Scrutiny of the Subpoenas**

Although the Fourth Amendment provides an important limitation on John Doe subpoenas, a standard that is even more stringent applies here. Because CFSA's documents and data reflect core political speech and political association, they are also subject to the First Amendment privilege. "Disclosures of political affiliations and activities that have a 'deterrent effect on the exercise of First Amendment rights' are...subject to...exacting scrutiny." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2009), *cert. dismissed*, *Hollingsworth v. Perry*, 559 U.S. 1118 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976)). Courts apply such exacting scrutiny because compelled disclosure strikes at the core of the First Amendment. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably

enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "We have little difficulty concluding that disclosure of internal campaign communications can have such an effect on the exercise of protected activities." *Perry*, 591 F.3d at 1162. *See also Katzman v. State Ethics Board*, 228 Wis. 2d 282, 296, 596 N.W.2d 861 (Ct. App. 1999) (affirming order enjoining Ethics Board investigation into lobbyist spouse's political contribution because "'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'") (quoting *NAACP v. Alabama*, 357 U.S. at 460-61).

These principles have a direct application in litigation: "A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege*." *Perry*, 591 F.3d at 1160 (emphasis in original). Applying the First Amendment privilege, the *Perry* court held that given the burden on the campaign group's speech, "the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation." *Id.* at 1161. The information must also have been "carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Id.* Ultimately, the Ninth Circuit granted a writ of mandamus requiring the district court to enter a protective order prohibiting disclosure of communications concerning the formulation of campaign strategy and messages by a group that successfully passed an amendment prohibiting gay marriage. *Id.*

In criminal litigation, the standard is no less demanding. Indeed, the First Amendment privilege provides a level of protection much greater than that provided by the Fourth Amendment, even where documents are seized from a third party that may not

itself hold the First Amendment privilege. *In re Grand Jury Proceeding*, 842 F.2d 1229 (11th Cir. 1988).

Here, CFSA has an objectively reasonable fear of harassment. *See In re Grand Jury Proceeding*, 842 F.2d 1229, 1235-36 (11th Cir. 1988). In other cases, this has involved a showing that the group engages in political speech, and that previous disclosure of supporters' identities has led to private or official harassment. *Id.* (collecting cases). A lesser showing is required where, as here, "a government investigation into possible violations of law has already focused on a particular group or groups," based on the "rationale that the government investigation itself may indicate the possibility of harassment." *Id.* at 1236. The subpoenas to CFSA themselves are based on the presumption that CFSA engages in political speech. Further, the subpoenas to CFSA assume that its political associates are allies of the same groups and individuals who, when recently identified in the Wisconsin press (a matter of which this Court can take judicial notice), were subjected to boycotts, harassment, and death threats.

The First Amendment privilege applies. Accordingly, assuming for the moment that the government's theory of criminal liability actually exists under Wisconsin law and is consistent with the United States Constitution, the government "must show that the information sought is highly relevant to the claims or defenses in the litigation." *Perry*, 591 F.3d at 1160. The government must also show that its subpoena demands were "carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Id.* at 1161. As discussed in the next section, the government cannot make this showing as a matter of law.

## II. The Subpoenas Are Invalid Under the First and Fourth Amendments

The subpoenas are invalid for two distinct reasons. First, they cannot be "highly relevant" to any compelling state interest (*i.e.*, any act that has constitutionally been made subject to criminal penalties under Wisconsin law), because Wisconsin has chosen not to regulate the type of communications CFSA decided to issue. Accordingly, regardless of the degree of communication or coordination between CFSA and any candidate campaign, no campaign had to report CFSA's advertisements as a contribution. This means that no report could have been false, and certainly not criminally false.

Second, even if CFSA had paid for advertisements that could be regulated under Wisconsin law, only certain types of communications and conduct can constitute the kind of "coordination" that can—under the regulations of Wisconsin's Government Accountability Board, and consistent with the First Amendment—convert free, independent speech into a "contribution" that must be reported. Rather than focusing on this specific conduct, the Special Prosecutor's subpoenas plot a free-ranging exploration of all of CFSA's activities relating to the 2011 and 2012 recall elections, and all of its confidential communications, strategy, and supporters' identities going back to 2009. Accordingly, the subpoenas are fatally overbroad.

