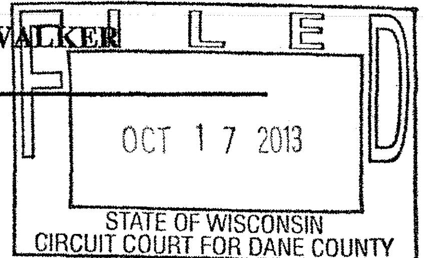
STATE OF WISCONSIN BEFORE THE JOHN DOE JUDGE

IN THE MATTER OF A JOHN DOE PROCEEDING

Columbia County Case No. 13JD000011
Dane County Case No. 13JD000009
Dodge County Case No. 13JD000006
Iowa County Case No. 13JD000001
Milwaukee County Case No. 12JD000023
(Judge Barbara A. Kluka for all proceedings)

(PROCEEDINGS SUBJECT TO SECRECY ORDER)

NOTICE OF APPEARANCE FOR FRIENDS OF SCOTT WALKER



To: Special Prosecutor Francis D. Schmitz
P.O. Box 2143
Milwaukee, WI 53201

PLEASE TAKE NOTICE that Friends of Scott Walker (FOSW), a recipient of a subpoena in the above-named action, appears by Attorneys Steven M. Biskupic and Michelle L. Jacobs of Biskupic & Jacobs, S.C. A copy of all papers in this action should be served upon these attorneys at the address stated below.

Dated this 16th day of October, 2013.

Respectfully submitted,

Steven M. Biskupic

Attorney Steven M. Biskupic
State Bar ID No. 1018217
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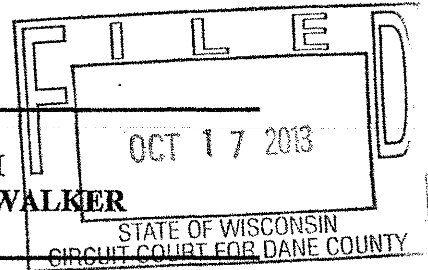

NOTICE OF MOTION AND MOTION TO QUASH OCTOBER 1, 2013 SUBPOENA TO FRIENDS OF SCOTT WALKER

To: Special Prosecutor Francis D. Schmitz
P.O. Box 2143
Milwaukee, WI 53201

PLEASE TAKE NOTICE that Friends of Scott Walker (FOSW) moves the Court pursuant to Wis.Stat. § 968.135 to quash the subpoena issued October 1, 2013 to FOSW. The grounds for the motion are set forth in the accompanying memorandum. The motion shall be heard at a date, time and place to be set by the Court.

Dated this 16th day of October, 2013.

Respectfully submitted,

Steven M. Biskupic

Attorney Steven M. Biskupic
State Bar ID No. 1018217
Attorney Michelle L. Jacobs
State Bar ID No. 1021706
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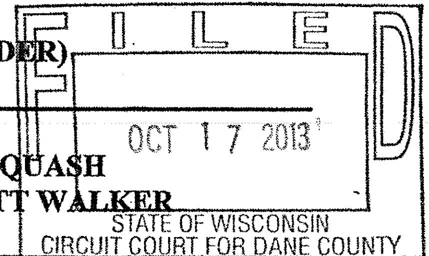

MEMORANDUM IN SUPPORT OF MOTION TO QUASH OCTOBER 1, 2013 SUBPOENA TO FRIENDS OF SCOTT WALKER

The Special Prosecutor in the above-named proceedings served a John Doe Subpoena Duces Tecum on Friends of Scott Walker (FOSW). The return date of the subpoena is October 29, 2013. By its terms, the subpoena seeks almost every document, whether electronic or hard copy, in the possession of FOSW from 2011-2012. The subpoena encompasses literally hundreds of thousands, if not more than a million documents. There is no question that the subpoena is constitutionally and statutorily defective and must be quashed under the standards set forth by the Wisconsin Supreme Court in *In re John Doe Proceeding,* 2004 WI 65, 272 Wis. 2d 208, 235, 680 N.W.2d 792, 805 *opinion modified on denial of reconsideration sub nom. In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001,* 2004 WI 149, 277 Wis. 2d 75, 689 N.W.2d 908.

In addition, this Court should exercise its supervisory authority to insure that any reissued subpoena is as narrowly tailored as the First Amendment and Wisconsin law require. The current subpoena was served three days before an opponent announced her opposition to Scott Walker for the 2014 gubernatorial election. This current subpoena also means that every state-

wide race of FOSW in the last four years will coincide with John Doe scrutiny. The subpoena and comments by the Special Prosecutor indicate this investigation is centered on campaign finance, political speech, and the concept of "coordination" between candidates and non-candidate entities and individuals. Because the Special Prosecutor has apparently undertaken an investigation squarely in the scope of critical First Amendment political speech protections, this Court should undertake exacting, special consideration of what the law does and does not permit with respect to regulation in these areas.

