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October 18, 2013

The Honorable Barbara Kluka
Reserve Judge
P.O. Box 2143
Milwaukee, WI 53201

Re: In re John Doe Proceeding
Columbia County Case No. 13-JD-11
Dane County Case No. 13-JD-9
Dodge County Case No. 13-JD-6
Iowa County Case No. 13-JD-1
Milwaukee County Case No. 12-JD-23

Dear Judge Kluka:

Along with Edward D. Greim and Todd P. Graves of Graves Garrett LLC, we represent the Wisconsin Club for Growth, Inc. in connection with the John Doe Subpoena Duces Tecum served upon the Club in this proceeding.

Enclosed herewith is a Motion to Suspend Inspection Pending Approval of Protocol for Shielding Materials Protected from Prosecutorial Review under the Attorney-Client Privilege and Fourth and First Amendments.

Given the sensitivity of these matters and the constitutional issues involved, we respectfully request that the Court schedule an in-person hearing on the motion, in advance of the currently scheduled return date on the Subpoena of October 29, 2013. As noted in the Motion, the Club will also be filing a Motion to Quash the Subpoena which it intends to file next week. In order to properly protect its constitutional rights, the Club requests this motion as well be heard prior to the current return date of the Subpoena.

Very truly yours,

MATTHEW W. O'NEILL

MWO:kkn
Enclosure
cc: Special Prosecutor Francis D. Schmitz
Edward D. Greim, Esq.
Todd P. Graves, Esq.
Wisconsin Club for Growth

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

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

MOTION TO SUSPEND INSPECTION PENDING APPROVAL OF PROTOCOL FOR SHIELDING MATERIALS PROTECTED UNDER THE ATTORNEY-CLIENT PRIVILEGE AND FOURTH AND FIRST AMENDMENTS

The Wisconsin Club for Growth, Inc., hereby moves this Court to: (1) suspend the Special Prosecutor's inspection of sensitive and privileged information seized from the Club's political associates; (2) approve a protocol for the Club and other entities to assert attorney-client and First Amendment privileges over the seized materials; and (3) order the Special Prosecutor to preserve and prepare to produce data relating to the protocols the Special Prosecutor and any "taint team" has used to search files and segregate documents for privilege. Because there is a significant risk that the First Amendment and Fourth Amendment rights of the Club and many parties are being violated, or are about to be violated, the Club respectfully requests that this Court grant items (1) and (3) immediately in order to preserve the status quo, and schedule an in-person hearing to consider the substantive law and the document review protocol that should be adopted for the remainder of this proceeding.

Introduction and Factual Background

1. Shortly before October 8, 2013, the directors of the Wisconsin Club for Growth, Inc. (the "Club") received subpoenas for all of their records relating to various Wisconsin recall campaigns in 2011 and 2012. These subpoenas demand disclosure of the Club's internal political deliberations and associational activity. They also demand

disclosure of the Club's communications with many of its political associates and vendors, including political consultants R.J. Johnson and Deborah Jordahl.

2. The subpoenas suggest that the government seeks to prove a "coordination" theory. Assuming for the moment that such a theory exists under Wisconsin law, is tenable under the United States Constitution, and could be proved,[1] a finding of coordination would convert the Club's independent and fully protected political speech into "contributions" to one or more candidate committees. Because the campaigns did not consider or treat the Club's speech as contributions when they were making financial disclosures, this revised treatment would require an amendment of past campaign finance reports. Under the government's theory, it could also allow numerous felony convictions.

3. The Club resolved to gather responsive documents, and turned to Johnson and Jordahl, whom it expected would be able to provide the Club with materials for review or production. The Club learned that law enforcement officers had already conducted pre-dawn searches and seizures at the family homes of Johnson and Jordahl. Officers removed files and numerous electronic devices without conducting any review for subsets of documents residing on the devices. The Club believes that the government made off-site mirror images of the entire contents of the devices.

4. Further, assuming that any warrants are as broad as the subpoenas the Club received, it is likely that the government is now perusing the entire contents of the

[1] The Club intends to directly challenge the subpoenas under the First and Fourth Amendments, as it appears that the prosecution's "coordination" theory cannot, in fact, apply under Wisconsin law. The instant motion is filed simply to halt and attempt (so far as possible) to remediate ongoing constitutional violations.

seized files and devices not only to uncover any documents "related" to the 2011 and 2012 recalls, but to review every single communication between the Club and Jordahl or Johnson since early 2009.

