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IN THE MATTER OF  
JOHN DOE PROCEEDINGS

COLUMBIA Co. Case No. **13JD000011**  
DANE Co. Case No. **13JD000009**  
DODGE Co. Case No. **13JD000006**  
IOWA Co. Case No. **13JD000001**  
MILWAUKEE Co. Case No. **12JD000023**

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**STATE'S CONSOLIDATED RESPONSE TO MOTIONS TO QUASH  
SUBPOENAS DUCES TECUM**

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**I. INTRODUCTION**

The State is filing a consolidated response to the motions to quash subpoenas filed in this John Doe proceeding by Friends of Scott Walker (FOSW), Wisconsin Club for Growth (WiCFG), Citizens for a Strong America (CFSa), Wisconsin Manufacturers and Commerce (WMC) and Wisconsin Manufacturers and Commerce – Issues Mobilization Council (WMC-IMC).<sup>1</sup> The State believes that a consolidated response is proper as the movants make similar arguments concerning the scope and constitutionality of the subpoenas.<sup>2</sup> In asserting their defenses, the movants fail to appreciate the consequences of coordination under Wisconsin campaign finance law. Coordination results in contributions and disbursements subject to regulation regardless of whether the activities constitute express advocacy.

As the movants all speculate as to the nature of the investigation, a detailed summary of the factual basis for this investigation is included. As those facts show, the investigation focuses on a wide-ranging scheme to coordinate activities of several organizations with various candidate committees to thwart attempts to recall Wisconsin Senate and Gubernatorial candidates. That coordination included a nationwide effort to raise undisclosed funds for an organization which then funded the activities of other

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<sup>1</sup> For the remainder of this response, the initials of the respective entities will be used.

<sup>2</sup> Indeed, the legal arguments made by the WiCFG and CFSa are virtually identical.

organizations supporting or opposing candidates subject to recall. The subpoenas are necessarily broad in an effort to collect additional evidence because the coordination activities were extensive and involving at least a dozen separate organizations.

The State recognizes the important First Amendment protections implicated in election campaigns and fundraising. However, the Wisconsin Legislature has also declared that the State of Wisconsin has a compelling interest in transparent campaign financing and that “our democratic system of government can only be maintained if the electorate is informed.” Wis. Stat. § 11.0001(1). Furthermore, the United States Supreme Court has found 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*, 130 S.Ct. 876, 899 and 916 (2010.) No court has ever recognized that secret, coordinated activity resulting in “undisclosed” contributions to candidates’ campaigns and used to circumvent campaign finance laws is protected by the First Amendment. Accordingly, the purpose of this investigation is to ensure the integrity of the electoral process in Wisconsin.

## **II. PROCEDURAL POSTURE<sup>3</sup>**

On August 10, 2012, the State of Wisconsin filed a petition requesting the commencement of a John Doe proceeding in Milwaukee County pursuant to Wis. Stat. § 968.26 for the purpose of investigating potential crimes including but not limited to violations of Wis. Stats. §§11.27(1), 11.26(2)(a), 11.61(1)(b), 11.36, 939.31 and 939.05, viz., Filing a False Campaign Report or Statement (PTAC), Conspiracy to File a False Campaign Report or Statement, and Political Solicitation involving Public Employees. A corresponding affidavit dated August 10, 2012 in support of the commencement of a John Doe proceeding was filed outlining the factual basis for the belief that a John Doe investigation was warranted. Based upon the petition and supporting affidavit, a John Doe proceeding was commenced by the order of Judge Barbara Kluka on September 5, 2012 as Milwaukee County Case No. 2012JD000023.<sup>4</sup>

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<sup>3</sup> Pursuant to the Secrecy Order previously entered in this John Doe investigation, the procedural posture of this case relevant to the issuance of the above subpoenas has been redacted from the brief provided to counsel for the movants, but is filed with the John Doe Judge.

<sup>4</sup> The August 10, 2012 petition for commencement of the John Doe proceeding and supporting affidavit are incorporated by reference.

In January 2013, Milwaukee County District Attorney John T. Chisholm referred the John Doe investigation to Wisconsin Attorney General J.B. Van Hollen. The referral was based upon evidence adduced during the early stages of the John Doe investigation indicating that potential campaign finance violations were committed by individuals residing in Columbia, Dane, Dodge and Iowa Counties, in addition to Milwaukee County.

By a letter dated May 31, 2013<sup>5</sup>, Attorney General Van Hollen advised District Attorney Chisholm that he declined to provide assistance. The basis for the Attorney General's declination was a potential conflict of interest, concerns related to perceptions of impartiality (or bias), and the fact that the Government Accountability Board, as a non-partisan entity, had the authority and statewide jurisdiction to investigate.<sup>6</sup>

After consultation, the District Attorneys of Dane, Columbia, Iowa, and Dodge counties filed separate petitions for the commencement of a John Doe investigation. The petitions alleged the same violations as in Milwaukee County Case No. 12JD000023. Judge Kluka was appointed by the presiding Judge in each of the respective counties to hear the petitions. On August 21, 2013, Judge Kluka authorized the commencement of a John Doe proceeding in each of the respective four counties.<sup>7</sup>

On that same day, the District Attorneys jointly submitted a letter to Judge Kluka.<sup>8</sup> The letter cited the statewide nature of the criminal investigation and the need to conduct a unified, efficient, and effective investigation that could only be facilitated by the appointment of a special prosecutor. This need, of course, was occasioned by the recusal of Attorney General Van Hollen who possessed statewide authority to conduct such an investigation.

Judge Kluka agreed that there was a "need for one overall investigation and prosecution." Citing the Court's authority as expressed in *State v. Carlson*, 2002 WI App 44, 250 Wis.2d 562, 641 N.W.2d 562 and *State v. Cummings*, 199 Wis.2d 721, 735, 546 N.W.2d 406, 411 (1996), the Court then appointed a former federal prosecutor, Attorney

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<sup>5</sup> The letter was received on June 5, 2013.

<sup>6</sup> The May 31, 2013 letter of Attorney General J.B. Van Hollen is attached and included as Exhibit A.

<sup>7</sup> The respective petitions and orders are part of the record and incorporated by reference.

<sup>8</sup> The letter of August 21, 2013 is attached as Exhibit B.

Francis D. Schmitz, as a Special Prosecutor in the five counties. The order was dated August 23, 2013.<sup>9</sup>

### III. THE LEGAL PREDICATE FOR THE JOHN DOE INVESTIGATION

Most of the issues raised by the movants have already been decided in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board (WCVP v. SEB)*, 231 Wis.2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999). See generally Section V.C.4 at page and specifically a discussion, pp 24-25.

It is axiomatic in the law of campaign finance that, consistent with First Amendment considerations, campaign contributors must be identified and contributions may be limited in amount. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Campaign reporting laws, which require disclosure of the true source and extent of candidate support, guard against potential corrupting influences that undermine the democratic process. *Id.*; See also Wis. Stat. §11.001(1).

A contribution, under the law, is “[a] gift ... of money or anything of value ... made for political purposes.” Wis. Stat. § 11.01(6)(a)1. Contributions are not limited to acts of “express advocacy.” Under Wis. Stat. §11.01(16), for example, an act is also done for a political purpose if it is undertaken “for the purpose of influencing the recall from or retention in office of an individual holding a state or local office.” In addition, an act is also done for a political purpose if it is undertaken “for the purpose of influencing the election ... of any individual ....” *WCVP v. SEB*, 231 Wis.2d at 680. In-kind contributions are subject to reporting requirements just the same as cash contributions. Wis. Stats. §§11.06(1) and 11.01(6)(a)1. See also Wis. Adm. Code GAB §1.20(1)(e).

Contributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy. See §11.06(1). *WCVP v. SEB*, 231 Wis.2d at 679 (emphasis in original). 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. See *id.*

In addition, another Wisconsin statute specifically provides that no candidate may establish more than one personal campaign committee; however such committee may have subcommittees. Wis. Stat. §11.10(4). Any subcommittees shall have the

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<sup>9</sup> The order of appointment dated August 23, 2013 is attached as Exhibit C.

candidate's personal campaign treasurer deposit all contributions received in and make all disbursements from the candidate's campaign depository account. *Id.* If a committee coordinates with a candidate's campaign committee, by statute, such committee is a subcommittee of the candidate's campaign committee.<sup>10</sup> This requires the candidate's campaign committee to report any contribution made to and any disbursements made by the subcommittee. This also mandates that the subcommittee may only accept permissible contributions and make only permissible disbursements in compliance with Wis. Stats. ch. 11 because it is in effect the candidate's campaign committee.