I. Background

On March 1, 2013, the Milwaukee County District Attorney publicly announced the closing of a John Doe proceeding involving an investigation of campaign activity tied to FOSW. *See* Bice & Umhoefer, *John Doe probe of Scott Walker office closed with no new charges*, JSOnline (March 2, 2013), http://www.jsonline.com/news/milwaukee/report-scott-walker-probe-closed-with-no-new-charges-qh8vsfb-194194091.html (site visited Oct. 14, 2013). The three-year investigation involved hundreds of witnesses and hundreds of thousands of documents. *Id.*

On October 3, 2013, the Special Prosecutor served the current John Doe subpoena on FOSW. The Special Prosecutor indicated that he was working in conjunction with investigators and lawyers from the Milwaukee County District Attorney's Office. The Special Prosecutor further indicated the scope of the investigation included improper "coordination" and the resulting failure to properly report campaign donations.

The subpoena, included herein at Tab A of the Appendix, is eight pages long, and lists two-dozen organizations or political committees affiliated with conservative issues. Compliance is demanded by October 29, 2013.

II. The subpoena must be quashed as unconstitutionally overbroad.

The power wielded by the prosecutor in John Doe proceedings is considerable. As a result, there is real and serious potential for the substantial infringement of an individual's constitutional rights, including their First Amendment right to free speech and their Fourth Amendment right to be free of unreasonable searches and seizures. The prosecutor must maintain keen awareness of individual rights, and exercise its powers cautiously. And, the presiding judge must ensure that those powers are exercised with "due regard for the rights of the witnesses, the public, and those whose activities may be subject to investigation." *State v. O'Connor,* 77 Wis.2d 261, 284; *In re John Doe Proceeding,* 2004 WI 65 at ¶ 56, 272 Wis. 2d at 243, 680 N.W.2d at 808 (internal citations omitted). The broad, untailored, and sweeping nature of the subpoena served on FOSW strongly indicates that the prosecutors here did not exercise such care here.

A subpoena issued in a John Doe proceeding must satisfy both statutory requirements and constitutional concerns. Statutorily, the judge presiding over the John Doe has authority to issue a subpoena for documents under Wis. Stat. § 968.135. The request for the subpoena must be supported by an affidavit establishing probable cause that the requested data is limited to the subject matter described in the John Doe petition, and that the data requested is relevant to the subject matter of the John Doe proceeding. *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001,* 2004 WI 149, 277 Wis. 2d at 78, 689 N.W.2d at 910.

Constitutionally, the subpoena must be narrowly tailored to avoid the Fourth Amendment problem of unreasonable overbreadth. In short, it must specify the documents requested with reasonable particularity. *Id*

The constitutional problem inherent in a lack of particularity, and thus an overly broad subpoena for documents, is analogous to the problem inherent in a general warrant: Overly

broad subpoenas "are held unreasonable in that their lack of specificity allows the government to go on an indiscriminate fishing expectation, similar to that provided by a general warrant." *In re John Doe Proceeding,* 2004 WI 65 ¶ 50, 272 Wis. 2d at 239, 680 N.W.2d at 807 (citing *Marron v. United States,* 275 U.S. 192, 196, 48 S. Ct. 74 (1927); and *Boyd v. United States,* 116 U.S. 616, 625-26 (1886)). "As the United States Supreme Court has explained, a subpoena is 'equally [as] indefensible as a search warrant would be if couched in similar [general] terms." *Id.* (quoting *Hale v. Henkel,* 201 U.S. 43, 77 (1906)).

As addressed below, the sweeping subpoena served on FOSW is almost wholly untailored: it demands what are probably hundreds of thousands, if not more than a million pages of documents and emails, demands information from potentially thousands of people who were associated with FOSW during 2011-12, and requires production of almost every shred of paper or electronic document the organization generated or maintained for the entire two-year period covered by the subpoena.

The Wisconsin Supreme Court quashed a similar subpoena in *In re John Doe Proceeding, supra.* That case arose out of the John Doe investigation of the political caucuses in the late 1990s. A subpoena was served on the Legislative Technology Services Bureau (LTSB), demanding the backup tapes for all 54 servers used by the LTSB to maintain legislators', constituents' and service agency emails, web pages, and office computer systems. Alternatively, the subpoena requested all electronically stored documents for certain identified legislators, aides, or persons who worked for the caucuses. 272 Wis.2d at 215.

The LTSB moved to quash the subpoena on several grounds, including a challenge that the subpoena was overbroad and thus unreasonable under the Fourth Amendment. *Id.* at 215-16. Reversing an initial denial of the motion, the Supreme Court quashed the subpoena. The Court

held that the subpoena was overly broad, and thus unconstitutional, because it failed to sufficiently specify or narrow the topics or the types of documents sought. For example, rather than provide key word searches which could be used to search the LTSB databases for relevant material, the subpoena demanded all records for specific individuals. Equally problematic, the subpoena failed to limit the time period covered by the requests. *Id.* at 239-40.

In a follow-up opinion clarifying its holding quashing the subpoena, the Court directed that any future subpoena limit the requested documents to the subject matter described in the John Doe petition; demonstrate the documents requested are relevant to the subject matter of the John Doe proceeding; specify the documents requested with reasonable particularity; and cover a reasonable period of time. *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001,* 2004 WI 149, 277 Wis. 2d at 78, 689 N.W.2d at 910.