5. In short, the prosecution team now likely possesses a substantial trove of documents that are protected by the attorney-client privilege, the First Amendment privilege, or are otherwise well beyond the scope of any alleged crime being investigated (and therefore, for Fourth Amendment purposes, likely beyond the permissible scope of any legal process that authorized the seizure).

6. The undersigned asked the Special Prosecutor eight days ago to disclose the procedures being used to ensure that these materials are not being unlawfully searched and viewed by members of the prosecution team. The Special Prosecutor has failed to respond. Additionally, the Special Prosecutor has not indicated that any "taint" or "privilege" team he is using to screen the raw electronic materials is applying the First Amendment privilege or is otherwise screening out sensitive political documents that would be irrelevant to any "coordination" test that may apply under Wisconsin law.

7. This Court's prompt intervention is necessary to ensure that no further constitutional harm is done to the Club or any other person or entity whose files were seized. By moving quickly to protect the integrity of the investigation, this Court can also avoid the possible suppression of evidence or disqualification of members of the prosecution team who unlawfully viewed privileged materials. As discussed below, this Court can take several practical measures to supervise the investigation and ensure its integrity.

I. The First and Fourth Amendment Protect the Club Against Overbroad Computer and File Searches

8. Both the First and Fourth Amendment to the United States Constitution protect the Club and apply to the Special Prosecutor's search and seizure of files. Based on information the Club has gathered from its conference with the Special Prosecutor and from its review of its own Subpoena, there is a substantial likelihood (or, absent judicial supervision, at least a serious danger) that the Special Prosecutor's search of the seized files is overbroad under both the First and Fourth Amendments.

9. 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). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S .192, 196 (1927).

10. "Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance... [T]he centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain." *U.S.*

v. Galpin, 720 F.3d 436, 446 (2d Cir. 2013) (warrant to search computer was unconstitutionally overbroad). As the *Galpin* court explained:

> The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous. This threat is compounded by the nature of digital storage. Where a warrant authorizes the search of a residence, the physical dimensions of the evidence sought will naturally impose limitations on where an officer may pry: an officer could not properly look for a stolen flat-screen television by rummaging through the suspect's medicine cabinet, nor search for false tax documents by viewing the suspect's home video collection.[7] Such limitations are largely absent in the digital realm, where the size or other outwardly visible characteristics of a file may disclose nothing about its content.

Galpin, 720 F.3d at 447. The danger that insufficiently specific computer search warrants can morph into the sort of general search warrants prohibited by the Fourth Amendment compelled the *Galpin* court to warn that "[t]his threat demands a heightened sensitivity to the particularity requirement in the context of digital searches." *See also U.S. v. Schlinghoff*, 901 F.Supp.2d 1101, 1105 (C.D. Ill. 2012) (requiring suppression of child pornography files prosecution computer expert opened during review of computer for documents relating to passport fraud and harboring of an illegal alien).

11. Additionally, where documents and data reflect core political speech and political association, they are 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) (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).

12. 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,[2] "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.*

13. 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

[2] The Club is also preparing a motion to quash, which it expects to file the week of October 21, 2013. Following *Perry*, that motion will more fully establish the factual basis for the burden that the subpoenas and the seizure of Club records have had on the Club's First Amendment rights. It is that showing which will ultimately require the application of the First Amendment privilege.

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).

II. There Is a Substantial Likelihood that the Search and Seizure of Club Information Has Been Overbroad

14. Considering the breadth of the subpoenas the Club has already received, and based on the Club's knowledge that Johnson and Jordahl will possess much more of its confidential political communications than would be necessary to establish any "coordination" recognized under Wisconsin law, there is a substantial likelihood that any search and seizure has been overbroad.

15. First, the Club's subpoenas command it to produce all information about its donors, and about its communications with Johnson and Jordahl, as far back as 2009—over two years before any recall campaign. This demand is not tied by subject matter or timing to the recall campaign. Additionally, it is completely unmoored from the specific actions—alleged coordination in the distribution of political advertisements—that the government will likely claim led to the commission of a crime. If the warrant, search, and seizure of Johnson and Jordahl's files and computers are similar in scope to the Club's subpoenas, they would allow the prosecution team to peruse all of the Club's political activity since 2009, and (more narrowly, but still too broadly) all of its recall-related activity.