A candidate's campaign committee commits a crime when it knowingly coordinates with other organizations without reporting either permissible in-kind contributions from those organizations or all activity of those organizations as required by Wis. Stats. ch. 11.<sup>11</sup>

This investigation is premised upon information which provides the State strong reason to believe that coordination occurred in the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. Consequently, significant in-kind or direct contributions to the recall candidates were not disclosed on campaign finance reports as required. In addition, prohibited contributions from corporations or contributions well beyond legal contribution limits were made and accepted.

None of the candidate campaign, legislative campaign, or other political committees identified in this investigation could have legally coordinated with other organizations. The coordination under investigation resulted in either prohibited and illegal in-kind or direct contributions that were not reported by the candidate campaign committees as required by law.

#### **IV. THE FACTUAL PREDICATE PROVIDING A "REASON TO BELIEVE" A CRIME HAS OCCURRED.**

A John Doe proceeding commenced under Wis. Stat. § 968.26 is a special investigative proceeding commenced with a petition and a corresponding finding that there is a *reason to believe* that a crime has occurred within the jurisdiction of the court.

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<sup>10</sup> Wis. Stat. §11.10(4) provides that, when a third party "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, [it] is deemed a subcommittee of the candidate's personal campaign committee."

<sup>11</sup> Wis. Stat. §11.27(1) provides, "No person may prepare or submit a false report or statement to a filing officer under this chapter."

*State ex. rel. Reimann v. Circuit Court for Dane County*, 214 Wis.2d 605, 611, 571 N.W.2d 385, 386 (1997). This section summarizes the factual basis which provides the State the reason to believe that a crime has been committed in violation of the statutes referenced in Section III.

#### **A. Overview.**

The investigation presently focuses on activities of a number of “organizations,” candidate campaign committees, and a legislative campaign committee during the 2011 and 2012 Wisconsin Senate and Gubernatorial recall election campaigns. These organizations include movants WiCFG, CFSA, and WMC-IMC, as well as other organizations funding or funded by those entities. Under Wisconsin law, coordination between purportedly “independent entities” and candidate campaign committees (such as FOSW) has either of these effects: (1) the “independent entity” is deemed a subcommittee of the candidate’s personal campaign committee (Wis. Stats. §11.10(4))<sup>12</sup> and all permissible contributions and disbursements must be disclosed on the candidate’s personal campaign committee reports pursuant to Wis. Stat. §11.06 or (2) permissible coordinated expenditures must be disclosed as in-kind contributions on the candidate’s personal campaign committee reports pursuant to Wis. Stat. §11.06. Permissible contributions do not include corporate contributions (Wis. Stat. §11.38) or certain contributions exceeding statutory limits (Wis. Stat. §11.26.) For this reason the investigation focuses on the degree of coordination, if any, between the respective organizations and candidate campaign committees.

Consequently, the legal / factual issue relative to the propriety of subpoenas issued is whether the documents in possession of the movants are relevant to an investigation of campaign coordination. That is, are the documents “in some manner connected” with improper campaign coordination. *See State v. Washington*, 83 Wis.2d 808, 843, fn. 35, 266 N.W.2d 597, 614 (1978)(“The test [of relevance] is whether the information sought is in some manner connected with the suspected criminal activity under investigation.”)

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<sup>12</sup> See FN 10.

**B. Factual basis for the issuance of the subpoenas duces tecum to the movants.<sup>13</sup>**

**1. Background of the Movants**

**a. Wisconsin Club for Growth (WiCFG)**

WiCFG is a tax exempt “social welfare organization” formed under Title 26 U.S.C. 501(c)(4). State of Wisconsin online records related to incorporation reflect that WiCFG is a “non-stock” corporation. In the 2009 and 2010 federal tax filings for the WiCFG, Eric O’Keefe was listed as the Director, Charles Talbot was the President/Director, and Eleanor Hawley was the Director / Secretary / Treasurer.<sup>14</sup> Deborah Jordahl is a signatory on the WiCFG bank account. During the 2011 to 2012 Wisconsin Senate and Gubernatorial recall elections, R.J. Johnson exercised direction and control over WiCFG.<sup>15</sup>

**b. Citizens for a Strong America (CFSA)**

CFSA is also a “501(c)(4)” organization. Federal tax filings reflect that John Connors is the President. CFSA, however, was the creation of Deborah Jordahl and R.J. Johnson.<sup>16</sup> R.J. Johnson’s wife, Valerie, was the treasurer for CFSA and a signatory on the CFSA bank account.<sup>17</sup>

**c. Wisconsin Manufacturers and Commerce (WMC) and WMC – Issues Mobilization Council (WMC-IMC)**

WMC is a Wisconsin business trade organization that through WMC-IMC<sup>18</sup> became a means used by WiCFG for placement of advertisements during the recall campaign supporting Governor Scott Walker and criticizing his opponents.<sup>19</sup> WiCFG contributed \$2,500,000 to Wisconsin Manufacturers and Commerce (WMC), which was deposited in the WMC-IMC bank account. In turn, WMC-IMC ran advertisements supporting gubernatorial candidate Scott Walker and advertisements critical of his

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<sup>13</sup> For the benefit of the court, reference will be made in this brief to the particular affidavits, paragraphs and exhibits that provide the legal and factual basis for the subpoenas. Since those documents are subject to the secrecy order, they will not be provided to the movants.

<sup>14</sup> See Affidavit of December 10, 2012, ¶19

<sup>15</sup> Affidavit of September 28, 2013, ¶¶21-27.

<sup>16</sup> See Affidavit of December 10, 2012, ¶14 and 15; Affidavit of September 28, 2013, ¶16.

<sup>17</sup> See Affidavit of December 10, 2012, ¶15; also Affidavit of September 28, 2013, ¶17.

<sup>18</sup> WMC-IMC is a 501(c)(4) corporation.

<sup>19</sup> See Affidavit of September 28, 2013 ¶41.

opponent, Tom Barrett.<sup>20</sup> James Buchen was Senior Vice President of WMC and participated conference calls with Governor Walker and others involving the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections.<sup>21</sup>

d. Friends of Scott Walker (FOSW)

The Friends of Scott Walker (FOSW) was the personal campaign committee for the gubernatorial candidate, Scott Walker, at all times throughout the period before and during the recall elections. R.J. Johnson and Deborah Jordahl were political consultants, and worked together as R.J. Johnson and Associates, Coalition Partners, and Jordahl / Johnson Strategic Communications.<sup>22</sup> R. J. Johnson was an agent of the FOSW campaign, as were other individuals.<sup>23</sup> R.J. Johnson was involved in fundraising, media buys and production, as well as campaign strategy and other campaign activities. Similarly, his partner, Deborah Jordahl, was involved in the media production and strategy for FOSW.<sup>24</sup>

2. Factual basis for the issuance of the subpoenas

The affidavits which are a part of the record outline the close coordination by R.J. Johnson with other FOSW agents, including Governor Scott Walker, in the 2011 and 2012 Wisconsin Senate and Gubernatorial recall campaigns.<sup>25</sup> Agents of FOSW and WiCFG such as Mary Stitt and Kelly Rindfleisch, were involved in fundraising for the 2011 and 2012 Wisconsin Senate and Gubernatorial recall campaigns not only for FOSW, but also for WiCFG.<sup>26</sup> Kate Doner and Doner Fundraising, additional agents of FOSW and WiCFG, coordinated fundraising on behalf of both organizations. During the 2011 Wisconsin Senate recall elections, Governor Walker's Chief of Staff, Keith Gilkes was included in discussions involving coordination between several different

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<sup>20</sup> See Affidavit of September 28, 2013, ¶41.

<sup>21</sup> See Affidavit of September 28, 2013, ¶41; Affidavit of December 10, 2012, ¶27.