The subpoena served on FOSW is similarly, constitutionally flawed. Just as in the LTSB case, rather than tailor or narrow the requests with any level of particularity, the subpoena demands almost everything FOSW generated in 2011 and 2012.

Consider paragraphs 1(a) and 1(b) of the subpoena. The latter specifies the names of 12 people or entities, and requests copies of contracts or agreements between FOSW and any of those twelve. This request is tailored, and will allow for FOSW to search for and disclose any such agreements.

In stark contrast, paragraph 1(a) [incorporating Attachment A] is not tailored at all. Paragraphs 5(a) and (c) of the attachment require FOSW to disclose every communication, including every email, between any agent of FOSW on the one hand, and any director, officer, agent or employee (none of whom are identified) of 26 organizations and the campaign committees of three recall elections. With no particularity as to identities of people, dates, or

topics for search, FOSW would have to do an email-by-email review of what are most certainly at least hundreds of thousands of emails sent or received by any agent, employee, officer, or director of FOSW during 2011 and 2012.

Likewise, paragraphs 5(f), 5(g) and 5(h) will require compilation and disclosure of likely hundreds of thousands, if not millions of documents. Paragraph 5(f) covers every bill, invoice, receipt, financial document or any other record of any expenditure, disbursement or transfer made in connection with FOSW, before, during, and after the gubernatorial recall. Paragraph 5(g) requires disclosure of every bank record, credit card bill, and other record associated with every such bill, receipt, expense, disbursement or transfer. And paragraph 5(h) requires FOSW to identify every communication, including every email, related to every such financial transaction. Taken together, these provisions essentially demand every shred of paper related to every financial transaction of the campaign committee, down to things such as the payment of office telephone bills or parking meter expenses of its employees.

Without some level of particularity, these requests make the subpoena unconstitutionally overbroad. With no narrowing or specificity as to the type(s) of financial transactions or people or organizations with whom they were conducted, FOSW would have to review and analyze the substance of every email communication of every FOSW director, officer, employee, or agent, to determine whether they address financial transactions, and will have to review every shred of paper or computer record to determine the same. As might be obvious from the nature of these overly broad requests, FOSW has no practical way to conduct such review or assure compliance with the subpoena.

As a final example, consider paragraph 5(d). It demands all records of calendars or other records (which would presumably include telephone records) on "Recall related topics and

issues." Yet again, this request is entirely untailored. It would require the disclosure of the entire calendar and all telephone records of Governor Walker, every employee of FOSW, and all of the thousands of agents and volunteers of FOSW who were working on recall-related business during a substantial portion of the time period covered by the subpoena.

These examples demonstrate the practical impossibility of complying with such an overbroad and thus constitutionally infirm subpoena. They also demonstrate that compliance with the subpoena would be unfairly and unduly burdensome and oppressive, and prohibitively expensive, for FOSW. For all of these reasons, the subpoena must be quashed.

III. Attorney-Client privilege concerns must be respected

In light of the sweeping nature of the subpoena, including overlap with the prior John Doe investigation, attorney-client privileged material will almost certainly fall within the parameters of the subpoena. FOSW (as an organization) and several of its principals had separate, retained counsel throughout the time period covered by the subpoena, not only for purposes of representation on the previous (Milwaukee County) John Doe investigation, but also for routine legal advice on campaign-related issues. Because the subpoena fails to particularize the email communications and documents sought, the sheer volume of material FOSW would be required to turn over results in substantial risk of disclosure of privileged communications. This is particularly serious here because the very prosecutors and investigators receiving the material are prosecutors and investigators on the former John Doe proceeding.

We have had initial discussions with the Special Prosecutor about our concern in this regard, but were not assured that there is any system of taint/review in place to assure respect for and integrity of the attorney-client privilege, nor were we assured that the Special Prosecutor has

sufficient information (identification of counsel for each principal or the person or entity they represent) to set up such a review system.

IV. **Under the First Amendment and Wisconsin law, Scott Walker, his agents, and those individuals otherwise involved with his authorized campaign committee were permitted to engage in coordinated, First Amendment-protected issue advocacy with any independent party for all of 2011 and that part of 2012 prior to April 9 for purposes related to a potential recall. For purposes of "coordinated" activity regarding *other* candidates, Scott Walker, his agents, and representatives have no time or date limits when their involvement with third parties is restricted.**

Under Wisconsin campaign finance laws, the sole restrictions on "coordination" of protected First Amendment communications regarding candidates exist in Wis. Stat. § 11.06(7) and Wis. Admin. Code § 1.42. Under those provisions, "coordination" between an independent group and an elected official such as Scott Walker (and his agents) becomes subject to the campaign finance restrictions in Chapter 11 of the Wisconsin Statues only when:

(1) Scott Walker becomes a "clearly identified candidate" in "any election";

(2) the candidacy is "supported or opposed"; and

(3) the coordination involves "expenditures" done for a political purpose by a group outside the campaign in support of that particular candidacy in a particular election (as opposed to some other candidate or candidates involved in other elections). Wis. Stat. § 11.01(16)(a)(1) (defining "political purpose"), Wis. Stat. § 11.06(7)(a) ("clearly identified candidate" in any "election"); and Wis. Admin. Code § 1.42 (coordination, cooperation or consultation). And of course, all of these considerations are made in the context of political activity in speech, where the First Amendment has its fullest and most urgent application. *See, e.g., Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 223, 109 S. Ct. 1013 (1989).