16. Second, even if the searches are part of a general effort to find "coordination," without more specific guidance on the acts that constitute coordination, they are likely overbroad. "Coordination" does not have the meaning in campaign finance law (and under a constitutional analysis) that it has in common parlance. Instead,

it is an important constitutional concept that defines the very narrow line between completely protected, core political speech, and (in some states) an impermissible contribution that can also constitute a felony. "Coordination" is ultimately a legal conclusion that can only be drawn based upon the application of both (1) a specific regulatory test that requires the finding of certain facts and (2) constitutional limitations. *See* Wisconsin Admin. Code § GAB 1.42(6) (setting forth 4-part test for determining whether contacts between specific individuals constitute coordination); *Federal Election Commission v. Christian Coalition*, 52 F.Supp.2d 45, 91-92 (D. D.C. 1999) (explaining the quality and quantity of communication necessary for contacts to constitute "coordination" and qualify for regulation as a contribution under the First Amendment).

17. In short, very few contacts between a campaign and outside person are relevant for determining coordination. And of contacts that do occur relating to third-party political advertisements, only certain types of contacts can support a finding of "coordination." Accordingly, any sweeping allowance to search and review the totality of a group's documents relating to a certain race, the totality of the communications between two people, or even the totality of documents that seem related to a lay understanding of "coordination," is either overbroad or places so much discretion in the hands of law enforcement that it is tantamount to a general warrant.

18. Here, the Special Prosecutor has declined to state how his privilege or review team is operating. Indeed, he has failed to confirm that the prosecution team even recognizes the potential applicability of the First Amendment privilege—much less that it is actually applying the privilege to screen out documents that are not "highly relevant" to proving coordination under Wisconsin law. *Perry*, 591 F.3d at 1161. Thus, there is a

substantial likelihood that the prosecution's search has already swept into privileged materials, and that members of the prosecution team have been exposed to this taint.

III. This Court Can and Should Supervise the Review of Seized Documents

19. For the reasons discussed above, the special problem of Fourth Amendment and First Amendment overbreadth in a sensitive political case should require heightened judicial supervision. This is particularly true where law enforcement is reviewing computers, which typically contain far more information than the files relevant to a specific crime:

> The promise of the Fourth Amendment to be free from unreasonable searches and seizures contemplates a warrant that sets forth with specificity the area to be searched and the subject matter of the search. So if a warrant authorizes an officer to look in all files on a computer, should the courts care how it is done? This Court believes so.

U.S. v. Schlinghoff, 901 F.Supp.2d 1101, 1105 (C.D. Ill. 2012).

20. Here, the Special Prosecutor has suggested the he is using a taint team to review at least some of the seized material. A "taint" team is so called "because the knowledge that members of the team have gained by examining privileged information 'taints' them, so that they should have no involvement or input in the course of the investigation or the development of evidence." Douglas Farquhar, "Federal Taint Teams and Attorney-Client Privilege in Corporate Criminal Investigations," 72 Contemporary Legal Note Series, Washington Legal Foundation (February 2013) at 3.

21. "Taint teams cannot be effective if the secret materials are not segregated and transmitted to them." *Id.* at 9. Further, as the Sixth Circuit recently noted, even taint teams that receive secret materials and are given appropriate instructions for their review can be untrustworthy in sensitive cases:

> Furthermore, taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors. That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations. **It is thus logical to suppose that taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience.**

In re Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006) (emphasis supplied). The Court elaborated on several risks to using even a properly-instructed taint team:

> It is reasonable to presume that the government's taint team might have a more restrictive view of privilege than appellants' attorneys. But under the taint team procedure, appellants' attorneys would have an opportunity to assert privilege *only* over those documents which *the taint team has identified* as being clearly or possibly privileged. As such, we do not see any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise; that is to say, we can find no check against Type II errors in the government's proposed procedure. On the other hand, under the appellants' proposal, which incidentally seems to follow a fairly conventional privilege review procedure employed by law firms in response to discovery requests, the government would still enjoy the opportunity to challenge any documents that appellants' attorneys misidentify (via the commission of Type I errors) as privileged.
>
> We thus find that, under these circumstances, the possible damage to the appellants' interest in protecting privilege exceeds the possible damage to the government's interest in grand jury secrecy and exigency in this case. Therefore, we reverse the district court, and hold that the use of a government taint team is inappropriate in the present circumstances. Instead, we hold that the appellants themselves must be given an opportunity to conduct their own privilege review; of course, we can presently make no ruling with respect to the merits of any claimed privilege that may arise therefrom.

Id. at 523.