<sup>22</sup> See Affidavit of September 28, 2013 ¶10.

<sup>23</sup> See Affidavit of December 10, 2012, ¶12- 20. Those individuals included: 1) Scott Walker, the gubernatorial candidate; 2) Keith Gilkes – the FOSW campaign manager; 3) Kate Lind – treasurer for FOSW; 4) R. J. Johnson - a paid advisor to FOSW who worked for WiCFG and with CFSA; 5) Deborah Jordahl - an advisor to FOSW (who was paid by R.J. Johnson and Associates, a paid consultant to FOSW) who issued checks for WiCFG; 6) Kate Doner and Doner Fundraising – fundraisers working for FOSW and WiCFG; 7) Kelly Rindfleisch – a fundraiser for FOSW and WiCFG; 8) Mary Stitt – a fundraiser for FOSW and WiCFG.

<sup>24</sup> See Affidavit of December 10, 2012, ¶67 and ¶69.

<sup>25</sup> See Affidavit of September 28, 2013 and December 10, 2012 generally.

<sup>26</sup> See Affidavit of September 28, 2013, ¶58



organizations. During the 2012 Wisconsin Senate and Gubernatorial recall elections, Keith Gilkes served as the Campaign Manager for Governor Scott Walker and again was included in discussions involving coordination between several different organizations. In addition to fundraising for FOSW, Governor Scott Walker simultaneously raised funds for WiCFG for “coordinated activities” under the control and direction of R.J. Johnson during the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. Concurrently, R.J. Johnson directed many activities of both WiCFG and FOSW.<sup>27</sup>

For all practical purposes, movant WiCFG “was” R.J. Johnson and Deborah Jordahl. R.J. Johnson has stated, “We own CFG.”<sup>28</sup> Deborah Jordahl was a signatory for the WiCFG bank account and is believed to have signed all WiCFG checks from January 2011 to June 2012.<sup>29</sup>

During the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections, R.J. Johnson used WiCFG as the hub for the coordinated activities involving 501(c)(4) organizations and FOSW. Beginning in March 2011,<sup>30</sup> there were open and express discussions of the need to coordinate the activities of entities like Americans for Prosperity (AFP), Club for Growth (CFG), Republican Party of Wisconsin (RPW), Republican State Leadership Committee (RSLC), and the Republican Governors Association (RGA). Conference calls were held involving entities such as FOSW, RGA, and WMC.<sup>31</sup>

WiCFG funded several other entities, including “501(c)(4)” organizations, enabling those organizations to run advertisements or conduct activity in support of Republican recall candidates or to oppose candidates running against the Republican recall candidates.<sup>32</sup> Money from WiCFG funded the political activities of CFSA, WMC-IMC, and other 501(c)(4) organizations.<sup>33</sup> WiCFG also funded CFSA, yet another organization that was controlled by R.J. Johnson. Of the \$4,620,025 in revenue reported by CFSA in 2011, WiCFG contributed \$4,620,000, or 99.99%, of CFSA revenue. In turn, CFSA provided funding to Wisconsin Family Action (\$1,169,045), Wisconsin Right

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<sup>27</sup> See Affidavit of September 28, 2013, ¶¶21-27, 46.

<sup>28</sup> See Affidavit of December 10, 2012, ¶19 and FN 9.

<sup>29</sup> See Affidavit of September 28, 2013, ¶¶17, 24, FN 24.

<sup>30</sup> See Affidavit of December 10, 2012, ¶¶24-25.

<sup>31</sup> See Affidavit of December 10, 2012, ¶¶27-28, ¶44-46; Affidavit of September 28, 2013, ¶¶34-37.

<sup>32</sup> See Affidavit of September 28, 2013, ¶16; Affidavit of December 10, 2012, ¶39 and Exhibit 28.

<sup>33</sup> See Affidavit of September 28, 2013, ¶¶21-27; 41-44.

to Life (\$347,582), and United Sportsmen of Wisconsin (\$245,000).<sup>34</sup> These 501(c)(4) organizations were all actively involved in coordinated absentee ballot application activities during at least the 2011 Wisconsin Senate recall elections.<sup>35</sup>

While working with WiCFG, R.J. Johnson was also coordinating with the RSLC in at least the 2011 Wisconsin Senate recall elections.<sup>36</sup> In an email sent to Karl Rove on May 4, 2011, Governor Scott Walker extolled R.J. Johnson's importance in leading the coordination effort when he wrote:

Bottom-line: R.J. helps keep in place a team that is wildly successful in Wisconsin. We are running 9 recall elections and it will be like running 9 Congressional markets in every market in the state (and Twin Cities.)(emphasis added)<sup>37</sup>

In comments prepared by R.J. Johnson and sent to Governor Walker for use in an August 18, 2011 conference call,<sup>38</sup> Johnson said WiCFG efforts were run by

. . . operative R.J. Johnson and Deborah Jordahl, who coordinated spending through 12 different groups. Most spending by other groups were directly funded by grants from the Club.<sup>39</sup>

During the 2012 Gubernatorial recall election, R.J. Johnson sought and received the assistance of other entities such as "Ending Spending" that also ran television ads.<sup>40</sup>

WiCFG is likely to possess relevant documentary evidence dating back to 2009. Notably, prior to the 2011 Wisconsin Senate recall elections, the national Club for Growth organization raised concerns about coordination or interaction between WiCFG and FOSW as early as 2009.<sup>41</sup> R.J. Johnson was a paid advisor to FOSW during the 2010 Gubernatorial election, and through at least January 2012.<sup>42</sup> For this reason, evidence related to the activities of WiCFG and FOSW beginning in 2009 are relevant

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<sup>34</sup> See Affidavit of September 28, 2013, ¶17.

<sup>35</sup> See Affidavit of September 30, 2013, pgs. 20, 33; also Affidavit of September 28, 2013, ¶57

<sup>36</sup> See Affidavit of September 28, 2013, pg. 25.

<sup>37</sup> See Affidavit of December 10, 2012, ¶31.

<sup>38</sup> Coincidentally, August 18, 2011 was also the date the GAB certified the official results of the 6 Republican Senate recall elections held on August 9, 2011.

<sup>39</sup> See Affidavit of December 10, 2012, ¶39, Exhibit 28.

<sup>40</sup> See Affidavit of September 28, 2013, ¶30 and FNs 36-37; Affidavit of December 10, 2012, ¶70.

<sup>41</sup> See Exhibit 15, Affidavit of December 10, 2012, ¶23. On April 28, 2009, David Keating the Executive Director of the (national) Club for Growth at that time told R.J. Johnson that Keating had "legal concerns" about whether WiCFG should continue to run ads that featured Scott Walker, who had declared his candidacy for Governor. Keating requested that R.J. Johnson brief the CFG on legal issues prior to running such ads.

<sup>42</sup> See Affidavit of December 10, 2012, ¶20; Affidavit of September 28, 2013, ¶¶10, 12.

and probative of knowledge and discussions of any potential illegality involving coordinated activities between those entities and others involved with R.J. Johnson.

## **V. ISSUES PRESENTED BY THE CHALLENGES TO THE SUBPOENAS DUCES TECUM.**

### **A. The Motions to Quash Ignore Established Wisconsin Precedent**

The motions to quash filed by Citizens for a Strong America (CFSA), Wisconsin Club for Growth (WiCFG), Friends of Scott Walker (FOSW), Wisconsin Manufacturers and Commerce (WMC), and Wisconsin Manufacturers and Commerce –Issue Mobilization Council (WMC-IMC) challenge the issuance of the respective subpoenas, each similarly asserting that the government’s likely theory of liability is invalid and subpoenas are unconstitutionally overbroad.