During the time period of 2011-12 covered by the subpoena, Scott Walker did not become a "supported or opposed candidate" until after April 9, 2012. 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.

A. The First Amendment and Issue Advocacy

"There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs, includ[ing] discussion of candidates.'" *Wisconsin Right to Life State Political Action Committee v. Barland [Government Accountability Board]*, 664 F.3d 139, 151-52 (7th Cir. 2011) (quoting *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2817, 2828 (2011)). Any individuals (including those holding elective office) may combine, whether informally or formally, for the purpose of engaging in what is known as "issue advocacy" under First Amendment protections. *See Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976); *Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999). By definition, issue advocacy is the discussion of the public policy issues facing someone in elective office and subject to re-election. *Id.* at 664-665, 597 N.W.2d at 728-29.

Restrictions on issue advocacy, such as those found in Chapter 11 of the Wisconsin Statutes, must conform to First Amendment standards under the "most rigorous judicial review" or they are invalid. *Wisconsin Right to Life*, 664 F.3d at 152, 155 (permanently enjoining the application of Wis. Stat. § 11.26(4) contribution limits on independent third-party expenditure committee).

B. "Express Advocacy v. Issue Advocacy"

The distinction between "express advocacy" and "issue advocacy" is at the heart of Wisconsin's regulatory scheme involving campaign finance laws and independent disbursements. In fact, the Wisconsin Elections Board Opinion on the matter uses that exact headline in attempting to offer guidance. *See Wis. Elections Bd. Op. 00-2*, at 3 ("A. Express Advocacy v. Issue Advocacy").

Individuals (including elected officials) or groups, alone or in concert, may engage in issue advocacy without subjecting themselves to the campaign finance and other restrictions of Chapter 11 "if the message does not expressly advocate the election or defeat of a clearly identified candidate." *Id. See also Wisconsin Right to Life*, 551 U.S. at 469. As long as the advocacy does not involve the explicit advocacy of the election or defeat of a candidate, the advocacy is not subject to restriction, including those set forth in Chapter 11. *Id.*; *see also*, Wis. Stat. § 11.06(16) (defining communications for "political purposes" as "the making of a communication which expressly advocate the election, defeat, recall, or retention of a clearly identified candidate or a particular vote or referendum) (emphasis added). If, however, the communication at issue uses a term such as "vote for," "elect," "support," "defeat," or the like, the communication becomes political advocacy, or "express advocacy," subjecting the communication to restrictions under law, including Chapter 11. *Id.*

The Supreme Court of the United States, more than three decades ago, articulated this bright line in order to ensure that the citizenry would know which speech is subject to regulation and which speech is not subject to government regulation. *See Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976).

Wisconsin law clearly recognizes this standard: speech which does not, in express terms, advocate the election or defeat of a clearly identified candidate is not political speech subject to government regulation. *See* Wis. Stat. §11.01(16)(a)(1) (communication for political purpose is one "which expressly advocates the election, defeat, recall, or retention of a clearly identified candidate"); *see also Wis. Elections Bd. Op. 00-2* (reaffirmed Mar. 26, 2008).

The phrase "clearly identified candidate" is repeated in Wis. Stat. § 11.06(7) and section 1.42 of the Government Accountability Board (GAB) regulations adds an additional important caveat: the candidate at issue must be either "supported" or "opposed" in an election at the time of the issue communication. Wis. Admin. Code § 1.42. If the communication falls within these qualifications, then the expenses associated with the communication are subject to Chapter 11 restrictions, most particularly "coordination" (discussed below). If these conditions are not met, then the communication is not and cannot be subject to Chapter 11.

This First Amendment distinction is dramatically present on the national level, where President Barack Obama established and controls a third party advocacy group, Organizing for America, which has raised millions of dollars as an IRS § 501(c)(4) organization. See Matea Gold, *"Organizing for Action raises $4.8 million in first quarter,"* Los Angeles Times April 12, 2013, http://articles.latimes.com/2013/apr/12/news/la-pn-organizing-for-action-fundraising-20130412 (site visited October 11, 2013). Those who contributed $500,000 or more were permitted to attend quarterly meetings with the president at the White House. See Mike Allen, *"Playbook, 6 days to sequester,"* Politico.com (Feb. 23, 2013) http://www.politico.com/playbook/0213/playbook10090.html (site visited October 11, 2013).

Elected officials must be permitted such activity because "[t]he Supreme Court repeatedly has explained that elected officials do not park their constitutional rights at the door

when they assume public office." *In re John Doe Proceeding,* 2004 WI 65, 272 Wis. 2d 208, 235, 680 N.W.2d 792, 805 *opinion modified on denial of reconsideration sub nom. In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001,* 2004 WI 149, 277 Wis. 2d 75, 689 N.W.2d 908 (*citing Republican Party of Minnesota v. White,* 536 U.S. 765, 788, 122 S. Ct. 2528 (2002) (overturning restriction on speech of candidates for office, including incumbents, because the law violates First Amendment)).