### a. The Wisconsin Legislature Chose to Limit its Campaign Regulation to Communications that Constitute Express Advocacy, and Chose Not to Reach CFSA's Issue Advocacy

The government's coordination theory cannot be sustained because, regardless of the quality and extent of communications between CFSA and any candidate campaign, all advertisements paid for by CFSA fall outside of the ambit of the Wisconsin campaign

finance law. None of the advertisements constituted "express advocacy."[1] Because Wisconsin only recognizes "express advocacy" as the sort of communication that has a "political purpose" and can therefore qualify as a reportable "disbursement" or "contribution," issue advertisements are not reportable under Wisconsin law.

**(1) Only Disbursements or Contributions Are Reportable**

Election-related spending must qualify as a "disbursement" or "contribution" before it becomes subject to reporting obligations, limits, or (in some cases) outright bans. No "disbursement" need be reported unless it (1) is a "contribution" or (2) expressly advocates the election or defeat of a clearly identified candidate. Wis. Stat. § 11.06(2). The second exception does not apply because no CFSA communication expressly advocated the election or defeat of a clearly identified candidate. *See* footnote 1, *supra*. Assuming for a moment that CFSA's communications were paid for by "disbursements,"[2] then, they could only have been reportable if they were otherwise defined as "contributions."

[1] Because the qualification of advertisements as "express advocacy" would be an element of any campaign finance related-crime, the government has the burden of identifying the advertisements it believed were express advocacy. CFSA believes the government cannot make this showing. Nonetheless, CFSA plans to provide evidence at the hearing on this motion showing the content of the advertisements it paid for in 2011 and 2012. From the text and content of these advertisements, this Court can determine whether any CFSA advertisements are implicated by the campaign finance law and, therefore, could be the subject of any regulation or civil or criminal penalty.

[2] The same feature that disqualifies CFSA's communications as "contributions" would also disqualify them as "disbursements." Like a "contribution," a "disbursement" must be made for political purposes. Wis. Stat. § 11.01(7)(a). As discussed in subsection (2) of this brief, issue ads are not made for political purposes.

**(2) As a Matter of Law, Issue Ads Are Not "Made for Political Purposes," and Therefore, Spending on Issue Ads Is Not a "Contribution"**

CFSA's communications could not have been contributions because, under Wisconsin law, they were not "made for political purposes." Wisconsin defines "contributions" as follows:

> (6)(a) Except as provided in par. (b), "contribution" means any of the following:
> 1. A gift, subscription, loan, advance, or deposit of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, **made for political purposes**. In this subdivision "anything of value" means a thing of merchantable value.

Wis. Stat. § 11.01(6)(a). (emphasis added).

Even adopting (*arguendo*) the government's likely theory that any person who pays for an advertisement that they know will benefit a candidate has given that candidate a "gift," Wisconsin's legislature supplemented the definition of contribution with an important additional requirement: "made for political purposes."

Parties wishing to avoid criminal penalties of the kind the government seeks to impose here must rely on the legislature's definition of the limiting phrase, "for political purposes." The law provides as follows:

> (16) An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum. In the case of a candidate, or a committee or group which is organized primarily for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, or for the purpose of influencing a particular vote at a referendum, all administrative and overhead expenses

> for the maintenance of an office or staff which are used principally for any such purpose are deemed to be for a political purpose.
> **(a) Acts which are for "political purposes" include but are not limited to:**
> **1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.**
> 2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office.

Wis. Stat. § 11.01(16) (emphasis added). The only specific act referenced in the statute is communication using *express advocacy*—the type of advertisement that is not at issue here. *See* Wis. Stat. § 11.01(6)(a)(1).[3]

The government may argue that notwithstanding Wisconsin's statutes, the Government Accountability Board ("GAB") promulgated in 2010 a regulation that defined "political purpose" to include a new category of issue advocacy: advertisements that reference candidates in a certain way 60 days before a general election, but do not call for voters to take a specific action in an election. Wis. Adm. Code GAB 1.28(3)(b). If it turns out that any CFSA advertisement falls into this narrow category, those ads cannot now form the basis for a criminal prosecution.