The movants argue that coordination by WiCFG, CFSA, FOSW, WMC and WMC-IMC through its agents, with 501(c)(4) organizations, legislative campaign committees, or political committees is legal and permissible when those organizations are airing issue-centered advertising, rather than express advocacy advertising. However, in asserting this defense, the movants fail to recognize Wisconsin authority which is directly adverse to the movants’ primary arguments. In *WCVP v. SEB*, 231 Wis.2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999), as discussed below in greater detail, the Wisconsin Court of Appeals 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 group. The court held that the First Amendment could not be interpreted to bar an investigation into potential violations of the state’s campaign finance law as a consequence of coordination. *Id.*

### **B. The Subpoenas Duces Tecum Are Not Impermissibly Overbroad**

#### **1. The Authority of the John Doe Judge to Issue Subpoenas Duces Tecum**

Under Wis. Stat. §968.26(1), a John Doe Judge has the authority to issue subpoenas. In the context of a John Doe proceeding, the John Doe Judge must determine if the documents sought are relevant to the topic of the inquiry; that is, that the information sought is “in some manner connected with” the suspected criminal activity under investigation. *State v. Washington*, 83 Wis.2d 808, 843, 266 N.W.2d 597, 614 (1978) As set forth in *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, 277 Wis.2d 75, 689 N.W.2d 908:

[W]e conclude that any subsequent subpoena duces tecum issued in this John Doe proceeding satisfies the requirements of Wis. Stat. §§ 968.26 and 968.135 and the constitutional concerns regarding an overly broad subpoena explained above, when the affidavit submitted to request the subpoena for documents: (1) limits the requested data to the subject matter described in the John Doe petition; (2) shows that the data requested is relevant to the subject matter of the John Doe proceeding; (3) specifies the data requested with reasonable particularity; and (4) covers a reasonable period of time.

*Id.* at 78 (citations omitted).

Wisconsin Statutes §968.13(2) defines “documents” for purposes of a subpoena or search warrant. “Documents” as defined in Wis. Stat. §968.13(2) includes, but is not limited to, “books, papers, recordings, tapes, photographs, films or computer or electronic data.”

## 2. The Contents of the Subpoenas Duces Tecum

As set forth in the petition for the commencement of the John Doe proceeding and as summarized in Section III above, the scope of the criminal scheme under investigation is expansive. It includes criminal violations of multiple elections laws, including violations of Filing a False Campaign Report or Statement and Conspiracy to File a False Campaign Report or Statement in violation of Wis. Stats. §§11.27(1), 11.26(2)(a), 11.61(1)(b), 11.36, 939.31 and 939.05. As a result, the investigation necessarily will touch on many activities and communications of FOSW, the involved 501(c)(4) organizations, a legislative campaign committee, and other political committees.

On September 30, 2013, the John Doe Judge issued a subpoena duces tecum (hereafter subpoenas) to the respective movants requiring the production of documents related to the criminal scheme of R.J. Johnson, Deborah Jordahl, Governor Scott Walker and Friends of Scott Walker (“FOSW”) to utilize and direct 501(c)(4) organizations, as well as other political committees. The affidavits in support of the subpoenas established a concerted effort to circumvent Wisconsin’s campaign finance contribution prohibitions, limitations and disclosure requirements during the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. As illustrated below by the comparison of subpoenas, each were tailored to the respective movant consistent with the information in the affidavits.<sup>43</sup>

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<sup>43</sup> Pursuant to the secrecy order, each movant is only provided with a reproduction of their subpoena within this brief.

The timeframes in which a movant would have documents relevant to the John Doe investigation differed, and accordingly, this was reflected in the timeframe for document production. The individual movants had contact with differing entities, so the document production was tailored to those relevant individuals and entities. In addition, it should be noted that there are some similar persons or organizations identified in each subpoena, but that is simply the result of the significant level of coordinating activities among the various involved organizations.

For example, the subpoena to WiCFG directed the production of the following:

1. For the timeframe of March 1, 2009 to the present, all records and information in the possession of the corporation or any of its Employees, Agents, Officers and/or Directors, including but not limited to Eric O'Keefe, Eleanore Hawley and Charles Talbot, as follows:
  - a. All corporate minutes and resolutions;
  - b. All communications between corporate directors, officers, employees and/or agents on the one hand, and R.J. Johnson and/or Deborah Jordahl on the other hand;
  - c. All communications naming R.J. Johnson in the body of the communication;
  - d. All communications naming Deborah Jordahl in the body of the communication;
  - e. All contracts, agreements, accords or understandings of any kind which have been entered into with any of the following:
    - i. R.J. Johnson & Associates, Inc.;
    - ii. Citizens for a Strong America, Inc.;
    - iii. Coalition Partners, L.L.C.;
    - iv. Doner Fundraising Inc.;
    - v. Richard "R.J." Johnson;
    - vi. Deborah Jordahl; or
    - vii. Kate Donor.
  - f. All invoices and payment records relating to any item identified in the preceding subparagraph;
  - g. All records of income received, including fundraising information and the identity of persons contributing to the corporation;

The subpoena to CFSA directed production of the following:

1. For the timeframe of February 16, 2010 to the present, all records and information in the possession of the corporation or any of its Employees, Agents, Officers and/or Directors, including but not limited to John Connors, Valerie Johnson, Jessika Stauffacher and Virginia Marschman, as follows:
  - a. All corporate minutes and resolutions;
  - b. All communications between corporate directors, officers, employees and/or agents on the one hand, and R.J. Johnson and/or Deborah Jordahl on the other hand;
  - c. All communications naming R.J. Johnson in the body of the communication;
  - d. All communications naming Deborah Jordahl in the body of the communication;
  - e. All contracts, agreements, accords or understandings of any kind which have been entered into with any of the following:
    - i. R.J. Johnson & Associates, Inc.;
    - ii. Coalition Partners, L.L.C.;
    - iii. Doner Fundraising Inc.;
    - iv. Richard "R.J." Johnson;
    - v. Deborah Jordahl; or
    - vi. Kate Donor.
  - f. All invoices and payment records relating to contracts, agreements, accords or understanding of any kind with Richard "R.J." Johnson and/or Deborah Jordahl;
  - g. All records of income received, including fundraising information and the identity of persons or other entities contributing to the corporation;
  - h. All records of money spent, including expense and other disbursements data,

See Exhibit E and F.<sup>44</sup>

<sup>44</sup> Additionally, each of the movants were directed to produce the documents identified on Attachment A to their respective subpoenas. See Exhibit D.

As noted above, the document production was tailored to the activities of each of the respective movants as evidenced by the differing timeframes and requests for production of records. Both WiCFG and CFSA were directed to produce records related to R.J. Johnson and Deborah Jordahl that included communications, contracts and agreements, as well as several entities with which they were involved. Given the fact that CFSA was nearly completely funded by WiCFG for all practical purposes and was largely an agent for WiCFG's activities, CFSA was directed to produce records of money spent.<sup>45</sup>

In contrast, the production from WMC and WMC-IMC differs substantially from that of WiCFG, CFSA, and FOSW. The WMC and WMC-IMC subpoena requested production of the following:

1. For the timeframe of 2011-2012, all records and information in the possession of the corporation or any of its Employees, Agents, Officers and/or Directors as follows:
  - a. In connection with the **2011 Senate Recall Elections**, the **2012 Senate Recall Elections**, and/or the **2012 Gubernatorial Recall Election**, all e-mails (including archived e-mails), memoranda, and correspondence with:
    - i. The Milwaukee Metropolitan Association of Commerce; or
    - ii. The United States Chamber of Commerce;
  - b. All Recall Related Information and Records as defined in Attachment A.

See Exhibit G.

The WMC timeframe is limited to 2011-2012, the period that we believe that WMC has documents relevant to the investigation into the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections as described in the affidavit, as that was the timeframe WiCFG funded advertising placed by WMC-IMC. WiCFG gave WMC \$988,000 in 2011 and \$2,500,000 in 2012.<sup>46</sup> WMC-IMC in turn paid for ads related to the various recall elections, primarily the 2012 Gubernatorial recall election.<sup>47</sup>

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<sup>45</sup> See Affidavit of September 28, 2013, ¶¶16-20.

<sup>46</sup> See Affidavit of September 28, 2013, ¶42

<sup>47</sup> See Affidavit of September 28, 2013, ¶41 and Exhibit 18; See Affidavit of December 10, 2012, ¶46.