C. "Coordination": the distinction between restricted and unrestricted activity

A nuanced and potentially complex area of the law arises when third party organizations make communications regarding issues, and reference or depict elected officials who are also candidates or potential candidates at the same time, in those communications. *See, e.g.*, Richard Briffault, *Coordination Reconsidered,* Columbia Law Review (May 2013) http://www.columbialawreview.org/coordination-reconsidered_briffault/ (site visited October 11, 2013) (explaining that in 2012 elections, "the coordination/independence distinction at the center of the contribution/expenditure divide essentially collapsed due to the emergence of single-candidate Super Political Action Committees"); *see also Wis. Elections Bd. Op. 00-2*, at 8 ("In this tension between permissible [campaign] contribution limits and impermissible independent expenditure limits, the [*Buckley*] court recognized that the necessity of regulating expenditures that were so 'coordinated' with a campaign that they ceased to be independent and were enough like contributions to be treated as such.")

Wisconsin's campaign finance statute provides that an "express advocacy" communication coordinated by the campaign with an outside group making the communication, is subject to Chapter 11 and the contribution limits in the statute. Wis. Stat. § 11.06(7). The purpose of the coordination requirements is to enforce contribution limitations: "Without a

coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly -- say, [by] paying for a TV ad or printing and distributing posters." *Shays v. Federal Election Commission,* 414 F.3d 76, 97 (D.C. Cir. 2005).

In Wisconsin, restricted "coordination" between an advocacy group and a campaign is defined under Wis. Admin. Code § 1.42(2): The advocacy group's expenditures become reportable campaign contributions "if the expenditures or obligations incurred are made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed." *See also* Wis. Stat. § 11.06(7) (referencing that support or opposition in conjunction with any "election") (emphasis added).

The coordinated disbursement also must be for the express support of the candidate involved in the coordination, and specifically referenced in the communication -- not the candidacy of someone uninvolved in the coordination or not even referenced in the communication. *See Independent Disbursements of Corporations and Non-Political Organizations*, GAB 128 (May 2012) (coordination must be with a candidate "supported by the disbursement").

Therefore, for an expenditure to become an in-kind campaign contribution to the identified candidate, the following elements must be met:

(1) the disbursement by a third party must involve coordination between the third party with a "clearly identified candidate" or agent of such candidate in an "election";

(2) at the time of the disbursement, the candidacy was "supported or opposed" (in terms of the communication itself); and

(3) the coordination must have involved "expenditures" for a communication in support of that particular candidate with whom the third party group engaged in "coordinating" the communication (as opposed to some other candidate or candidates involved in other elections).

These coordination regulations are of course limited by the First Amendment. "The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776, 98 S. Ct. 1407 (1978). This protected activity extends to advocacy that may reference or depict those already in office, as well as candidates seeking elective office. *See Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed, 2d 329 (2007).

D. <u>Scott Walker was not a "supported or opposed" recall "candidate" until after April 9, 2012.</u>

The 2012 recall election of Governor Scott Walker was the first gubernatorial recall in the history of Wisconsin. Governor Walker's candidacy on the recall election ballot was a matter of constitutional and statutory rights, triggered by the successful presentment, review and "filing" of a sufficient number of proper recall petition signatures. As set forth below, those triggering events were not completed **<u>until April 9, 2012</u>**. Accordingly, Governor Walker was not a "supported or opposed" recall "candidate," subject to restrictions on coordination of communications regarding his own candidacy until after **<u>April 9, 2012</u>**. Indeed, recall candidates must be distinguished from other candidates when applying the coordination provisions because one becomes a recall "candidate" only by operation of law, not by voluntary decision to run for office. 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.

1. Recall in Wisconsin

The right to recall in Wisconsin began in 1911, when the legislature enacted a statute allowing for recall of municipal officials.[1] The requirements for recall were straightforward: "any city officer holding an elective office," who had been in office for at least six months, would be forced to face the voters again within 50 days if a petition were submitted with signatures equaling at least 1/3 of the city-wide vote total from the last gubernatorial election. The petition was required to contain a general statement of the grounds upon which removal was sought and the signatures had to be collected within a 30-day period. The signed petitions were to be presented to the city clerk, who was given 10 days to insure that the appropriate number of signatures had been submitted.[2]

Recall did not apply to Wisconsin state office holders until the state constitution was amended in 1926.[3] The constitutional amendment was similar to the existing municipal recall statute, except that the state incumbent had to be in office for one year before a recall (instead of just six months), and the number of necessary signatures was 25 percent of the prior gubernatorial election total (as opposed to 33 percent for municipal officials).[4]

Another seven years passed before the state legislature enacted statutes providing the "machinery governing recall elections" similar to those in place for municipal recalls.[5] For example, the legislature imposed requirements for the circulation of the petitions (similar to