22. The Club respectfully suggests that at least the same risks are present in this case—if they have not already come to fruition. Presently, defense counsel know nothing about the membership of the taint team, the methods used to screen them from

the prosecution team, or even what information is being treated as privileged or beyond the scope of permissible review under the First and Fourth Amendments. Thus, there is currently no "check" on the taint team procedure or on the review of sensitive materials. *See In re Grand Jury Proceedings*, 454 F.3d at 523.

23. To halt any constitutional violations which have already occurred, and to ensure against the commission of any additional violations, the Club respectfully suggests that those entities whose documents were seized have an opportunity to conduct their own review for purposes of (1) the attorney-client privilege; and (2) the First Amendment privilege. A privilege log may then be provided to the prosecution, and disputed items can be reviewed and resolved by this Court or a special master. This review can be conducted in an expedited manner and should not lead to the degradation of evidence, since mirror images of the devices have likely already been made.

24. Further, the Club respectfully suggests that mirror images of the working copies of the devices being reviewed by the prosecution or taint teams be preserved and produced for forensic examination. In that way, entities whose documents were seized will be able to determine whether any privileged materials have already been viewed. At a later stage, this might possibly require the suppression of evidence or the disqualification of counsel.

25. Finally, the Club suggests that the following steps be taken as soon as possible and before any further review of documents. The Special Prosecutor should:

a. preserve and disclose any records of his search and search protocol. Specifically, the Special Prosecutor should:

i. produce any and all protocols and procedures for the taint team review, including an explanation of the procedures (if any) being followed to keep the taint team from sharing with the prosecution team documents that are protected by the attorney-client privilege, First Amendment privilege, or that are beyond the scope of whatever process was used to obtain the materials;

ii. identify every person on the taint team, and for each person, indicate the dates and approximate times that the person worked on the taint review; and

iii. identify the person (if any) who has been deciding whether materials are in fact subject to the attorney-client privilege, the First Amendment privilege, or are within the scope of whatever process was used to obtain the materials;

b. produce a receipt for the devices and files that were seized;

c. produce an audit log showing what steps were taken to forensically preserve and search the seized devices;

d. disclose the name and version of the program used to make any mirror images or perform searches;

e. as discussed above, immediately produce copies of any mirror images, or "working copies" of those mirror images; and

f. provide to the parties a log of those documents or files that have already been accessed by the taint team and prosecution team.

IV. The Club Is Prepared to Move Expeditiously

26. The Club respectfully requests an oral argument and in-person hearing regarding this motion as soon as is practicable, but in any event, in advance of the return date (October 29, 2013) of the Club's own subpoenas.

27. Further, perhaps because of secrecy orders, the Club is unaware of the identity of all other parties that have received subpoenas or have been subject to searches and seizures. Some of those entities may well have documents of the Club. Some of those entities may have already had documents seized from the residences of Johnson and Jordahl, but may be unaware that the seizure occurred. In view of this, the Club respectfully requests that the Special Prosecutor be instructed to serve a copy of this motion, along with any notice of hearing from the Court, on all parties who have been served with any form of process, or whose documents it reasonably believes have been subject to the search and seizure.

28. Finally, this motion can be an important first step in this Court's overall supervision of this proceeding. The Club intends to file a motion to quash the underlying subpoena. The Club will make a showing in that motion that the crime the government appears to be investigating is not in fact a crime under Wisconsin law and under the United States Constitution. The motion will also show that the materials being sought by the government cover a far greater scope than what would actually be necessary to evaluate even the broadest interpretation of the alleged crime.

29. Given the scope of the government's demands and the unprecedented nature of its seizure of political communications from private residences, the Club is concerned that the government's inspection of materials could quickly run far afield of

what appears to be the initial focus of the inquiry. The possibility of such a second-order constitutional injury makes it all the more important that this Court undertake an expeditious review of the legal basis for this proceeding. The necessary first step in that review is preservation of the status quo and the assertion of judicial supervision over the government's review of seized political communications.

WHEREFORE, the Club respectfully requests that this Court set this matter for an expedited, in-person hearing, and:

(1) order that pending the hearing, the Special Prosecutor: (a) suspend the government's inspection of sensitive and privileged information seized from the Club's political associates; and (b) preserve and prepare to produce data relating to the protocols the Special Prosecutor and any "taint team" has used to search files and segregate documents for privilege.

(2) at or after the hearing, approve a protocol to limit the government's access to documents to only those items relevant to the alleged crime, and a process for the Club and other entities to assert attorney-client and First Amendment privileges over the seized materials.

Respectfully submitted this 18th day of October, 2013,

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