The FOSW subpoena requested production of the following:

1. For the timeframe of 2011 and 2012, all records and information of Friends of Scott Walker in the possession of the campaign committee or any of its Employees, Agents, Officers and/or Directors, including but not limited to the Candidate Scott K. Walker, as follows:
  - a. All Recall Related Information and Records as defined in Attachment A;
  - b. All contracts, agreements, accords or understandings of any kind between the campaign committee and any of the following:
    - i. Richard "R.J." Johnson;
    - ii. Deborah Jordahl
    - iii. Kate Doner
    - iv. Mary Stitt
    - v. Dan Morse
    - vi. Kelly Rindfleisch
    - vii. R.J. Johnson & Associates, Inc.;
    - viii. Citizens for a Strong America, Inc.;
    - ix. Coalition Partners, L.L.C.;
    - x. Doner Fundraising, Inc.;
    - xi. Mary Stitt & Associates, L.L.C.; and
    - xii. JVS Consulting, L.L.C.

See Exhibit H.

The FOSW timeframe and production differs from that of WiCFG, CFSA, and WMC, as noted above. Additional individuals involved with FOSW in recall strategy and activities, as well as fundraising for both FOSW and WiCFG, are included in that production request.

3. The Subpoenas Duces Tecum Fulfill the Requirements of Wisconsin Case Law

As articulated by the court in *In re John Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, 277 Wis.2d 75, 689 N.W.2d 908, quoted above in Section V, a John Doe subpoena duces tecum is lawfully issued (and is not overbroad) when: (1) it limits the requested data to the subject matter described in the John Doe petition; (2) it shows that the data requested is relevant to the subject matter of the John Doe proceeding; (3) it specifies the data requested with reasonable particularity; and (4) it covers a reasonable period of time.

- a. The requested documents are limited to the Subject Matter of the John Doe Proceeding.

There should be no reasonable dispute that the subpoenas seek information within the scope of the original petition papers. The John Doe Judge authorized an investigation into potential campaign finance violations including Wis. Stats. §§11.27(1), 11.26(2)(a), 11.61(1)(b), 11.36, 939.31 and 939.05, *viz.*, Filing a False Campaign Report or Statement (PTAC), Conspiracy to File a False Campaign Report or Statement, by Governor Scott

Walker, FOSW, WiCFG, various 501(c)4 organizations, and political campaign committees.<sup>48</sup>

The scope of a subpoena is not overbroad if it does not exceed the parameters of the authorized investigation and the more extensive the probable wrongdoing, the greater the permissible scope of the subpoena.<sup>49</sup> In this instance, the affidavits allege extensive unlawful activity involving Governor Scott Walker, FOSW, WiCFG, other 501(c)(4) organizations, and political committees. Accordingly, the respective subpoenas are squarely within scope of this John Doe investigation into the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections.

b. The requested documents are relevant to the Subject Matter of the John Doe Proceeding.

The relevancy of the documents sought in the subpoenas is predicated on the detailed information outlined in several affidavits that specifically addressed the basis for the requests for documents from CFSA, WiCFG, WMC, WMC-IMC and FOSW.<sup>50</sup> The basis for the subpoenas was outlined in the Affidavit of September 30, 2013 (33 pages) that directly incorporated the Affidavit of September 28, 2013 (26 pages with 143 pages of exhibits), and the Affidavit of December 10, 2012 (46 pages with 243 pages of exhibits).<sup>51</sup>

Each of these affidavits established that the evidence and records sought from the movants were connected with the suspected criminal activity under investigation. For example, in the context of the 2011 Wisconsin Senate recall elections, R.J. Johnson stated that he coordinated spending through 12 different groups.<sup>52</sup> The broad scope of R.J.

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<sup>48</sup> See Petition and Affidavit for the Commencement of a John Doe dated August 10, 2013.

<sup>49</sup> See *United States v. Hickey*, 16 F.Supp.2d 223, 240 (E.D.N.Y. 1998), motion for reconsideration granted on other grounds, in the context of an 4<sup>th</sup> Amendment overbreadth challenge to a search warrant that is equally applicable here. The court stated, "... a warrant – no matter how broad – is, nonetheless, legitimate if its scope does not exceed the probable cause upon which it is based. The more extensive the probable wrongdoing, the greater the permissible breadth of the warrant."

<sup>50</sup> In the *Matter of a John Doe Proceeding*, Id. at 240, 680 N.W.2d at 807, 2004 WI 65, ¶52, the court noted in its ruling that the court did not have the affidavit supporting the subpoena duces tecum, nor the John Doe petition used to begin the proceeding.

<sup>51</sup> The September 30, 2013 affidavit and of Robert Stelter with accompanying exhibits, and referenced September 28, 2013 affidavit of Investigator Dean Nickel and accompanying exhibits are part of the record and incorporated herein by reference.

<sup>52</sup> See Affidavit of December 10, 2012, Exhibit 28.



Johnson's activities justify the permissible breadth of the subpoenas, and the subpoenas are proportionate to the potential wrongdoing identified in the affidavits.<sup>53</sup>

For this reason, the present case is unlike the "overbroad" subpoenas that were quashed in *In the Matter of a John Doe Proceeding*, 2004 WI 65, 272 Wis.2d 208, 680 N.W.2d 792 (2004). There, the John Doe subpoenas:

" . . . requested all of the data from the computer system of an entire branch of state government in order to investigate whether a crime has been committed. It did not specify the topics or the types of documents in which evidence of a crime might be found. The subpoena also did not specify any time period for which it sought records."

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*In the Matter of a John Doe Proceeding*, 272 Wis.2d at 239.

c. The documents are specified with reasonable particularity.

Each subpoena identifies with specificity the entities potentially involved with the movants in illegal coordination. The subpoena provided to each movant identifies and directs the production of particular classes of documents related to specific entities and the movants, all relating to the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections.<sup>54</sup>

d. The requested documents cover a reasonable period of time.

The timeframe for the production of documents by each of the movants is appropriately identified, each timeframe relating to the existence of potential evidence related to the subject matter of the John Doe investigation.

The timeframe for the production of documents by CFSA begins on February 16, 2010. This is in accord with the general timeframe of R.J. Johnson's and Deborah Jordahl's involvement with CFSA.<sup>55</sup> Since they used WiCFG and CFSA to coordinate campaign activities, documents related to their involvement with and possible control of CFSA are highly relevant evidence of coordination.

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<sup>53</sup> See FN 45 that identifies paragraphs in the affidavits that address the overlap in activities between R.J. Johnson, Deborah Jordahl, WiCFG, and WMC and that establishes the relevancy of the documents sought in the subpoena.

<sup>54</sup> Additionally, the movants have been provided with the names of individuals within the organization to assist in identifying documents and communications relevant to the investigation.

<sup>55</sup> See Affidavit of September 28, 2013, ¶16 and Exhibit 3 establishing the involvement of R.J. Johnson and Deborah Jordahl with CFSA as early as March 3, 2010. Online public records reflect that CFSA was incorporated on October 23, 2009.

The subpoena duces tecum to WiCFG seeks documents for a broader timeframe, *i.e.*, March 1, 2009 to the present. Again, the broader timeframe is justified by the specific evidence identified in the supporting affidavit, an April 2009 discussion between the national Club for Growth and R.J. Johnson questioning the legality of pro-Walker ads run by WiCFG.<sup>56</sup> This establishes the probability of other relevant information following that timeframe involving WiCFG. As discussed in the affidavits, R.J. Johnson and Deborah Jordahl were involved in the various recall campaigns with FOSW, while simultaneously directing the activities of WiCFG, CFSA, R.J. Johnson and Associates, and Coalition Partners in the same recall campaigns.<sup>57</sup> Accordingly, the result is a significant overlap in the requested document production involving those entities and individuals.

In contrast, the timeframe for FOSW and WMC are limited to the timeframe of the 2011 to 2012 Wisconsin Senate and Gubernatorial recall elections,<sup>58</sup> as the affidavits establish that as the timeframe that those respective entities are likely to possess documents for production and relevant to the John Doe.<sup>59</sup>

**C. The conduct under investigation clearly violates Wisconsin law and the subpoenas do not infringe on constitutionally protected speech or activity.**

**1. Entities involved in coordinated activity with political campaign committees must comply with Wisconsin campaign finance laws.**

The movants assert the John Doe subpoenas are improper because they are predicated on an “invalid” theory of criminal liability. In order to address the claimed invalidity” of the subpoenas, the court must examine the legal and factual basis for the

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<sup>56</sup> See Affidavit of December 10, 2012, ¶23 and Exhibit 15.