That is because shortly after the GAB promulgated the new regulation to expand the definition of "political purposes," the Wisconsin Club for Growth, Inc., a political

[3] This is consistent with Wisconsin's laws regulating disbursements by groups (potentially, like the Club or CFSA) who pay for their own communications and advertisements surrounding a candidate election. Wisconsin requires such groups to file an "oath" that they do not "act in cooperation or consultation with" a candidate, a candidate committee, or its agents. *See* Wis. Stat. § 11.06(7). Notably, this requirement extends only to groups who (unlike CFSA) "advocate the election or defeat of any clearly identified candidate or candidates in any election..." *Id.* It does not extend to issue advocacy groups. Thus, Wisconsin has extended its primary reporting requirements for independent expenditures only to groups engaging in the equivalent of express advocacy—not to groups engaging in issue advocacy or the species of issue advocacy recognized at the federal level as electioneering communications.

associate and ally of CFSA, challenged it in federal court based upon the very danger it is now facing—that it could be held civilly or criminally liable for a rule that it believed was unconstitutional and unauthorized by statute. The Club argued that the GAB's action was an unconstitutional enlargement of Wisconsin's campaign finance laws beyond the scope of conduct—express advocacy—regulated by the legislature. *See Wisconsin Club for Growth v. Myse*, 2010 WL 4024932, at *2 (W.D. Wis., Oct. 13, 2010) (noting that GAB and the Club had prepared a stipulation "permanently enjoining enforcement of the second sentence of GAB 1.28(3)(b)—the new language plaintiffs allege is invalid under state law and violates their First Amendment rights").

The district court stayed the action based in part upon GAB's representation that it would not enforce its attempted regulatory expansion of "political purpose" beyond express advocacy. *Wisconsin Club for Growth*, 2010 WL 4024932 at *8 ("Moreover, GAB seems to be backing away altogether from enforcement of the language of newly-amended GAB 1.28 at issue."). And recently in a companion case in the Seventh Circuit Court of Appeals, counsel for Wisconsin's GAB stated that "GAB intends to honor the stipulation [in the Club for Growth case]" and "GAB is committed to not enforcing the second sentence of GAB 1.28(3)(b) because of a stipulation in Club for Growth," even though it desired to defend the constitutionality of a part of that sentence. *See* Ex. A, attached hereto, pp. 62-63.

Wherever this nuanced maneuvering leaves GAB 1.28(3)(b), it certainly cannot be validly enforced based on GAB's signed stipulation with the Club and numerous representations in federal court that it would not enforce the rule. As a result, no person—including CFSA—who pays for the narrow category of advertisements that

GAB initially tried to reach with GAB 1.28(3)(b) has made a "disbursement" or "contribution" under Wisconsin law.

In conclusion, then, if CFSA made no "disbursement" or "contribution," then the money it spent to spread its beliefs among Wisconsin citizens cannot be reportable by anyone—not by CFSA, and not by any candidate committee. Wisconsin's legislature has not provided any special exception for communications that benefited a candidate campaign, that CFSA believed would benefit a candidate campaign, or that a candidate campaign wanted or believed would benefit it. The desire of the GAB or of a prosecutor to reach such conduct as a matter of policy cannot support a sweeping John Doe investigation. On this ground alone, the subpoenas should be quashed.

**(3) There Is No Novel End-Run Around the Coordination Laws**

As discussed above, the Wisconsin legislature has limited the reach of its campaign finance laws to acts with a "political purpose," a decision which has its genesis in the fact that the First Amendment limits not only the type speech that campaign finance laws can reach, but also the type of coordination which can constitute a contribution. Chafing under the First Amendment's restraints, the government may urge a novel theory that avoids the definition of "political purpose" and thereby reaches into every possible form of political speech.