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[1] Wis. Session Laws, Chapter 635, at 843-44 (July 12, 1911) (creating section 94j-1) *see also Stahovic v. Rajchel*, 122 Wis.2d 370, 376, 363 N.W.2d 243, 245 (Wis. Ct. App. 1984) (the right to recall municipal officials is a statutory creation; the recall of congressional, judicial or non-municipal legislative officers is a constitutional right).
[2] Wis. Session Laws, Chapter 635, at 843-44.
[3] *See* Laws of Wisconsin, chapter 270 at 348-49 (June 11, 1925) (creating Wis. Const. art. XIII, section 12).
[4] Laws of Wisconsin, chapter 270, at 348.
[5] Letter from Chief of Legislative Reference Library to George Brown, Office of the Secretary of State, Chapter 44, Laws of 1933 drafting records (December 23, 1932) (regarding creation of Wis. Stat. § 6.245 as "machinery to govern recall elections").

normal nomination procedures); review by the appropriate election official (limited to three days); and the necessity of a primary (for opponents of the incumbent only).[6]

2. Current Recall Statute

The modern version of the recall statute is contained in Wis. Stat. § 9.10. It contains three main parts: general guidelines relating to the circulation of a petition, specific requirements for the face of the recall petition, and standards for review and scheduling of a recall election by a government agency. Wis. Stat. § 9.10 (2011-12).

(a) General Guidelines

Section 9.10(1) provides that any elected official in Wisconsin may be subject to a recall.[7] To commence a recall, the petitioners must file a declaration of intent with the appropriate election official -- in the case of the governor, the GAB. *See* Wisconsin Government Accountability Board Recall of Congressional, County and State Officials, Wisconsin GAB (June 2009), http://gab.wi.gov/sites/default/files/publication /65/recall_manual_for_ congressional_county_and_state__82919.pdf (site visited May 20, 2013). If petitioners file a declaration, the GAB must publicly announce the necessary number of signatures. Wis. Stat. § 9.10(d). In most cases, the necessary number of signatures will be 25 percent of the votes cast during the prior gubernatorial election. Wis. Stat. § 9.10(b).

(b) Specific Petition Requirements

Section 9.10(2) sets forth a laundry list of requirements for the actual recall petition and the signatures to be gathered, including:

- The petition must contain the words "RECALL PETITON" in bold print on the top of every page.

[6] Wis.Stat. §6.245(3) (1933).
[7] The preamble of Art. XIII, section 12 requires the office holder to have served one year before being subject to recall.

- The signatures must be gathered within a 60-day period.
- Each individual signature must be from a "qualified elector" and must be dated.
- The circulator of the petition must certify that he or she properly collected each of the signatures on each page.

See Wis. Stat. § 9.10(2)(a), (d), (e)7, (em).

(c) Review/scheduling by a government agency

Under Wis. Stat. § 9.10(3)(b), if a recall petition is submitted ("offered for filing"), the election official to whom the petition is submitted (normally the GAB) has 31 days to complete a "careful examination" of whether the petition on its face is sufficient to call for an election. The grounds for challenge, which are not exclusive, are listed in Wis. Stat. § 9.10(2)(e)-(s). Within that 31-day period, the incumbent has 10 days in which to file objections. Wis. Stat. § 9.10(3). The recall petitioners then receive 5 days to file a "rebuttal," and the incumbent has 2 days to file a reply. If the election official determines that the petition is insufficient, its decision must set forth the particular reasons for the deficiencies and give the petitioners 5 days to correct any errors. During this 31-day period, any party may seek an extension of the 31-day time limit by establishing "good cause" to the local circuit (county) court. *Id.*

If the election official accepts the petition for filing, the incumbent has 7 days to file a writ of mandamus or prohibition in the circuit court, challenging the agency determination. Wis. Stat. § 9.10(bm). At that point, the only matter that the court may consider is whether the petition was sufficient. *Id.* If the petition is sufficient, the recall election proceeds.

The recall election is scheduled for the Tuesday of the sixth week after the petition filing. If a primary is required, that date becomes the primary and a general election is held four weeks later. Wis. Const. art. XIII, §12(2), (4)(c).

3. The recall candidacy of the Incumbent is a matter of constitutional and statutory right

Under Article XIII, section 12(4) of the Wisconsin Constitution, "Unless the incumbent [subject to recall] declines within 10 days after the filing of the petition, the incumbent shall without filing be deemed to have filed for the recall election." Wis. Stat. § 9.10(3)(c) contains similar language. The procedures for other "candidates" are the same as the normal election nomination procedures. Wis. Stat. § 9.10(3)(c).