<sup>57</sup> Specifically, the overlap of activities is detailed as follows: with respect to R.J. Johnson, see the Affidavit of September 28, 2013, ¶¶11-15, and 46 with respect to Nonbox and FOSW; Affidavit of December 10, 2013, ¶¶23-31, ¶¶36-42 with respect to the activities of R.J. Johnson and R.J. Johnson and Associates; with respect to Deborah Jordahl see Affidavit of September 28, 2013, ¶¶11-15, Affidavit of December 10, 2013, ¶¶65, 67, 69, 71, 74; for CFSA see Affidavit of September 28, 2013, ¶¶16-20, Affidavit of December 10, 2013, ¶75; for Coalition Partners see Affidavit of September 28, 2013, ¶¶11-15; for Doner Fundraising see Affidavit of September 28, 2013, ¶50-¶52, December 10, 2013, ¶¶30, 32, 51, 56-57, 48, 76-77; for FOSW see Affidavit of September 28, 2013, ¶¶34-36 re RGA, ¶45 with respect to R.J. Johnson and NonBox; ¶¶53-55 with respect to R.J. Johnson, FOSW and RSLC (also ¶36, Affidavit of December 10, 2012 re RSLC); ¶¶28-40 with respect to FOSW, RGA, and Doner Fundraising; Affidavit of December 10, 2012, ¶27, and generally Affidavit of December 10, 2013.

<sup>58</sup> The State has advised FOSW that the timeframe could be narrowed to February 1, 2011 to July 31, 2012.

<sup>59</sup> With respect to FOSW, See Affidavit of December 10, 2012, ¶¶21-89; for WMC see Affidavit of September 28, 2013, ¶¶41-44; Affidavit of December 10, 2012, ¶¶67-68

issuance of the subpoenas. As a starting point, Wis. Stats. ch. 11 governs campaign financing. In particular, Wis. Stat. §11.10(4) provides:

“No candidate may establish more than one personal campaign committee. Such committee may have subcommittees provided that all subcommittees have the same treasurer, who shall be the candidate’s campaign treasurer. The treasurer shall deposit all funds received in the campaign depository account. **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.**” (Emphasis added)

By operation of law, any “committee”<sup>60</sup> acting in concert with or with the cooperation of or upon consultation with, or at the request or suggestion of Governor Scott Walker or FOSW, or the personal campaign committees of Wisconsin State Senate candidates, are deemed to be a subcommittee of the relevant candidate’s personal campaign committee.<sup>61</sup> As a consequence of Wis. Stats. §§11.16 and 11.10(4), the third party organizations were subject to the same restrictions on the receipt of contributions and expenditures as FOSW itself. The contributions had to be permissible and disclosed by the candidates’ personal campaign committees, but were not. In addition, every expenditure by any subcommittee must be a permissible disbursement and disclosed.

In addition, Wis. Stat. §11.06(7) provides 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. If such a committee does not comply with this oath and makes expenditures that are coordinated with a candidate or agent or authorized committee of a candidate, that expenditure becomes a reportable in-kind contribution to the candidate’s campaign committee and must also be a permissible contribution. Wis. Adm. Code GAB §§1.20,

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<sup>60</sup> Wis. Stat. §11.01(4) broadly defines “committee” as “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, . . . .”

<sup>61</sup> See ¶11 of the December 10, 2012 affidavit. As noted in FN 5 of that affidavit, in 2005, former Wisconsin State Senator Charles “Chuck” Chvala was convicted in Dane County Circuit Court Case No. 2002CF2451 of violating Wisconsin Stats. §§ 946.12(2) and 11.26(2)(b). The violations of Wis. Stat. §11.26(2)(b) arose out of the campaign coordination involving Chvala, personal campaign committees and “independent interest groups” that are analogous to the potential violations here.

1.42(6)(a).<sup>62</sup> See also *WCVP v. SEB*, 231 Wis.2d 670 at fn. 2 (citing Wis. Stats. §§11.01(6)(a)1. and 11.12(1)(a)); *OAG-05-10*, ¶20 (recognizing that a “disbursement” may also qualify as a “contribution” under Wisconsin statutes).

Accordingly, contrary to the defense assertions and for the reasons set forth in greater detail below, Wisconsin law clearly does regulate, and long has regulated, “coordinated” activities.<sup>63</sup>

2. Relevant Wisconsin Statutes and Administrative Code implicated by the coordinated activity.

The following statutes are relevant to the discussion herein:

Wis. Stat. §11.05(1) provides, “Every committee...which makes or accepts contributions, incurs obligations, or makes disbursements in a calendar year in an aggregate amount in excess of \$25 shall register with the appropriate filing officer.”

Wis. Stat. §11.05(6) provides, “Except as provided in subs. (7) and (13), no person, committee or group subject to a registration requirement may make any contribution or disbursement from property or funds received prior to the date of registration under this section.”

Wis. Stat. §11.01(4) provides, “A “committee” means any person and any combination of two or more persons, which makes or accepts political contributions or political disbursements, whether or not engaged in activities which are exclusively political.”

In relevant part, a “contribution” means a contract, promise or agreement to make or actually making a gift, subscription, loan, advance, or deposit of money or anything of value made for political purposes or a transfer of funds between candidates,<sup>64</sup>

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<sup>62</sup> Interestingly, the language in Wis. Adm. GAB § 1.42 uses the term “expenditure” instead of “disbursement” when describing the scope and treatment of independent committee activities. This rule uses a broader definition of activity that could be attributable to a candidate committee by the use of the term “expenditure” as opposed to the term “disbursement” (which by definition in Wis. Stats. §11.01(7) requires that the activity be for a political purpose.)

<sup>63</sup> This basic principle is apparently lost on CFSA and WiCFG as demonstrated by the statement that “. . . 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.” CFSA motion, Pg 8. The motion filed by WiCFG makes an identical statement. See WiCFG motion, Pg. 10

<sup>64</sup> FOSW asserts that Wisconsin’s campaign finance laws somehow did not apply to Governor Walker or to FOSW and its agents because Governor Walker was not a “recall candidate” at the time of some of the activities under investigation. In fact FOSW, at all relevant times, is and was Governor Scott Walker’s personal campaign committee for Governor and it was actively raising and spending campaign contributions. Wis. Stat. §11.01 (1) provides:

committees, individuals or groups subject to a filing requirement under Wis. Stats. ch. 11. See Wis. Stats. §11.01(6)(a)1, 3 and 4. In relevant part, a “disbursement” means a contract, promise or agreement to make or actually making a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for political purposes or a transfer of personalty, including but not limited to campaign materials and supplies, valued at the replacement cost at the time of transfer.

A contribution or disbursement must have a “political purpose.” Wis. Stats. §§ 11.01 (6) and (7). In part, an act is for a “political purpose” “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. Stats. §11.01(16). Importantly, “political purpose” “is not restricted by the cases, the statutes, or the code, to acts of express advocacy.” *WCVP v. SEB*, 231 Wis.2d 670, 680, 605 N.W. 2d 654 (Wis. Ct. App. 1999).

### 3. Wisconsin’s coordination standard.

Wisconsin law clearly distinguishes between independent political activities and coordinated political activities. The meaning of coordination can be further understood by looking to the requirements an independent committee must meet.

Pursuant to Wis. Stat. §11.06(7), committees making independent disbursements must sign an oath affirming:

1. That the committee ... does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported,

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“Candidate” means every person for whom it is contemplated or desired that votes be cast at any election held within this state, other than an election for national office, whether or not the person is elected or nominated, and who either tacitly or expressly consents to be so considered. *A person does not cease to be a candidate for purposes of compliance with this chapter or ch. 12 after the date of an election and no person is released from any requirement or liability otherwise imposed under this chapter or ch. 12 by virtue of the passing of the date of an election.*

(Emphasis added).

Under Wisconsin statutes, an individual is a candidate unless and until one terminates one’s campaign committee. Under FOSW’s view, an incumbent would apparently stop being a candidate after election until the next election is called and would be free from the restraints of the law between one election and the time for circulating nomination papers for the next election – an illogical interpretation.