Specifically, CFSA believes the government may now claim that every group that 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," should be "deemed a subcommittee of the candidate's personal campaign committee." Wis. Stat. § 11.10(4).

Taken without reference to any other part of the campaign finance law, this could convert almost every independent corporation, union, or church that could be deemed to have at some point acted "in concert with" a candidate, into a subcommittee of the candidate's principal committee. Since few Wisconsin campaigns have ever filed such a "subcommittee" report, felony convictions could be harvested as low-hanging fruit, virtually at will and limited only by the peculiar political interest of prosecutors.

However, this theory is unavailable to the government. Section 11.10(4) does not, in fact, apply to any "group" who acts "in concert with" a campaign. Instead, by its plain language, it applies only to "[a]ny *committee* which is organized or acts with the cooperation of or upon consultation with a candidate..." *Id.* And to be a "committee," a an entity or person must first make or accept "contributions" or "disbursements:"

> (4) "Committee" or "political committee" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, **which makes or accepts contributions or makes disbursements**, whether or not engaged in activities which are exclusively political, except that a "committee" does not include a political "group" under this chapter.

Wis. Stat. § 11.01(4) (emphasis added). As shown in sections a(1) and (2) above, money that is spent or given is only a "contribution" or "disbursement" if it is for "political purposes," and again, only express advocacy is made for "political purposes." Accordingly, section 11.10(4) is not a recently discovered trap door in the superstructure of Wisconsin's campaign finance law; it simply describes the legal effect of coordination in the peculiar circumstance where the entity coordinating with a candidate's committee has itself already qualified as a "committee" under Wisconsin law. It does not apply to CFSA, a non-committee. Try as it might, the government cannot escape the legislature's decision to limit the scope of the campaign finance law to express advocacy.

**b. Even if Wisconsin Regulated CFSA's Issue Advocacy, the Subpoenas Demand Documents Far in Excess of What Would Be Necessary to Establish Coordination Between a Candidate Campaign and an Organization Paying for Issue Advertisements**

The Wisconsin legislature provided no test for determining when a group's disbursement for a political communication could be considered a "gift" or contribution to a candidate, rather than an independent expense of the group to express its views about the candidate. Nor did the legislature provide that a group's mistake in reporting its expenses could qualify as a criminal offense. Instead, it mandated that groups who engaged in express advocacy must provide a registration statement or oath that they had not made expenses in "cooperation or consultation" with a candidate, candidate committee, or candidate's agent. Wis. Stat. § 11.06(7).

Despite the lack of statutory guidance, the GAB provided a four-part test for determining when an outside group's express advocacy communication could be deemed to be in "cooperation or consultation" with a candidate committee. That test mandates specific communications between the outside group and certain specified individuals associated with the candidate:

> (6) Guidelines.
> (a) Any expenditure made on behalf of a candidate will be presumed to be made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed and treated as an in-kind contribution if:
> 1. It is made as a result of a decision in which any of the following persons take part:
> a. A person who is authorized to raise funds for, to spend the campaign funds of or to incur obligations for the candidate's personal campaign committee;
> b. An officer of the candidate's personal campaign committee;
> c. A campaign worker who is reimbursed for expenses or compensated for work by the candidate's personal campaign committee;

> **d.** A volunteer who is operating in a position within a campaign organization that would make the person aware of campaign needs and useful expenditures; or
> **2.** It is made to finance the distribution of any campaign materials prepared by the candidate's personal campaign committee or agents;

Wis. Adm. Code GAB 1.42(6).

Even this test is vague; it explains who must "take part" in a decision, but does not explain what level or degree of discussion will trigger a finding, or what topics the two individuals must discuss. Because the test defines the line between fully protected speech and a potentially illegal contribution, specificity and notice is required. "First Amendment clarity demands a definition of "coordination" that provides the clearest possible guidance to candidates and constituents..." *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D. D.C. 1999). And as the Wisconsin Supreme Court has instructed:

> "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."... Such notice is a basic requirement of due process. *Grayned,* 408 U.S. at 108, 92 S.Ct. 2294. When First Amendment interests are implicated by laws which may result in criminal penalties, imprecise standards "may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.' " ..."Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

*Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 676-77, 597 N.W.2d 721, 734, *cert. denied*, 528 U.S. 969 (1999).