4. The Walker Recall

Governor Walker was elected governor of Wisconsin in November 2010 and was sworn in on January 3, 2011. The recall effort against Governor Walker became formal on November 15, 2011, when the Committee to Recall Walker filed the necessary registration with the GAB. The Committee then had 60 days to gather the required number of signatures, which the GAB calculated to be 540,208. [8]

The Committee to Recall Walker submitted almost 1 million signatures.[9] After a legal fight involving the amount of time allowed for the Walker campaign and the GAB to review signatures,[10] the parties (both supporting and opposing recall) and the GAB came to an agreement on the sufficiency of the recall petitions and the scheduling of the recall election. The parties agreed with the GAB recommendation that the gubernatorial recall election be held on the same date as the other pending recall elections, including that of the Lieutenant Governor and

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[8] See *Committee to Recall Walker*, Wis. GAB, http://gab.wi.gov/node/2100 (site visited May 21, 2013). A second Walker recall group, "Close Friends to Recall Walker, filed registration papers as well, but did not submit signatures. See *Close Friends to Recall Walker*, Wis. GAB, http://gab.wi.gov/node/2085 (site visited May 21, 2013).

[9] *Committee to Recall Walker*, Wis. GAB, http://gab.wi.gov/node/2100 (site visited May 21, 2013).

[10] See *In Re: Petitions to Recall Governor Scott Walker et al*, Case No. 12-CV-0295 (Dane County Circuit Court 2012) (involving not just the recall against Governor Walker, but also the simultaneous effort to recall Lieutenant Governor Kleefisch and four state senators). The GAB ultimately determined that the number of valid signatures was 900,939. See *Committee to Recall Walker*, Wis. GAB, http://gab.wi.gov/node/2100.

four state senators.[11] The parties also agreed that the recall petition would be "filed" as of March 30, 2012, thereby providing for a recall primary (if needed) to be held May 8, 2012, and the general election to follow on June 5, 2012.[12] The Dane County Circuit Court approved this agreement at a hearing on March 14, 2012. Therefore, according to Wisconsin constitutional and statutory provisions, Governor Walker became a "candidate" 10 days after the "filing" date of March 30, 2012 -- **April 9, 2012**.

E. The Subpoena

The subpoena received by FOSW references the recall campaign for governor, recall campaigns of various state senators, and dozens of organizations. Some of these groups would be subject to Chapter 11 restrictions on "coordinated" activity involving FOSW; others would not. See Wis. Stat. § 11.06(7)(a). The subpoena makes no distinction.

To properly narrow the focus of the subpoena, one must not only examine what conduct constitutes coordination or consultation, but also which organizations are subject to the restrictions on disbursements under such coordination.

The definition of "contribution" limits the scope of the independent disbursement statute to donations of money "made for a political purpose." Wis. Stat. § 11.01(6)(a)(1). Specifically excluded from the definition of "contribution" is a donation of money or "anything of value received by a committee or group *not organized exclusively for political purposes* that the group or committee *does not utilize for political purposes*." Wis. Stat. § 11.01(6)(b)7 (emphasis added).

The italicized words are critical limitations on the scope of the independent disbursements statute. The term "group[s] not organized exclusively for political purposes"

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[11] See *Judge approves May, June 5 recall dates*, WQOW, Mar. 13, 2013, http://www.wqow.com/story/17152190/all-sides-agree-to-may-8-june-5-for-recalls?clienttype=printable (March 13, 2013) (site visited May 22, 2013) (Wisconsin judge has signed off on an agreement for May 8 and June 5 recall dates).

[12] Id.

refers to organizations exempt from taxation because they are trade associations,[13] such as the Wisconsin Chamber of Commerce, and social welfare organizations[14] such as the Club for Growth. By contrast, campaign committees, political action committees, and political parties are all organized primarily for political purposes and are exempt from taxation under a different statute.[15]

Groups covered by the exclusion from the definition of contribution may not use the donated funds "for political purposes." This term is defined, in part, as "for the purpose of influencing the recall from or retention in office of an individual holding a state or local office." Wis. Stat. § 11.01(16). The definition of political purpose goes on to provide one example of activity within its scope: "Acts which are for 'political purposes' include but are not limited to ...[t]he making of a communication which expressly advocates the election, defeat, *recall or retention* of a clearly identified candidate...." Wis. Stat. § 11.01(16)(a)(1) (emphasis added).

Any communication which is not, by its express terms, calling for the election or defeat of a clearly identified candidate is still considered for a political purpose if it is susceptible of no other reasonable interpretation other than as an appeal to vote for or against a <u>specific candidate</u> in a specific election. Wis. Stat. § 11.06(7); Wis. Admin. Code § 1.28(3)(b). The regulations also contain a specific window wherein there is a presumption of no reasonable interpretation, if the communication includes a reference to or depiction of a clearly identified candidate and certain references to the candidate's positions, personal qualities or public record. *Id.*

Although the Legislature intended the "political purposes" requirement to encompass express advocacy communications, adhering to the bright line standard in *Buckley,* it did not specify the breadth of this term, leaving it to the GAB and the courts to determine the extent to

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[13] 26 U.S.C. § 501(c)(6).
[14] 26 U.S.C. § 501(c)(4).
[15] 26 U.S.C. § 527.

which speech could be regulated without infringing on First Amendment rights. The Wisconsin Supreme Court has concluded that where no express advocacy "terms" appear in a communication, there are a limited number of other facts that may nonetheless qualify a communication as express advocacy and subject it to government regulation. *Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce,* 227 Wis. 2d 650, 668, 597 N.W.2d 721, 730 (1999).