2. That the committee ... does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate who is supported,
3. That the committee ... does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who benefits from a disbursement made in opposition to a candidate, and
4. That the committee ... does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate who benefits from a disbursement made in opposition to a candidate.

The former State Elections Board issued a formal opinion subsequent to *WCVP v. SEB*. See El.Bd.Op. 00-2 (affirmed by the G.A.B. on 3/26/08). This formal opinion addressed a host of campaign finance issues including the coordination of expenditures. *Id.* at pp. 8-13. The former SEB, and now the G.A.B., have always treated any expressive coordinated expenditure made at the request or suggestion of the candidate or an authorized agent of a candidate as a contribution. See *id.* at pp. 11-12. (citing *FEC v. The Christian Coalition*, 52 F.Supp.2d 45, 98 (Dist. Ct. for D.C. 1999)). “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 FECA’s prohibition on contributions.” *Id.* The formal opinion explores case law regarding the regulation of coordinated activity and clarifies the coordination standard for Wisconsin. The formal opinion melds the standard established in *Christian Coalition* with Wisconsin’s statutory language. As set forth in the opinion:

Coordination is sufficient to treat a communication (or the expenditure for it) as a contribution if:

1. The spender’s communication is made at the request or suggestion of the campaign (i.e., the candidate or agents of the candidate); or,
2. In the absence of a request or suggestion from the campaign, the cooperation, consultation or coordination between the spender and the campaign is such that the candidate or his/her agents can exercise control over, or where there has been substantial discussion or negotiation between the spender and campaign over, a communication’s: a) contents; b) timing; c) location, mode or intended audience (e.g., choice between newspaper or radio advertisement); or d) “volume” (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the spender and the candidate emerge as partners or joint venturers in the

expressive expenditure, but the spender and the candidate need not be equal partners.

See El.Bd.Op. 00-2 at p. 12.

4. Campaign Coordination to Subvert Campaign Finance Laws Is a Crime in Wisconsin.

Movants argue that “coordination” of political activities that do not arguably involve express advocacy cannot be a crime under Wisconsin law.<sup>65</sup> These arguments fail to recognize or misinterpret Wisconsin statutes, administrative rules, and G.A.B. formal opinions. Movants have also ignored controlling Wisconsin case law. Indeed, in their submissions, movants - FOSW,<sup>66</sup> Citizens for a Strong America, Inc. (CFSA),<sup>67</sup> Wisconsin Manufacturers & Commerce, Inc. (WMC) and Wisconsin Manufacturers &

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<sup>65</sup> However, Justice Wilcox and former State Senator and Majority Leader Chuck Chvala were implicated in highly public cases involving illegal coordination activities. See *State of Wisconsin v. Charles Chvala*, Dane Co. Case No. 02-CF-2451 (criminal complaint filed on 10-17-2002), Counts 11-20 and Bradley Kust Complaining Witness Statement, ¶¶ 210-233, 236, 250-255 (Former Senator Chuck Chvala’s illegal coordination of fundraising and expenditures of “independent” entities, including an issue advocacy entity.) Recently, Vermont and California have also had highly publicized cases resulting in significant forfeitures for coordination or circumvention schemes. See *State of Vermont v. Republican Governors Association and Brian Dubie*, Civil Division Docket No. 762-12-11 (Coordination case where RGA agreed to pay a \$30,000 civil penalty and Candidate Dubie pay a \$10,000 civil penalty), See also *Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership*, Sacramento County, CA, Case No. \_\_\_\_ (“Dark money” case where Center to Protect Patients Rights and Americans for Responsible Leadership were required to pay civil penalties of \$1,000,000 each. In addition, the recipients of the “dark money” were required to forfeit the illegal contributions. The Fair Political Practices Commission required the Small Business Action Committee PAC to forfeit \$11,000,000 and the California Future Fund to forfeit \$4,080,000.) “Dark money” defines funds used to pay for an election campaign without disclosure before voters go to the polls, often associated with 501(c) corporations.

<sup>66</sup> FOSW Memorandum in Support of Motion to Quash Subpoena (October 16, 2013), pp. 8-9 (“Moreover, even after that point, Walker, his agents, and those involved in his authorized campaign were permitted to engage in ‘coordinated’ activity and communications regarding other candidates because the statute and regulation apply only to coordination between a candidate and groups supporting that candidate.”), p. 14 (“Equally important, at no point do the restrictions apply when Scott Walker, his agents or representatives engage in coordination activities regarding communications in support of or opposition to candidates other than recall candidates for governor.”).

<sup>67</sup> CFSA Motion to Quash Four Subpoenas (October 25, 2013), p. 8 (“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.”), pp. 8-9 (“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.’”), p. 18 (“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.”).

Commerce-Issues Mobilization Council (WMC-IMC),<sup>68</sup> and Wisconsin Club for Growth (WiCFG)<sup>69</sup> appear to have tacitly admitted to violating Wisconsin law.

The clearly stated purpose of Wisconsin's campaign finance laws is set out in legislative findings codified in Wis. Stats. §11.001:

"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. . . . One of the most important sources of information to 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."

In Wisconsin, it is illegal to use coordination to avoid statutorily required campaign finance disclosure laws and limits. The movants' argument that candidates are permitted to coordinate with issue-centered organizations and committees, without

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<sup>68</sup> Affidavit of Kurt Bauer (October 24, 2013), ¶13 ("In addition, WMC participates in formal and informal coalitions of groups with shared goals and policy positions, including the decision to support or oppose specific questions of public policy, and separately, candidates for public office--legislative, executive and judicial.").

<sup>69</sup> Wisconsin Club for Growth Motion to Quash Five Subpoenas (October 25, 2013), p. 11 ("The government's coordination theory cannot be sustained because, regardless of the quality and extent of communications between the Club and any candidate campaign, all advertisements paid for by the Club fall outside of the ambit of the Wisconsin campaign finance law. None of the advertisements constituted 'express advocacy.'"). p. 20 ("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."). See also, Affidavit of Eric O'Keefe (October 24, 2013), ¶13 ("The Club also gave grants to some organizations that then decided to use their money to express their own views--in accord with the Club's views--on public issues."), ¶28 ("For example, many Club records were stored at the homes of Deborah Jordahl and R.J. and Valerie Johnson, who had contractual relationships with the Club.").



compliance with campaign finance disclosure laws, was squarely rejected in *WCVP v. SEB*, 231 Wis.2d 670, 605 N.W. 2d 654 (Wis. Ct. App. 1999).

In *WCVP*, the Wisconsin Court of Appeals specifically relied upon the rationale first espoused by the United States Supreme Court in *Buckley v. Valeo* in 1976. In *WCVP v. SEB*, plaintiffs sought to enjoin an investigation by the State Elections Board into illegal coordination between Supreme Court Justice Jon Wilcox's campaign and Wisconsin Coalition for Voter Participation, Inc. (WCVP). At issue was the dissemination of a post card that WCVP maintained did not constitute express advocacy. The Court of Appeals considered both statutory and constitutional affirmative defenses, rejected them and dismissed plaintiffs' motions. The Court of Appeals definitively wrote, "[c]ontributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy."<sup>70</sup> *WCVP*, 231 Wis.2d at 679 (emphasis in original). The Court of Appeals emphasized that if the WCVP mailing was coordinated, it was a contribution, and it was illegal *regardless* of how one might interpret the postcards' language.<sup>71</sup> *Id.* (emphasis added).

In a subsequent enforcement action in March 2000, those involved with WCVP and the coordination paid significant civil forfeitures in exchange for a non-referral to a District Attorney to assess criminal liability for having coordinated an issue advocacy postcard.<sup>72</sup>

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<sup>70</sup> The court noted, "'express advocacy' is one part of the statutory definition of 'political purpose,' it is not the only part. . . . It encompasses many acts undertaken to influence a candidate's election; Contrary to plaintiff's assertions...the term 'political purposes' is not restricted by the cases, the statutes or the code to acts of express advocacy." *WCVP v. SEB*, 231 Wis.2d at 680. When an entity "coordinates" with a political campaign, that entity and those activities are no longer independent and are subject to campaign finance regulations. See *WRTL v. Barland*, 664 F.3d 139, 155 (7<sup>th</sup> Cir., 2011) This is needed to insure transparency and fairness in elections.