Even if it is crystal-clear, a First Amendment-compliant definition must also balance the government interest in avoiding quid pro quo corruption with fundamental rights of political speech and association. *Id.* At a minimum, this requires a narrowly-

tailored definition that "focus[es] on those expenditures of the type that would be made to circumvent the contribution limitations." *Id.* It also requires that it be limited to those types of expenditures that provide the candidate "with something of value that she wants or needs," which necessarily "depends on the circumstances." *Id.* The definition also should be limited to sources that the candidate will feel "obliged" to reward by taking "official action that is not in the public interest." *Id.*

Considering all of these factors, *Christian Coalition* developed the following substantive test for a "coordination" standard that would comply with the First Amendment:

> 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 spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

*Christian Coalition*, 52 F. Supp. 2d at 92.

Reading Wisconsin's regulatory standard in conjunction with the First Amendment limitations on any state regulation, it follows that any test would require as follows:

(1) communications between, on the one hand, a candidate, a candidate's fundraiser, a campaign officer, or worker or volunteer who is in a position to make decisions for the campaign, and on the other hand, the person who creates the ad;

(2) that the communication was about (a) content; (b) timing; (c) location, mode, or intended audience; or (d) volume; and was a "substantial" discussion or negotiation such that the campaign and independent group emerge as joint venturers or partners in the expressive expenditure.

Even if CFSA had engaged in express advocacy and was therefore subject to a coordination test, the subpoenas here[4] range far beyond the elements of the test. *See* Subpoenas, Ex. B hereto. In CFSA's case, they seek donor identities and internal CFSA communications for two full years prior to any recall election—when the recall subjects may not have even been elected to office in the first place. Additionally, they seek CFSA communications with a whole range of persons and entities who are not candidates or candidate campaigns. These communications may establish "coordination" among groups on one side of the legislative and political spectrum, but they have nothing to do with coordination between issue groups and candidate campaigns. Further, the subpoenas seek all CFSA communications with trusted political associates and vendors, regardless of whether they discuss the content, timing, or mode of distribution of advertisements paid for by CFSA.

In short, the subpoenas seem directed to uncover the entirety of the confidential communications that occurred on one side of Wisconsin's intensely-charged public policy and political debates over a two-year period—not specific communications that

[4] The subpoenas bear signs of being one-size-fits-all, and it seems likely that at least a few dozen individuals and entities received the exact same subpoena, regardless of their role in the political advertisements that are at the core of the governments' theory. For example, footnote 1 of CFSA's subpoenas instructs recipients to ignore references to themselves in a 29-person laundry list of people whose communications the recipients have to produce. *See* Ex. B. Presumably, many or most people in the list received the exact same subpoena, and the form subpoena was not individualized even to fix commands for recipients to produce communications with themselves.

are "highly relevant" to proving that covered advertisements were actually coordinated within the meaning of the law. If this John Doe investigation is intended to uncover evidence of a specific crime, it should be targeted to the elements of that crime rather than to all related—and First Amendment-protected—political communications.

**Conclusion**

CFSA's subpoenas must be quashed. First, they attempt to investigate a crime—failure to properly report "coordination" using non-express advocacy—which does not exist under Wisconsin law. Second, even if such a crime did exist, the subpoenas are overbroad under both the Fourth and First Amendments to the United States Constitution. John Doe investigations are not vehicles for roving explorations of political opponents' private, privileged political speech and association. Now, before more sensitive documents are seized or demanded, and before even more core political speech and association is unlawfully chilled, this Court must closely examine the viability of the government's legal theory and investigative plan. CFSA respectfully requests that this Court promptly:

(1) schedule a hearing and oral argument on this motion on or after the subpoena return date of October 29, 2013; and

(2) quash the four subpoenas directed to CFSA and its officers and directors.

Dated this 25th day of October, 2013.

**HANSEN REYNOLDS DICKINSON CRUEGER LLC**

By: _____

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