The GAB was equally circumspect in determining the scope of regulated speech otherwise permitted by the independent disbursements statute, for purposes of determining whether political speech is independent or not. Its regulation on voluntary committees provides "Guidelines" on which expenditures are independent and which must be considered in-kind contributions subject to contribution limits. An expenditure "on behalf of a candidate will be *presumed* to be made in cooperation or consultation with any candidate [if it] is made *as a result of a decision in which any of the following persons take part....*" *See GAB* § 1.42(6). The regulation goes on to list "a person authorized" to raise or spend campaign funds; "an officer of the candidate's personal campaign committee; a campaign worker compensated by the campaign; or a volunteer with knowledge "of campaign needs and useful expenditures." *Id.* The GAB focused exclusively on the role of the campaign in influencing the outside group to make an expenditure.

The Guidelines are silent on which expenditures should be treated as in-kind contributions. The GAB rule would obviously cover only express advocacy communications, because that is the only speech that falls within the definition of "political purpose." The regulation does not suggest that any speech beyond express advocacy is subject to GAB § 1.42. And, the regulations assume there is a "clearly identified candidate." In the contest of the

gubernatorial recall here, these Guidelines could not apply to Scott Walker until after April 9, 2012, when Governor Walker was considered a candidate.

It is fully appreciated that as the recipient of the subpoena, FOSW and its counsel are not privy to the affidavit the Special Prosecutor presumably presented to this Court in support of the subpoena. However, because the John Doe investigation is operating squarely in the realm of political speech, where the First Amendment "has its fullest and most urgent application," *see Citizens United,* 558 U.S. at 339-40 (citations omitted), this Court must forego the traditional deference given to prosecutors, as a too-broad inquiry such as the one here may itself violate the First Amendment. Close examination by this Court is critical where "legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley,* 424 U.S. at 40-41. Threats of criminal liability and the heavy costs of defending against a criminal investigation may function as the equivalent of prior restraint of free speech, giving prosecutor's a power that the First Amendment was drawn to prohibit. *Citizens United,* 558 U.S. at 335; 130 S. Ct. at 895-96.

The Special Prosecutor's sweeping subpoena suggests an overly broad interpretation of the law, and compelling production of information involving protected speech by itself crosses the First Amendment's free-speech line. It is the Special Prosecutor's obligation to identify for this Court with particularity the specific communications and disbursements which may legally subjected to scrutiny, before this Court may, under the First Amendment, permissibly order citizens to comply with a subpoena demanding documents related to those communications. In carefully undertaking review of such a subpoena, this Court must "give the benefit of any doubt to protecting rather than stifling speech." *Federal Election Comm'n v. Wisconsin Right to Life, Inc. ("WRTL"),* 551 U.S. 449, 469, 127 S. Ct. 2652, 2666-67 (2007). "Protected speech does not

become unprotected merely because it resembles the latter. The Constitutional requires the reverse." *WRTL,* 551 U.S. at 476, 127 S. Ct. at 2670 (citations omitted). Thus, the subpoena, and the affidavit in support, must be narrowly drawn and carefully focused and supported, to avoid infringing protected speech as a means to investigate what the Special Prosecutor may believe is unprotected speech. *Id. See also Elections Board of State of Wisconsin v. Wisconsin Manufacturers & Commerce,* 227 Wis. 2d 650, 597 N.W.2d 721 (1999).

V. <u>Conclusion</u>

The subpoena is constitutionally and statutorily defective and must be quashed under the standards set forth by the Wisconsin Supreme Court in *In re John Doe Proceeding,* 2004 WI 65, 272 Wis. 2d 208, 235, 680 N.W.2d 792, 805 and *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, 277 Wis. 2d 75, 689 N.W.2d 908. This Court should also exercise its supervisory authority to ensure that any reissued subpoena is as narrowly tailored as the law requires.

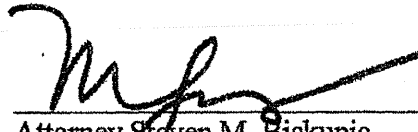
In that regard, Governor Walker was not a "supported or opposed" recall "candidate," subject to restrictions on coordination of public communications regarding his candidacy until after he legally became a candidate. By constitutional and statutory provisions, he could not have been and was not a supported or opposed candidate before April 9, 2012. Section 11.06(7), and § 1.42 of the GAB's regulations, for the time period of 2011-2012, did not and could not have applied to any involvement by Governor Walker, or the involvement of those associated with him, in discussions regarded communications by third party groups.

In addition, for purposes of discussing and coordinating public communications regarding the recall election of *other* candidates, there was no time bar or other legal "coordination" restriction applying to Scott Walker, his agents or other representatives.

Finally, the Special Prosecutor is obligated to demonstrate to the Court those communiications which are for a "political purpose," as defined under Wisconsin law, before a subpoena may be issued demanding such evidence. Evidence sought by the Special Prosecutor must relate to potential violations of law, not protected activity under the First Amendment.

Dated this 16th day of October, 2013.

Respectfully submitted,



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