<sup>71</sup> The movants have had due notice of the Wisconsin Statutes, administrative rules, appellate decisions, and formal GAB opinion explaining in detail the case law, statutes and administrative rules, and coordination principles. This GAB opinion was originally published by the former State Elections Board in 2000 and later reviewed and affirmed by the Government Accountability Board. See *El. Bd. Op. 00-2* (affirmed by the G.A.B. 3/26/08).

<sup>72</sup> See Exhibit I, Stipulations and Orders for Judgment, *Elections Board of the State of Wisconsin v. Mark J. Block, Brent J. Pickens, James M. Wigderson, Wisconsin Coalition for Voter Participation, and Justice Wilcox for Justice Committee*, Dane County Case No. 00-CV-797 (filed 3-24-2000). Wilcox campaign paid \$10,000, Mark Block paid \$15,000, and Brent Pickens paid \$35,000.

5. The regulation of “coordinated activity” does not infringe upon constitutionally “protected speech”.

The Wisconsin Statutes and Administrative Code provisions are consistent with federal campaign finance laws approved by the United States Supreme Court in *Buckley*. They regulate – but do not prohibit – expenditures that are “coordinated” with, or made “in cooperation with or with the consent of the candidate . . . or an authorized committee” as campaign contributions. *Id.* at 681. Contributions to a candidate’s campaign committee must be reported, and they must be reported whether or not they constitute express advocacy – the content of the message is immaterial. *Id.* at 679 (citing Wis. Stat. §11.06(1)).

As noted above, Wisconsin law specifically prohibits a candidate from establishing more than one personal campaign committee or working in concert with a second committee. *See* Wis. Stat. §11.10(4). Where concerted activity occurs, contributions resulting from concerted activity are reportable as if the second organization was a subcommittee of the campaign committee.

When a 501(c)(4) organization and its agents act as the alter ego of a candidate, collecting money raised by the candidate (contributions) and make coordinated expenditures benefiting the candidate or authorized committee (disbursements), the 501(c)(4) organization is engaged in activities with a political purpose and qualifies as a “committee” under Wisconsin Statutes. The statutes prohibit a candidate’s circumvention of the campaign finance statutes through the secret activities of agents (and the candidates themselves) -- the very conduct being investigated here. When that same 501(c)(4) organization acts at the request or suggestion of, or with the cooperation of, or consultation with a candidate or with an agent or authorized committee of a candidate, the 501(c)(4) is also deemed a subcommittee of the candidate’s personal campaign committee.<sup>73</sup>

Pursuant to Wis. Stat. §11.10(4), any donations to these 501(c)(4) organizations and other entities constitute “contributions” directly to FOSW. Any expenditures by these organizations constitute “disbursements” by FOSW, regardless for what purpose these organizations were organized or whether the organizations engaged in speech

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<sup>73</sup> *See also* Wis. Adm. Code §1.42 (6) (a) and El.Bd.Op. 00-2 (affirmed by the G.A.B. 3/26/08) (citing *FEC v. The Christian Coalition*, 52 F. Supp.2d 45 (D.C. Dist. Ct. 1999).

qualifying as express advocacy or its functional equivalent. As subcommittees of FOSW, each 501(c)(4) organization or other entity are subject to all campaign contribution prohibitions and limitations, as well as all disclosure requirements, that are applicable to FOSW. Violation of these statutes carries both civil and criminal penalties. *See* Wis. Stats. §§11.60 and 11.61. This regulation of “coordinated” activity is consistent with federal and state court decisions addressing First Amendment concerns and the applicability of campaign finance laws.

Although First Amendment restrictions should be fully respected, no court has ever recognized that secret, coordinated activity resulting in “undisclosed” contributions to candidates’ campaigns and used to circumvent campaign finance laws is so protected.<sup>74</sup> In fact, as established in 1976 by the United States Supreme Court in *Buckley v. Valeo*, “prearranged or coordinated expenditures” are equivalent to contributions, subject to the same limitations as contributions, and any restrictions on coordinated expenditures are subject to only the intermediate level of scrutiny—any restriction must be closely drawn to match a sufficiently important government interest. *Buckley*, 424 U.S. at 25. Contribution limitations, whether by direct contribution or resulting from coordinated expenditures, are closely drawn restrictions designed to limit corruption and the appearance thereof resulting from large individual contributions. This is a sufficiently important government interest to support regulation. *Id.* at 25-26.

The United States Supreme Court and other federal appellate and district courts have consistently upheld the proposition that coordinated expenditures are contributions

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<sup>74</sup> The United States Supreme Court has recognized that the citizens’ right to know is inherent in the nature of the political process. On January 21, 2010, the United States Supreme Court stated “voters must be free to obtain information from diverse sources in order to determine how to cast their votes.” *Citizens United v. FEC*, 130 S.Ct. 876, 899, 916 (2010). By an 8-1 vote, the Supreme Court held that campaign finance disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way, such transparency enabling the electorate to make informed decisions and give proper weight to different speakers and messages. *Id.* at 916.

By the same 8-1 vote, 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 914-915 (citing *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612 (1976); *McConnell v. FEC*, 540 U.S. 93, 201, 124 S. Ct. 619 (2003)). In the context of the *Citizens United* decision and an analysis of Wisconsin’s campaign finance laws, the Wisconsin Attorney General has stated that “the Constitution does not categorically limit disclosure and disclaimer regulations to only express advocacy or its functional equivalent.” *OAG-05-10*, ¶¶35-6 (August 2, 2010).

subject to campaign finance limitations and disclosure requirements in the context of First Amendment challenges to campaign finance regulations. *See, e.g., Citizens United v. FEC*, 130 S. Ct. at 908, 910; *McConnell v. FEC*, 540 U.S. 93, 202, 219-223 (2003); *FEC v. Colorado Republican Fed. Campaign Committee (Colorado II)*, 533 U.S. 431, 456, 465, 121 S. Ct. 2351 (2001)(coordinated expenditures, unlike truly independent expenditures, may be restricted to minimize circumvention of contribution limits); *WRTL v. Barland*, 664 F.3d 139, 153, 155 (7<sup>th</sup> Cir., 2011); *Cao v. FEC*, 619 F.3d 410, 427, 433-34 (5<sup>th</sup> Cir., 2010).

Coordinated “issue advocacy” is subject to campaign finance regulations as contributions. This is particularly applicable when the candidate or agents have requested or suggested that the spender engage in certain speech because that indicates it is valuable to the candidate. It would be equally applicable where the candidate or agents can exercise control over certain speech; or where there has been substantial discussion or negotiation between the campaign and the spender over expenditures which give such expenditures sufficient contribution-like qualities to fall within the prohibition on contributions. *FEC v. Christian Coalition*, 52 F.Supp.2d 45, 91-2, 98-9 (D.C., 1999)

“The First Amendment permits the government to regulate coordinated expenditures.” *WRTL*, 664 F.3d at 155 (citing *Colorado II*, 533 U.S. at 465). The court stated that the “free speech safe harbor for independent expenditures” would not be available if there was collusion between a candidate and an independent committee, as the “independent group is not truly independent”, thus permitting regulation. *Id.* Conversely, an independent expenditure is political speech when not coordinated with a candidate. *WRTL*, 664 F.3d at 153 (citing *Citizens United*, 130 S. Ct. at 910). The Court of Appeals for the Seventh Circuit clarified 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. *Id.*

In the instant matter, the evidence shows an extensive coordination scheme that pervaded nearly every aspect of the campaign activities during the historic 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. The John Doe Judge has already relied upon this evidence in finding probable cause to issue subpoenas to the movants,

therefore, the despite the movants' protestations otherwise, the John Doe Judge should deny all movants' motions to quash the very same subpoenas.

**VI. CONCLUSION**

Based on the authorities set forth herein, the motions to quash should be denied so that this investigation can move forward expeditiously.

Respectfully submitted this \_\_\_\_ day of December, 2013.

By:

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FRANCIS D. SCHMITZ  
Special Prosecutor  
Bar No. 100023

NONE

# EXHIBITS